

JUNE 1990

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JUNE 1990

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

Secretary of Labor, MSHA v. Beth Energy Mines, Inc., Docket No. PENN 89-222.
(Judge Weisberger, May 2, 1990)

Secretary of Labor, MSHA v. J.R. Thompson, Inc., Docket No. CENT 89-161-M.
(Default Decision of Chief ALJ Merlin on February 6, 1990)

Secretary of Labor, MSHA v. Ten-A-Coal Company, Docket No. WEVA 89-274.
(Judge Maurer, May 3, 1990)

Secretary of Labor, MSHA v. Lanham Coal Company, Docket No. KENT 89-186)
(Judge Broderick, April 30, 1990 - previously directed for review sua sponte
by the Commission on May 30, 1990)

Secretary of Labor, MSHA v. Bentley Coal Company, Docket Nos. WEVA 90-36 and
WEVA 90-52. (Default Decisions of Chief ALJ Merlin on May 31, 1990)

Secretary of Labor, MSHA v. Hickory Coal Company, Docket No. PENN 90-49.
(Default Decision of Chief ALJ Merlin on May 24, 1990)

Secretary of Labor, MSHA v. Sanger Rock and Sand, Docket No. WEST 88-275-M
and WEST 89-71-M. (Judge Morris, May 17, 1990)

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

Secretary of Labor, MSHA v. Brown Brothers Sand Company, Docket No. SE 90-12-M.
(Judge Melick, April 27, 1990)

Arnold Sharp v. Big Elk Creek Coal Company, Docket No. KENT 89-147-D.
(Interlocutory Review of Judge Melick's Order dated May 31, 1990)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 5, 1990

ODELL MAGGARD	:	
	:	
v.	:	Docket No. KENT 86-1-D
	:	
CHANEY CREEK COAL COMPANY	:	
	:	
and	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf	:	
of ODELL MAGGARD	:	
	:	
v.	:	Docket No. KENT 86-51-D
	:	
DOLLAR BRANCH COAL CORPORATION	:	
and CHANEY CREEK COAL	:	
CORPORATION	:	

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

ORDER

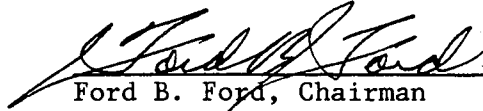
BY: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

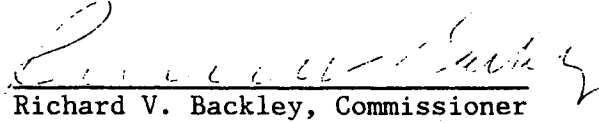
In our most recent decision in this discrimination case, on remand from an opinion of the United States Court of Appeals for the District of Columbia Circuit (Chaney Creek Coal Corp. v. FMSHRC, etc., 866 F.2d 1424 (1989), aff'g in part, rev'g in part, Odell Maggard v. Chaney Creek Coal Co., etc., 9 FMSHRC 1314 (August 1987)), we reinstated Commission Administrative Law Judge Gary Melick's initial award of attorney's fees and remanded this matter to the judge for further proceedings with respect to interest on back pay. 12 FMSHRC 380, 383-86 (March 1990). Following our decision, private counsel for complainant Odell Maggard filed with the Commission a Motion for Instructions Concerning Supplemental Fees on Remand to Administrative Law Judge. No response to this motion has been received from the other parties. Upon consideration of the motion, it is granted as explained below.

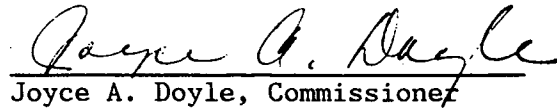
In this motion, Maggard requests the Commission to instruct the judge to determine the additional amount of attorney's fees owed Maggard in connection with his private legal representation in review proceedings before the Commission and the D.C. Circuit subsequent to the judge's initial decisions in this matter in 1986. Maggard points to the language in section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"), providing that a successful complainant in Mine Act discrimination proceedings may be awarded attorney's fees "reasonably incurred ... for, or in connection with, the institution and prosecution" of such proceedings. 30 U.S.C. § 815(c)(3).

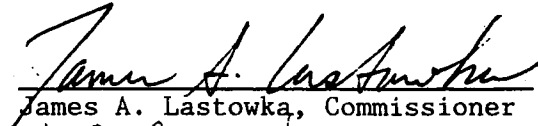
A similar motion for attorney's fees incurred in administrative and court appellate proceedings was acted upon by the Commission in Robert Simpson v. Kenta Energy, Inc., 11 FMSHRC 1638 (September 1989). There, we remanded the case to Commission Administrative Law Judge James A. Broderick for "resolution of whether the attorney's fees being sought for administrative and court appeal proceedings are properly awardable under the Mine Act and, if so, for all appropriate findings of fact relevant to determination of the amount to be awarded." 11 FMSHRC at 1639. On remand, Judge Broderick issued a Partial Decision on Remand concluding that such post-trial fees were recoverable and that a Commission administrative law judge may properly make findings and determinations with respect to the appropriate amount of any such fee award. Robert Simpson v. Kenta Energy Inc., 11 FMSHRC 2543, 2544-46 (December 1989)(ALJ).

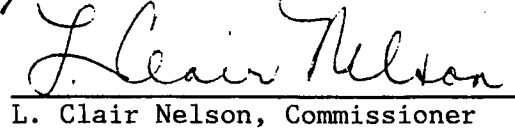
We follow here the course that we took in Simpson, supra. In the course of the remand proceedings previously ordered, the judge is also instructed to rule on the question of whether attorney's fees incurred in connection with appellate proceedings are awardable under the Mine Act and, if so, to enter all appropriate factual findings relevant to determination of the amount to be awarded.


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 6, 1990

DENNIS WAGNER :
 :
 v. : Docket No. VA 88-21-D
 :
 PITTSTON COAL GROUP :
 CLINCHFIELD COAL COMPANY :
 JACK CRAWFORD :
 MONROE WEST :
 WAYNE FIELDS :
 :
 and :
 :
 ANN McLAUGHLIN :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :
 GERALD SLOCE AND KENNETH HOWARD :

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

DECISION

By: Ford, Chairman; Doyle and Nelson, Commissioners

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), the Secretary of Labor seeks interlocutory review of that portion of an order by Commission Administrative Law Judge James A. Broderick, holding that the Department of Labor's Mine Safety and Health Administration ("MSHA") and its employees are "persons" subject to the discrimination prohibitions of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). 1/ The judge certified his ruling to the

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

No person shall discharge or in any manner
discriminate against or cause to be discharged or
cause discrimination against or otherwise interfere
with the exercise of the statutory rights of any

Commission, and the Secretary's petition for interlocutory review was granted. For the reasons that follow, we reverse the judge insofar as he held that MSHA and its employees are "persons" subject to section 105(c) of the Mine Act, and we dismiss those portions of Wagner's complaint pertaining to the individual governmental respondents.

I.

At all times relevant to this case, Dennis Lee Wagner was employed as a miner at the McClure No. 1 Mine, an underground coal mine, located near McClure, Virginia, and operated by Clinchfield Coal Company ("Clinchfield"), a subsidiary of the Pittston Coal Group ("Pittston"). Wagner was also a United Mine Workers of America ("UMWA") safety committeeman at the mine.

On June 26, 1987, Wagner was suspended with intent to discharge by Clinchfield, but shortly thereafter was reinstated with back pay, as the result of an arbitration proceeding conducted pursuant to the wage agreement between Clinchfield and the UMWA.

On July 17, 1987, Wagner filed a discrimination complaint with MSHA, alleging that Clinchfield, Pittston and their employees, Monroe West, Jack Crawford, and Wayne Fields, as well as the Secretary of Labor and MSHA and its agents, Inspector Gerald Sloce and District Manager Kenneth Howard, had all unlawfully discriminated against him in violation of section 105(c) of the Mine Act.

Wagner alleged that the respondents had collectively conspired to obstruct effective operation and enforcement of the Mine Act and had discriminated against him because he had engaged in protected activities

miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] ... or because such miner, representative of miners or applicant for employment has instituted or caused to be 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].

30 U.S.C. § 815(c)(1).

as a representative of miners. Alternatively, Wagner alleged that the respondents had individually discriminated against him because he had reported unsafe conditions and safety violations to MSHA officials and because of other actions associated with his status as a representative of miners.

Upon completion of MSHA's investigation of Wagner's complaint, the Secretary filed an action on Wagner's behalf against Clinchfield pursuant to section 105(c)(2) of the Act (Docket No. VA 88-19-D). 2/ The complaint named only Clinchfield as a respondent and alleged that

2/ Section 105(c)(2) of the Mine Act provides in part:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. 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, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest....

30 U.S.C. § 815(c)(2).

Clinchfield illegally discriminated against Wagner when it suspended him with intent to discharge because he had reported a safety violation to Inspector Sloce during an inspection of the mine. Because Wagner had been reinstated prior to the filing of the complaint and paid back wages as the result of the arbitration award, the Secretary sought only interest on his back pay, reimbursement to Wagner of attorney's fees incurred as a result of the discrimination, an order directing Clinchfield to comply with section 105(c) in the future, and the assessment of a civil penalty for the operator's violation of section 105(c). Subsequently, Judge Broderick approved a settlement of the Secretary's section 105(c)(2) complaint on Wagner's behalf. Pursuant to the parties' settlement agreement, the judge awarded interest on lost wages, noted Clinchfield's promise of future compliance with section 105(c), and assessed a civil penalty of \$700 against Clinchfield. 10 FMSHRC 1542 (November 1988)(ALJ).

Approximately one month after the Secretary's complaint was filed, Wagner, as an individual and member of a class, filed the subject discrimination complaint pursuant to section 105(c)(3) of the Act. 3/

3/ Section 105(c)(3) of the Mine Act provides in part:

Within 90 days of the receipt of a complaint filed under [section 105(c)(2)], the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]. The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such

The multi-count complaint reiterates many of the allegations in Wagner's complaint to MSHA and alleges that MSHA and its agents illegally disclosed to operators the identities of miners making safety complaints and, in particular, disclosed Wagner's identity to Clinchfield and Pittston; that Clinchfield and Pittston illegally required miners to report to management all safety violations prior to reporting them to MSHA and suspended Wagner for failing to conform to that policy; that MSHA and its agents, in collusion with the operators, obstructed the enforcement of mine safety laws; and that MSHA and its agents conspired with Clinchfield and/or Pittston and their agents to interfere with miners' rights to file safety complaints.

Wagner's complaint seeks to have the Commission order MSHA and its agents to cease and desist from violating miners' rights to anonymity, from harassing and retaliating against miners, including Wagner, and from refusing to re-establish a special unit investigating discrimination complaints. Wagner further seeks to have the Commission order Clinchfield and/or Pittston and their agents to cease and desist from retaliation and harassment against Wagner and others for reporting safety violations and from the policy of requiring miners to first report safety violations to management. Finally, Wagner's complaint seeks an order requiring all of the respondents to cease their alleged conspiracy to render mine safety laws ineffectual and to impede the independence of investigators and inspectors. Wagner also seeks interest, punitive damages, costs, attorney's fees, and the assessment of a civil penalty against the respondents.

Clinchfield, Pittston and their named employees moved for dismissal of Wagner's complaint on the grounds that it was barred by the Secretary's complaint on Wagner's behalf, which was settled in Docket No. VA 88-19-D. The Secretary also moved to dismiss Wagner's complaint, arguing that section 105(c)'s prohibition against "persons" committing acts of discrimination does not encompass federal agencies or officials and that MSHA and its officers and agents are immune from suit under section 105(c); that section 105(c) does not contemplate class action suits, or that if it does, the purported class has not been properly alleged; that parts of the complaint are untimely; and that Wagner has no right to challenge in a section 105(c) proceeding the manner in which the Secretary chooses to investigate discrimination complaints.

In an unpublished interlocutory order, the administrative law judge concluded that the complaint did not state a cause of action against the Secretary of Labor individually; that it must be dismissed with regard to those acts of discrimination that had also been charged in the Secretary's complaint; that it did not meet the prerequisites for a class action; that those portions of the complaint charging all of the respondents with conspiring to undermine enforcement of the Act and to discriminate against Wagner were too vague to support a claim; and that portions of the complaint were untimely. ALJ Order 2-4 (May 24, 1988)("Order").

violation....

30 U.S.C. § 815(c)(3).

The judge also stated:

The Secretary argues that neither MSHA nor any of its officers or agents can be considered a "person" under section 105(c) of the Act because of the doctrine of sovereign immunity. I have previously ruled that MSHA is a person under 105(c) in the case of Local 9800 v. Secretary of Labor or Thomas Dupree, 2 FMSHRC 2680 (September 1980)[(ALJ)]. I adhere to that ruling in this case.... I conclude that Congress intended that the prohibition against discrimination applies to all persons, including government officials.

Order 3.

Accordingly, all of the allegations in the complaint were dismissed except for the allegation that the federal respondents had adopted a policy, which they enforced against Wagner, of disclosing to coal companies the names of miners who had reported safety violations and the allegation that the operators had adopted a policy requiring miners to report safety violations to management before communicating them to MSHA. Order 4.

II.

The Secretary asserts that "the judge erred in ruling that MSHA may be sued and that employees of MSHA may be sued individually and/or in their official capacity as 'persons' under section 105(c) of the Mine Act." PIR 1. For the reasons set forth below, we agree.

In Local 9800, on which the judge relied, the complainant union alleged that an employee of MSHA had unlawfully discriminated against it when he threatened the union local and its president with legal action as a result of their complaints about alleged irregularities in certain mine inspections. MSHA moved to dismiss the union's complaint asserting, among other things, that MSHA was not a "person" subject to the provisions of section 105(c). The judge found nothing in the Mine Act or in its legislative history to indicate that Congress directly considered whether MSHA or any other public agency could be a "person" involved in discriminatory conduct under section 105(c) of the Act. Therefore, the judge stated that he was required "to guess" what Congress would have intended if it had considered the question. 2 FMSHRC at 2683. The judge noted the statement in the Senate Committee Report that "the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved" and also noted the same committee's admonition that section 105(c) is "to be construed expansively" in order "to assure that miners will not be inhibited in any way in exercising any rights afforded by legislation." S. Rep. No. 95-181, 95th Cong., 1st Sess. 36 (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 624 ("Legis. Hist."); 2 FMSHRC at 2683. The judge reasoned that the "general rule" that the United States is not

bound by legislation when it is not expressly named in or made subject of the legislation may be curtailed when the statute is "intended to prevent injury and wrong." 2 FMSHRC at 2683 (quoting Nardone v. United States, 302 U.S. 379, 384 (1937)). The judge further reasoned that, in such cases, the entire scheme of regulation must be examined to determine if an effective alternate remedy is available. 2 FMSHRC at 2683. The judge concluded that the alleged act of discrimination was "by its inchoate nature, uniquely within the domain of this Commission" and held that "MSHA is a person under section 105(c)" and, as such, is "prohibited from discriminating against any miner." 2 FMSHRC at 2684.

On review, the Secretary takes issue with this rationale and its application to the present case, arguing that a waiver of the doctrine of sovereign immunity must be unequivocally expressed, and that when, as in the Mine Act, the definition of "person" does not expressly extend to a governmental agency and its employees, Congress did not mean for the agency and its officers and agents to be liable under the Act. See Sec. Br. at 8-11. Further, the Secretary notes that holding MSHA liable under section 105(c) would result in the anomalous situation of MSHA investigating and prosecuting cases in which it and its agents are also defendants. Id. at 12.

Wagner responds that granting sovereign immunity to MSHA inspectors and other agency employees is inconsistent with the spirit and intent of the Mine Act and general legal principles of sovereign immunity. Wagner urges the adoption of a case-by-case approach in analyzing the conduct of MSHA employees and determining whether immunity is justified. Wagner contends that where, as here, the conduct of an MSHA employee does not further a clearly expressed governmental policy, immunity does not apply. Wagner Br. 6, 9-11.

Our analysis of these issues begins, as it must, with the words of the Mine Act. Section 105(c)(1) states, "[n]o 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...." Although the term "person" is not defined in section 105(c), section 3(f) of the Act defines "person" as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." Absent from the definition of "person" is any reference to the government or any governmental entity. 30 U.S.C. § 802(f). "[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1974) (quoting United States v. Cooper Corp., 312 U.S. 600, 604 (1941)). See also United States v. United Mine Workers of America, 330 U.S. 258, 275 (1947). As the Commission has previously observed, it is well settled that the United States, as the sovereign, is immune from suit except as it consents to be sued and that waivers of its immunity must be unequivocally expressed. See Rushton Mining Co., 11 FMSHRC 759, 766 (May 1989). The Mine Act contains no such waiver of MSHA's immunity from suit under section 105(c).

Further, other terms in the Mine Act specifically denote governmental entities. Section 3(a) defines "Secretary" as "the

Secretary of Labor or his delegate." 30 U.S.C. § 802(a). Section 3(n) defines "Administration" as "the Mine Safety and Health Administration in the Department of Labor." 30 U.S.C. § 802(n). Where Congress has specifically defined the term "person" so as to avoid including the government and its agencies within that definition, and has expressly included them in other definitions, it is clear that Congress has purposefully legislated into the Act a distinction between a "person" and the government, here specifically MSHA, and that neither may be subsumed into the other. ^{4/} Had Congress intended to include MSHA as a potential defendant under section 105(c), it would have done so explicitly.

For the foregoing reasons, we hold that MSHA is not a "person" subject to the provisions of section 105(c).

III.

We also conclude that MSHA's employees and agents are not "persons" subject to the provisions of section 105(c), and thus that MSHA Inspector Sloce and MSHA District Manager Howard cannot be sued individually under section 105(c).

We have noted that the definitions set forth in the Act and the enforcement scheme of section 105(c) indicate that Congress regarded the Secretary and MSHA as separate and distinct from the population covered by the term "person." While MSHA possesses its own legal identity, it is composed of individuals who hold and staff MSHA's offices and positions. In view of MSHA's role in effectuating section 105(c), we are convinced that, had Congress intended that MSHA's employees be susceptible to section 105(c) suits, it would have expressly stated as much.

The Mine Act, unlike some other acts, does not specifically include employees of the government as "persons" for purpose of liability under the Act. Compare Omnibus Crime Control Act of 1968, 30 U.S.C. §§ 2510, 2520 (1982); Marine Protection Research and Sanctuaries Act of 1972, 30 U.S.C. §§ 1415(g), 1402(e) (1982); Federal Pollution Control Act, 30 U.S.C. § 1365(a) (1982). Further, as we have noted, the structure of section 105(c) requires the Secretary (actually MSHA in practice) to investigate all initial discrimination complaints. Under the judge's interpretation of section 105(c), MSHA would be required to investigate its own employee if a discrimination complaint were filed against him and, upon finding evidence of discrimination, prosecute him on behalf of the complainant. In effect, the Secretary would be required to prosecute herself, a result not contemplated in the enforcement scheme of section 105(c).

^{4/} For example, in providing for the judicial review of Commission orders, section 106(a)(1) of the Act states "[a]ny person adversely affected or aggrieved by an order of the Commission ... may obtain ... review," 30 U.S.C. § 816(a)(1), and section 106(b) states, "[t]he Secretary may also obtain review...." 30 U.S.C. § 816(b).

Further, the type of relief that Congress envisioned discriminatees be awarded is not of the type MSHA employees may readily provide. Section 105(c)(2) gives the Commission the authority to require a person violating section 105(c) "to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." 30 U.S.C. § 815(c)(2). Rehiring and reinstatement with back pay and interest are typically within the control of the operator. While Congress envisioned that the Commission might also issue cease and desist orders where appropriate, it emphasized that those orders "include requirements for the posting of notices by the operator." Legis. Hist. at 625.

In addition, section 105(c)(3) states that "[v]iolations by any person of ... [section 105(c)(1)] shall be subject to the provisions of sections 108 and 110(a)." 30 U.S.C. §§ 818 and 820(a). Since the injunctive provisions of section 108 and the civil penalty provisions of section 110(a) apply specifically to the "operator" or "his agent," it does not appear that Congress intended employees of MSHA to be subject to the sanctions applicable to "persons" who violate section 105(c).

Thus, we agree with the Secretary that section 105(c) was not structured by Congress to accord complainants the right to proceed against MSHA's employees.

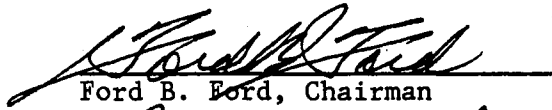
Although we find no cause of action for abuse of power by an employee of MSHA under section 105(c), it must be noted that an employee whose action is in violation of his or her duties is not immune from civil suit and possible punitive action. It is well settled that individuals wronged by federal agents through abuse of their power may have a cause of action for damages under state law. See Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963). ^{5/} Moreover, the Secretary clearly has the authority through her Office of Inspector General to investigate, punish and to remove from office any of her employees found to have engaged in conduct violative of the Mine Act or in other misconduct.

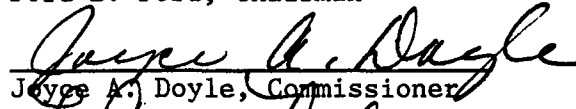
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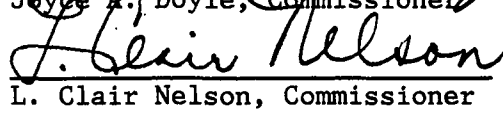
Accordingly, we reverse the judge's holding that MSHA and its employees are subject to suit under the provisions of section 105(c), and we dismiss those portions of Wagner's complaint pertaining to the

^{5/} We note that Wagner brought a civil action in Virginia against MSHA Inspector Sloce, among others, alleging common law claims under state law. Wagner v. Pittston Coal Group, et al., Law No. 6499, Dickinson County, Virginia Circuit Court (filed June 21, 1988), removed by order of July 13, 1988, to U.S. District Court for the Western District of Virginia, Civil Action No. 88-0195-A. Sec. Br. 6 n. 5. While Wagner did not expressly allege violations of his constitutional rights, we note that damages are available when Fourth and Fifth Amendment rights have been violated. See Bivens v. Six Narcotics Agents, 403 U.S. 388 (1971); Davis v. Parsman, 442 U.S. 228 (1979).

federal respondents. We remand this matter to the judge for further proceedings consistent with this opinion.


Ford B. Ford, Chairman


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Commissioners Backley and Lastowka, concurring in part and dissenting in part:

We agree with the majority that complainant Dennis Wagner is barred by the principle of sovereign immunity from bringing a discrimination action against the Mine Safety and Health Administration ("MSHA") pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). We base our agreement on the Mine Act's failure to include any reference to the government or any governmental entity in its definition of "person" and the principle of sovereign immunity.

We dissent, however, from that part of the majority decision that holds that Wagner is similarly barred in all circumstances from bringing a discrimination action against individuals employed by MSHA. As discussed below, a different analysis is required, and a different conclusion results, in determining the potential liability under section 105(c) of individuals employed by MSHA as opposed to the governmental agency itself.

Sovereign Immunity

At the outset, we acknowledge that "determining the extent to which a federal officer may be protected by sovereign immunity for acts done in his or her official capacity is an extraordinarily difficult problem" requiring careful analysis and a delicate balancing of conflicting interests. 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3655 at 218 (2nd ed., 1985) ("Wright & Miller"). Wagner alleges in Count 25 of his complaint that two MSHA officials, Inspector Gerald Sloce and District Manager Kenneth Howard, adopted a policy of informing coal companies, including Wagner's employer, the Pittston Coal Group, of the names of miners who report safety violations to MSHA, that pursuant to this policy Pittston was informed that Wagner had made a safety complaint to MSHA, and that as a direct consequence of the actions by the MSHA officials Wagner was harrassed and discharged by Pittston. Because the complaint alleges official misconduct on the part of Sloce and Howard, an inquiry into the principle of sovereign immunity is required.

When federal officials are sued in their official capacity, the facts of the case and the relief sought by the plaintiff must be analyzed to determine if the suit in reality is against the individual or against the United States. Wright & Miller § 3655 at 217. If the suit is not against the federal government, then sovereign immunity does not apply. Id. "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" Pennhurst State School v. Halderman, 465 U.S. 89, 101 n.11 (1984) (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963) (citations omitted)); U.S. v. Yakima Tribal Court, 806 F.2d 853, 858 (9th Cir. 1986).

A suit brought against a federal official for specific relief is not a suit against the United States if the official acted outside the scope of his authority and his actions are therefore ultra vires. "If an employee of the United States acts completely outside his governmental authority, he has no immunity." Yakima Tribal Ct., 806 F.2d at 859; Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949). For example, suits charging federal officials with unconstitutional conduct are not barred by sovereign immunity because in such suits, "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." Larson, 337 U.S. at 690, 696-97, 702.

Where a claim against a federal official is based on an official's violation of federal statutes or regulations, as opposed to an unconstitutional act, a somewhat different analysis applies. Yakima, 806 F.2d at 859. In such instances, if the official has simply committed a mistake of fact or law in the discharge of his duties, his actions do not necessarily exceed the scope of his authority. The Supreme Court has expressly rejected the argument that a government official "given the power to make decisions is only given the power to make correct decisions." Larson, 337 U.S. at 695. In Larson, the Court held that official action is not invalid because it was based on an incorrect decision as to law or fact, "if the officer making the decision was empowered to do so." Id. "Official action is still action of the sovereign, even if wrong, if it 'do[es] not conflict with the terms of [the officer's] valid statutory authority...'" Yakima, 806 F.2d at 860 (quoting Larson at 695).

Thus, when a federal official is charged with violating a federal statute or regulation, the applicability of sovereign immunity "turns on whether the [official] was empowered to do what he did, i.e., whether even if he acted erroneously, it was action within the scope of his authority." Pennhurst, 465 U.S. at 112 n.22. Stated similarly, an ultra vires claim "rests on the official's lack of delegated power." Yakima, 806 F.2d at 860. An important consideration in making this determination is whether the official's power is limited by statute and whether he has exceeded such limitation. Larson, 337 U.S. at 689-90; Martinez v. Marshall, 573 F.2d 555, 560 (9th Cir. 1977). At some point, a violation of a statute or regulation becomes so inconsistent with the agent's authority that his actions are divested of the cloak of sovereign immunity. Yakima, 806 F.2d at 860.

Thus, as specifically applied to persons employed by MSHA, the principle of sovereign immunity can be summarized as follows. An MSHA official is subject to individual suit, and cannot raise a sovereign immunity bar, if his actions are unconstitutional, or conflict with and exceed the scope of his statutory or regulatory authority and amount to more than a mistake of law or fact in the exercise of delegated duties, and if the relief sought against the individual is not a claim against the United States Treasury, does not interfere with a government program or does not restrain the Government from acting or compel it to act.

Therefore, the Secretary's argument that the principle of sovereign immunity in all circumstances requires that discrimination claims brought

against persons employed by MSHA be dismissed must be rejected. A bald claim of sovereign immunity cannot preclude Wagner from an opportunity to establish that Inspector Sloce's and District Manager Howard's authority is limited by the Mine Act, that one or both of them exceeded such limitation and acted in a manner violative of section 105(c), and that the relief sought is against Sloce and Howard as individuals rather than against the government. If such a showing is made, the principle of sovereign immunity does not apply.

Structure of Section 105(c)

The majority would also dismiss Wagner's complaint on the basis that section 105(c) is not structured to allow the Secretary to investigate an alleged act of discrimination committed by one of her agents. Given the express language of section 105(c), this protest is unpersuasive. The Mine Act in no way precludes the Secretary from filing a section 105(c) discrimination complaint against an individual employed by MSHA where such person acted in a manner exceeding the scope of his statutory authority and in violation of section 105(c).

Section 105(c)(1) of the Mine Act expressly provides that "no person shall ... in any manner discriminate against ... or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner...." 30 U.S.C. 815(c)(1)(emphasis added). The term "person" is defined in section 3(f) as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." 30 U.S.C. 802(f)(emphasis added). Thus, by its express terms, the Mine Act prohibits any individual from discriminating against miners in violation of section 105(c), and this broad prohibition includes, rather than exempts, individuals employed by the Secretary.

Unless exceptional circumstances dictate otherwise, judicial inquiry into the meaning of a statute is complete once a court finds that the terms of the statute are unambiguous. Burlington Northern R. Co., v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987). As the Supreme Court has stated:

[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); see also Chevron USA, Inc., v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 842 (1984). Section 3(f) of the Mine Act defines "person" to include "any individual." The Mine Act does not include a second special definition of "person" applicable only to section 105(c) or an express exclusion in section 105(c) limiting its reach. Thus, in the absence of a clearly expressed legislative intention to the contrary, section 105(c)'s use of the word "person" and section 3(f)'s definition of "person" to include "individuals" must be interpreted in accordance with the plain meaning of those words.

Furthermore, the legislative history of the Mine Act clearly provides that section 105(c) is to be broadly interpreted:

It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal. It should be emphasized that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved.

S. Rep. No. 95-181, 95th Cong., 1st Sess., at 36 (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 624 (1978) (emphasis added). Thus, the legislative history is consistent with the express language of the statute and fortifies the conclusion that Congress intended to subject to the anti-discrimination provisions of section 105(c) of the Mine Act "any person" who interferes with a miner's protected rights.

Contrary to the majority's conclusion, the overall structure of section 105(c) does not otherwise preclude giving effect to the plain wording of the statute. There is no restriction on the Secretary preventing her from investigating allegations that one of her employees exceeded the scope of his or her authority and acted in violation of the Mine Act by interfering with a miner's protected rights. To the contrary, it is not unusual for a federal agency to investigate complaints of misconduct or illegal conduct by its own employees. Thus, the fact that an MSHA investigator would be called on to examine the alleged illegal conduct of an MSHA employee is not a basis for defeating a miner's right to engage in protected activity without suffering harassment or retaliation. Even if the Secretary believed that in a particular set of circumstances it would be better, for logistical reasons, if MSHA did not conduct the investigation into the activities of one of its own employees, she could assign another official of the Department of Labor or another of her investigatory agencies, e.g., the Inspector General, to assume this function. Certainly, a miner's statutory right to engage in safety related activities free from the threat of retribution cannot be sacrificed simply because the Department of Labor finds itself in an awkward position.


In sum, nothing in the Mine Act precludes the Secretary from filing a complaint against an individual employed by MSHA who, after investigation, is determined to have committed an act of discrimination prohibited under section 105(c). Further, because no absurd or unworkable result flows from interpreting section 105(c) in accordance with its express terms, no ambiguity should be created where none exists so as to preclude giving effect to the statute's express provisions.

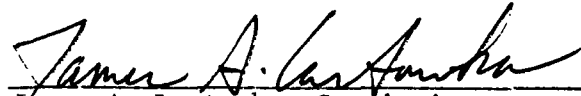
We also disagree with the majority's suggestion that the fact that the remedies that a discriminatee might seek against a government employee who has acted illegally would not be the "typical" remedies sought in discrimination cases i.e., backpay and reinstatement, has some bearing on the outcome of the liability issue presented. First, the fact that the relief that could be awarded is not "typical" should not be surprising in view of the fact that the issue raised in this case is one of first impression. Second, section 105(c)(2) authorizes the Commission to direct the discriminator "to take such affirmative action to abate the violation as the Commission deems appropriate, including but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." 30 U.S.C. § 815(c)(2) (emphasis added). Thus, the Mine Act expressly contemplates that the relief granted to any discriminatee will be tailored to fit the particular circumstances of the case. In a case such as the present, if illegal discrimination were ultimately established, appropriate forms of relief could include an award of damages, the issuance of cease and desist orders and the imposition of civil penalties.

Conclusion

For the above reasons, we agree with the majority that the administrative law judge must be reversed insofar as he held that MSHA itself is subject to the provisions of section 105(c). We dissent, however, from their conclusion that in no circumstances can a section 105(c) complaint be brought against an individual employed by MSHA who is alleged to have acted in a manner exceeding the scope of his statutory authority and in violation of section 105(c). We express no opinion as to whether the allegations in the complaint before us satisfy the criteria applicable to the determination of whether Wagner's suit is barred by sovereign immunity. We would remand to the judge for further analysis of this issue.

Accordingly, we concur in part and dissent in part.


Richard V. Backley, Commissioner


James A. Lastowka, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 12, 1990

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

v.

J.R. THOMPSON, INC.

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Docket No. CENT 89-161-M

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On February 6, 1990, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent J.R. Thompson, Inc. ("J.R. Thompson") in default for its failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. The judge assessed J.R. Thompson civil penalties of \$2,485 as proposed by the Secretary. By letter dated April 27, 1990, addressed to Judge Merlin, the Secretary requests that this matter be reopened on the grounds that the parties have settled the case. For the reasons explained below, we deem the Secretary's submission to be one seeking relief from a final Commission decision, vacate the judge's default order, and remand for further proceedings.

On October 18, 1989, the Secretary filed with the Commission a Complaint Proposing Penalty, in which the Secretary proposed civil penalties for seven citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to J.R. Thompson at its Nunneley Quarry. When no answer to the penalty proposal was filed with the Commission, the chief judge, on December 19, 1989, issued an order directing J.R. Thompson to file an answer within 30 days or show cause why it failed to do so. Judge Merlin entered an Order of Default on February 6, 1990, after J.R. Thompson failed to file an answer.

On May 1, 1990, the Commission received a letter addressed to Judge Merlin from the Secretary's counsel, requesting the judge's

approval of a settlement of this case. Attached to the letter was a copy of a signed settlement agreement stating that the parties have agreed to the assessment of specified reduced penalties for the alleged violations, payable in monthly installments, and stating that J.R. Thompson answered the Secretary's civil penalty petition, but sent the answer to the Solicitor's Dallas, Texas, office rather than to the Commission.

Under the Commission's rules of procedure, the party against whom a penalty is sought must file an answer with the Commission within 30 days after service of the proposal for penalty. 29 C.F.R. § 2700.5(b) & 28. The official record of this case does not contain an answer. However, the official record of Docket No. CENT 90-8-M contains a copy of a letter dated November 10, 1989, from Johnny R. Thompson, president of J.R. Thompson, to the Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, in which Thompson challenges the penalties proposed for the violations alleged in this case. The letter was forwarded to the Commission by counsel for the Secretary, but was referenced to Docket No. CENT 90-8-M rather than to the present case. The letter was therefore lodged in the official file of Docket No. CENT 90-8-M and Judge Merlin was unaware of its existence when he issued the show cause and default orders.

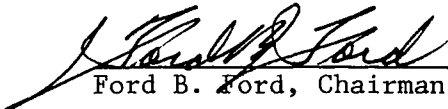
The judge's jurisdiction over the case terminated when his default order was issued on February 6, 1990. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Because the judge's decision has become final by operation of law, 30 U.S.C. § 823(d)(1), we can consider the merits of the Secretary's submission only if we construe it as a request for relief from a final Commission decision incorporating a petition for discretionary review. See 29 C.F.R. 2700.1(b) (applicability of Federal Rules of Civil Procedure to Commission proceedings); Fed. R. Civ. Pro. 60(b) (relief from judgment or order).

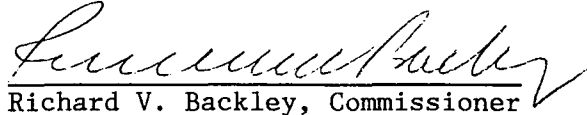
J.R. Thompson appears to be a small company proceeding without benefit of counsel. In compliance with the standards set forth in Fed. R. Civ. P. 60(b)(1), the Commission has previously afforded such a party relief from final orders of the Commission where it appears the party's failure to respond to a judge's order and the party's subsequent default are due to inadvertence or mistake. See Kelley Trucking Co., 8 FMSHRC 1867, 1868 (December 1986); M.M. Sundt Construction Co., 8 FMSHRC 1269, 1270-71 (September 1986). Here, J.R. Thompson appears to have confused the roles of the Commission and the Department of Labor in this adjudicatory proceeding. J.R. Thompson's letter answering the Secretary's civil penalty petition was apparently mailed to the Department of Labor's solicitor within the time provided for a timely answer. Further, counsel forwarded the letter to the Commission on January 8, 1990, within the time provided for a response to the judge's show cause order, but, because of counsel's reference to an erroneous docket number, the letter did not come to the attention of the judge. Accordingly, we accept the Secretary's submission as a request for

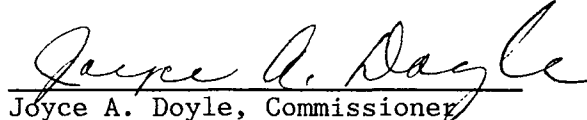
relief from a final order incorporating by implication a petition for discretionary review.

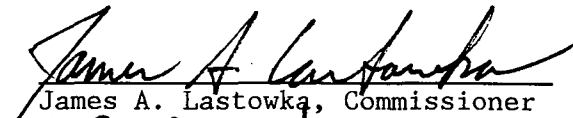
We have observed repeatedly that default is a harsh remedy and that if the defaulting party can make a showing of adequate or good cause for the failure to respond, the failure may be excused and appropriate proceedings on the merits permitted. Sundt, 8 FMSHRC at 1271. Here, where J.R. Thompson has proceeded without benefit of counsel, where the parties agree that J.R. Thompson filed an answer, but mistakenly filed it with the Solicitor's Office, where counsel for the Secretary inadvertently submitted a copy of the answer for inclusion in the official record of CENT 90-8-M, and where the parties may have subsequently settled the matter, we conclude that, in the interest of justice, the Secretary and J.R. Thompson should have the opportunity to present their positions to the judge, who shall determine whether final relief from the default order is warranted.

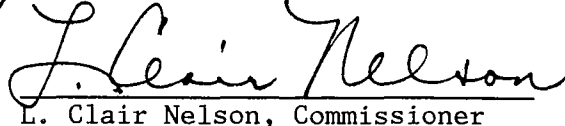
For the foregoing reasons, the judge's default order is vacated and the matter is remanded for proceedings consistent with this order. J.R. Thompson is reminded to file further documents connected with this proceeding with the judge and to serve counsel for the Secretary with copies of its filings. 29 C.F.R. §§ 2700.5(b), 2700.7.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 14, 1990

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 90-36
	:	
BENTLEY COAL COMPANY	:	

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

ORDER

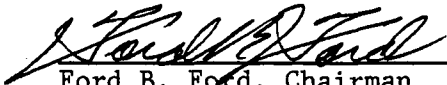
BY THE COMMISSION:

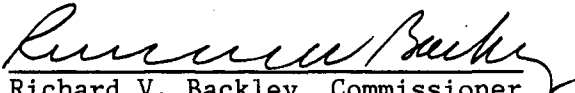
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). On May 31, 1990, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding Bentley Coal Company ("Bentley") in default for its failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. The judge assessed the civil penalty of \$894 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

The judge's jurisdiction over this case terminated when his default order was issued on May 31, 1990. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Bentley mailed to the Commission a letter, dated June 4, 1990, that appears to be its answer to the Secretary of Labor's civil penalty proposal. Bentley's June 4 letter was received by the Commission on June 7, 1990. We will treat Bentley's letter as a timely filed petition for discretionary review. See e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

Although Bentley filed a "Blue Card" request for a hearing in this matter, neither its June 4 letter nor any other part of the record


reveals the reasons for its failure to file its answer within 30 days after receipt of the Secretary's penalty proposal petition, as required by 29 C.F.R. § 2700.28, or its failure to respond to the judge's show cause order. We grant the petition and vacate the judge's default decision in order to allow Bentley, which is apparently proceeding pro se, an opportunity to present the reasons for these failures, and for the Secretary to interpose any objections to relief from the default decision.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 14, 1990

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
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v. : Docket No. WEVA 90-52
 :
BENTLEY COAL COMPANY :

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

ORDER


BY THE COMMISSION:

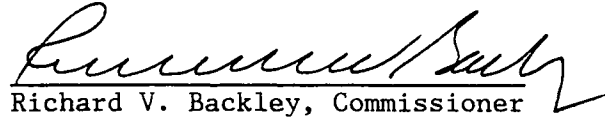
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The judge's jurisdiction over this case terminated when his default order was issued on May 31, 1990. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Bentley mailed to the Commission a letter, dated June 4, 1990, that appears to be its answer to the Secretary of Labor's civil penalty proposal. Bentley's June 4 letter was received by the Commission on June 7, 1990. We will treat Bentley's letter as a timely filed petition for discretionary review. See e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

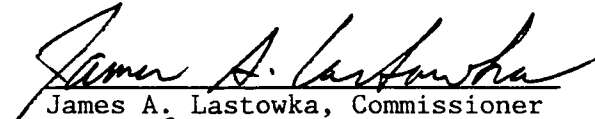
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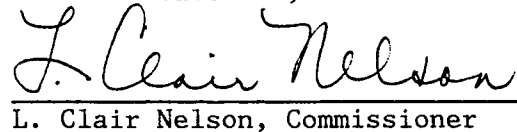
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Ford B. Ford, Chairman


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 18, 1990

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

v.

HICKORY COAL COMPANY

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Docket No. PENN 90-49

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

ORDER

BY THE COMMISSION:

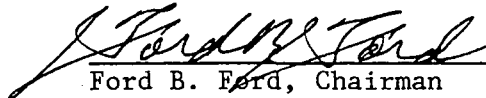
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On May 24, 1990, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Hickory Coal Company ("Hickory") in default for failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. The judge assessed the civil penalty of \$850 proposed by the Secretary. By letter to the Commission dated May 31, 1990, Hickory requests that this matter be reopened on the grounds that it mistakenly thought that it had filed its answer in this proceeding but, in fact, the answer applied to another Commission proceeding. We deem Hickory's May 31 letter a timely petition for discretionary review of the judge's default order, grant the petition, and remand this matter to the judge for further proceedings.

The judge's jurisdiction in this proceeding terminated when his default order was issued on May 24, 1990. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Here, Hickory's May 31 letter to the Commission seeks relief from the judge's default order and we will treat it as constituting a timely filed petition for discretionary review. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

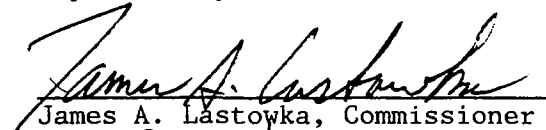
Hickory appears to be a small coal company proceeding without benefit of counsel. It also appears from the record that Hickory may have raised a colorable explanation for its failure to respond to the judge's show cause order. In conformance with the standards set forth in Fed. R. Civ. P. 60(b)(1), the Commission will afford relief from default upon a showing of inadvertence, mistake, or excusable neglect. E.g., Amber Coal Co., 11 FMSHRC 131, 132 (February 1989).

We are unable on the basis of the present record to evaluate the merits of Hickory's position but, in the interest of justice, we will permit Hickory the opportunity to present its position to the judge, who shall determine whether final relief from the default order is warranted. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867 (December 1986).

Accordingly, we vacate the judge's default order and remand this matter for further proceedings. Hickory is reminded to serve the opposing party with copies of all its correspondence and other filings in the matter. 29 C.F.R. § 2700.7.


Ford B. Ford, Chairman


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 28, 1990

JOHN A. GILBERT	:	
	:	
v.	:	Docket No. KENT 86-49-D
	:	
SANDY FORK MINING COMPANY, INC.	:	
	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of JOHN A. GILBERT	:	
	:	
v.	:	Docket No. KENT 86-76-D
	:	
SANDY FORK MINING COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"), is on remand to the Commission pursuant to an opinion of the United States Court of Appeals for the District of Columbia Circuit reversing and remanding our prior decision in this matter. John A. Gilbert v. FMSHRC, 866 F.2d 1433 (1989), rev'g, John A. Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (August 1987). In response to the Court's decision, the Commission resolved at the Commission level all factual issues remanded by the Court in favor of Gilbert. We ordered a remand, however, so that Commission Administrative Law Judge Gary Melick could address remaining remedial issues. 12 FMSHRC 177 (February 1990). Sandy Fork Mining Company, Inc. ("Sandy Fork") filed a Petition for Reconsideration requesting that we reconsider our decision entering factual findings at the review level and that we remand to the administrative law judge the issues remanded by the Court concerning the merits of this case. 1/ Mr. Gilbert opposes this motion. For the

1/ Sandy Fork's Petition for Reconsideration does not question that part of the Commission's decision reinstating Gilbert's individual

reasons set forth below, the Petition for Reconsideration is granted. 2/

The facts and procedural history of this proceeding are set forth in detail in the Commission's prior decisions and will not be repeated here. See 9 FMSHRC 1327 (August 1987) and 12 FMSHRC 177 (February 1990). Following an evidentiary hearing, the administrative law judge determined that Sandy Fork had not violated section 105(c)(1). 8 FMSHRC 1084 (July 1986). The Commission affirmed his decision on substantial evidence grounds. The Court reversed the Commission's decision and remanded the case back to the Commission for further consideration.

The Court raised a number of specific questions to be resolved by the Commission. The Court explained:

On the record as we understand it, it is plain that Gilbert made a good faith attempt to communicate his reasonable fears to management. What is not clear, however, is whether management addressed Gilbert's concerns in a way that his fears reasonably should have been quelled. In other words, did management explain to Gilbert that the problems in his work area had been corrected? Or did management indicate to Gilbert that he would be assigned to another area in the mine that was free of safety problems? Or did management indicate to Gilbert that the situation was unsettled, and that he should wait five hours (until the start of his assigned shift) before inquiring further about safety conditions in his area? These questions must be answered by the Commission in order for it to determine whether the management at Sandy Fork reasonably addressed Gilbert's fears on the morning of August 7. If management effectively "stonewalled" Gilbert in responding to his inquiries on the 7th, then his continued fears regarding work hazards were reasonable, and his refusal to return to work cannot be viewed as either unreasonable or in bad faith. On remand, the Commission will be required to make the necessary factual findings to address these issues.

complaint brought under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). 12 FMSHRC at 182-83. In its original decision, a majority of the Commission had granted the Secretary of Labor's motion to dismiss the complaint brought by Gilbert on his own behalf. The Court reversed this conclusion. In light of the Court's decision, in our February 16, 1990 decision we reinstated Gilbert's private complaint. That aspect of the Commission's decision is not affected by this order.

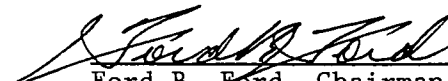
2/ Sandy Fork petitioned for review of the Commission's February 16, 1990 decision with the U.S. Court of Appeals. Sandy Fork Mining Company, Inc. v. John A. Gilbert, No. 90-1145 (D.C. Cir. filed March 19, 1990). This proceeding has been stayed pending the Commission's consideration of the Petition for Reconsideration.


On remand, the Commission discussed the evidence and concluded that Gilbert's safety concerns were not addressed by Sandy Fork in a manner sufficient to reasonably quell his fears. 12 FMSHRC at 180-81. The Commission determined that given the Court's belief that Gilbert did not act precipitately and its finding that he entertained a good faith, reasonable belief in a hazard, Gilbert's departure from the mine constituted a discriminatory constructive discharge in violation of section 105(c)(1) of the Mine Act. Id.

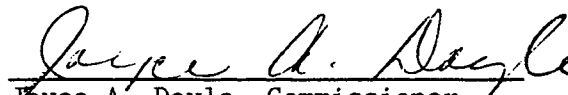
In its Petition for Reconsideration, Sandy Fork argues that, given the nature of the record in this case and the questions posed by the Court, the Commission should have remanded the case to the trier of fact for the "necessary factual findings" ordered by the Court. It suggests that the findings may turn on the demeanor or credibility of the witnesses and that the administrative law judge is in the appropriate position to make such determinations. In addition, it argues that the Commission exceeded the scope of its authority under the Mine Act by engaging in independent fact finding at the review level. In reply, Gilbert argues that the Commission's decision on remand was mandated by the undisputed testimony of record, that it was unnecessary to remand the case to the administrative law judge, and that the Commission was within its authority in making the narrow determinations ordered by the Court.


Further proceedings before the administrative law judge are already necessary pursuant to our remand order of February 16, 1990. Sandy Fork has explained with some force its concern that the administrative law judge, who is familiar with the witnesses and the testimony, was not given an opportunity to "make the necessary factual findings" ordered by the Court's remand. Although we do not agree with Sandy Fork's contention that the Commission was required under the circumstances to remand this issue to the judge, upon reconsideration and in the exercise of our discretion, we believe it is more appropriate to do so in order to assure that all parties are given a full and fair opportunity to respond to the Court's order. Therefore, we grant Sandy Fork's Motion for Reconsideration and remand this proceeding to the judge to respond to the Court's remand on the merits of Gilbert's complaint. To the extent, however, that Sandy Fork is requesting that the record be reopened for the introduction of further evidence in this case, the motion is denied. The record was fully developed in the hearing before the administrative law judge. All that is necessary at this juncture is the entry of further findings.

For the foregoing reasons, we vacate that portion of our decision of February 16, 1990, resolving the merits of Gilbert's discrimination complaint. We remand this matter to the judge for determination, on the existing record, of the issues raised by the Court on the merits of Gilbert's discrimination complaint, as set forth above, and for determination of any outstanding remedial issues.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, 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 5 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 89-92-M
Petitioner	:	A.C. No. 20-00024-05514
v.	:	
	:	Monroe Stone Quarry
FRANCE STONE COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

Following remand of this case to me by the Review Commission, the parties on May 29, 1990, filed a Joint Motion to Amend Settlement, Approve Amended Settlement and Dismiss.

The two violations charged in this proceeding were originally assessed at \$2000 and \$10,000. The motion states that the parties agree to settle for the amounts originally assessed.

Citation 3265648, charging a violation of 30 C.F.R. § 56.14131 because of the failure of the operator of a haul truck to wear seat belts, was assessed at \$2000. The parties agree that Respondent demonstrated a low degree of negligence in that it would have been extremely difficult for Respondent to know that the operator was not wearing seat belts. The violation was significant and substantial.

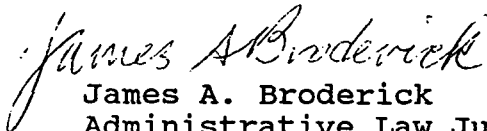
Citation 3265649, charging a violation of 30 C.F.R. § 56.9301 because a berm or bumper block to prevent overtravel was not provided at the top edge of a dumping location, was assessed at \$10,000. The parties agree to amend the § 104(d)(1) citation to a § 104(a) citation and to reduce the negligence from high to moderate because, while Respondent had established a rule and practice of not permitting haul trucks to dump in areas above loading operations, it was not followed in this case. A fatality occurred when a haul truck backed over the edge of a stock pile ramp. The parties agree that the violation is significant and substantial in that dumping above a loading area creates a reasonable probability of a reasonably serious injury or death. The parties agree that Respondent asserts and the evidence shows that employees unsuccessfully tried to warn the truck driver

prior to the accident that he was about to dump at a hazardous place on the stockpile.

The parties further agree that except for these proceedings, and any other subsequent MSHA proceedings between the parties, none of the foregoing agreements, statements, findings, and actions taken by Respondent shall be deemed an admission by the Respondent of allegations contained within the citations. The agreement, statements, for the purpose of compromising and settling this matter economically and amicably, and they shall not be used for any other purpose whatsoever, except as herein stated.

I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved.

Accordingly, the Motion to Amend Settlement and Approve Amended Settlement is GRANTED. The Amended Settlement is APPROVED and Respondent is ORDERED to pay the sum of \$12,000 within 30 days of the date of this order.


James A. Broderick
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 5 1990

JOSEPH PELEHAC, JR.,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. PENN 89-226-D
	:	MSHA Case No. PITT CD 89-15
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Dilworth Mine

DECISION

Appearances: Edward D. Yankovich, Jr., President, UMWA District No. 4, Masontown, Pennsylvania; Michael J. Healey and Paul Girdany, Esqs., HEALEY WHITEHILL, Pittsburgh, Pennsylvania, for the Complainant; Walter J. Scheller, III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Joseph Pelehac against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, (the Act). Mr. Pelehac filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and he was advised by MSHA that after review of the information gathered during its investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred. A hearing was held in Washington, Pennsylvania, and the complainant filed a posthearing brief. The respondent did not file a brief, but I have considered all of the oral arguments made by the parties during the course of the hearing.

The complainant contends that the respondent discriminated against him when it refused to pay him wages or overtime pay after he was required to remain at work after his normal work shift on 3 days in order to be interviewed by company safety officials in connection with a company accident investigation, and to give testimony in the course of an MSHA accident investigation. The complainant asserts that two of his fellow miners

who participated in the accident investigation were paid overtime for the extra time they were required to stay over beyond their normal shifts, and that the respondent's refusal to pay him was based on the fact that his testimony was not favorable to the respondent and did not absolve the respondent of all responsibility for the accident.

Applicable Statutory and Regulatory Provisions

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

Issue

The issue presented in this case is whether or not the respondent's refusal to pay the complainant for his time beyond his normal work shifts during the accident investigations constituted illegal discrimination under the Act. Additional issues raised by the parties are disposed of in the course of my adjudication of this matter.

Complainant's Testimony and Evidence

Complainant Joseph Pelehac confirmed that on Tuesday, January 24, 1989, an accident occurred on one of the barges where he was working. His normal quitting time was 2:15 p.m., but mine superintendent Louis Barletta informed him that he could not leave the mine because safety inspectors were on their way to investigate the accident. Mr. Pelehac stated that he did not leave work until 5:45 p.m., and was not paid for the extra hours he was required to stay at work that day.

Mr. Pelehac stated that he was scheduled to work the 12:01 a.m. night shift on Tuesday, January 24, 1989, but since he got home so late, he asked Mr. Barletta if he could work the day shift on Wednesday, January 25, 1989, and Mr. Barletta agreed. Mr. Pelehac stated that he reported to work at 8:00 a.m., that morning, but was called out of the mine to be interviewed by the inspectors. After speaking with an inspector for an hour, he returned to work and finished his work shift at 4:00 p.m., and was paid for the entire shift, including the hour he spent with the inspector. After finishing his work, he was again required to stay over to speak with the inspectors, and remained at the mine for approximately 2 hours beyond his normal 4:00 p.m., quitting time, and was not paid for these extra hours. He was

also required to stay two extra hours on Thursday, January 26, 1989, and was not paid.

Mr. Pelehac stated that he has worked at the mine for 12 years, and has worked for the respondent for six years. He confirmed that he has worked overtime "off and on" during these years, was always paid when asked to stay over, and has always assumed that he would be paid when told by management to stay. The instant case was the first time he was told to stay and was not paid. He conceded that this was the first time he was asked to stay to participate in an accident investigation (Tr. 8-14).

The parties stipulated that during the 3 days in question when Mr. Pelehac was requested to stay over to be interviewed by the accident investigators or mine management, he performed no work in his regular job classification (Tr. 16-17).

Mr. Pelehac confirmed that he made no safety complaint concerning the accident (Tr. 18). Respondent's counsel pointed out that the first day Mr. Pelehac was required to stay over, January 24, 1989, was in connection with the accident investigation conducted by mine management to ascertain the facts, and that the following 2 days, January 25, and 27, 1989, were in connection with the accident investigation conducted by the state and Federal mine inspectors (Tr. 20; 68). Mr. Pelehac confirmed that this was the case (Tr. 22-24).

Mr. Pelehac conceded that when he filed his initial complaint with MSHA on March 10, 1989, he did not allege that he was not paid because he gave unfavorable testimony against the respondent, and simply stated that he was discriminated against because he was not paid for the extra time he stayed at work (Tr. 25). When asked why he not mentioned his "unfavorable testimony" allegation, he responded "I didn't think it was necessary" (Tr. 26).

Mr. Pelehac stated that the respondent was attempting to establish that the accident victim, Paul Bandish, had violated a safety procedure when he was injured and that his injuries were the result of his violation. Mr. Pelehac believed that the respondent refused to pay him for the extra hours in question because "because I couldn't give testimony to the fact to say that he was doing something wrong" (Tr. 27). Mr. Pelehac confirmed that no one from management ever suggested or inferred that he should testify "one way or the other" (Tr. 28).

Mr. Pelehac did not believe that Mr. Bandish violated any safety rules, and he stated that he (Pelehac) was only a trainee and that Mr. Bandish was training him to take his job. Mr. Pelehac stated that he had no idea why the respondent may have taken the position that Mr. Bandish may have violated a

safety rule and caused the accident (Tr. 28). He further explained as follows at (Tr. 28-29):

A. In the investigation they kept saying like, you're sure he didn't do this, you're sure he didn't do that, you're sure he didn't hit this thing with a hammer instead of doing it the proper way. And I said, no. They kept inferring, did he hit this with a hammer, did he hit this with a hammer.

JUDGE KOUTRAS: Okay.

A. And I said no.

JUDGE KOUTRAS: Who?

A. Lou in particular said that several times.

JUDGE KOUTRAS: How about during the investigation on the 25th and the 26th by the MSHA and State people? Did those inspectors or investigators ask you the same questions?

A. No. I don't believe they ever asked me.

JUDGE KOUTRAS: Okay.

A. But on each day he asked me or someone from management asked me.

Mr. Pelehac confirmed that he filed a grievance with his foreman over the pay issue, and that after he was informed that the respondent had no contractual obligation to pay him, this "ended" his grievance (Tr. 30).

Mr. Pelehac confirmed that the respondent was not served with any violations as a result of the testimony which he gave during the accident investigation. He believed that it would be in the respondent's best interest to try and establish that Mr. Bandish was negligent and "that they would want me to say that he did, in fact, do something wrong which I wasn't on the job long enough to know if he did something wrong or not" (Tr. 33). He confirmed that no one from management ever suggested that he not tell the truth (Tr. 34).

Mr. Pelehac believed that the repeated questioning by management was for the purpose of determining whether or not Mr. Bandish may have been negligent or violated any safety rule that resulted in his injuries in order to mitigate the respondent's liability, and that he did not find this unusual (Tr. 35). When asked to specify any testimony on his part that he believed would have been damaging to the respondent, Mr. Pelehac responded

as follows (Tr. 35): "Because if Mr. Bandish tries to assume at a later date, which I don't believe he has yet, they would have evidence that I, in fact, said that Mr. Bandish did violate a safety rule."

Mr. Pelehac stated that he gave no testimony which would indicate that Mr. Bandish violated any safety rule, and he believed that the respondent suspended Mr. Bandish for 5 days, effective when he returned to work, but that to his knowledge, Mr. Bandish has not returned to work since he is still recovering from his injuries (Tr. 36). Mr. Pelehac confirmed that Mr. Bandish contested his 5-day disciplinary suspension through arbitration, and that he (Pelehac) testified at the arbitration hearing held on November 13, 1989, and that the decision of the arbitrator is still pending (Tr. 38). Mr. Pelehac further confirmed that he was again questioned by the respondent during the arbitration hearing (Tr. 38).

Mr. Pelehac stated that he filed a "verbal grievance" because he was not paid for the time he spent during his accident investigation questioning, and it was verbally denied when his foreman who considered the grievance made a determination that the labor-management contract did not provide for such payments. Mr. Pelehac confirmed that he did not further pursue the grievance (Tr. 40; exhibit R-1).

Respondent's Testimony and Evidence

Louis Barletta, Jr., respondent's mine superintendent, testified that Mr. Pelehac has never filed any safety grievances or made any safety complaints, and that he considers him to be a good employee. Mr. Barletta stated that after being informed of the accident he went to the scene and observed Mr. Bandish receiving medical attention, and he spoke with Mr. Pelehac and two other employees, and requested Mr. Pelehac to remain after his normal work shift on January 24, 1989. Mr. Barletta explained that Mr. Bandish's injuries did not initially appear to be serious, but when it was later determined from the hospital report that they were, MSHA and the appropriate state agency were informed of the accident.

Mr. Barletta stated that he conducted the respondent's accident investigation and that it began at 1:15 or 1:30 p.m., shortly after Mr. Bandish was taken to the hospital, and he spent the rest of the day on his investigation. After Mr. Pelehac left the mine, MSHA and the state inspectors arrived at the mine, and Mr. Barletta was involved in the investigation until 9:30 p.m. that day, and it continued on January 25-27, 1989, and a few days in February (Tr. 50). He confirmed that Mr. Pelehac was not interviewed by the inspectors on January 24, and that he had requested to go home before the inspectors arrived, and he permitted him to leave (Tr. 50). Mr. Barletta stated that at the

time he conducted his interviews up to 5:00 p.m., on January 24, he did not believe that the accident would be investigated by MSHA (Tr. 51).

Mr. Barletta stated that he investigated the accident because it was the second serious accident in 15 years, and that since he was the superintendent, it was his responsibility to investigate accidents, and it was important for him to know how Mr. Bandish was injured. He confirmed that in addition to Mr. Pelehac, he also interviewed dockman Dan Bailey and barge loader operator Ronnie Seliga. He was not sure whether or not Mr. Bailey and Mr. Seliga remained over their normal work shift hours and stated that "I'm not positive but I know they are not paid for the investigation unless it was on their normal shift" (Tr. 52). He confirmed that Mr. Pelehac made no complaints about the accident in question (Tr. 52).

Mr. Barletta confirmed that in prior instances when he has requested to speak to miners before or after their work shifts, they were never compensated for their time because company policy only requires that employees be paid for work performed, and that investigations, counselling, matters dealing with employee problems, including discipline, are not considered to be "work performed," and that no one has been compensated for the time spent on such matters (Tr. 53). In response to certain bench questions concerning an employee's refusal to stay over and beyond his normal work shift unless he were paid, Mr. Barletta responded as follows (Tr. 53-54):

JUDGE KOUTRAS: Can I just ask one question? What happens if an employee declines to stay? He says, I'm not getting paid, I'm not staying.

A. Well, I don't believe that case ever occurred to me. I could answer that if it would.

JUDGE KOUTRAS: Answer it in a hypothetical.

A. If it would, I would give them a direct work order to make them stay.

JUDGE KOUTRAS: How can you give them a work order if he's not going to do any work?

A. Okay.

* * * * *

A. It depends on the situation. It would depend on the situation. I have had people saying they couldn't stay because they had other engagements. Then I would talk to them at the start of the next shift.

Mr. Barletta stated that an employee must report any accident on his shift to his supervisor prior to the end of the shift, and no later than the end of the shift. An employee must also fill out an accident report, and if this occurs after his normal shift, the report is reviewed with the employee, and he may be "tagged" to stop by the office at the end of his shift. The employee would not be compensated for his time because there are no contractual requirements for payment for time spent investigating accidents before or after a shift (Tr. 55).

Mr. Barletta testified that in September, 1988, he conducted an investigation of an incident involving an employee who was observed walking under an unguarded belt conveyor, which resulted in an imminent danger order issued by an MSHA inspector (exhibit R-3). He confirmed that the employee was suspended for 3 days without pay, and that during his investigation of the incident, the employee was asked to stay after her normal work shift for 2 days. The employee stayed over for 45 minutes after her shift on September 1, and for approximately 30 minutes on September 2, and she was not compensated for this time (Tr. 60-61).

Mr. Barletta stated that on Wednesday, January 25, 1989, an MSHA investigator began his formal accident investigation, and through a prior agreement with Mr. Pelehac, he was working the daylight shift that day. He was called out of the mine at 9:00 a.m., because the MSHA inspector wanted to hear his accident testimony. Mr. Pelehac was questioned by the inspector, management, and the mine safety committee, and then returned to his underground job assignment (Tr. 63). That evening, Mr. Pelehac was requested to stay over because another MSHA special investigator was coming to the mine and wanted to speak with witnesses. Mr. Barletta stated that he informed the inspector by telephone before he arrived that Mr. Pelehac was the only eye witness, and the inspector requested an opportunity to speak with him. Mr. Barletta then advised Mr. Pelehac that he was requested to stay at the end of his shift to testify about the accident (Tr. 64, exhibit R-2, MSHA accident report of investigation).

Mr. Barletta stated that the MSHA, state, and company investigation continued on Thursday, January 26, and Mr. Pelehac was not interviewed that day (Tr. 65). Mr. Barletta confirmed that Mr. Pelehac's claim for pay for 2 hours on January 26, is in error, and that he confused the days, and that the correct day for this claim should be Friday, January 27 (Tr. 67). Mr. Pelehac's representative confirmed that this was the case, and that the correct day was January 27 (Tr. 68).

Mr. Barletta stated that Mr. Pelehac requested to return to his normal midnight work shift, and that he worked that shift on January 27, from 12:01 a.m. to 8:00 a.m. Mr. Barletta requested Mr. Pelehac to stay over because the MSHA inspector requested

that he be available for testimony that morning during the continuing investigation. The investigation meeting was conducted by the MSHA inspector and special investigator, and other than their normal onshift work time, no one was compensated for the time spent during the investigation because of the company practice and policy pursuant to the contract that does not allow compensation for people involved in accident investigations (Tr. 69).

Mr. Barletta identified exhibit R-4, as the list of people who participated in the MSHA accident investigation, and the time sheets of the employees who were interviewed and questioned. He confirmed that none of these employees were paid for any time other than their regularly scheduled work times (Tr. 70-71).

Mr. Barletta confirmed that there have been other instances when MSHA has conducted investigations and miners were questioned after their work shift and were not compensated, and that this was a common occurrences in instances where miners have filed safety complaints pursuant to section 103(g) of the Act, and requested an MSHA investigation (Tr. 73). He stated that this occurred on April 13, 1989, when seven hourly and salaried employees working on the midnight shift were requested to stay over by MSHA and state inspectors who were conducting a section 103(g) investigation, and that none of these employees were compensated for the time spent during that investigation (Tr. 74, exhibit R-5). Although some of the time sheets for these employees reflects overtime pay, he explained that "there is some overtime but that was for production purposes because we do not change in the face on two or three hourly employees in question." He reiterated that management did not pay any of these employees for the time spent on the investigation, nor has it paid any overtime for such time (Tr. 74). He also confirmed that compensation has never been paid for extra time spent on state or company investigations (Tr. 75).

When asked about Mr. Pelehac's belief that he was discriminated against because his testimony did not absolve the respondent of liability for the accident, and whether he would have been paid if his testimony was "favorable," Mr. Barletta responded as follows (Tr. 75-77):

A. I can't say his testimony was unfavorable. Favorable or unfavorable, no, I wouldn't have paid him either way. There was no reason to based on my policy and the policy Consolidation Coal has. But his testimony --- I can't do --- whoever determined it was unfavorable, I don't know. He basically said that he saw nothing of the accident. He turned his back and it happened. He turned around, the man was injured.

Q. Mr. Pelehac stated during his testimony that you repeatedly asked him about hammering and, in essence, that you were harassing him. Could you tell us why you were asking him about the accident?

A. I repeatedly asked him about a hammer. The reason I asked him about a hammer, that I observed a hammer laying on the landing on the empty side of the dock and Mr. Pelehac observed it too after I pointed it out to him. Our employees were trained not to use a hammer to knock down and bring them loose while it was under tension. Mr. Pelehac stated to me on the 24th he was informed by the victim, Mr. Bandish, and another person training him, you don't ever hit it while under tension.

When we looked --- when I say we looked, Consolidation Coal Company, and their employees looked at the accident scene, there was no hammer on the barges which came out in the testimony and the MSHA report. But the concern was that when the accident scene was recreated, the rope, the chain and the ratchet assembly all functioned properly.

And later on that evening it was found out by Rich Werth, W-E-R-T-H, he is a safety inspector for management at Dilworth Mine, there were statements made at the hospital by the victim. And that's why the question was asked so many times. The statements made at the hospital by the victim was that he's never screwed up, and he used other four letter words, so bad that he beat high, he beat low, he beat high and everything just blew apart. And the victim said ---.

* * * * *

A. I had a reason to question it and I continue to question it.

JUDGE KOUTRAS: You suspected that the accident victim may have beat on this thing with a hammer?

A. Yes, sir.

On cross-examination, Mr. Barletta stated that he requested Mr. Pelehac to stay over his normal work shift hours on one day for his own investigation, and for 2 days for MSHA's investigation. When asked whether he makes it clear to an employee that such requests are a "direct work order," Mr. Barletta responded that this is not needed because "our employees should be responsible enough that they will do what they are told" (Tr. 78).

Mr. Barletta reviewed the time sheets of Tuesday, January 24, 1989, for Mr. Pelehac, Mr. Bailey, and Mr. Seliga, and he explained the entries made (Tr. 78-80, exhibit R-4). He confirmed that he shut the dock loading facility down when the accident occurred in order to investigate it and to prevent further accidents (Tr. 81). He also confirmed that he probably ordered a foreman to tell Mr. Pelehac that he was requested by MSHA to stay over on January 25 and 27, for the investigation (Tr. 82).

Mr. Barletta confirmed that the accident occurred at approximately 1:00 p.m., on January 24, and he, rather than MSHA, requested Mr. Pelehac to stay over beyond his normal quitting time at 2:15 p.m. (Tr. 85). In response to further questions on direct, Mr. Barletta confirmed that Mr. Pelehac performed no work in his job classification after his normal work shift ended on January 24, but that Mr. Bailey, who was asked to work a double shift for an employee who was absent, worked in his own job classification for nine and three-quarter hours during the entire shift. Mr. Barletta stated that in the course of the investigation, some of the witnesses were interviewed during their work shifts and were paid, including Mr. Pelehac who was called out of the mine on the morning of January 25, and that this was analogous to Mr. Bailey being paid when he was interviewed while working a double shift. With regard to Mr. Seliga, who was scheduled to work overtime every day of the week of January 23, although he was required to perform his work, he did not do so because the facility was shutdown, and he was not present to be interviewed (Tr. 86-88).

In response to questions concerning the time sheets and hours recorded for Mr. Pelehac, Mr. Bailey, and Mr. Seliga, Mr. Barletta further explained the time entries. He stated that Mr. Bailey's participation in the accident investigation consumed approximately 30 minutes, and Mr. Seliga consumed approximately 5 to 10 minutes because he observed nothing at the time of the accident. He further stated that Mr. Bailey and Mr. Seliga were both performing work during his investigation, but that Mr. Pelehac stayed with him (Barletta) for 3-1/2 hours while trying to resolve how the accident occurred. Mr. Barletta could not explain why Mr. Pelehac's time sheet for January 24, showed an entry for 3 hours overtime, and was then scratched out and initialed by the individual who signed the sheet (Tr. 89-102).

Mr. Pelehac was recalled in rebuttal, and he testified that on the afternoon of the accident on January 24, 1989, from 2:15 p.m. until 5:00 p.m., no coal was loaded on the barges. He stated that Mr. Bailey and Mr. Seliga were present with him, Mr. Barletta, and other management personnel during the questioning of the barge specialist which took place until he went home at 5:45 p.m. Mr. Pelehac stated that he assisted in carrying out the accident victim on a stretcher, and Mr. Bailey and Mr. Seliga

were assigned no other work duties, and he did not observe them doing any work. He further confirmed that no one did any work, and that "everything was left alone just the way it was, I guess, to preserve the evidence so the barge specialist from Clariton could come up and look at it." Mr. Bailey and Mr. Seliga were with him the entire time "in a group" (Tr. 112-113).

Complainant's Arguments

In his closing arguments at the hearing, the complainant's representative argued that Mr. Barletta's testimony reflects that Mr. Bailey and Mr. Seliga, two employees who were involved in the accident investigation, were compensated for their time, but that the complainant was not. The complainant concluded that he was discriminated against because he did not supply the testimony the respondent was seeking with respect to the employee who was injured. Complainant asserted that he was repeatedly questioned by the respondent's management in an effort to have him say that the injured employee caused the accident by beating on the pelican hook with a hammer.

The complainant further argued that the respondent failed to provide a satisfactory explanation as to why the other two employees (Bailey and Seliga) were paid, or why the complainant's time sheet on the day of the accident initially reflected 3 hours of overtime, and then subsequently marked out. He also pointed out that the complainant testified that Mr. Bailey and Mr. Seliga were with him the entire time on the day of the accident (Tr. 114-118).

In a posthearing brief filed on his behalf by counsel who entered a simultaneous appearance when they filed the brief, complainant asserts that he had been ordered in the past to remain past the end of his workshift by supervisors, but that the 3 days in question were the only times that he had ever been ordered to remain past the end of his workshift and received no overtime pay compensation.

The complainant points out that Mr. Bailey and Mr. Seliga also remained past the end of their shifts to assist in the accident investigation of January 24, 1989, and were compensated in overtime wages for their time. Complainant asserts that the respondent never offered a plausible explanation for this disparate treatment, and the fact that the respondent repeatedly and unsuccessfully tried to elicit testimony and information from him that the accident victim, through his own negligence, had caused the accident becomes extremely relevant.

The complainant argues that section 105(c) of the Act protects miners against retaliation by mine operators for their exercise of safety rights protected under the Act, and that section 105(c)(1) specifically protects a miner who "has

testified or is about to testify" in any proceeding "under or related to this chapter" or one who has exercised "any statutory right afforded by this chapter." Complainant asserts that it is undisputed that he was interviewed by MSHA inspectors, and that he assisted in the investigation and provided information to MSHA during its investigation of the January 24, 1989, accident. Complainant takes the position that such participation on his part is akin to delivering testimony in an MSHA proceeding and is clearly one of the statutory rights afforded by the Act.

Citing several NLRB decisions under the Labor Management Relations Act, the complainant asserts that the NLRB has consistently held that participation and assistance in NLRB investigations by an employee, even when such employee has not actually filed charges or testified in any formal proceedings, is protected activity which an employer may not retaliate against in any way, whether through disciplinary action or failure to pay proper wages. Complainant concludes that it is clear that he engaged in protected activities under the Act when he stayed past the end of his shift on the 3 days in question to assist in the investigation of the January 24, 1989, accident.

The complainant maintains that he exercised his protected rights by submitting to the interviews during the course of the accident investigation, and that the respondent was aware of the exercise of those rights but refused to pay him for the hours he remained at the mine despite the fact that it had ordered him to remain at work to assist in the investigation. Complainant concludes that the respondent's refusal to pay him overtime wages was an act of discrimination because there was no legitimate business reason not to do so.

Complainant argues that the cooperation of witnesses in accident investigations is essential for proper administration and enforcement of the Act, and he concludes that the refusal of the respondent to pay him for his time discourages witness cooperation and constitutes discrimination and impairs enforcement of the Act.

Complainant cites a West Virginia Supreme Court of Appeals decision in Carpenter v. Miller, 325 S.E. 2d 123 (1984), involving a state law similar to section 105(c)(1) of the Act. Complainant asserts that the court held that the withholding of compensation by employers from a miner who testifies at a mine safety proceeding is a form of discrimination prohibited by the statute, and that coal companies were required to fully compensate each miner whose pay was docked on days they testified in a mine safety proceeding.

Complainant also cites a decision by Commission Judge William Fauver in Joseph G. DeLisio v. Mathies Coal Company, 11 FMSHRC 2353 (November 1989), holding that the failure by a

mine operator to pay a miner the difference between his regular daily wage and the \$30 statutory witness fee he received for appearing as a subpoenaed witness on behalf of MSHA in a Commission proceeding constituted a violation of section 105(c) of the Act. In that case, Judge Fauver held that the operator's refusal to pay the wages of the miner who testified against it at the hearing, while at the same time paying the wages of other miner witnesses who testified on its behalf, constituted discriminatory treatment of witnesses in violation of the Act.

The complainant concludes that the public policy in the Act favors far ranging enforcement of its provisions, and that one manner of enhancing enforcement is the ability to interview employees/witnesses who will provide first hand information about the cause and circumstances surrounding mine accidents. The complainant believes it is clear that if a witness/employee must remain on the mine site after he has completed a full work shift in order to be accessible to MSHA investigators, that there will be less incentive for him to remain at the mine site if he must give up several hours of his free time without receiving any compensation after having completed a full work shift, and that this obviously undercuts the public policy embodied in the Act.

Respondent's Arguments

In his closing oral arguments, the respondent's counsel asserted that the complainant has not establish that he engaged in any protective activity under the Act, made no safety complaint, and that the respondent took no adverse action against him because of any protected activity on his part on January 24, 1989. With regard to the other 2 days, counsel asserted that the accident investigation was an official MSHA investigation, that the respondent was not in charge, and that the MSHA inspectors requested that the complainant be present for testimony. Counsel concluded that the complainant has failed to establish any adverse motive by the respondent, and has not established that he was treated any differently than any other employee.

Counsel further asserted that the work time sheets show that the union has paid its safety committeemen for union business during the accident investigation, while the respondent did not. Counsel suggested that the union could have paid the complainant for his time, and that in the event the respondent paid him, his testimony would have been suspect because someone could point out that he was paid to give favorable testimony for the respondent. Counsel pointed out that the respondent does not even compensate foremen or management personnel for staying over during an accident investigation.

Counsel asserted that any protected activity pursuant to the Act must be in connection with complaints to MSHA, mine management, or to the union, and that the complainant has not shown that he engaged in this kind of activity (Tr. 120-124).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ___ U.S. ___, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

The record in this case establishes that while in the course of his regularly scheduled work duties on January 24, 1989, the complainant was a witness to a serious, non-fatal injury accident involving Mr. Paul Bandish, a fellow miner. Although the complainant's normal quitting time was 2:15 p.m., mine superintendent Barletta requested him to stay at the mine in order to be interviewed by the respondent about the accident. At the conclusion of the interviews, the complainant was released from work at 5:45 p.m. The following day, January 25, 1989, the complainant was again notified by the respondent that he had to remain at the mine in order to be interviewed by the respondent and State and Federal mine inspectors who were conducting an accident investigation. He was again interviewed and was not released to go home until after 6:00 p.m. His normal work shift on this day ended at 4:00 p.m. On January 27, 1989, the complainant was again required to stay after completing his work shift, to be interviewed by the respondent and government mine inspectors, and he was not released to go home until approximately 2 hours later.

The complainant spent approximately 7-1/2 hours past his normal work times during a 3-day period while being interviewed as part of the accident investigations conducted by the respondent and State and Federal mine inspectors. Superintendent Barletta confirmed that if the complainant had declined to stay and make himself available for the investigations he would have given him a direct work order to stay. Under the circumstances, I conclude and find that the complainant's staying over beyond his normal work shifts on the days in question was involuntary. Despite his involuntary presence at the mine, the respondent refused to pay the complainant the overtime wages he would normally be entitled to if he had remained and worked. These wages would have been \$171.64.

The parties agreed that although the applicable UMWA/management bargaining agreement allows for compensation for safety

committeemen in connection with a fatality, mine explosion, or disaster inquiry, it does not allow or provide for compensation for miners who participate in accident investigations which take place after their normal working shifts (Tr. 102-102).

Complainant's representative confirmed that in the event the union initiates the investigation, i.e., pursuant to section 103(g) of the Act, a miner may be made an "employee" of the union for purposes of the investigation, and he would be compensated by the union for the time spent on the investigation (Tr. 103-104). This was not done in this case because the union did not initiate the accident investigation in question (Tr. 104).

The respondent contended that in this case, the union could have placed the complainant on union business and paid him for his time after his normal work shift, as it did in the case of the safety committeemen who participated in the investigation, but that it did not do so (Tr. 105). The respondent confirmed that in the event of an MSHA investigation with respect to a union initiated section 103(g) complaint, an employee who is "on the clock" is made available to the inspectors (Tr. 106). Mr. Barletta confirmed that if an inspector requests access to an employee during his work shift, the employee is made available to the inspector, and if the request is made by the inspector after the employee's work shift, management will notify the employee that the inspector wishes to see him and will request the employee to stay over (Tr. 107-108).

The complainant asserts that he had been ordered in the past to remain past the end of his workshift by supervisors, but that the 3 days in question were the only times he had been ordered to remain and received no overtime pay. While this may be true, the complainant conceded that he had never previously been involved in an accident investigation and had never been asked to stay over to participate in such an investigation. He also conceded that when he was asked to stay over in the past, he was paid overtime for work which he performed, and that at no previous time during his employment with the respondent was he ever asked to stay and did not perform his normal work duties (Tr. 12, 16). The complainant has stipulated that he performed no work in his job classification on the 3 days that he stayed over to participate in the accident investigation.

The Protected Activity

Section 105(c)(1) of the Mine Act provides in pertinent part as follows:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner * * * because such miner * * * has filed or made a complaint

under or related to this Act * * * or because such miner * * * has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner * * * of any statutory right afforded by this Act.

A threshold determination to be made in this case is whether or not Mr. Pelehac was engaged in any protected activity at the time of the alleged discriminatory act. The alleged discriminatory act is the failure by the respondent to compensate Mr. Pelehac for the extra time he spent answering questions and giving information in connection with the accident investigation. Mr. Pelehac claims that the respondent refused to pay him because he failed to give favorable testimony absolving the respondent of responsibility for the accident.

In Donovan v. Stafford Construction Company, 732 F.2d 954 (D.C. Cir. 1984), the court held that an employee was protected by the Mine Act against retaliation for providing testimony in connection with an MSHA investigation concerning a discrimination complaint filed by a miner. The court took a broad view of section 105(c) of the Act, and stated as follows at 732 F.2d 959:

There can be little doubt that an employee's right to testify freely in mine safety proceedings encompasses the giving of statements to MSHA personnel conducting preliminary investigations. * * * Although a literal reading of the statute might indicate that a discharge is illegal only if the employee has testified or is about to testify against the employer, we decline to adopt such a hypertechnical and purpose-defeating interpretation. Instead, we hold that an employee's refusal to agree to provide MSHA investigators with testimony that the employee in good faith believes to be false is protected activity, regardless of whether the employee eventually happens to be asked for a statement.

In Elias Moses v. Whitley Development Corporation, 4 FMSHRC 1475 (August 1982), the Commission held that the coercive interrogation, harassment, and subsequent discharge of a miner suspected of reporting an accident to MSHA was discriminatory and constituted a violation of section 105(c)(1) of the Act. The Commission found that discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1). The Commission stated in relevant part as follows at 4 FMSHRC 1478-1479:

We find that among the "more subtle forms of interference" are coercive interrogation and harassment

over the exercise of protected rights. A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act. We therefore conclude that coercive interrogation and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Act. 8/

In the footnote noted at 4 FMSHRC 1479, the Commission stated as follows:

This is not to say that an operator may never question or comment upon a miner's exercise of a protected right. Such question or comment may be innocuous or even necessary to address a safety or health problem and, therefore, would not amount to coercive interrogation or harassment. Whether an operator's actions are proscribed by the Mine Act must be determined by what is said and done, and by the circumstances surrounding the words and actions. (Emphasis added).

In upholding the judge's finding of discrimination, the Commission concluded that the persistence with which the subject of Moses' supposed accident reporting was raised by the operator, and the accusatory manner in which it was done, could logically result in a fear of reprisal and a reluctance by Moses to exercise his rights in the future, and therefore constituted prohibited interference under section 105(c)(1).

In Joseph G. DeLisio v. Mathies Coal Company, 11 FMSHRC 2353 (November 1989), Commission Judge William Fauver held that the withholding of a miner's wages from a miner who is subpoenaed to testify at a hearing before a Commission judge on behalf of MSHA and against a mine operator was discriminatory. Judge Fauver took a broad view of section 105(c) of the Act and held that it prohibits "any manner" of discrimination. With regard to the mine operator's discriminatory motive in refusing to pay DeLisio the difference between his regular daily wages and the witness fee paid by MSHA, Judge Fauver found that the refusal by the mine operator to pay wages to DeLisio, who was an opposition witness, while at the same time paying the wages of the witnesses who testified on behalf of the operator, was discriminatory on its face and required no further examination of the operator's discriminatory motive.

In the instant case, the evidence establishes that Mr. Pelehac made no safety complaints to mine management or to MSHA, and there is no evidence that he refused to perform any job tasks because of any safety concerns, or that he reported or complained about the accident. He was simply required to remain beyond his normal work shift in order to testify or give information about the accident which he purportedly witnessed.

The respondent's assertion that Mr. Pelehac's protected rights under the Act are limited to safety complaints is rejected. The applicable case law clearly established that the protections afforded miners in the exercise of their rights pursuant to the Act must be broadly construed. Section 105(c)(1) of the Act prohibits a mine operator from discriminating against a miner because he has testified in any proceeding related to the Act.

Section 103(a) of the Act requires the Secretary of Labor (MSHA) to investigate a mine accident to determine its cause, and to determine whether a mine operator has violated any mandatory safety or health standard. Section 103(d) of the Act requires a mine operator to likewise investigate all mine accidents to determine the cause and means of preventing a recurrence. The operator is also required to retain all accident investigation information and records and to make them available to MSHA, and section 103(j) requires the operator to prevent the destruction of any evidence which would assist in investigating the cause of an accident.

Section 103(b) of the Act authorizes the Secretary to hold a public hearing, after notice, and to subpoena witnesses to testify in connection with an accident investigation. In this case, although the testimony of Mr. Pelehac was not presented at any formal public hearing, and he was not subpoenaed, the information sought to be elicited from him in connection with the accident was part of the fact finding inquires being conducted by mine management and the MSHA inspectors pursuant to their obligations under sections 103(a), (d), and (j) of the Act.

In view of the foregoing, I conclude and find that the accident investigations in question were proceedings related to the Act and that Mr. Pelehac's participation in those investigations as a witness to the accident was a protected activity within the meaning and intent of section 105(c)(1) of the Act, Donovan v. Stafford Construction Company, supra. I further conclude and find that the respondent is prohibited from interfering with this activity on the part of Mr. Pelehac, and is prohibited from harassing, intimidating, or otherwise impeding Mr. Pelehac's participation in these kinds of accident investigations or inquiries.

The Respondent's Alleged Discriminatory Actions

Mr. Pelehac confirmed that he had worked overtime on an intermittent basis while employed with the respondent and that he was always paid for this work. He apparently assumed that he would be paid when he was asked to stay beyond his normal work shift on the 3 days in question, even though he conceded that he performed no work in his regulation job classification during this time. I take note of the fact that at the time Mr. Pelehac filed his complaint with MSHA he did not allege that the respondent refused to pay him because he gave unfavorable testimony. He explained that he did not do so because he did not believe it was necessary, and during the hearing he asserted that the respondent refused to pay him because he could not testify that the accident victim (Bandish) had done anything wrong, or that the accident was the result of his own negligence. I also take note of the fact that Mr. Pelehac filed a grievance for overtime pay, but it was apparently not pursued further because he had no contractual right to be paid for time spent away from his regular work duties (exhibit R-1).

In order to prevail in this case, there must be some credible showing by the complainant that the refusal by the respondent to compensate him for the extra time spent in the accident inquiries was motivated by its desire to punish him or retaliate against him because of his alleged failure to give favorable testimony on behalf of the respondent. Such a showing may be established by direct evidence, or by circumstantial evidence establishing a strong and un rebutted inference of discriminatory motive. In the Elias Moses case, the Commission held that a mine operator's coercive and harassing interrogation of a miner to support its suspicion that he had reported an accident to MSHA was discriminatory. In the Joseph G. DeLisio case, supra, Judge Fauver found that the refusal by the mine operator to pay him for his time as an opposition witness, while at the same time paying witnesses who appeared on behalf of the operator, was discriminatory on its face.

Although it is clear that Mr. Pelehac filed no safety complaints or reported the accident, he is protected against any harassing and coercive interrogations of the kind found by the Commission to be discriminatory in Elias Moses. With regard to the application of the DeLisio decision to the facts of this case, I take note of the fact that DeLisio was subpoenaed as an adverse witness by MSHA to testify against the operator in a hearing before a Commission judge involving an alleged violation of a mandatory safety standard. In the instant case, Mr. Pelehac was but one of several employees who were interviewed and gave information or "testimony" regarding the accident, and I find no support for any conclusion that any of these employees were "adverse" witnesses. The record reflects that the accident

investigation revealed no violations on the part of the respondent which would have contributed to the cause of the accident, and Mr. Barletta testified credibly that he could not conclude that the information given by Mr. Pelehac during the accident inquiries was "unfavorable" to the respondent because he basically testified that he did not actually see the accident because he had his back turned at the time that it occurred and that when he turned around he saw that Mr. Bandish was injured (Tr. 75).

Mr. Pelehac believed that his failure to exonerate the respondent of any fault or liability for the accident was "the damaging testimony" which served as the basis for the respondent's refusal to pay him for the extra time in question. However, as noted earlier, the MSHA accident investigation revealed no violations on the part of the respondent which may have contributed to the cause of the accident, and Mr. Pelehac conceded that his questioning by mine management with respect to the accident victim's purported negligence and possible violation of company safety rules was not unusual. Further, as previously noted, Mr. Pelehac agreed that mine management at no time ever suggested that he not tell the truth about what he knew about the accident. Although Mr. Pelehac believed that it would be in the best interest of the respondent to establish that Mr. Bandish was negligent, he nonetheless agreed that it was not unusual for the respondent to attempt to mitigate its liability in the event it were sued by Mr. Bandish, and that he would probably do the same thing if he were sued.

Mr. Pelehac asserted that the respondent "repeatedly" questioned him during the course of the accident inquiries, as well as in the course of the grievance hearing involving the respondent's disciplinary action against Mr. Bandish. Mr. Pelehac suggested that he was "hounded" by the respondent in its attempts to elicit testimony from him to support the respondent's belief that Mr. Bandish was negligent and caused the accident by striking the piece of equipment which injured him with a hammer.

Superintendent Barletta confirmed that he repeatedly asked Mr. Pelehac about Mr. Bandish's possible use of a hammer because he had reason to believe that Mr. Bandish may have used a hammer to beat on the piece of equipment which blew apart and struck him in the head. Although MSHA's accident report contains information that Mr. Bandish did not have a hammer in his possession when he was last observed by Mr. Pelehac, the report also reflects a statement by a company safety inspector that during a conversation with Mr. Bandish at the hospital on the day of the accident, Mr. Bandish informed the inspector that he used a hammer to beat on the piece of equipment in question "when all of a sudden everything let loose" (exhibit R-2, pg. 7). In these circumstances, and given the fact that the respondent had an obligation to ascertain the cause of the accident, and to prevent

a recurrence in the future, I find nothing unusual or unreasonable in Mr. Barletta's pursuing the question of the possible use of the hammer by Mr. Bandish. I also find nothing unusual or unreasonable in the respondent's attempts to mitigate its liability by pursuing this question with Mr. Pelehac, the only other person at the immediate scene of the accident at the time Mr. Bandish was injured.

During the course of the hearing, Mr. Pelehac's representative confirmed that there was no transcript of the testimony given during the arbitration hearing in connection with Mr. Bandish's grievance. The transcript of Mr. Pelehac's testimony in connection with MSHA's accident investigation, if it exists, was not produced or offered by any of the parties in this proceeding, and it is not a matter of record in this case. Under the circumstances, I have no basis for concluding that Mr. Pelehac was "hounded" because the respondent "repeatedly" questioned him about Mr. Bandish's use of a hammer. Although Mr. Pelehac testified that Mr. Barletta or someone from management questioned him each day as to whether or not Mr. Bandish may have struck the equipment with a hammer, and that Mr. Barletta in particular asked him about this "several times," I find no credible or probative evidence to support any conclusion that the respondent's questioning of Mr. Pelehac was coercive, or that it constituted harassment of Mr. Pelehac, or an attempt by the respondent to intimidate him. To the contrary, based on the record in this case, I cannot conclude that the respondent's questioning of Mr. Pelehac, and its request that he remain beyond his normal work shift to make himself available to mine management and the inspectors investigating the accident was anything other than a bona-fide good faith effort on the part of the respondent to ascertain all of the facts in connection with the accident in question.

The Alleged Disparate Treatment of Mr. Pelehac

There is no evidence in this case that mine management harbored any ill towards Mr. Pelehac, and he agreed that no one ever suggested that he not tell the truth during the course of the accident investigations. Superintendent Barletta considered Mr. Pelehac to be a good employee, and the record reflects that he granted Mr. Pelehac's request to leave the mine on January 24, after the accident was reported, and before the arrival of an MSHA accident investigator. Mr. Barletta also accommodated Mr. Pelehac by agreeing to certain changes in his work shifts during the accident inquiries (Tr. 62). Although Mr. Barletta indicated that he would have issued a direct order to Mr. Pelehac to remain at the mine if he had refused to do so, he also indicated that if an employee advised him that he could not stay because he had other engagements, he would talk to him at the beginning of his next shift. Mr. Barletta confirmed that during a prior MSHA investigation on April 17, 1989, one of his

employees, Bobby Clark, went home because he did not want to get involved in the investigation, and he was interviewed a week later by the inspector at the beginning of his shift (Tr. 109, exhibit R-5). In this case, there is no evidence that Mr. Pelehac requested to go home at the end of his work shifts, and was refused.

The parties are in agreement that the applicable bargaining agreement does not provide for compensation for the extra time spent by miners on matters dealing with accident investigations. The record also establishes that in the absence of any contractual obligation to compensate miners for time spent on matters other than work, the respondent has a policy of not compensating miners for any time spent beyond their normal work shift on such matters as counselling, disciplinary problems, and accident investigations. If an employee is required to remain at the mine after his normal work shift to give information, or to otherwise participate in the fact-finding process with respect to these matters, he is not paid for his time. However, if an employee is called out of the mine during his normal work shift to give information during an accident investigation, or is interviewed during his shift at his work location, he continues to receive his regular pay even though he is not performing any work.

Mr. Barletta's credible testimony establishes that those employees interviewed during their normal work shifts, including Mr. Pelehac, were paid for their regular shift. With regard to the respondent's failure to pay Mr. Pelehac for the time spent on an investigation beyond his normally scheduled work shift, Mr. Barletta's credible testimony further establishes that in the absence of any contractual obligation to do so, the respondent has not compensated other employees who were required to stay beyond their normal work shifts in order to participate in an accident investigation or similar inquiries dealing with employee safety and disciplinary matter.

Mr. Barletta testified that in April, 1989, seven employees were asked to stay beyond their normal work shifts by MSHA and state mine inspectors who were investigating a safety complaint, and that none of these employees were compensated from their time. He also testified to an investigation which he conducted in September, 1988, in connection with an imminent danger order issued by MSHA involving an employee who was observed walking under an unguarded belt conveyor. Mr. Barletta stated that the employee was required to stay over her normal work shift on 2 days and that she was not compensated for the extra time (Tr. 61, exhibits R-3 and R-5).

Mr. Pelehac's allegation of disparate treatment lies in his assertion that hourly employees Daniel Bailey and Ronald Seliga, both of whom stayed beyond their normal work shift during the accident inquiry on Tuesday, January 24, were paid overtime, and

he was not. Mr. Pelehac does not suggest, nor has he established, that these individuals were paid overtime by the respondent because they may have given "favorable" testimony or information. He simply concludes and suggests that since Mr. Bailey and Mr. Seliga were paid, and he was not, he was discriminated against. In support of this argument, Mr. Pelehac relies on the payroll time records which reflects that Mr. Bailey was paid for 9-3/4 hours of overtime for January 24, and that Mr. Seliga was paid for 3 hours of overtime that day (exhibit R-4). Mr. Pelehac points out that his time record for that day reflects that he was initially credited for 3 hours of overtime, but that the timekeeper scratched it out, and that the respondent has not satisfactorily explained why this was done.

Superintendent Barletta testified that the initials of the individual who scratched out the 3 hours of overtime on Mr. Pelehac's time record appears to be those of Mr. Pelehac's underground section foreman Mel Robinson, who was located 2 miles from the office where the records are kept. Mr. Barletta confirmed that Mr. Pelehac was working on temporary assignment at the river barge location on Monday and Tuesday, January 23 and 24, and that the outside foreman would have probably reported Mr. Pelehac's work time. However, Mr. Barletta stated that he had no actual knowledge as to how Mr. Pelehac's time may have been reported, who reported it, and he did not know why Mr. Robinson may have scratched out and initialed the overtime entry made on Mr. Pelehac's time record (Tr. 90-93).

Mr. Barletta confirmed that he interviewed Mr. Bailey and Mr. Seliga on Tuesday, January 24, and he stated that "I know they were not paid for the investigation unless it was on their normal shift" (Tr. 52). He further confirmed that in keeping with company policy, employees are paid their wages if they are interviewed during a scheduled shift while "on the clock," but that no employee would be paid for an extra time beyond his normal shift (Tr. 69, 71). He explained that Mr. Seliga was paid for 3 hours overtime on January 24 because he was scheduled to work 3 hours overtime that day, as well as on Monday, January 23, and the rest of the week loading barges (Tr. 80). Mr. Bailey was paid overtime because he was scheduled to work a double shift that day replacing another employee who was absent from work (Tr. 79).

Mr. Barletta testified that Mr. Bailey's participation in his investigation on January 24, consumed approximately 30 minutes, and that Mr. Seliga's participation lasted for 5 or 10 minutes (Tr. 100). MSHA's official accident investigation report reflects that the accident occurred at approximately 1:55 p.m., on January 24, and Mr. Barletta testified that the dock loading facility was shutdown for 3 hours, and that no work was performed by anyone during the shutdown, including Mr. Bailey

and Mr. Seliga, but that they continued working after the facility was reopened (Tr. 89). He testified that Mr. Bailey performed work "dumping the sampler" and sweeping the barges, and that Mr. Seliga was assigned other work while his investigation continued (Tr. 97, 101). He confirmed that Mr. Seliga and Mr. Bailey were both "on the clock" during the investigation, but that Mr. Pelehac was not because his regularly scheduled shift ended at 2:15 p.m. (Tr. 97-99). Mr. Barletta had no knowledge that Mr. Pelehac was also previously scheduled to work 3 hours that day (Tr. 99).

Mr. Pelehac confirmed that no coal was loaded on the barges from 2:15 p.m. until 5:00 p.m., on Tuesday, January 24. He testified that Mr. Seliga and Mr. Bailey were with him during the time that Mr. Barletta was conducting his interviews, but that he (Pelehac) went home at 5:45 p.m. Mr. Pelehac further testified that Mr. Seliga and Mr. Bailey were not assigned any work duties and he observed them doing no work during this time (Tr. 112-113).

MSHA's accident report reflects that the accident was not immediately reported because it was not initially considered to be life threatening. However, when it was learned at approximately 5:00 p.m., that Mr. Bandish had sustained a skull fracture and was being transferred to another hospital for possible surgery, the mine safety supervisor notified MSHA of the accident by telephone, and an MSHA inspector was dispatched to the mine to obtain facts pertaining to the accident.

Mr. Seliga and Mr. Bailey were not called to testify in this case. Although the evidence reflects that no one may have performed any work during the 3-hour shutdown period immediately following the accident, since Mr. Pelehac left the mine at 5:45 p.m., he would have no way of knowing whether or not Mr. Bailey or Mr. Seliga continued to perform any work while Mr. Barletta was continuing his inquiry, and Mr. Barletta's testimony that work resumed stands un rebutted. Mr. Seliga's time record reflects that he was paid 3 hours of overtime for each day of the week in question, and this lends credence Mr. Barletta's testimony that he had been previously scheduled to work overtime and was in fact "on the clock." Mr. Pelehac offered no testimony that he too was previously scheduled to work 3 hours of overtime on January 24, and in these circumstances, I find Mr. Barletta's testimony explaining Mr. Seliga's overtime pay to be credible, particularly in light of his un rebutted testimony that Mr. Seliga's interview time only consumed 5 or 10 minutes. With regard to Mr. Bailey's overtime pay for January 24, Mr. Barletta's testimony that his interview with Mr. Bailey only consumed 30 minutes, and that he was scheduled to work a double shift on January 24, is un rebutted, and I find Mr. Barletta's explanation as to why he was paid to be likewise credible.

Mr. Barletta's investigation notes (exhibit R-4), for Wednesday, January 25, include a list of individuals who participated in the MSHA and state investigations, and although Mr. Pelehac's name is included as one of the individuals who participated in a 5:30 p.m. meeting on that day, the names of Mr. Bailey and Mr. Seliga are not included among those individuals who participated in the investigation on that day. Mr. Pelehac did not participate in the investigation which continued on Thursday, January 26, and although Mr. Seliga and Mr. Bailey are listed among those who were interviewed that day, there is no evidence that they were interviewed on or off their regular work shift. Further, although Mr. Pelehac's name is included as a "witness" who participated in the investigation on Friday, January 27, Mr. Seliga and Mr. Bailey are not listed as participants on that day.

As noted earlier, Mr. Seliga and Mr. Bailey did not testify in this matter. Mr. Pelehac's underground foreman, Mel Robinson, the individual who apparently signed Mr. Pelehac's work attendance and time record, and who apparently initialed and scratched out the entry crediting Mr. Pelehac with 3 hours of overtime on January 24, did not testify. I take note of the fact that the time records for Mr. Bailey and Mr. Seliga were signed by an individual other than Mr. Robinson. In the absence of any credible or probative evidence to the contrary, I cannot conclude that the deletion made on Mr. Pelehac's work time record crossing out the 3 hours of overtime was the result of mine management's desire to retaliate or otherwise penalize Mr. Pelehac. Nor can I conclude that this deletion supports any reasonable inference of any disparate treatment of Mr. Pelehac. To the contrary, I conclude and find that Mr. Barletta's explanations as to why Mr. Bailey and Mr. Seliga were paid overtime, and Mr. Pelehac was not, is credible and plausible.

I conclude and find that the respondent has established that it has consistently applied its policy of not compensating its employees by paying overtime for time spent on accident investigations to all of its work force. The policy is based on the fact that the union/management agreement does not provide for such compensation. Absent any evidence of any discriminatory motive on the part of the respondent, I simply cannot conclude that the record in this case supports any conclusion that its failure to pay Mr. Pelehac overtime was the result of his giving unfavorable testimony or information, or his failure to exonerate the respondent from all liability for the accident. As noted earlier, I find no evidentiary support for any conclusion that any information given by Mr. Pelehac was unfavorable, and MSHA's accident investigation failed to reveal any violations by the respondent which would have contributed to the cause of the accident.

In my view, the facts presented in this case are distinguishable from those presented in the Elias Moses and Joseph DeLisio cases, supra. In the Elias Moses case, the mine operator indulged in conduct which amounted to coercive interrogation and harassment of a miner suspected of reporting an accident to MSHA, and the Commission concluded that this was a subtle form of interference with the miner's protected rights under the Act. I find no such conduct on the part of the respondent in this case. In the Joseph DeLisio case, Judge Fauver found that the withholding of wages from a miner subpoenaed by MSHA as an adverse witness to testify against a mine operator, while paying other miners who testified on behalf of the operator was discriminatory on its face, and required no further examination of the operator's discriminatory motive. I simply cannot reach such a conclusion in this case.

The complainant's assertion that the respondent's refusal to pay him was an act of discrimination because there was no legitimate business reason not to pay him is rejected. The parties agreed that the applicable UMWA/Management bargaining agreement does not provide for payment of wages for a miner's participation in accident investigations which take place after their normal work shift. The respondent's credible and un rebutted evidence reflects that in the absence of any contractual obligation to compensate a miner for the time spent on such investigations, company policy only allows the payment of wages for work performed by an employee, and that pursuant to this policy, the time spent by an employee beyond his normal work shift participating in accident investigations, counselling sessions, and employee disciplinary matters, is not considered compensable "work performed" under the contract.

The record in this case suggests that Mr. Pelehac's union could have placed him on "union business" and compensated him for his time after his normal work shift while participating in the accident investigations, as it apparently did in the case of the safety committeemen who participated in the investigations. Mr. Pelehac conceded that this was true, but asserted that union compensation was only available in a case where the union initiates the accident investigation. In this case, although it is true that the union did not initiate the investigation, it would appear that the union nonetheless apparently paid the safety committeeman, but did not pay Mr. Pelehac.

Absent any evidence of discrimination within the parameters of section 105(c) of the Act, it is not my function to mediate or arbitrate the question of whether or not Mr. Pelehac should have been paid for the time spent on the accident investigations. I find no statutory right to such payment, and it seems clear from the record that the respondent was not obliged to pay Mr. Pelehac pursuant to the bargaining agreement, and Mr. Pelehac's grievance was apparently not pursued further because of this fact. Under

all of these circumstances, I conclude and find that the respondent's refusal to pay Mr. Pelehac was a reasonable and plausible management business decision unrelated to any unfavorable or adverse information or testimony which may have been given by Mr. Pelehac in the course of the accident inquiries. In this regard, I take particular note of the Commission's decision in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982). Citing its Pasula and Chacon decisions, the Commission stated in part as follows at 4 FMSHRC 993: "* * * Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, his complaint IS DISMISSED, and his claims for relief ARE DENIED.


George A. Koutras
Administrative Law Judge

Distribution:

Edward D. Yankovich, Jr., President, UMWA District No. 4,
32 South Main Street, Masontown, PA 15461 (Certified Mail)

Walter J. Scheller, III, Esq., Consolidation Coal Company,
1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Michael J. Healey and Paul Girdany, Esqs., Healey Whitehill,
Fifth Floor, Law & Finance Building, Pittsburgh, PA 15219
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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 7 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 89-187
Respondent	:	A.C. No. 15-05423-03618
v.	:	
	:	No. 1 Mine
MANALAPAN MINING COMPANY,	:	
Respondent	:	

DECISION

Before: Judge Fauver

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, TN,
for the Petitioner,
Richard D. Cohelia, Safety Director, Evarts, KY,
for the Respondent.

At the hearing of this case on May 16, 1990, in Big Stone Gap, Virginia, the parties moved for approval of a settlement on the record. For the reasons stated on the record, the motion is GRANTED.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the approved civil penalties of \$2,600 within 30 days and upon such payment this proceeding is DISMISSED.

William Fauver

William Fauver
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Richard D. Cohelia, Safety Director, Manalapan Mining Co., Inc., Rt 1, Box 374, Evarts, KY 40828 (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 7 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 89-204
Petitioner	:	A.C. No. 15-15473-03515
v.	:	
	:	No. 1 Mine
CALDRON COAL CORPORATION,	:	
Respondent	:	

DECISION

Before: Judge Fauver

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner,
Bruce Hawkins, Consultant, Phelps, Kentucky,
for the Respondent.

At the hearing of this case on May 15, 1990, in Big Stone Gap, Virginia, the parties moved for approval of a settlement. For the reasons stated on the record, the motion is GRANTED.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the approved civil penalties of \$120 within 30 days and upon such payment this proceeding is DISMISSED.


William Fauver
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (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 7 1990

DONALD H. GIBSON, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. WEST 89-11-DM
 :
 : MD 87-47
CYPRUS BAGDAD COPPER COMPANY, :
Respondent :

DECISION

Appearances: R. Henry Moore, BUCHANAN INGERSOLL, 600 Grant
Street, 58th Floor, Pittsburgh, Pennsylvania 15219,
for Complainant.
Donald H. Gibson, pro se, 885 Munley Drive, Reno,
Nevada 89503

Before: Judge Cetti

This case is before me upon the pro se discrimination com-
plaint of Donald H. Gibson, under section 105(c)(3) of the Fed-
eral Mine Safety and Health Act of 1977, 30 U.S.C. § 802, et
seq., the "Act," alleging unlawful discharge by Cyprus Bagdad
Copper Company (Cyprus) in violation of section 105(c)(1) of the
Act. 1/

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

No person shall discharge or in any manner discrimi-
nate against or cause to be discharged or cause dis-
crimination against or otherwise interfere with the
exercise of the statutory rights of any miner, repre-
sentative 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 em-
ployment, has filed or made a complaint under the re-
lated to this Act, including a complaint notifying
the operator or the operator's agent, or the represen-
tative of the miners at the coal or other mine of an
alleged danger or safety or health violation in a coal
or other mine or because such miner, representative of
miners or applicant for employment is the subject of
medical evaluations and potential transfer under a
standard published pursuant to section 101 or because

Mr. Gibson initially filed his complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), at its Phoenix, Arizona, office, on July 22, 1987. In a statement executed by Mr. Gibson on that day on an MSHA complaint form, he made, in pertinent part, the following complaint:

Mr. Walz came out to my job to inspect my job performance. During one of these visits I asked him about the drug traffic inside of this mine, and specifically about the drugs found, since I work around a lot of moving equipment. He told me, "It's none of your business," and that I am good for nothing but lube and fuel driver. I never seem to see my foremen only Larry Walz. I have brought this to the attention of Employee Relations but they have refused to act on any of my requests about this man's behavior towards me. Since this incident occurred, Mr. Walz gave me an unexcused absence. I had already taken care of this with my immediate foreman and had my job secured.

Mr. Walz overrode this absence and told me to appeal it. I did so, and it was rescinded. Mr. Walz received a copy of this and was upset about this and stated that it was immaterial. Since then, I received a 30-day suspension for not greasing rippers. In my PM sheets there is no mention of these rippers. I was again told it was immaterial. Mr. Walz at that time called me "a safety hazard." Again I brought up the drug use and stated, "How come there no suspension pending investigation for possession of cocaine on these premises?" He told me, "It's none of your business. Stay out of it." I seem to feel that, because I am the only person who has actually faced these gentlemen with this information, that I am continuing to be harrassed.

1/ (continued)

such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings 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 or miners or applicant for employment on behalf of himself or of any statutory right afforded by this Act.

No one else has ever received a suspension for that amount of time, even for damaging equipment. I have broken no rules and only try to do my job. I was recalled on the layoff with no problems. Again, since Mr. Walz came to this company in 1986 and I confronted him about the use of drugs, I have had nothing but problems. . . . I really do enjoy my job and pray for reinstatement with Cyprus Bagdad, and that my 30-day suspension be looked into also.

MSHA conducted an investigation of Mr. Gibson's complaint, and by letter dated September 16, 1988, advised him that, on the basis of the information gathered during the course of its investigation, a violation of section 105(c) of the Act had not occurred. Mr. Gibson then pursued his complaint with the Commission.

Respondent filed an answer to the complaint stating in part:

Cyprus Bagdad specifically denies that it or any person acting on its behalf violated section 105(c) of the 1977 Act.

Complainant was terminated from his employment with Cyprus Bagdad on July 21, 1987, because he had an unacceptable work record and continuing irregular attendance after being repeatedly warned that, unless his work and attendance record improved, he would be subject to termination.

Cyprus's answer enumerates a partial listing of the events which lead up to the decision to terminate complainant and attached numerous exhibits documenting its answer.

Mr. Gibson, in his initial complaint filed on an MSHA complaint form, left blank the line that asked for the date of the discriminatory action. In the line asking for the person(s) responsible for the discriminating action, Mr. Gibson typed in the name "Larry C. Walz," one of Cyprus's superintendents.

To help clarify Mr. Gibson's allegations against Cyprus, his response to my prehearing order is set forth in pertinent part as follows:

During my employ with Cyprus Bagdad Copper Corporation (1980-1987) myself and any other employee could request time off as needed. (Immediate supervisor approval) There was no rules stating how many

days a year you were allowed. I have never had an "unexcused absence." I mentioned that there was a drug problem within the mine. They (Mr. Walz) told me it was none of my business. I did file a formal complaint with MSHA during this period, stating that I felt a need for an investigation was needed because of two separate incidents that occurred in the mine. From then on it was continuous harrassment. There is noted in the rule book of the company (CBCC) that there is a "chain of command" that has to be followed. This was not how it was in my case at all. Mr. Walz completely overrode my immediate supervisor and any other foreman or salaried personnel who might have tried to intervene.

This is what I hope to be able to bring forth is that in fact it was not my absenteeism that caused my termination but the fact that I requested an investigation of the mine for safety reasons and for that reason only I was terminated.

STIPULATIONS

At the hearing, the parties stipulated to the following, which I accept as established facts:

1. That the presiding administrative law judge, August F. Cetti, has jurisdiction over this matter.
2. The Bagdad Mine Company was owned and operated by Bagdad Copper Company (Cyprus), and had MSHA ID No. 02-00137.
3. The Bagdad Mine is located in Bagdad, Arizona, and employs approximately 550 persons.
4. Donald H. Gibson was first employed by Cyprus, or its predecessor corporation, in 1980.
5. On February 12, 1984, Mr. Gibson was laid off during a reduction in force. He was rehired on October 23, 1984.
6. At the time of his termination, Mr. Gibson was an hourly employee assigned to the mine maintenance department.
7. The company records show that on June 7, 1983, Mr. Gibson was given an unexcused absence for his failure to report to work on that day.

8. Company records show that on July 22, 1983, Mr. Gibson was given a verbal reprimand for his failure to report to work on July 18, 1983.
9. The company records show that on August 8, 1983, a general report was made concerning Mr. Gibson's excused absence from work on August 7, 1983.
10. The company records show that Mr. Gibson received a Notice of Termination for unexcused absence from work on October 16, 17, 18, 1983. The termination was modified to a 10-day suspension on October 25, 1983.
11. The company records show that on March 7, 1985, Mr. Gibson received a warning concerning excessive absenteeism.
12. The company records show that on March 11, 1985, Mr. Gibson received a suspension for two working days and two hours of another day for poor judgment in utilizing his time on duty.
13. Company records show that on September 19, 1986, Mr. Gibson received a written warning which included attendance guidelines for excess absenteeism.
14. The company records show that on March 6, 1987, Mr. Gibson was given attendance guidelines because of his poor attendance record.
15. Company records show that on April 29, 1987, Mr. Gibson received a written warning for an unexcused absence from work on April 24, 1987.
16. On May 22, 1987, Mr. Gibson was given a suspension pending an investigation concerning his failure to perform his job duties.
17. On May 27, 1987, at the conclusion of the investigation, Mr. Gibson received a suspension for 18 additional working days.
18. On July 16, 1987, Mr. Gibson was given a suspension pending an investigation for termination because of unexcused absences on July 14 and 15 of 1987.
19. On July 21, 1987, Mr. Gibson's employment was terminated.
20. On July 17, 1987, Mr. Gibson first contacted the Mine Safety and Health Administration concerning complaints he had concerning the drug and alcohol abuse at Cyprus.

21. On July 29-30, 1987, MSHA inspectors, Gary Day and Virgil Wainscott, investigated Mr. Gibson's complaint concerning drug and alcohol abuse, and issued a notice of negative finding concerning the complaint.

22. On July 21, 1987, Mr. Gibson filed a complaint of discrimination with the Mine Safety and Health Administration which is now at issue in this case.

23. On September 16, 1988, the Mine Safety and Health Administration issued a determination that no violation of section 105(c) of the Federal Mine and Health Safety Act of 1977 has occurred.

ISSUES

1. Whether Mr. Gibson's complaint that he was being treated unfairly in comparison to other employees, made at the time that he was told of his suspension for deficient work performance in May 1987, was activity protected under the Act.

2. Whether Mr. Gibson's complaints concerning disparate treatment of Robert Otteson constituted protected activity under the Act.

3. Whether Mr. Gibson's telephone call to MSHA concerning the issue of whether his wife could attend his disciplinary hearing was activity protected under the Act.

4. Whether any protected activity that Mr. Gibson might have engaged in motivated in any part his suspension on May 27, 1987, or his discharge on July 21, 1987.

5. If protected activity motivated in any part the decisions to suspend Mr. Gibson and to discharge him; whether such discipline would have been taken in any event, because of his history of absenteeism and his poor work performance.

At the hearing of August 24, 1989, the following witnesses testified for the complainant:

Donald Gibson, complainant
Irene Gibson, complainant's wife
Mervin Corbitt, supervisor of equipment operators
Larry P. Burkhead, heavy equipment operator

A continued hearing was delayed at the request of complainant, Mr. Gibson who was temporarily unable to go to the hearing as a result of injuries he sustained when he was struck by a car while he was crossing a street.

At the continued hearing in Phoenix, Arizona, credible testimony on the relevant issues was taken from the following 20 Cyprus employees.

Charles Rising	-	Manager, Human Resources
Patsy C. Morris	-	Mine Maintenance Supervisor
Harry Cosner	-	Mine Manager
Junior Morgan	-	General Mine Foreman
Vernon Swinson	-	Mill Maintenance Supervisor
Don Berdine	-	Mill Maintenance Superintendent
Raphael Perkins	-	Mine Maintenance Supervisor
Daniel L. Mead	-	Manager Community Services
Ron Foster	-	Master Equipment Operator
Harold R. Rubash	-	Lubrication Maintenance
Robert Otteson	-	Mine Supervisor
Joe Mortimer	-	Safety Director
Robert Swain	-	Mine Maintenance Supervisor
Janette Bush	-	Manager, Human Resources (as of 7/88)
Larry Walz	-	Mine Maintenance Superintendent
Pete Mendibles	-	Equipment Operator
Floyd Chandler	-	Equipment Operator
Peter Gray	-	Mine Supervisor
Raphael H. Perkins	-	General Supervisor of Maintenance
William T. Watson	-	Maintenance Supervisor

Messrs. Rising, Walz, and Ms. Morris testified as to the facts and circumstances surrounding the termination of Mr. Gibson's employment, including the unexcused absences he received in July 1987, his suspension for substandard work performance in May 1987, his unexcused absence in April 1987, his work history in general, and the motivation for the termination of his employment. In addition, Ms. Morris testified as to certain conversations she had with Mr. Gibson during the middle of July 1987. Mr. Rising also testified as to the drug and alcohol program at the mine and to the discipline of other miners.

Mr. Cosner testified concerning the facts and circumstances surrounding the termination of Mr. Gibson's employment, including the unexcused absence he received in April 1987, his suspension for substandard work performance in May 1987, the unexcused absences he received in July 1987, and his work history.

Messrs. Morgan, Swinson, Linger, and Foster testified as to the facts and circumstances surrounding Mr. Gibson's suspension in May 1987 for substandard work performance.

Mr. Berdine testified as to the facts and circumstances surrounding Mr. Gibson's suspension in May 1987 for substandard work performance, Mr. Gibson's unexcused absence in April 1987, and an incident in March 1985, when Mr. Gibson was suspended.

Messrs. Perkins and Watson testified as to Mr. Gibson's work history.

Mr. Rubash testified as to the circumstances of his assignment to a job performing lubrication work at the concentrator.

Mr. Meade testified generally as to his contacts with Mr. Gibson, including the housing problem after Mr. Gibson's termination.

Mr. Otteson testified as to an incident for which he was disciplined in June 1987.

Chris Crawl testified as to his conversations with Mr. Gibson in May - June 1987.

Ms. Bush testified generally as to discipline records maintained at the mine, to the drug and alcohol program at the mine, and to discipline of other miners.

At the conclusion of the hearing, the matter was left open for post-hearing briefs and proposed findings and orders. Respondent filed a helpful brief; complainant filed no brief. The matter was submitted for decision on May 17, 1990.

FINDINGS OF FACT

I

Cyprus operates an open pit copper mine in Bagdad, Arizona, employing approximately 550 persons.

II

Complainant, Donald H. Gibson, became employed by the predecessor company to Cyprus in 1980. He was employed in the mine maintenance department as an hourly employee. Early in his employment, he began to have attendance problems. He missed days of work and frequently did not follow the procedures for notifying his supervisors that he was not going to come to work. On June 7, 1983, he was given a verbal warning for an unexcused absence.

III

In July 1983, Mr. Gibson's absentee problems had become serious enough that his supervisor, Patsy Morris, invoked formal discipline against him. On July 18, 1983, she gave him a verbal reprimand for an unexcused absence from work. After he had returned to work, he gave as an excuse the inability to return to Bagdad in time to work after taking a family member to the airport. Mrs. Morris had previously counseled Mr. Gibson about his absences, as had other supervisors.

IV

Mrs. Morris and Robert Swain again noted their concern over Mr. Gibson's attendance in August 1983 when he took a day off that was unexcused. Not long after their concern was conveyed to Mr. Gibson, he again took three days off, resulting in unexcused absences for October 16, 17, and 18, 1983. Initially, it was determined that his employment should be terminated but that determination was changed to a ten-day suspension.

V

On February 12, 1984, Mr. Gibson was laid off as part of a general reduction in force. This layoff continued until October 23, 1984, when Mr. Gibson returned to work as an hourly employee in the maintenance department. He had previously been a leadman, an hourly employee with certain supervisory authority, but did not hold that position when he returned from layoff.

VI

After Mr. Gibson returned from layoff, he again accumulated unexcused absences. In March of 1985, he was formally counseled by his supervisor, Raphael Perkins, concerning his absences. He had two more absences in 1985, after he was counseled.

VII

Not long after his counseling session, he received a suspension for failing to utilize his time properly. He was observed at a remote location in a company truck parked in a fashion and for a period that suggested to Cyprus that he had been sleeping. The investigation concerning that incident raised questions as to the accuracy of Mr. Gibson's statements concerning his behavior.

VIII

There was a change in supervisors in the maintenance department in the first half of 1986, and it was September 1986, before the new maintenance superintendent, Larry Walz, realized that Mr. Gibson had developed a serious absentee problem. At that time, he placed Mr. Gibson on attendance guidelines that required that any absence from work would be considered unexcused and would result in a suspension or possible termination. At that time, Mr. Gibson's absentee rate was the worst in his department, over 10 percent, as opposed to a plant average of 2.5 percent.

IX

In March 1987, the guidelines were reissued, but were somewhat less stringent. Mr. Gibson was told that, if he was absent from work, he would receive a written warning for his first absence before he would be subject to termination for a second absence.

X

Not long after the guidelines were relaxed, Mr. Gibson took a day off from work because of some personal business he wanted to attend to concerning a court appearance of his stepson. He was given a written warning for this absence and was told that a further absence would result in his discharge.

XI

When he received the written warning, Mr. Gibson appealed the discipline to Harry Cosner, the Mine Manager. Mr. Cosner considered the fact that Mr. Gibson's attendance had improved, that Mr. Berdine, the maintenance supervisor at the concentrator where Mr. Gibson was assigned, had not had any negative reports about Mr. Gibson's job performance, and the fact that Mr. Gibson's absence was a result of his attendance at Court proceedings for his stepson. He wanted to motivate Mr. Gibson to continue his improvement and indicated that if Mr. Gibson did not miss any work through July 1, then the written warning would be rescinded. The guidelines issued in March would, however, remain in effect, and if Mr. Gibson was absent during this probation period it would result in discharge.

XII

In May 1987, Mr. Gibson's job was to service equipment out at the concentrator associated with the mill, rather than at the

mine. Responsibility for his supervision was divided between the mine and mill maintenance departments. Mr. Walz would, however, be responsible for any discipline given to him. As part of his duties Mr. Gibson was also responsible for servicing the equipment involved in what was known as the tailings project. That project was supervised directly by an hourly person, Ron Foster.

XIII

Early in May some of the employees on that site came to Mr. Foster and complained that Mr. Gibson was not properly servicing the equipment. Mr. Foster took the matter to his supervisor, Junior Morgan. On May 18, Junior Morgan brought the problem to Patsy Morris, who he knew was familiar with servicing of equipment. They inspected the equipment that day and found deficiencies in the lubrication. The next day Mrs. Morris returned to inspect the equipment again with Vernon Swinson who was in charge of maintenance at the concentrator. They determined that the equipment had not been lubricated. While they were at the site, they also determined that several pieces of the equipment had not been fueled. They also examined the worksheets Mr. Gibson was required to fill out concerning the equipment he serviced and found them to be confusing. Their findings were reported to their supervisors, Mr. Berdine in Mr. Swinson's case and Mr. Walz in Mrs. Morris's case.

XIV

On May 20, Mr. Berdine and Mr. Swinson inspected two bulldozers and a front-end loader which were of concern. They found that the equipment had not been lubricated. In particular, there was no lubrication done on the rippers, which were in regular use.

XV

On May 21, Mr. Walz, Mr. Swinson, and Joan Schmidt, a representative from the Cyprus Human Resources Department, inspected these two dozers as well as a loader. Again they determined that this equipment had not been properly serviced.

XVI

As a result of this investigation, on May 22 Mr. Gibson was suspended from work until an investigation was completed to determine whether he had also falsified his worksheets.

XVII

A meeting was held on May 27 to give Mr. Gibson the opportunity to present evidence on his behalf. He was accompanied to the meeting by another hourly employee, Bruce Covey. The meeting

was conducted by Charles Rising, the Manager of Cyprus's Human Resources Department and Mr. Walz. The first part of the meeting involved a discussion of the issues and the evidence. A break was then called so that Mr. Walz and Mr. Rising could determine the appropriate discipline to be given to Mr. Gibson.

XVIII

They decided that because of the inconsistencies in how Mr. Gibson filled out company forms they could not prove he deliberately falsified these records. They also decided during the break to suspend Mr. Gibson for an additional 18 working days, making the full suspension to encompass a calendar month. They arrived at their relatively severe penalty because they felt they had to get Mr. Gibson's attention. He had not responded particularly well to earlier discipline and they thought they would give him one last chance to correct his deficiencies as an employee.

XIX

When the meeting resumed, Mr. Gibson was informed of his suspension. At that time he asked why he was being suspended when other miners who wrecked equipment or used alcohol or drugs might not be. Mr. Rising directed the discussion back to Mr. Gibson's situation and told him that he should use his time during suspension to decide whether he wanted to be a Cyprus employee. This was the first time that Mr. Gibson mentioned drug and alcohol use at the mine.

XX

Mr. Gibson appealed his suspension to W.J. Lampard, Cyprus's Vice President and General Manager. His suspension was upheld. Mr. Gibson met with Mr. Lampard and Mr. Rising. At that meeting Mr. Gibson complained that Mr. Walz was treating him unfairly but did not raise any safety related issues.

XXI

As a result of Mr. Gibson's suspension, the 60-day probation period for eliminating his unexcused absence for April 24 was extended. The probation was not completed on July 13 when Mr. Gibson asked his supervisor Patsy Morris if he could take a portion of the day off to attend a court hearing for his stepson; he indicated he would make up the time on Saturday. She permitted him to do so, but the next morning, after the shift had

started, Mr. Gibson called her and told her that he would not be coming to work that day. Mrs. Morris asked him if he knew the consequences of his action and he indicated that he did. That evening he called Mrs. Morris at home to ask if he could take the July 15 as a vacation day. She indicated that she would see what she could do, but did not indicate that he could have the day as vacation.

XXII

Mr. Gibson did not come to work on July 14 and 15. Mr. Walz made the decision at this point that he should be discharged and determined to suspend him for that purpose. Mr. Gibson had violated the attendance guidelines in effect since March by taking unexcused absences on July 14 and 15. Mr. Gibson was informed of his suspension after he had reported for work on July 16.

XXIII

An investigation was conducted concerning Mr. Gibson's reason for having to leave work on July 13. It was determined that he may not have actually gone to court as he had indicated to Mrs. Morris.

XXIV

A meeting was held on July 21 and Mr. Gibson was given an opportunity to present evidence that would mitigate his actions. The decision had been made prior to the hearing that discharge was appropriate unless information of extenuating circumstances was presented by Mr. Gibson. Prior to the meeting, Mr. Rising consulted with Messrs. Cosner and Lampard, who concurred in this decision. No evidence of extenuating circumstances was presented and Mr. Gibson was informed that he was discharged.

XXV

Cyprus had disciplined other employees for excessive absenteeism. Some of these employees were also discharged. Some employees were placed on similar attendance guidelines prior to Mr. Gibson's discharge.

XXVI

On July 17, after his suspension pending discharge, Mr. Gibson made a complaint to MSHA concerning discipline for drug and alcohol use at Cyprus. He made such complaint initially by telephone and confirmed that complaint in writing the same day.

Neither Mr. Rising nor Mr. Walz nor anyone else in management involved in Mr. Gibson's discharge was aware of such complaint prior to his discharge. This complaint was investigated by MSHA and was found to be without foundation. Cyprus had an existing drug and alcohol policy and no violation of any mandatory standard was found. Cyprus had begun developing a drug-testing program that included testing for cause in 1986. They had an existing program in place in 1987 that included testing applicants for employment. Their drug and alcohol policy prohibited use on the property. If employees were under the influence of drugs or alcohol on duty, they could be discharged.

XXVII

Earlier in 1987, there had been incidents at the mine involving the discovery of a vial of cocaine in a truck and marijuana in a drill. These incidents were investigated but the persons responsible could not be identified. Credible evidence was presented that if the persons responsible for the presence of the drugs were identified under the existing discipline policy, they could have been discharged. Under the testing, which was put into effect after Mr. Gibson's discharge, persons have been discharged.

XXVIII

At the time of the meeting on July 21 concerning his discharge, Mr. Gibson expressed a desire to have his wife accompany him into the meeting. The policy was that only employees could so accompany an employee into such a meeting and his request was refused. At that time, he asked to call MSHA to see if the company's position could be overridden. Mr. Rising dialed the MSHA number for Mr. Gibson and then left the room when he talked to the MSHA personnel.

XXIX

After his discharge, Mr. Gibson sought unemployment compensation. Such compensation was denied because he had been discharged for proper reasons.

After his discharge, pursuant to the usual practice, Mr. Gibson and his wife were asked to terminate their occupation of the company-owned housing that they were renting. Cyprus offered to make available other housing, so long as they could qualify under the company's income requirements. Eventually, Cyprus was compelled to seek to have the Gibsons evicted under the month-to-month rental agreement which contained a 30-day notification provision. The Gibsons were given a number of

extensions of their occupancy of the house. A court order was eventually entered with the Gibsons' agreement that they would vacate the house in March 1988. They complied with the court order.

XXX

On June 12, 1987, while Mr. Gibson was on suspension, a supervisor named Robert Otteson attempted to conduct a tour of the mine for some friends on a day when he was not scheduled to work. It was the belief of the security guard and Mervin Corbitt, a supervisor, that Mr. Otteson was intoxicated. Pursuant to company policy, he was not permitted to go beyond the entrance to the mine property.

XXXI

Mr. Otteson reported the incident to his supervisor, Kent Watson, the next morning. As a result, Mr. Otteson was given, on July 8, a written warning that a repeat of the incident would result in his discharge.

XXXII

Some time after the incident occurred, Mr. Gibson apparently called Chris Crowl, the former Human Resources Manager at Bagdad to inquire as to why Mr. Otteson had not been disciplined. Mr. Crowl inquired concerning the issue with Mr. Rising who told him that the matter had been investigated and was proceeding to discipline.

DISCUSSION

I. ESTABLISHED LAW

It is well established that, in order to make out a prima facie case, a complainant bears the burden of production and proof in establishing that he engaged in protected activity, that adverse action was taken against him, and that the adverse action was motivated, in part, by the protected activity. Secretary of Labor/Paula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (Rev. Comm. October 1980), rev'd on other grounds, 663 F.2d 1211 (3d Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal, 3 FMSHRC 803, 817-18 (Rev. Comm. April 1981). The operator may rebut by showing that no protected activity occurred, that there was no adverse action, or that the adverse action was not motivated in any part by protected activity. The operator may also defend affirmatively by showing that the

adverse action was also motivated by the miner's unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. Secretary of Labor/Paula v. Consolidation Coal Co., 2 FMSHRC at 2797-2800; Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC at 817-818; Bolch v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983). The ultimate burden of proof never shifts from the miner. See Robinette, 3 FMSHRC at 817; Secretary of Labor/Paula v. Consolidation Coal Co., 2 FMSHRC at 2797-2800; Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC at 817-818; Bolch v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983). The ultimate burden of proof never shifts from the miner. See Robinette, 3 FMSHRC at 817; Secretary of Labor/Bush v. Union Carbide, 5 FMSHRC 993, 997, n.8 (Rev. Comm., June 8, 1983); Schultz v. Lizza Industries, Inc., 6 FMSCRC 8, 16 (Rev. Comm., January 9, 1984).

II. CYPRUS'S POSITION

It is Cyprus's position that there was no evidence of protected activity prior to Mr. Gibson's suspension on May 27, 1987, and that Mr. Gibson did not make out a prime facie case concerning this discipline. Further, the raising of disparate treatment by Mr. Gibson at the meeting of May 27 was not, in fact, protected activity but concerned only his treatment in comparison to other employees. It is also Cyprus's position that the complaints concerning Mr. Otteson did not constitute protected activity. While Mr. Gibson did make a complaint concerning discipline for drug and alcohol use to MSHA on July 17, after he was suspended pending discharge, there was no knowledge of this protected activity by management prior to his discharge. Mr. Gibson did call MSHA on the morning of the meeting concerning his discharge but such activity was not protected because it did not involve a safety issue but rather the attendance of his wife at the meeting.

Cyprus contends that even if Mr. Gibson did engage in protected activity prior to his discharge, such activity did not motivate his discharge in any part. Even if it did, Mr. Gibson would have been discharged for unprotected activity alone; his chronic absenteeism had reached a point at which Cyprus decided that discharge was the only reasonable action Cyprus could take since Mr. Gibson had failed to correct his attendance problems.

III. THE MAY SUSPENSION

Mr. Gibson did not engage in any protected activity prior to his suspension on May 27, 1987, for failing to perform his duties. He made no complaints to either MSHA or the persons involved in

his discipline concerning safety-related matters prior to his suspension.

It has been stipulated that Mr. Gibson did not contact MSHA with any complaints about discipline for drug and alcohol use at the mine until July 17, 1987, long after his suspension in May. The question then arises as to whether, prior to his suspension on May 27, he made any safety complaints to the operator which could arguably be construed as protected activity and thus a basis for an argument that protected activity motivated his suspension.

Mr. Gibson conceded that he first raised the issue of discipline of persons who used drugs and alcohol on May 27 at the meeting concerning his suspension. The context of his mentioning of the issue, must, however, be examined. On May 22, Mr. Gibson had been suspended pending investigation for failing to perform his duties. After further investigation and consideration of the issues by Cyprus, a meeting was held on May 27 to discuss this matter with him. Mr. Gibson was given the opportunity to present information in order to explain his notations on company forms and the deficiencies discovered by Messrs. Walz, Berdine, Swinson, Foster, Morgan, and Mrs. Morris. These issues were discussed in the first part of the meeting and then a recess was held. During the recess, Messrs. Walz and Rising discussed the information and arguments presented by Mr. Gibson and determined that a suspension was warranted. They decided on an additional 18 working-day suspension in order to try to bring home the point to Mr. Gibson that this performance needed to be corrected.

The meeting was then reconvened. When Mr. Rising told Mr. Gibson that he was going to be suspended, Mr. Gibson reacted and asked why he was being suspended when other persons who damaged equipment or used drugs or alcohol were not disciplined. It was not until after the suspension was announced that Mr. Gibson raised this issue.

This complaint of disparate treatment was not activity protected under the Act. It was not directed to a safety issue but rather to a fairness issue. The circumstances of the making of the statements clearly indicate that it was not intended to be a safety complaint but rather was related solely to Mr. Gibson's perception of the fairness of the discipline he was receiving. It was raised defensively not out of a concern for safety miners but rather out of reaction to the discipline he had received. Under these circumstances, his statements should not receive the protection of the Act. The Commission has indicated that its function under section 105(c) is not to determine the fairness of a particular action but to provide protection for activity under

the Act. See, e.g., Bradley v. Belva Coal Co., 4 FMSHRC, 982 (Rev. Comm. June 4, 1982).

The question arises as to what constitutes protected activity. Section 105(c)(1) indicates that protection is offered to a complaint of an alleged danger or safety and health violation. See Secretary of Labor/Gabossi v. Western-Fuels Utah, Inc., 10 FMSHRC 953, 958 (Rev. Comm. August 15, 1988). In this case, Mr. Gibson's "complaint" was not made for reason of safety. It appears that it was designed only to divert attention from his own poor work performance.

There is no evidence in the record that Mr. Gibson made any other safety-related complaints to either Larry Walz or Charles Rising prior to his suspension meeting. The only evidence on the record that could arguably be construed as a complaint is testimony about a dispute Mr. Walz and Mr. Gibson had in March 1986, concerning the installation of a backup alarm. It was clear from the credible evidence that this dispute involved no safety complaint but only a dispute as to how the job was to be performed. This activity, even if it were considered to be protected, is too remote in time from May 1987 to have any bearing on the issues here. See Klimczak v. General Crushed Stone Co., 5 FMSHRC 684, 690 (ALJ Melick, April 6, 1983) (4 months too long to support reference of connection); Frazier v. Morrison-Knudson, Inc., 5 FMSHRC (ALJ Morris, January 19, 1983) (4 months too long to support reference).

The May 27 suspension was not motivated in any part by purportedly protected activity involving Mr. Gibson's complaint of disparate treatment since it was made after he was informed of his additional suspension. Protected activity close in time to adverse action may in some circumstances be considered as showing a discriminatory motive but it can hardly be argued that protected activity, if Mr. Gibson's complaint of disparate treatment was such, after the discipline has been decided upon and announced, in any way motivated the adverse action.

Even if the circumstances of this suspension are examined further, it is clear that it was not motivated in any part by protected activity.

Early in May there had been complaints from members of Ron Foster's crew that Mr. Gibson was not servicing their equipment properly, both from a lubrication standpoint and a fueling standpoint. These complaints were brought to Mr. Foster's supervisor, Junior Morgan, who approached Patsy Morris. Mrs. Morris had previously been involved in servicing of equipment and, upon

inspection of the equipment, she and Mr. Morgan found that it was not being serviced properly. In order to make sure of their conclusions, Mrs. Morris and Vernon Swinson, who was normally in charge of the equipment at the concentrator, reinspected it the next day and determined that the servicing had not been done or was inadequate.

They then brought it to the attention of their supervisors Messrs. Walz and Berdine, who also examined the equipment. There was no doubt in any of their minds that the servicing had not been done. They felt that the lack of servicing was obvious and undisputable. The only question was whether Mr. Gibson had also falsified the company records concerning his activities.

Even after all of the inspections, Mr. Gibson was given an opportunity to explain his actions. He was unable to do so, although Messrs. Rising and Walz came to the conclusion that they could not prove that Mr. Gibson had falsified the company records because the records were too confusing and inconsistent. For that reason, they did not discharge him but decided to give him one last chance to correct his behavior.

The conclusion that the equipment was not serviced properly is confirmed by the testimony of Ray Rubash, who had held the particular position previously and had trained Mr. Gibson, and who was assigned to it after Mr. Gibson was removed from it. When Mr. Rubash resumed the position, he was required to do additional lubrication because it had not been done for some time. He also had to repair equipment and replace parts because of the failure to properly lubricate the equipment. The preponderance of the evidence clearly establishes that Mr. Gibson had not been performing his duties.

The suspension given to Mr. Gibson was severe, but it must be considered in context. He had an extensive history of discipline and it appears from the record that his failure to perform his duties was deliberate. He could have been discharged, but Messrs. Rising and Walz decided he could have one last chance. By way of comparison, evidence was presented that an employee who had damaged equipment through momentary inattention, was given a suspension almost as long, and other employees who damaged equipment were discharged.

Even the testimony of Mr. Gibson casts doubt on the argument that the May 27 suspension was motivated by protected activity. Mr. Gibson stated that all the discipline that he received was a result of personal animus against him by Larry Walz. For example, he claimed that the May 27 suspension was motivated by the

fact that Mr. Cosner modified the warning issued on April 29 by Mr. Walz. He also said his first confrontation with Mr. Walz occurred when he told Mr. Walz that he did not know what he was doing. He claimed that his assignment to the job at the concentrator upset Mr. Walz because he displaced Mr. Rubash, a friend of Mr. Walz. ^{2/} If, in fact, these incidents were the basis of a dislike of Mr. Gibson by Mr. Walz, they are not protected activity under the Act. If Mr. Gibson's conjectures are to be believed, Mr. Walz acted against him for personal reasons unrelated to protected activity.

IV. THE JULY DISCHARGE

A. No protected activity prior to July 17

Between his suspension on May 27 and his suspension with intent to discharge on July 17, Mr. Gibson did not engage in protected activity. The fact that he did not do so supports the argument that his discharge on July 21, for absenteeism and for his poor work history, was not motivated in any part by protected activity.

After his suspension on May 27, Mr. Gibson appealed it to the Vice President and General Manager, W.J. Lampard. He and his wife met with Messrs Lampard and Rising in early June. At that time, Mr. Gibson did not raise the issue of drug and alcohol use at the mine, rather, he told Mr. Lampard that Mr. Walz was treating him unfairly.

On June 12, there was an incident involving Robert Otteson, a supervisor at the mine, who sought admission to the mine when he was off duty. The guard at the security gate believed that Mr. Otteson was intoxicated and referred his request for admission to Mr. Corbitt, who was on duty that night. After some discussion with Mr. Corbitt, Mr. Otteson left the mine because he had been refused entry consistent with the existing policy at the mine. The next day, Mr. Otteson reported the incident to his supervisor Kent Watson. The incident was investigated and Mr. Otteson was warned that he would be discharged if a similar

^{2/} The evidence indicates that Mr. Gibson's belief concerning personal animus was unfounded. Credible evidence was presented that Mr. Rubash gave up the job at the concentrator in an effort to upgrade his pay scale.

incident ever occurred. Credible evidence was presented that if Mr. Otteson had been on duty, he would have been discharged at the time.

Apparently, Mr. Gibson, as a follow-up to his belief that his suspension was not proper, complained to Chris Crawl, formerly the Human Resources Manager at Bagdad, at the time located in the parent company's office in Englewood, Colorado, about the Otteson incident. It was Mr. Gibson's perception that Mr. Otteson had not been disciplined and Mr. Gibson apparently felt that this was unfair when considered with respect to his own suspension.

Again, this contact with Mr. Crawl does not appear to constitute protected activity. It appears to be a defensive measure by Mr. Gibson to bolster his arguments that his suspension was unfair. As such, it does not represent protected activity.

B. No protected activity motivated the July discharge

Mr. Gibson stipulated at the hearing that he did not contact MSHA until July 17. At that time, he called them and discussed his belief that Cyprus was not dealing appropriately with drug and alcohol use at the mine. He followed up that telephone contact with a letter dated and sent on July 17 concerning this issue. There is no evidence on this record that anyone in management who was involved in the decision to discharge Mr. Gibson, was aware of this telephone contact or of the writing of the letter.

It is well established that an operator must be aware of protected activity to motivate action against an employee. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8, 15 (Rev. Comm. January 9, 1984); Secretary of Labor/Bishop v. Mountin Top Fuel, Inc., 2 FMSHRC 1126, (March 31, 1981); Buford Smith v. R.J.F. Coal Co., Inc., 11 FMSJRC 2050, 2055-6 (October 24, 1989); Luttrell v. Jericaol Mining, Inc., 10 FMSHRC 1328, 1334 (September 30, 1988). There was no such knowledge here and the July 17 letter is found to be no part of any motivation for the discharge.

It should, of course, also be noted that this contact with MSHA occurred after Mr. Gibson had been suspended with the intent to discharge him. He was suspended shortly after the start of the shift on July 16 and this contact came after that.

Mr. Gibson did telephone MSHA on the day of his meeting concerning his discharge. A dispute arose that morning about

whether his wife would be permitted to attend the meeting. When Mr. Gibson was told that he was entitled to have another employee at the meeting but that his wife could not attend, he asked to call MSHA. Mr. Rising dialed the number for him and left the room during the conversation.

It does not appear that this contact was the type of activity intended to be protected by the Act. As far as the evidence indicates, it did not involve a safety complaint, but one of disciplinary procedure. As such, it was not the sort of activity to be protected under section 105(c).

Even if it is assumed, for the sake of argument, that Mr. Gibson engaged in protected activity and that management was aware of it, the evidence at hearing did not indicate that the discipline given to Mr. Gibson was motivated in any part by the protected activity. While it is often difficult to prove discriminatory intent directly, the Commission has discussed the sorts of circumstantial evidence of discriminatory intent that are appropriate to consider. These include knowledge by the operator of the miner's protected activities, hostility toward the miner because of his protected activity, coincidence in time between the protected activity and the adverse action and disparate treatment of the complaining miner. See Secretary of Labor/Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (Rev. Comm. November 1981), rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391 (Rev. Comm. June 1984); Sharp v. Big Elk Creek Coal Co., 11 FMSHRC 382, 394 (March 20, 1989). An examination of these factors does not indicate that the discharge was motivated, in any part, by protected activity. There was limited knowledge of his protected activity, no hostility toward the protected activity was shown and there was no disparate treatment of Mr. Gibson.

The only action by Mr. Gibson which arguably can be considered protected is his telephone call on July 21 to MSHA about the attendance of his wife at the meeting concerning his discharge. His letter of July 17 was not then known to management

and could not have played a role in his discharge. His complaints concerning Mr. Otteson were simply considered to be concerned about fairness of his suspension. ^{3/}

The fact that a miner has a conversation with MSHA personnel does not necessarily mean such conversation is protected activity. See Hacker v. Black Streak Mining Co., 11 FMSHRC 2240, 2265 (ALJ Koutras November 9, 1989). Even protected activity close to time to the adverse action may not be sufficient to show the connection between the two. Grafton v. National Gypsum, 12 FMSHRC 63, 66-67 (ALJ Weisberger, January 12, 1990) (one day).

In this case, the decision to discharge Mr. Gibson had, in effect, been made prior to the meeting on July 21. Before the meeting, Mr. Rising had consulted with both Messrs. Cosner and

Lampard concerning a discharge and they had concurred in the decision. The purpose of the meeting was to give Mr. Gibson one last chance to explain his absences on July 14 and 15, which he failed to do at the meeting.

Under such circumstances, no reliance on the closeness in time is proper. See, e.g., Lester v. Garden Creek Pocahontas Co., 11 FMSHRC 1763 (decision made to discontinue position made before safety complaints were made); Luttrell v. Jericoal Mining, Inc., 10 FMSHRC 1320, 1331 (September 30, 1988).

Essentially, Mr. Gibson is relying here on conjecture to show a nexus between any protected activity and his discharge. This does not provide sufficient basis for showing that the protected activity is motivated in any part his discharge. See Buelke v. Thunder Basin Coal Co., 11 FMSHRC 238, 244 February 16, 1989); Buford Smith v. R.J.F. Coal Co., Inc., 11 FMSHRC 2050,

3/ Mr. Gibson offered certain evidence that Cyprus did not have a policy on drug and alcohol abuse. The credible testimony was that a policy existed and was enforced and that a new policy had been in the process of development for a considerable period before Mr. Gibson even claimed to make any complaints about the lack of such a policy. Moreover, the testimony about specific incidents of discovery of drugs on the property is irrelevant because there is no credible evidence that Mr. Gibson ever discussed these incidents with Messrs. Walz, Rising, Morris, Cosner, or Lampard.

2055, n.2 (October 24, 1989). There was not evidence that either the telephone call to MSHA or any other matter related to complaints about drug and alcohol abuse was discussed at the July 21 meeting or was a factor in the decision to discharge Mr. Gibson.

Also, it was undisputed that even if some of the incidents that Mr. Gibson would rely upon are considered protected activity, there was a lack of knowledge of those incidents by all the parties involved in his discharge. Mrs. Morris did not know of the discussions at the May 27 meeting, was not aware of Mr. Gibson's complaints about Mr. Otteson, and did not know of the July 17, letter. Yet she recommended Mr. Gibson be discharged.

Mr. Walz did not know about the July 17 letter or about Mr. Gibson's complaints about Mr. Otteson, yet he believed discharge was proper. Mr. Rising did not know of the July 17 letter, yet he believed that discharge was appropriate.

I am satisfied from the record, that Mr. Gibson's discharge was not related to any arguably protected activity. It is undisputed that Mr. Gibson was absent on the two days in question. It is also undisputed that the attendance policy that he was subject to indicated that in the event of a second unexcused absence, he would be subject to discharge. When he called Mrs. Morris to say that he would not be coming to work on July 14 he admitted that he knew the consequences of his actions.

In September 1986, prior to any arguably protected activity by Mr. Gibson, he was placed on attendance guidelines that required him to maintain an unblemished attendance record and it was clearly warranted. He had a history of discipline for attendance problems, a history that included a ten-day suspension in lieu of discharge. In 1986 his attendance was the worst of any employee in the maintenance department.

When Mr. Gibson showed some improvements in his attendance, the guidelines were reissued and relaxed to a degree. Unfortunately, Mr. Gibson almost immediately violated those guidelines and was absent from work on April 24. Under the guidelines he was to receive a warning and that is what Mr. Walz gave him. His appeal to Mr. Cosner raised the possibility that this warning could be removed from his file, but reemphasized that the guidelines remained in effect.

On July 13, his supervisor permitted him to take partial day off to attend a court hearing that he may well not have attended. On July 14, after the start of the shift, Mr. Gibson called

Mrs. Morris and told, not asked her, that he was taking the day off. Their conversation made it clear that he was aware of the consequences of his action. Later that day he called Mrs. Morris at home to try to get a vacation day for the next day. This day of vacation was neither promised to him by Mrs. Morris, nor ultimately granted.

He thus had two more unexcused absences from work. One was sufficient basis for his discharge. He was unable to justify either absence at the time of his meeting and his employment was, by general consensus, terminated. This sort of action by an employee can properly be the basis of a discharge. See, e.g., Secretary of Labor/Brock v. Blue Circle, Inc., 11 FMSHRC 2181 (ALJ Koutras, November 7, 1989) (abuse of breaks and unsatisfactory job performance); Sharp v. Elk Creek Coal Co., 11 FMSHRC 382 (ALJ Koutras, March 20, 1989) (discharge for missing work); Thompson v. Island Creek Coal Co., 11 FMSHRC 17 (ALJ Maurer, September 13, 1989) (employee discharged for failing to report to work on one day).

Although Mr. Gibson claimed he was singled out by Mr. Walz, an examination of the record of other employees who were placed on attendance control programs shows no such disparate treatment. On April 21, 1986, Clyde Burke was placed on attendance guidelines requiring him to have perfect attendance for 90 days. On June 2, 1987, he was once again placed on such guidelines. He arrived one hour late to work on June 30, 1987, and was suspended for five days, a greater penalty than Mr. Gibson received for the first violation of his guidelines. On November 21, 1987, Mr. Burke was again one hour late to work and his employment was terminated.

On March 18, 1987, Clifford Minter was placed on such guidelines. He missed a portion of one day to go to court and all of the next day. He was suspended and was told that any further absences would result in his termination. Duane Dahlin was placed on similar guidelines also, in that he was given a final warning that if he had further absences, his employment would be terminated. It is clear that Mr. Gibson was not singled out. In fact, it appears that he was treated somewhat more leniently than his co-workers.

Mr. Gibson attempted to make an issue of the fact that Mr. Walz, a superintendent, was directly involved in his discipline. The evidence was that Mr. Walz's involvement was not unusual. For example, the memorandum concerning the termination of Mr. Burke's employment was signed by a superintendent, as were his attendance guidelines. The memorandum terminating Robert

Kesterson's employment for three absences was signed only by Mr. Walz. Mr. Neely's letter of discipline was signed by his superintendent.

The procedure was that the Vice President and General Manager must concur in a decision to discharge an employee, although he need not sign the letter of termination. In this case, both Mr. Lampard and Mr. Cosner, the Mine Manager, were consulted and concurred on the decision.

It must also be recognized that in May, when he was suspended, Mr. Gibson was told that he should decide whether he wanted to continue employment at Bagdad. He was instructed at that time: "If you fail to make a substantial improvement in your overall performance, you will be terminated." Mr. Rising was trying, by means of the lengthy suspension, to finally communicate to Mr. Gibson that he had to improve or he would be terminated. Mr. Gibson's response was to take almost three days off soon after he returned from his suspension. He took those days off knowing that Mr. Walz would act against him.

Violation of such a "last chance" policy such as Mr. Gibson was under is not a violation of section 105(c). Mullins v. Clinchfield Coal Co., 11 FMSHRC 1948 (ALJ Koutras, October 3, 1989). Application of the absentee policy was not directed solely at Mr. Gibson and no disparate treatment was shown. See Sharp v. Big Elk Coal Co., 11 FMSHRC 382 (ALJ Koutras, March 1989). Further the policy was applied to Mr. Gibson long before he even engaged in any arguably protected activity.

In evaluating the motivation in discharging Mr. Gibson, some discussion is appropriate of Mr. Gibson's history of excuses concerning his absences. There was undisputed testimony from persons other than Mr. Walz that Mr. Gibson was in the habit of giving suspect excuses, usually after the fact, for his absences.

When Mr. Gibson's work record at Cyprus is considered as a whole, it is clear that, as an employee, he had been given a number of chances to demonstrate that his employment should be continued. His discharge on July 21, 1987, was really the culmination of a career at Bagdad of absenteeism and unreliability. The evidence shows that his discharge was not motivated in any part by protected activity, and it also shows that, even if protected activity played a part in his discharge, Mr. Gibson would have been discharged in any event for his unprotected activity in absenting himself from work.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

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

Cyprus has satisfactorily shown with credible evidence a business justification for Mr. Gibson's May 27th suspension and his July 21st discharge.

CONCLUSION OF LAW

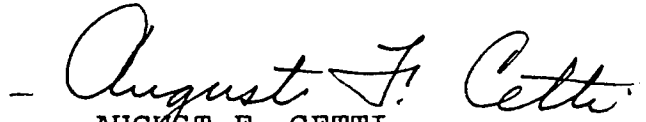
1. Cyprus did not violate Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c).

2. Any protected activity that Mr. Gibson engaged in did not in any part motivated his suspension on May 27 or his discharge on July 21.

3. Even if the suspension and discharge of Mr. Gibson were motivated in any part by the fact that he engaged in protected activity, he would have been suspended and discharged for unprotected activity alone.

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that Mr. Gibson has failed to establish that the respondent has discriminated against him or has otherwise harassed him or retaliated against him because of the exercise of any protected rights on his part. Accordingly, his claims for relief ARE DENIED and the Complaint and this proceeding are DISMISSED.


AUGUST F. CETTI
Administrative Law Judge

Distribution:

Mr. Donald H. Gibson, 885 Munley Drive, Reno, NV 89503

R. Henry Moore, Esq., Buchanan Ingersoll, 57th Floor, USX Tower,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 8 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 89-205
Petitioner	:	A.C. No. 36-07756-03508
v.	:	
	:	Kent No. 55 Mine
KENT COAL MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Evert Van Wijk, Esq., U.S. Department of Labor,
Office of the Solicitor, Philadelphia,
Pennsylvania, for the Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll,
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Maurer

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 Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging the Kent Coal Mining Company (Kent) with a violation of the mandatory standard found at 30 C.F.R. § 48.26(a) and proposing a civil penalty of \$1,000 for that violation. The general issue before me is whether Kent violated the cited standard and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

Pursuant to notice, a hearing on the merits was held in this matter on January 18, 1990, in Pittsburgh, Pennsylvania. A post-hearing brief was filed by the respondent on March 2, 1990, and the Secretary waived its right to file post-hearing argument by letter dated March 7, 1990. I have considered the entire record of proceedings and the contentions of the parties in making the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. That Kent Mine Number 55 is owned and operated by the Kent Coal Mining Company and is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. The Administrative Law Judge has jurisdiction over these proceedings.

3. Citation No. 2894017 and Order No. 2894016 were properly served by a duly authorized representative of the Secretary of Labor on an agent at the Kent Coal Mining Company and may be admitted into evidence for the purpose of establishing due issuance but not for the truth of the matters asserted therein.

4. Kent Coal Mining Company demonstrated good faith in the abatement of the Citation and Order.

5. The assessment of a civil penalty in the proceeding will not affect the Kent Coal Mining Company's ability to continue business.

6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the fact that Kent Coal Mining Company No. 55's annual production is 30,440 tons and the annual production of it and its affiliated companies which are also subsidiaries of the Rochester and Pittsburgh Coal Company is 9,386,168 tons.

7. Fred Albright, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on May 12, 1980. Prior to becoming an employee of Kent, Mr. Albright had been, since April 12, 1978, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation No. 2894017 on March 10, 1989, he had last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 28, 1988. His job classification was that of a dragline oiler.

8. Ronald Boltz, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Boltz had been, since September 5, 1972, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 21, 1988. His job classification was that of a highlift operator.

9. William C. Guntrum, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on April 27, 1982. Prior to becoming an employee of Kent, Mr. Guntrum had been, since September 5, 1972, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received

annual refresher training pursuant to 30 C.F.R. § 48.28 on October 16, 1988. His job classification was that of a dozer operator.

10. Charles D. James, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. James had been, since April 9, 1973, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 21, 1988. His job classification was that of a dozer operator.

11. Charles R. James, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. James had been, since May 21, 1974, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 28, 1988. His job classification was that of a highlift operator.

12. Ronald G. Peiffer, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Peiffer had been, since May 24, 1972, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 28, 1988. His job classification was that of a dragline operator.

13. David A. Scholl, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Scholl had been, since April 12, 1978, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 21, 1988. His job classification was that of a truck operator.

14. James W. Tarr, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Tarr had been, since April 3, 1978 an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received

annual refresher training pursuant to 30 C.F.R. § 48.28 on October 21, 1988. His job classification was that of a truck operator.

15. Gilbert Woodley, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Woodley had been, since June 13, 1974, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 21, 1988. His job classification was that of a dozer operator.

16. Daniel R. Dunlap, Jr., who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on May 19, 1980. Prior to becoming an employee of Kent, Mr. Dunlap had been, since June 4, 1979, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 21, 1988. His job classification was that of a mechanic.

17. W. R. Shondelmeyer, Jr., who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on May 12, 1980. Prior to becoming an employee of Kent, Mr. Shondelmeyer had been, since April 17, 1978, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 28, 1988. His job classification was that of a fuel truck operator.

18. Kevin J. Buggey, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on May 14, 1982. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 28, 1988. His job classification was that of a serviceman.

19. Galen L. Smith, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Smith had been, since May 22, 1972, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to C.F.R. § 48.28 on October 21, 1988. His job classification was that of a highwall miner operator.

20. Carl A. Smith, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Smith had been, since December 29, 1970, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 28, 1988. His job classification was that of a highwall miner operator.

21. Samuel T. Peace, Jr., who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on September 27, 1979. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 21, 1988. His job classification was that of a serviceman.

22. John E. Valkosky, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Valkosky had been, since April 19, 1974, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 28, 1988. His job classification was that of a fork lift operator.

23. Herman M. Blakley, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on May 21, 1984. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. § 48.28 on October 20, 1988. His job classification was that of a shift foreman.

24. At the time of the issuance of Citation No. 2894017, Edward F. Nett, Jr., who was referred to in Citation No. 2894017, was an employee of Metec, Inc., a contractor at the Kent No. 55 Mine. Prior to the issuance of the Citation, he last received his annual refresher training, pursuant to 30 C.F.R. § 48.28, on October 21, 1988.

25. At the time of the issuance of Citation No. 2894017, Vince Henderson, who was referred to in Citation No. 2894017, was an employee of Metec, Inc., a contractor at the Kent No. 55 Mine. Prior to the issuance of the Citation, he last received his annual refresher training, pursuant to 30 C.F.R. § 48.28, on October 21, 1988.

26. At the time of the issuance of Citation No. 2894017, Paul Gilbert, who was referred to in Citation No. 2894017, was an

employee of Metec, Inc., a contractor at the Kent No. 55 Mine. Prior to the issuance of the Citation, he last received his annual refresher training, pursuant to 30 C.F.R. § 48.28, on October 28, 1988.

27. At the time of the issuance of Citation No. 2894017, Randall K. Oslonian, who was referred to in Citation No. 2894017, was an employee of Metec, Inc., a contractor at the Kent No. 55 Mine. Prior to the issuance of the Citation, he last received his annual refresher training, pursuant to 30 C.F.R. § 48.28, on February 6, 1989.

28. Prior to being assigned to the Kent No. 55 site, the miners who were referred to by name in the Citation had previously worked at other mine sites operated by Kent but having different MSHA identification numbers. They did not receive newly experienced miner training pursuant to 30 C.F.R. § 48.26(a) related specifically to this particular mine site prior to commencing work at the Kent No. 55 mine site.

29. The miners referred to by name in the Citation were, as of the date of the Citation, experienced miners as defined in 30 C.F.R. § 48.22(b).

DISCUSSION AND FINDINGS

Citation No. 2894017, issued on March 10, 1989, charges a violation of the mandatory standard found at 30 C.F.R. § 48.26(a) and alleges:

The following employees of Kent No. 55 mine, Ronald Boltz, Bill Guntrum, David Scholl, Kevin Buggiey, Dan Dunlap, James Tarr, Bill Shondelmeyer, Fred Albright, Sam Peace, Gilbert Woodley, Edward Nett, Jr., Randall Oslonian, Galen Smith, Vince Henderson, Paul Gilbert, John Valkosky, Charles James, Carl Smith, Ronald Peiffer, Charles James and Herman Blakley were working at the 001 pit without first being given training under 48.26(a) 30 C.F.R. The employees were transferred to this mine approximately three weeks ago and have had annual training under ID No. 36-02854 but, no such training was provided for this mine site. A 1045/order (No. 2894016) has been issued in conjunction with this citation.

At the hearing and on the record, the above citation was amended to allege a non-S&S violation and also to delete the name of Herman Blakley, who was a supervisor at the mine. It is MSHA policy that supervisors are not required to undergo the training requirements of Part 48.

That amendment left twenty miners named in the citation. All are experienced miners. Sixteen of them are Kent employees of relatively long standing. Most have been with Kent for over ten years. The other four named miners are employees of Metec, Inc., a contractor hired by Kent to assist in the operation of the highwall mining machine leased from Metec. These four miners had worked at Kent locations for approximately one year. They had most recently been assigned to the Brick Church site along with the majority of the Kent employees cited herein.

Kent operates a number of relatively small surface mining sites under various MSHA ID numbers. In early 1989, February or March, Kent began to move some of its mining equipment and miners from its Iselin 10 and Brick Church sites to its Kent No. 55 site. The MSHA ID number for this site (No. 55) had previously been assigned to another site approximately 2000 feet away known as the Kent No. 56 Mine.

The miners at the Kent No. 55 site were operating the same equipment that they operated at the sites where they had previously been assigned and performing the same sort of tasks. The Brick Church and Iselin 10 sites were similar to the Kent No. 55 site. All had highwalls; the ground control plans and communications set-ups were similar, and the safety procedures were the same. Furthermore, they worked for the same Kent supervisory personnel that they had worked for at the previous mine sites.

When a miner was assigned to a new work location, he would receive instructions from his supervisor as to his duties when he arrived at the site, but he was not formally given the newly employed experienced miner training set out in 30 C.F.R. § 48.26(a).

Inspector Kopsic based the citation he issued on an unwritten MSHA policy which mandates newly employed experienced miner training whenever a miner transfers from one mine site to another if the MSHA mine identification numbers are different. The critical feature of this policy is the mine identification number. If the mine site has a different ID number than the mine site where the miner was previously assigned to work, even if for the same employer, this triggers a requirement for newly employed experienced miner training. This is the case even if the two mines are right next to each other. On the other hand, an operator can have as many different mines as he wants under the same ID number, miles apart from each other, as long as all the mines are in the same county and inspected out of the same MSHA field office. In the latter case, the employer is free to

transfer his workers to and among his various sites without concerning himself with the newly employed experienced miner training.

Kent's position in this case is that the twenty miners at issue here are not newly employed experienced miners required to be trained under 30 C.F.R. § 48.26(a) because they did not change employers when they changed job sites. "Newly employed" is not specifically defined in the regulations and Kent urges that a commonly accepted definition of the term be used. That is, that a "newly employed" person is a "newly hired" person, not an employee who merely shifts his worksite, but does not change his employer.

As between the two interpretations, Kent's is clearly the more reasonable. It gives effect to the usual meaning of the words "newly employed". Moreover, the Secretary's interpretation as implemented by its unwritten policy, creates a distinction based solely on mine ID numbers which is arbitrary at best. Using that interpretation, if the three Kent surface mine sites mentioned herein were located in the same county in Pennsylvania and were inspected out of the same MSHA field office, and if the operator requested it, they could be assigned the same Mine ID number and no section 48.26(a) training would be required in this instance. However, in this situation, the operator requested a different ID number for this particular site, and the training is therefore required. This policy/interpretation lacks any rational basis in my opinion.

Therefore, I find that the Secretary's policy in this case is not entitled to deference. To begin with, it just doesn't make any common sense as a practical matter. If a miner can be transferred by his employer from one job site to another, ten or fifteen miles away, and be required to undergo section 48.26(a) training depending only on whether or not his employer put the same mine ID number on the second worksite, that is nonsense. It also has nothing to do with being newly employed. Secondly, the "policy" is unwritten. It is not included in the 1988 Program Policy Manual which purports to contain all MSHA policies concerning training and retraining of miners under Part 48. Accordingly, even assuming this interpretation of the standard or "policy" exists, there apparently was no notice of it to the public or more specifically to the mine operators.

In Secretary v. Garden Creek Pocahontas Co., 11 FMSHRC 2148 (1989), the Commission addressed a particular interpretation of the Secretary that was not contained within the plain language of the standard in the following language:

A regulation cannot be applied in a manner that fails to inform a reasonably prudent person of the conduct required.

11 FMSHRC at 2152.


In this case, the interpretation of "newly employed experienced miner" espoused by the Secretary, fails to provide any reasonable notice of the conduct required and, for that reason also should be rejected.

The miners involved in this case were all experienced miners and they all had current annual refresher training under 30 C.F.R. Part 48. I conclude that this is all that Part 48 requires given the facts of this case. No violation of 30 C.F.R. § 48.26(a) existed because none of these miners was a newly employed miner by virtue of the fact that his employer moved him from Iselin 10 or Brick Church to Kent No. 55. Nothing concerning their employment status changed as a result of this transfer.

ORDER

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

Citation No. 2894017 IS VACATED, and no penalty may be assessed.


Roy J. Maurer
Administrative Law Judge

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JUN 8 1990


SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 90-8
Petitioner	:	A.C. No. 44-06497-03503
v.	:	
	:	No. 1 Mine
FLIPPY COAL COMPANY, INC.	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

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). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$1486 to \$1286 is proposed. 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 \$1286 within 30 days of this order.


Roy J. Maurer
Administrative Law Judge

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JUN 11 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 89-425-M
Petitioner	:	A.C. No. 04-05021-05501
	:	
v.	:	Darwin UG
	:	
BLUE RANGE MINING COMPANY,	:	
L.P.,	:	
Respondent	:	

DECISION

Appearances: George B. O'Haver, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco, California
R.D. Haddock, HOLME ROBERTS & OWEN, Salt Lake City,
Utah,
for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a proposal for assessment of civil penalty by Petitioner on October 2, 1989, pursuant to Section 110(a) of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801, et seq.

At the outset of hearing on May 23, 1990, the parties entered negotiations and ultimately announced their amicable resolution of the issues arising out of the four enforcement documents (three withdrawal orders and one citation). Pursuant to their agreement, and upon further review and re-evaluation by Petitioner, various modifications of the four enforcement documents (described in my order below) are to be made which, because of their mollification of the original evaluations of the penalty assessment factor of gravity as to each violation, result in reductions in the penalties originally and administratively assessed by Petitioner. The settlement agreement was proposed and considered on the record at the hearing and my bench decision approving such is here affirmed.

ORDER

1. Withdrawal Order No. 3463394 is MODIFIED to change the "Gravity" of the violation described in Section 10.A. of the Order from "Highly Likely" to "Unlikely," to change the degree of "Negligence" involved appearing in paragraph 11 of the Order from "Moderate" to "Low," and to delete the "Significant and Substantial" designation of the violation appearing at paragraph 10.C. of the Order. A penalty of \$50 is assessed for this violation.

2. Citation No. 3463395 is MODIFIED to change the degree of "Negligence" involved from "Moderate" to "Low." A penalty of \$55 is assessed for this violation.

3. Withdrawal Order No. 3463396 is MODIFIED to change the degree of Negligence involved from "Moderate" to "Low." A penalty of \$300 is assessed.

4. Withdrawal Order No. 3463398 is MODIFIED to change the "Gravity" Designation from "Highly Likely" to "Unlikely," to change the degree of Negligence involved from "Moderate" to "Low," and to delete the "Significant and Substantial" designation of the violation appearing in the Order. A penalty of \$50 is assessed.

5. Respondent, if it has not previously done so, shall pay to the Secretary within 30 days from the date hereof the sum of \$455 as and for the civil penalties agreed to and above assessed.

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

Distribution:

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Mr. Larry C. Hoffman, President, Blue Range Mining Company, L.P., 56 East Mercury, Butte, MT 59701 (Certified Mail)

/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 13, 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 89-161-M
Petitioner	:	A. C. No. 41-03014-05507
	:	
v.	:	Nunneley Quarry
	:	
J. R. THOMPSON INCORPORATED,	:	
Respondent	:	

ORDER VACATING DEFAULT
ORDER APPROVING SETTLEMENT
ORDER TO PAY

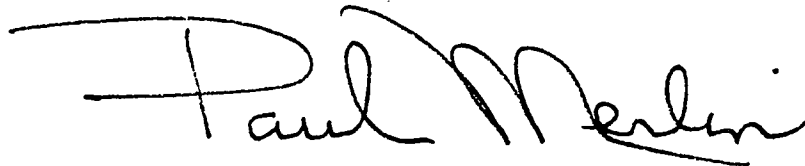
Before: Judge Merlin

This matter is before me pursuant to Order of the Commission dated June 12, 1990.

Upon review of the file I determine that sufficient grounds exist to grant relief from the default. Accordingly, it is ORDERED that the default dated February 6, 1990, be and is hereby VACATED.

Upon review of the proposed settlement agreement I determine that the settlement amounts are appropriate and that the suggested mode of payment is reasonable. The Solicitor has orally advised that the operator is making payments in accordance with the settlement agreement. Accordingly, it is ORDERED that the proposed settlement agreement in all respects be and is hereby APPROVED.

It is further ORDERED that the operator continue to make payments in accordance with the settlement agreement until the entire sum due is paid.



Paul Merlin
Chief Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

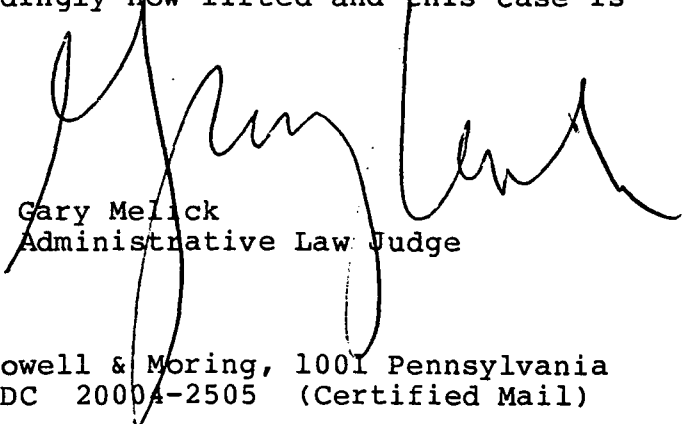
JUN 13 1990

DONALD F. DENU, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 90-26-D
: :
AMAX COAL COMPANY, : VINC CD 90-02
Respondent :
: Ayrshire Mine

ORDER LIFTING STAY AND DISMISSING PROCEEDINGS

Before: Judge Melick

Complainant requests approval to withdraw his Complaint the captioned case. Under the circumstances herein, the request is granted. 29 C.F.R. § 2700.11. The Stay Order previously issued is accordingly now lifted and this case is therefore dismissed.


Gary Melick
Administrative Law Judge

Distribution:

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Mr. Donald F. Denu, R.R. #1, Box 333, Rockport, IN 47635
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Amax Coal Company, P.O. Box 40, Chandler, IN 47610
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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 1990

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 90-106-D
on behalf of	:	PITT CD 90-06
DONALD F. RADOS,	:	
Complainant	:	Livingston Portal
v.	:	Eighty-Four Complex
	:	
BETH ENERGY MINES, INC.,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Melick

The Secretary of Labor requests approval to withdraw its Complaint in the captioned case on the grounds that she now believes there is insufficient evidence to establish a violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed. The undersigned has no authority in this case to modify the statutory filing requirements in a potential future case so the request of the Secretary to permit the individual miner "a period of 30 days to file a complaint on his own behalf" is denied.


Gary Melick
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 13 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 90-6
Petitioner	:	A. C. No. 46-07679-03501 Z2J
v.	:	
	:	Wolfe Mine
NOONE ASSOCIATES, INC.,	:	
Respondent	:	
	:	

DECISION

Appearances: Wanda M. Johnson, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for the Secretary;
Mr. Robert A. Kaufman, Treasurer, Noone
Associates, Inc., Stanaford, West Virginia, for
the Respondent.

Before: Judge Weisberger

Statement of the Case

In this case, the Secretary (Petitioner) seeks a civil penalty for the alleged violation by the Operator (Respondent) of 30 C.F.R. § 48.26(a). Pursuant to notice, the case was heard in Charleston, West Virginia, on April 3, 1990. Ronald Vincent Marrara and Thomas P. Stockdale testified for Petitioner, and Clifford William Farris testified for Respondent. At the hearing, time was reserved for the Parties to submit Proposed Findings of Fact and a Brief. Petitioner submitted its Proposed Findings of Fact and Memorandum of Law on May 9, 1990. Respondent did not file any Proposed Findings of Fact or Brief, but filed, on May 16, 1990, a rebuttal to Petitioner's submission.

Stipulations

At the hearing, the Parties indicated that they entered into the following stipulations:

1. The Administrative Law Judge has the jurisdiction to hear and decide this case.

2. Inspector Ronald Marrara was acting in his official capacity when he issued Citation No. 3114222.

3. Citation No. 3114222 was properly served to the Respondent's agents.

4. Abatement of the conditions cited in Citation No. 3114222 was timely.

5. The proposed penalty of \$56.00 will not adversely affect the Respondent's ability to continue in business.

6. If the Secretary establishes that the violation existed, then the amount of \$56.00 is an appropriate civil penalty under 30 U.S.C. § 820(i).

7. As of this date, the Respondent has no history of previous violations.

8. The training requirements under 30 U.S.C. § 825(a) and 30 C.F.R. § 48.21 et seq. were in effect at the time the Citation was issued.

9. The employee had not received training under 30 C.F.R. § 48.26 prior to the date of the Citation.

10. On the date of the alleged violation, the employee was performing the same duties as a coal sampler that he had performed at other mine sites.

11. The employee was working as a coal sampler on the mine site at the time that the Order was issued.

12. For purposes of 30 U.S.C. § 713(d) and 30 C.F.R. § 48.21-§ 48.31, on the date of the alleged violation, the Respondent was operating as an independent contractor who was performing coal testing/sampling services.

13. The Respondent had an agreement with a third party to perform coal testing/sampling at the Wolfe Mine site.

Findings of Fact and Discussion

I.

In May of 1939, Respondent had an agreement with a third party to perform coal testing/sampling at the Wolfe Mine site. On May 30, 1939, Respondent's employee, Clifford William Farris, was working at the Wolfe Mine site performing modified flow sampling, which required him to take coal samples from the pile.

Farris had approximately 5 years experience as a coal sampler and in addition, performed this type of testing approximately 100 times at other localities. Farris indicated that, as part of his duties, at each site that he takes coal samples, he is required once a year to sign a form indicating that he had received hazard training. When he entered the site in question on May 30, he received and read a one page statement entitled Hazard Training (Surface). Among the items set forth in this document is a Section entitled "Heavy Equipment Hazards." (Secy. Ex. 6, Page 2). Subparagraph C. provides as follows: "Beware of where equipment is moving at all times and make sure the operator is aware of your presence before boarding any equipment." (Secy. Ex. 6, page 2). In essence, Farris indicated that when he entered the subject site, he asked the end-loader operator where he should stand, and he informed the latter what he planned to do at the site that day.

Ronald Vincent Marrara, an MSHA Inspector, indicated that when he inspected the pit area on May 30, 1989, he observed Farris taking samples out of the pile and that "... it seemed to me that he was not aware of his surroundings." (Tr. 11). Thomas P. Stockdale, the Owner and President of Tri-State Safety Services, Incorporated, who provides safety training to employees of the Wolfe Mines, indicated that he had also observed Farris. He opined that Farris was "... not really observant about the end-loader," and was "... more concerned with his sampling." (Tr. 66). According to Marrara, Farris was not making eye contact with the end-loader operator. He indicated that he observed Farris walking away from the coal pile and the end-loader. He said that Farris did not look around at the end-loader which was backing up, and that the loader stopped within a few feet of Farris before it went forward to drop its load of coal. According to Stockdale, the end-loader was a new machine and the operator had been on that machine for only 2 weeks. According to Marrara, the manner in which the end-loader was being operated, i.e., backing up and turning around at the same time after picking up a load of coal, was not unusual.

Marrara indicated that he was of the opinion that there was not adequate communication between Farris and the end-loader operator. When he ascertained from Farris that the latter did not have training pursuant to 30 C.F.R. § 48.26(a), he issued a Section 104(a) Citation and a Section 104(g)(1) Order.

Subsequent to the issuance of the Citation and Order, and in order to abate the same, Stockdale conducted oral training with Farris. He indicated that in his opinion Farris was knowledgeable and had told him (Stockdale) that he knew the machine (end-loader), and the work that was being performed at the site. According to Stockdale, he reviewed with Farris the particulars of safety pursuant to Section 48.26, supra. Specifically, with regard to hazards

occasioned by the work environment and the end-loader, he explained to Farris that the end-loader was a new machine, and the work being performed at the site constituted a new job. He indicated that he told Farris to make sure that he caught the eye of the end-loader operator, to keep a safe distance back of the end-loader, and not to approach until the operator waved him on. He explained, that due to the height at which the end-loader sits on the machinery, it is difficult for the operator to see an individual close to the loader. He explained to Farris various head movements in order to signal the operator. He indicated that, if the safety training had not been provided, then the following could have happened: "If Mr. Farris was unobservant as to the danger in the pit" he could be "obviously" hurt by the end-loader or one of the environmental hazards of the highwall (Tr. 64).

Farris was asked, essentially, to indicate the matters contained in Stockdale's training that he was not familiar with. As a response, he indicated the location of an emergency telephone, and the fact that the operation at the site did not involve shooting dynamite. Marrara indicated that after the Citation and Order in question had been abated, the basic procedures at the site were the same. He offered his opinion that, after the citation had been abated, and Farris resumed working, he was "more alert to his surroundings." (Tr. 90).

II.

At the hearing, the Parties indicated that they stipulated that the only issue was that of the gravity of the violation, and Respondent indicated that it conceded that it did violate Section 48.26(a), supra. Based upon the evidence of record, as well as Respondent's concession, I find that Respondent did violate Section 48.26(a) as alleged.

III.

It is the position of Petitioner that the violation herein should be considered to be significant and substantial. An analysis of this aspect of the case is to be governed by the principles set forth by the Commission, in Mathies Coal Company, 6 FMSHRC 1 (January 1984). In Mathies, supra, the Commission set forth the elements of a "significant and substantial" violation 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. (6 FMSHRC, supra, at 3-4.)

As set forth above, (II., infra), the evidence has established that Respondent did violate Section 48.26(a), supra, and as such the first element of Mathies, supra, has been met. The Secretary, pursuant to Mathies, supra, must now establish "a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation;" (Mathies, supra, at 3-4). In essence, according to Marrara, a hazard was present inasmuch as Farris did not have eye contact with the end-loader operator, was not fully aware of his surroundings, and that accordingly, "it was most probably highly likely", that he was going to be seriously injured. (Tr. 17). In this connection, Farris did not contradict the version testified to by Marrara, that he (Farris) was not looking at the end-loader when it backed up, and stopped within a few feet of him. Also, according to Marrara, inasmuch as Farris did not make eye contact with the operator, to ensure that the latter would know his location, the operator would worry as to the former's location, could be distracted, and thus an accident causing an injury to the operator was likely to occur. In essence, Marrara was asked specifically to indicate how Farris' lack of training contributed to the hazard involving the end-loader. He indicated, in essence, that the safety training, (Section 48.26(a), supra), as contrasted to the hazard training contained in the document read by Farris on the morning of May 30, is "in greater depth and detail" (Tr. 19). Stockdale, who actually gave the training under Section 48.26(a), supra, noted that training thereunder is specific for a particular job site and its hazards. Further, with regard to the impact of the Section 48.26(a) training, Marrara opined that prior to such training, Farris was not fully aware of his surroundings, and Stockdale indicated that he (Farris) was more concerned with sampling. Marrara indicated that subsequent to the training, Farris was more alert to the surroundings.

I find this evidence inadequate to positively establish that the lack of training in the specifics contained in Section 48.26(a), contributed to the hazard of Farris being injured by the end-loader. The fact that Farris appeared more alert to Marrara after the Section 48.26(a) training was provided to him, does not establish that the specific information provided to him by Stockdale minimized the hazard of an injury caused by the end-loader. It is conceivable that the enhanced alertness exhibited by Farris, was as the result of his performing in the presence of the MSHA Inspector Marrara and the Safety Instructor Stockdale. Further, it might be implied that the lack of Section 48.26(a) training contributed to the hazard of an injury occasioned by the end-loader, based upon proof that such

training did decrease the risk of such a hazard. However, I find that the evidence has not established such an effect of the Section 48.26(a) training. Specifically, I find that the evidence has not established that the Section 48.26(a) training provided to Farris by Stockdale imparted to Farris any new information which minimized the hazard of an injury from the end-loader. In this connection, I note that Petitioner did not offer any evidence to impeach the credibility of Farris' testimony or to rebut his testimony, that the only new information contained in Stockdale's training to him that he was not familiar with, had to do with the location of an emergency telephone, and the fact that the mine was not involved in shooting dynamite. Further, although Stockdale indicated that the end-loader operator was new to the job, and was operating a new machine, Marrara indicated on cross-examination that the manner in which it was operated, i.e., the operator backing it up and turning it around at the same time, was not unusual. Further, Farris' testimony has not been impeached or contradicted that he had performed similar work in the past, informed the end-loader operator what he intended to do on the day in question, asked the latter where he was supposed to stand, and felt that he was aware of the end-loader at all times. In addition, although Stockdale indicated that he informed Farris to be sure and catch the operator's eye, to stay back a safe distance from the end-loader, not to approach the end-loader until the latter waved him on, and he related the usage of various head signals, Stockdale did not indicate that Farris did not already have knowledge of these particulars. I thus conclude that it has not been established that the training provided to Farris by Stockdale, i.e., training under Section 48.26(a), contained any significant new information that Farris was not previously aware of. It thus has not been established that the Section 48.26(a) training significantly decreased the hazard of an injury.

I also find that the record does not establish that there was a reasonable likelihood that the hazard of an injury in the pit area would result in an injury producing event. Marrara opined that it was reasonably likely that Farris would have been injured or killed if he continued working in the pit area. He also noted the possibility of an injury to the end-loader operator. However, taking into account Farris' experience, and the fact that it has not been established that the Section 48.26(a) training imparted any significant information that Farris did not already know with regard to the hazards at the pit area, I conclude that it has not been established that an event causing injury was reasonably likely to occur.

Thus, I conclude that the evidence has failed to establish that the failure of Respondent to have provided Farris with Section 48.26(a) training contributed to the hazard of an injury

from the operation of the end-loader. Thus, I conclude that it has not been established that the violation herein was significant and substantial (See, Mathies, supra). 1/

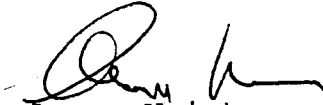
IV.

The Parties have stipulated that if it is established that the violation herein existed, then \$56 is an appropriate civil penalty. Based upon the evidence of record and the statutory factors contained in Section 110(i) of the Act, I too, conclude that a penalty of \$56 is appropriate.

1/ I reject Petitioner's argument, as advanced in its brief, that, in essence, failure to provide training under Section 48.26(a) supra, per se, constitutes a significant and substantial violation. In support of its position, Petitioner relies on Dolet Hills Mining Venture, 11 FMSHRC 1122 (1989) decided by Judge Koutras. Inasmuch as Dolet Hills, supra, involved a failure to provide annual refresher training pursuant to 30 C.F.R. § 48.28(a) which inter alia mandates a minimum of 8 hours training in session not less than 30 weeks if given periodically, it is not relevant to the instant proceeding which involves a violation of § 48.26, supra, which does not contain such mandates. Similarly, Westwood Energy Properties, 11 FMSHRC 105 (1989), rev'd on others grounds, 11 FMSHRC 2408 (1989), is not relevant to the instant case. In Westwood, supra, Judge Broderick, in concluding that the violations of Section 48.26 therein were necessarily likely to result in a serious injury, found that the newly employed experienced miners therein had not previously worked in a culm bank, which in the opinion of the inspector presented unique hazards. In contrast, in the case at bar, Farris had significant experience at sites similar to Respondent's operation. Lastly, Frank Ireby, Jr., Inc., 11 FMSHRC 990 (1989), is not relevant to the instant case. In Frank Ireby, supra, Judge Melick found that the significant and substantial nature of the violation of Section 48.28, supra, was indicated by the existence of another violation at the same site where the untrained miners were working, for burning and welding in the presence of coal dust. Such evidence is lacking in the case at bar.

ORDER

It is ORDERED that Order No. 3114221 be AFFIRMED. It is further ORDERED that Citation No. 3114222 be AMENDED to reflect the fact that the violation described therein was not significant and substantial. It is further ORDERED that Respondent shall, within 30 days of this Decision, pay \$56 as a penalty for the violation found herein.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 14 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. CENT 89-129-M
Petitioner	:	A.C. No. 14-01467-05504
v.	:	
	:	Portable No. 1 Mine
WALKER STONE COMPANY, INC.,	:	
Respondent	:	

ORDER OF DISMISSAL
ORDER TO PAY

This case came before me pursuant to a Commission Order dated February 16, 1990. On February 21, 1990, the Solicitor and operator were ordered to submit information and the operator was ordered to file an answer to the penalty petition. On March 13, 1990, the operator was granted an extension to file its answer, order for it to review a recently issued decision in another one of its cases. (Walker Stone Company, 12 FMSHRC 256 (February 1990)) In a letter dated May 14, 1990, the operator, advises that it has decided not to pursue this matter.

In light of the foregoing it is ORDERED that this case be DISMISSED, and that the operator PAY \$178 within 30 days of the date of this order.



Paul Merlin

Chief 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

June 15, 1990

KATHLEEN I. TARMANN, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 89-56-DM
: :
INTERNATIONAL SALT COMPANY, : MD 89-10
Respondent :
: Cleveland Mine

DECISION

Appearances: Daniel Kalk, Esq., Valore, Moss & Kalk, Cleveland,
Ohio for Complainant;
Joseph S. Ruggie, Jr., Esq., Thompson, Hine and
Flory, Cleveland, Ohio for Respondent.

Before: Judge Melick

This case is before me following remand by the Commission on January 8, 1990, (and by subsequent reassignment to the undersigned on April 26, 1990) for a determination of whether in fact a binding settlement agreement had been reached between the parties. In its Remand Order the Commission observed, quoting from Peabody Coal Company, 8 FMSHRC 1265 at page 1266 (1986) that "the record must reflect and the Commission must be assured that a motion for settlement [approval], in fact represents a genuine agreement between the parties, a true meaning of the minds as to its provisions." More particularly, at issue in this case is whether a binding settlement agreement was consummated during an October 26, 1989, teleconference between then counsel for the Complainant, Richard Valore, and then counsel for the Respondent Keith Ashmus.

The validity of a settlement or release agreement is in the first instance governed by the applicable contract law and that law is ordinarily the law of the place where it is made--in this case the State of Ohio. Williston on Contracts, Third Edition § 1792. U.S. v. ITT Continental Baking Company 420 U.S. 223, 238 (1975); Glazer v. J.C. Bradford and Co., 616 F.2d 167, 169 (5th Cir. 1980); Village of Kaktovika v. Watt 689 F.2d 222, 230 (D.C. Cir. 1982). In certain cases involving litigants under a nationwide federal program however, federal law may control. U.S. v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979); Mid South Towing v. Harwin, Inc., 733 F.2d 386, 389 (5th Cir. 1984),

Fulgance v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. 1981). Since there is no conflict in the basic principles of contract law here at issue there is no need to decide in this preliminary analysis which law is applicable.

In this case, upon reviewing the evidence introduced at hearings on the issue, I find that the Respondent has failed to sustain its burden of proving that a sufficiently definite and certain offer was made that could in any event result in a binding settlement agreement. In this regard when given the opportunity at hearing to set the background and to specifically describe the terms of the settlement "offer", the Respondent's principal witness, Mr. Ashmus, responded in the following colloquy:

[By Mr. Ruggel] Q. Did you subsequently receive authority from International Salt Company to settle for \$3,000?

[Mr. Ashmus] A. Under certain circumstances, yes.

Q. And what were those circumstances?

A. Well, they did not want to pay anything directly to the Complainant, Miss Tarmann; they said that the money would have to go to Mr. Valore for attorney's fees and then he could do whatever he wanted with the money; they said they wanted to make sure that she would not welch on the agreement because of past experiences with her, and they said we had to make sure it would settle all of the claims.

Q. Did you then call Mr. Valore to discuss this matter and communicate that to him?

A. Yeah. I called him on the next day, which would have been the 2 --

Q. 26?

A. 26. And told him that, and I said I specifically --

THE COURT: Told him what?

A. Told him that I -- that the client had indicated a willingness to go along with the figure but that the offer hasn't come from their side, it had to have authority from his client, it had to be payment to him and it had to cover everything.

Q. After you reviewed each of those points of agreement that your client had authorized to you, did Mr. Valore have a response?

A. Yeah, he said he'd get back to me.

Q. Did he, in fact, get back to you?

A. Yes, he did.

Q. And what was his response when he did get back to you?

THE COURT: Was that on the same day?

A. Same day, a little later in the morning. He said that he had talked to his client and that she was accepting of it, and we went over all four points again, and I said, "Fine. Then I'm authorized to accept the offer." And we talked a little bit about the fact that it was \$3,000 and he was going to have to get something to his client, and so I was going to prepare the release documents so that he wouldn't have to put in any time doing that. And he said to get the money to him as quickly as possible so that we could get everything signed up, and I said that I would get the check to him as soon as I could and that at the latest I would get it to him would be on Monday.

Q. And did you, in fact, get the check to him as well as the release document even before Monday?

A. Yes, that was delivered to his office on Friday.
(Tr. 24-26).

Within this framework of evidence I cannot find that a sufficiently definite or certain offer had been made, whether by Mr. Ashmus or, as Respondent claims, by Mr. Valore, during the telephone conversations on October 26, 1989. See General Motors Corp. v. Keener Motors, Inc., 194 F.2d 669 (6th Cir. 1952); Lyles v. Commercial Lovelace Motor Freight Inc., 684 F.2d 501, 504 (7th Cir. 1982); U.S. v. Orr Construction Co., 560 F.2d 765, 769 (7th Cir. 1977). Accordingly no contract could have been consummated during these telephone conversations.

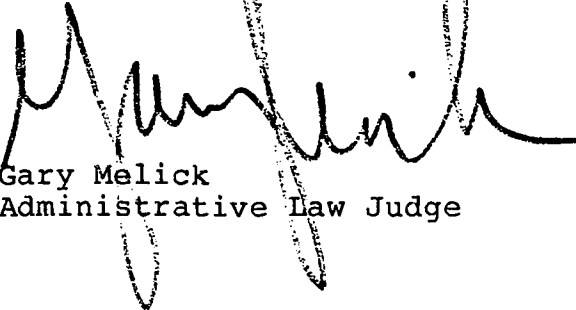
It is apparent from the record, moreover, that the parties contemplated that there would be no binding agreement until committed to writing and signed by the Complainant herself. This was the understanding of Mr. Valore according to his testimony at hearing and also the clear inference to be drawn from Mr. Ashmus'

version of the October 26, 1989, telephone conversations. The fact that a precisely drawn written offer, providing details not discussed during the teleconferences was thereafter prepared by Mr. Ashmus and delivered to Valore corroborates this. Significantly that document states that this case "has been or will be settled" thereby further indicating an existing lack of finality. (Appendix A)

There is in any event an overriding public interest under the Federal Mine Safety and Health Act of 1977 and in particular under the provisions of Section 105(c) of that Act, warranting Commission overview and approval of all settlement agreements. It would indeed be difficult to find in any case that this public interest would be served by compelling enforcement of any settlement when the individual miner/complainant has not accepted the proposed agreement. See Peabody Coal Co., 8 FMSHRC 1265, 1266 (1986); Secretary on behalf of John Koerner v. Arch Mineral Coal Co., Docket No. DENV 78-564 (March 1979). (Appendix B). Williston on Contracts, supra, Section 1792. It is clear from the credible testimony of the Complainant herein that she neither offered nor accepted any settlement agreement.

ORDER

Respondent International Salt Company has failed to sustain its burden of proving that a binding settlement agreement existed in the captioned proceeding and accordingly this case will proceed with trial on the merits as previously scheduled commencing August 28, 1990, at 9:00 a.m. in Cleveland, Ohio.



Gary Melick
Administrative Law Judge

Distribution:

Daniel Kalk, Esq., Valore, Moss & Kalk, 75 Public Square,
Suite 300, Cleveland, OH 44113 (Certified Mail)

Joseph A. Ruggie, Esq., Thompson, Hine and Flory, 1100 National
City Bank Building, 629 Euclid Avenue, Cleveland, OH 44114-0370
(Certified Mail)

nt

APPENDIX A

October 27, 1989

(216) 566-5723

VIA MESSENGER

A. Richard Valore, Esq.
Valore, Moss & Kalk
75 Public Square, Suite 300
Cleveland, Ohio 44113

Re: Kathleen I. Tarmann v. International Salt Company

Dear Dick:

Enclosed are three duplicate originals of the Release in the above-captioned matter, plus a check drawn to your order in the amount of \$3,000.00. Please hold the check in escrow pending the execution of the Release by Ms. Tarmann (including its witnessing, approval by you and notarization), and the return of two executed originals to me. At that time, you may then negotiate the check.

Please call me if you have any questions.

Very truly yours,

Keith A. Ashmus

KAA/cah

Enclosures

RELEASE

DO NOT SIGN WITHOUT READING AND UNDERSTANDING

I, KATHLEEN I. TARMANN, on behalf of myself and my heirs, successors and assigns, in consideration of the payment of attorneys' fees to my attorney, A. Richard Valore, Esq., in the amount of THREE THOUSAND AND NO/100 DOLLARS (\$3,000.00), the receipt of and sufficiency of which are hereby acknowledged, hereby release and forever discharge AKZO Corporation, International Salt Company, and their officers, directors, shareholders, agents, assigns, subsidiaries and affiliates (collectively referred to hereafter as "AKZO") from all claims, costs, damages, demands, liabilities and causes of action, including claims for attorneys' fees, which I now have or ever had from the beginning of the world to the date of this Release, including, without limitation on the general nature of this Release, any and all claims, costs, damages, demands, liabilities or causes of action arising out of or connected in any way with:

1. Any subject matter that was or could have been raised in my complaint in the case of Kathleen I. Tarmann v. International Salt Company, Docket No. LAKE 89-56-DM, MD-10, U.S. Mine Safety & Health Review Commission, which case has been or will be settled and dismissed with prejudice and which I agree never to refile in any form or forum;

2. Any subject matter that was or could have been raised in my complaint in the case of Kathleen I. Tarmann v. International Salt Company, Charge No. 220891426, U.S. Equal Employment Opportunity Commission, which case has been or will be settled and dismissed with prejudice and which I agree never to refile in any form or forum;

3. Any subject matter that was or could have been raised in my complaint in the case of Kathleen I. Tarmann v. International Salt Company, Case No. 8-CA-21410, National Labor Relations Board, which case has been or will be settled and dismissed with prejudice and which I agree never to refile in any form or forum;

4. My employment with AKZO;

5. The termination of my employment with AKZO and my reinstatement to employment;

6. My membership and activity in Teamsters Union Local No. 436;
and

7. Any other claim that AKZO violated any statutory, contractual or common law obligation owed to me, including, without limitation, any civil rights, labor relations or employment contract law.

Initials

Page 1 of 3 Pages

I warrant the following:

1. That no promise or inducement has been offered to me except as herein set forth;

2. That this Release is executed without reliance upon any statement by the parties released or their representatives except as herein set forth;

3. That I am legally competent to execute this Release and accept full responsibility for doing so;

4. That this Release evidences the compromise of claims disputed both as to liability and amount;

5. That AKZO does not admit to any liability or wrongdoing whatsoever; and

6. That I have not assigned or attempted to assign any claim or part thereof that I have or claim to have against AKZO.

I acknowledge that the terms of the settlement of my claims are confidential and agree not to reveal the existence of the settlement or the terms to any person.

I have read and understand the terms of this Release.

IN WITNESS WHEREOF, I have set my hand this _____ day of _____, 1989, at _____, Ohio.

Witness

Kathleen I. Tarmann

Witness

APPROVED TO AS FORM:

Valore, Moss & Kalk
A. Richard Valore, Esq.
Counsel for Kathleen I. Tarmann

Initials

Page 2 of 3 Pages

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

BEFORE ME, a Notary Public in and for said County, personally appeared KATHLEEN I. TARMANN, who swore to the accuracy of the statements contained in the foregoing instrument, acknowledged that she read, understood and personally signed the foregoing instrument and affirmed that the same was and is her free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal
this _____ day of _____, 1989, at _____, Ohio.

Notary Public

(SEAL)

Initials

Page 3 of 3 Pages

APPENDIX B

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW. 5TH FLOOR
WASHINGTON, D.C. 20006

March 9, 1979

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	
On behalf of John Koerner,	:	No. DENV 78-564
Applicant	:	
	:	
v.	:	
	:	
ARCH MINERAL COAL COMPANY,	:	
Respondent	:	

DIRECTION FOR REVIEW AND ORDER

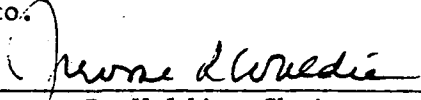
The decision of the Administrative Law Judge, dated February 7, 1979, is directed for review. We find that the Judge's decision may be contrary to law or Commission policy, or that a novel question of policy is presented.

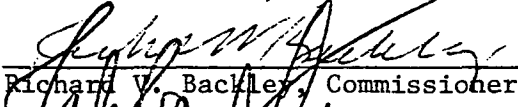
On September 12, 1978, the Secretary filed with the Commission his findings that John Koerner had brought a complaint of unlawful discrimination by Arch Mineral Coal Company, and that the complaint was not frivolously brought. He moved that Mr. Koerner be reinstated to his former position, or equivalent position, until a final Commission order on the complaint is issued. The motion was granted. On January 31, 1979, the Secretary filed a motion to vacate the order of reinstatement. The only stated basis for the motion was that "the parties have successfully negotiated a settlement of all matters formally in issue." Judge Malcolm P. Littlefield noted the ground for the motion, stated that "[a]s a result [of the settlement], continuation of the reinstatement order serves no purpose", and granted the motion to vacate. The terms of the settlement were not entered into the record; the record also does not disclose whether Mr. Koerner agreed to or acquiesced in the motion to vacate the reinstatement order.


The issue is: Were there sufficient grounds to grant the motion?

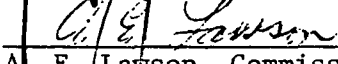
The Commission concludes that the record should be supplemented before we resolve this issue. Accordingly, we remand this case to Judge Littlefield for the limited purpose of supplementing the record

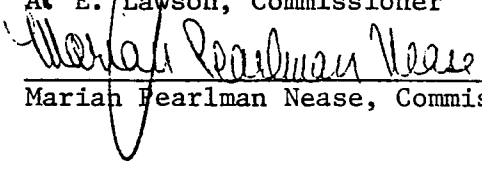
with answers to the following questions: What are the terms of the settlement agreement? Did Mr. Koerner agree to or acquiesce in the motion to vacate the order of reinstatement? The Commission otherwise retains jurisdiction of this case. The parties need not file briefs unless the Commission requests them to.


Jerome R. Waldie, Chairman


Richard V. Backley, Commissioner


Frank R. Westrahl, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

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 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 89-261
Petitioner	:	A. C. No. 15-11065-03577
v.	:	
	:	No. 10 Mine
SHAMROCK COAL COMPANY, INC.,	:	
Respondent	:	
	:	

DECISION

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

Before: Judge Weisberger

Statement of the Case

On October 19, 1989, the Secretary (Petitioner) filed a Proposal for Assessment of Civil Penalty alleging the Operator (Respondent) violated various provisions of Volume 30 of the Code of Federal Regulations. Respondent filed an Answer on November 15, 1989. Pursuant to notice, the case was scheduled for a hearing on February 14, 1990, in Bristol, Virginia. On February 5, 1990, Respondent filed a Motion to have the hearing scheduled at some place other than Bristol, Virginia, on the ground that the driving time between Respondent's home office and Bristol, Virginia, is approximately 3 hours. Respondent indicated that Petitioner did not have any objections to the Motion. The hearing was subsequently rescheduled for Richmond, Kentucky, and the matter was heard on February 14, 1990. At the hearing, John Walter Peck testified for Petitioner, and Elmer Richard Couch and Gordon Couch testified for Respondent. Petitioner filed Proposed Findings of Fact and a Memorandum of Law on May 14, 1990. Respondent did not file any brief or Proposed Findings of Fact.

Stipulations

1. The history of previous violations of this Operator is shown in Government's Exhibit 1.

2. The penalties proposed by the Secretary for the violations upheld are appropriate to the size of the business of the Operator, and will not affect the Operator's ability to continue in business.

3. The Operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations, where appropriate.

4. The size of this operation is shown in the pleadings: for 1988, this Operator produced 22,631,844 tons; and at the No. 10 Mine, where these citations arose, the Operator produced 1,438,937 tons in 1988.

Citation Nos. 9983904 and 3205192

At the commencement of the hearing, Counsel indicated that a settlement had been reached with regard to Citation Nos. 9983904 and 3205192. The Operator had agreed to pay in full the assessed penalties of \$79 and \$112 respectively. I have considered the representations made by Counsel, at the hearing as well as the documentation in this matter, and the criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act), and conclude that the proffered settlement and the agreed upon penalties are appropriate.

Citation Nos. 3202975 and 3205191

On May 23, 1990, Petitioner filed a Joint Motion to Approve Settlement. A reduction in penalty from \$290 to \$150 is proposed. I have considered the representations and documentation submitted in this matter, and I conclude that the proffered settlement, and the agreed upon penalty, are appropriate under the criteria set forth in Section 110(i) of the Act.

Citation No. 3205138

I.

On July 10, 1989, John Walter Peck, an MSHA Inspector, inspected the surface area of Respondent's No. 10 Mine. He issued a Section 104(a) citation alleging a violation of 30 C.F.R. § 77.205(b) in that "travelways," to areas where persons are required to travel or work, were not kept clean of stumbling or slipping hazards. Specifically the citation alleges that seven foot wooden posts, sections of round pipe, coiled cable, concrete blocks, and "assorted equipment parts," and communication wire were "in the travelway used to reach number 1 head drive and the area where work persons load/unload man trips" (sic).

30 C.F.R. § 77.205(b), provides as follows: "Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

According to Peck, the number 1 belt conveyor head-drive, at the surface area, is enclosed by a fence. Entry to the belt, for examination each shift, and for maintenance work, is by way of a gate in the fence. According to Peck the "travelway" or "walkway" to the gate was "obstructed" with material, (Tr. 33), and it was not possible to walk to the gate from the yard without stepping on the items designated in Government Exhibit 11. He indicated that one would have to climb over the crib blocks and miscellaneous items to reach the gate. On direct examination, he testified that "immediately in front" of the gate, he observed crib blocks of the dimensions of 6 inches by 6 inches by 30 inches. (Tr. 21). On cross-examination, he indicated that there were 2 or 3 such crib blocks located 4 to 6 feet from the gate. I accord more weight to this latter testimony as to the specific distance of the crib blocks to the gate, rather than Peck's general testimony on direct examination. Hence, taking into account the fact that the crib blocks were approximately 4 to 6 feet from the gate, and considering that there is no testimony with regard to the configuration of the blocks or the manner in which they were arranged, I cannot find that they constituted a stumbling or slipping hazard.

According to Peck, two metal battery stands and a battery charger were located 2 to 3 feet from the crib blocks. Inasmuch as there was no evidence presented as to the shape and dimensions of these items, I cannot conclude that they constituted stumbling or slipping hazards. Similarly, although Peck indicated that there was some wire within the fenced area, however, there was no evidence presented as to its size, shape, and specific location vis-a-vis a path that could be taken from the gate to the belt or to some other area within the fence requiring maintenance work. Thus, I cannot conclude that the wire constituted a stumbling or slipping hazard.

Peck indicated that a trailing cable containing 200 feet in a coil was in the area, and one going to the gate could stumble over it or become entangled in it. Inasmuch as there is no evidence of the dimension of the surface area in question, nor is there any evidence in the record as to the spatial relationship between the trailing cable and the gate, I cannot conclude that the cable was in any path that would be traveled by miners seeking access to the gate. Nor is there evidence that miners perform any work duties in the surface area in question, aside from the fenced in area.

According to Peck, a 20 inch section of a plastic water pipe, with a 2 inch diameter, was within the fenced area. Elmer Richard Couch, Respondent's superintendent in charge of the No. 10 Mine, indicated that a pipe was not within the fenced area when he checked it out. There is no evidence that he checked it out at the time of Peck's inspection. Thus, I find Couch's testimony to be insufficient to contradict the testimony of Peck, that he observed the pipe in question when he made his inspection. I thus find that there was a water pipe of the dimension testified to by Peck within the fenced area, which, considering its length, and cylindrical shape, could constitute a stumbling or slipping hazard.

Peck testified that he observed miners exiting from a rail runner. In essence, he indicated that he saw miners climbing and crawling over timber which had been placed on either side of the track within 2 feet of the rail runner. According to the uncontradicted testimony of Peck, there were 16 timbers of approximately 6 inches in diameter and 67 feet in length. The timbers were located unevenly on either side of the rail runner. They had been stacked one on top of another to a pile of approximately 4 feet high. Some of the timbers were on the ground. I find that the pile of timbers, in the path taken by the men exiting the rail runner as observed by Peck, constituted a slipping or stumbling hazard.

Inasmuch as the area in question contained timbers and a pipe in areas where men work and travel, and these items are stumbling and slipping hazards, I find that Respondent herein did violate section 77.205(b), supra.

II.

According to Peck, a person tripping or stumbling could easily fall on the battery charger, which had sharp edges, causing lacerations or broken bones. He indicated, on cross-examination, that there was a very good likelihood that someone stumbling over the hazardous equipment could have injured himself. He indicated that a person climbing over the timbers in exiting the rail runner could have fallen backwards and struck the rail runner. He opined that, in such an event, it was very possible there would be a serious injury, such as a laceration or broken bones. I find, with regard to the pipe and timbers, that, upon tripping or stumbling, one could have fallen against a battery charger or other objects. It has not been established that there was a reasonable likelihood that a person would stumble or slip over this material, rather than walk over it or around it. Further, due to the lack of evidence of the dimensions of the battery charger and stands, and their distance from the pipes, and other materials, I cannot conclude that there was a reasonable likelihood of one stumbling and sustaining serious injury.

Further, I find, based on the uncontradicted testimony of Couch, that normally it was the procedure for the rail runner to stop between a battery charger and the truck haul-way, and not alongside the timbers. Further, I note, as testified to by Couch, that the rail runner has a length of approximately 25 feet. There is no evidence that the 7 foot timbers were stacked in such a fashion as to have stretched over a 25 foot distance parallel to the tracks. Accordingly, the men exiting the rail runner, from its edges at either side, would not necessarily have been in the path of the stacked timbers. For these reasons, I conclude that Petitioner has not established that the violation herein was significant and substantial (See, Mathies Coal Corporation, 6 FMSHRC 1, 3-4, (1984)).

III.

There is no evidence before me with regard to the length of time that the material in question had been in place prior to its' being observed by Peck. I consider too hypothetical Peck's statement that, given the amount of material in question, it ". . . would had to have accumulated over a two or three shift period" (Tr. 27). Further, as noted, Couch's testimony was not contradicted that usually the rail runner did not park alongside the stacked timbers. I thus find that Respondent herein acted with only a moderate degree of negligence. Taking into account the remaining factors in 110(i) of the Act, I conclude that a penalty of \$80 is appropriate.

Citation No. 3205139

Peck testified that on July 10, 1989, he examined the Daily Report of the preshift examiner, and noted that the reports of the preshift examinations from June 30, 1989 to July 10, 1989, were signed by the preshift examiner, but were not countersigned by either the foreman or superintendent. Couch indicated that he was the superintendent and line foreman on July 10, 1989. He indicated that among his duties were to check the preshift reports to see if any hazards or dangerous conditions were noted by the preshift examiner. He indicated that, unless there were dangerous conditions, which required immediate attention, it was his normal practice to countersign the preshift examination report between 5:50 a.m. and 6:20 a.m. He said that on July 10, he did countersign the report between 5:50 a.m. and 6:30 a.m. He indicated that prior to Peck's inspection on July 10, previous MSHA Inspectors had considered it acceptable for him to countersign. I observed the demeanor of the witnesses and find Couch's testimony to be credible with regard to his countersigning the reports on July 10.

Peck issued Citation No. 3205140 alleging a violation of 30 C.F.R. § 57.323, on the ground that the reports in question were not countersigned by the foreman.

Section 57.323, supra, in its first sentence requires the mine foreman to countersign the Daily Report. In the last sentence, it requires the mine superintendent or assistant superintendent to also countersign the reports. Although Couch indicated that he was the mine foreman, he nonetheless testified that in the period in question, Jerry Farmer was the section foreman, and he (Peck) was the superintendent in charge of all three shifts. I find that a plain reading of Section 75.323 requires that both the mine superintendent and foreman countersign the reports. Inasmuch as Farmer was the foreman, he was obligated to countersign the reports. Inasmuch as the latter did not countersign the reports from June 30 to July 10, I find Respondent herein violated section 75.323 as alleged. Considering the statutory factors set forth in section 110(i) of the Act, I conclude that a penalty of \$20 is appropriate.

Citation No. 3205140

Peck testified that in the two or three times he had visited the mine in the year prior to July 10, 1989, he had observed timbers standing on the left side of the haulage track. He indicated that on July 10, in a 500 foot area, some of these timber posts were on the ground and some were missing. He said that he observed men walking along the left side of the haulage track. He also observed draw-rock, ranging from 6 inches by 1 inch to 18 inches by 3 inches by 3 feet, in various areas of the roof. He required the Operator to scale down the draw-rock, as he opined that this loose material could cause a fatality. He indicated that the roof, consisting of shale material, had deteriorated, and thus timbers were necessary for support. In this connection, he indicated that timbers functioned in the same way as bolts in supporting the roof.

Peck issued Citation No. 3205140 alleging a violation of 30 C.F.R. § 75.202(a) in that at least 56 posts "installed as additional roof support" were observed lying on the mine floor. 30 C.F.R. § 75.202(a) provides, in essence, that the roof or 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."

Gordon Couch, Respondent's safety director, acknowledged that there was deterioration of the roof caused by differing moisture conditions in the winter and summer. He indicated, however, that in addition to the proper setting of roof bolts as required by the roof control plan, additional bolts were provided as well as strapping. According to Couch, the timbers, which were not treated, were accordingly subject to rot, and were not to be used permanently. He indicated that when the section in

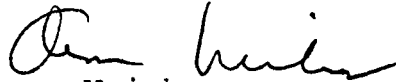
question was "rehabilitated" (Tr. 123) in 1983 or 1984, timber jacks were used when the area was bolted, as the bolter did not have an automatic temporary roof support. He indicated that the deterioration of the roof is controlled by scaling down the draw-rock, and that timbers prevent deterioration only for the diameter of the timber.

It appears from the testimony of both witnesses, that when observed by Peck, the roof in question did suffer from deterioration, and contained draw-rock which presents a hazard of falling. In light of this condition, I conclude that the support present on July 10, had not been adequate to prevent deterioration and draw-rock. Accordingly, the roof was not being adequately supported. Thus, I find that on July 10, as observed by Peck, Respondent was in violation of section 75.202(a) as alleged.

Considering the presence of significant amounts of draw-rock, I conclude that the violation herein was of a moderate level of gravity. Considering the remaining statutory factors of section 110(i) of the Act, I conclude that a penalty herein of \$112, as assessed, is appropriate.

ORDER

It is ORDERED that, within 30 days of this Decision, Respondent pay the sum of \$553, as civil penalty for the violations found herein.



Avram Weisberger
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Neville Smith, Esq., Smith & Smith, Shamrock Coal Company, Inc., 110 Lawyer Street, Manchester, KY 40962 (Certified Mail)

dcp

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 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 89-176
Petitioner	:	A.C. No. 46-06596-03513
v.	:	
	:	Pretzel Excavating Mine No. 1
PRETZEL EXCAVATING,	:	
Respondent	:	

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Petitioner;
Edward Andrew Moss, Safety Consultant, Pretzel
Excavating, Morgantown, West Virginia, for the
Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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 for four alleged violations of certain mandatory safety standards found in Parts 77 and 50, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations and a hearing was held in Morgantown, West Virginia. The parties waived the filing of posthearing briefs. However, I have considered the oral argument made by the parties during the course of the hearing in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standard, (2) whether two of the alleged violations were "significant and substantial" (S&S), (3) whether one violation was the result of the respondent's

unwarrantable failure to comply with the cited standard, and (4) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

The parties settled two of the alleged violations in this case, namely, section 104(a) non-S&S Citation No. 3100981, January 17, 1989, 30 C.F.R. § 50.20, and section 104(a) non-S&S Citation No. 3100743, March 7, 1989, 30 C.F.R. § 77.1110. The respondent agreed to pay the full amount of the proposed civil penalty assessments for the violations in question. Pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the settlement was approved from the bench, and my bench decision in this regard is herein affirmed (Tr. 5). The remaining contested citations which are the subject of this case are as follows:

Section 104(d)(1) "S&S" Citation No. 3119190, October 31, 1988, 30 C.F.R. § 77.1605(k):

A berm or guard is not provided on the right outer bank of the elevated roadway beginning at the top of the hill near the sedimentation pond and extending toward the main road a distance of approximately 1/10 of a mile. The berm is also inadequate at the outer selected areas where the berm had weathered down. All of the cited areas were shown to an agent of the operator. These conditions were observed at pit 010-0 (Howesville job).

Section 104(b) Order No. 3113195, November 2, 1988, 30 C.F.R. § 77.1605(k).

No effort had been made to provide berms or guards on the right outer bank of the elevated roadway beginning at the top of the hill near the sedimentation pond and extending toward the main road a distance of approximately 1/10 of a mile. No effort had been made to provide additional berms at three selected areas where the berms had weathered down. These conditions

existed at pit 010-0 (Howesville job). Vehicles used to transport persons had been used over this haul road. The abatement for such violation (Number 3113190, dated 10-31-88) had expired.

Section 104(a) "S&S" Citation No. 3113191, October 31, 1988,
30 C.F.R. § 77.410.

The D9H dozer (Serial Number 90V5231) was not equipped with an automatic warning device which gave an audible alarm when the equipment was put in reverse (back-up alarm). The back-up alarm was present and would sound an alarm when a switch was engaged but would not alarm automatically when the equipment was put in reverse. This condition existed at pit 020-0 (campground job).

Section 104(b) Order No. 3113194, November 2, 1988,
30 C.F.R. § 77.410.

An inadequate effort had been made to provide the D9H dozer (Serial Number 90V5231) with an operational automatic warning device which gave an audible alarm when the equipment is put in reverse (back-up alarm). The abatement time for such violation (Number 3113191), dated 10-31-88, had expired. The dozer was working in pit 020-0 (campground job).

Petitioner's Testimony and Evidence

MSHA Surface Mine Inspector Ronald V. Marrara, confirmed that he has inspected the respondent's mine since January, 1982, and his last regular inspection was in December, 1989. He confirmed that he issued the berm citation after finding "clear and obvious" major deterioration on the elevated haulage road in and out of the pit work area. There were three road areas where the berm "had weathered to almost nothing," and as he approached the final grade up the hill "there was no berm at all on the elevated roadway" (Tr. 18). Mr. Marrara identified exhibit 1-B as a diagram of the haulage road and pit area in question, and he stated that there were no berms at all on the left side of the roadway going to the pit for a distance of approximately 500 feet. The three additional areas where the berm had deteriorated covered distances of approximately 8 to 12 feet, and the entire berm along the roadway was "weathered and could have used an upgrading" (Tr. 19).

Mr. Marrara stated that the slopes at the three areas which were cited were "around a grade of a hundred percent, about a forty-five degree angle," and at the road elevation where there was no berm "it varied from probably forty to fifty percent grade, which would have been about twenty-two degrees to about

twenty-six or twenty-seven degrees." He believed that the cited conditions presented a reasonable likelihood of injury, because of the severe slopes, rocks and trees, and he believed that if a truck went off the roadway, there was a danger that it would roll over. He was aware of a number of accidents at other mine locations where injuries have occurred when trucks ran off the road (Tr. 21-22).

Mr. Marrara stated that he made a finding of "high negligence" because he had conducted a prior inspection of the same haulage road in May, 1988. Although the berms at the three cited locations were adequate at that time, work was in progress at the other 500 foot cited area, and he discussed the berm requirements with Mr. Pretzel. He also had cited Mr. Pretzel for berm violations in the past (Tr. 23). Mr. Marrara stated that the three cited locations had weathered down during the intervening period between May and October, 1988, and he saw no evidence that any berm had ever been provided at the cited 500 foot area. He stated that he spoke with Willard Wolf, the certified dozer man in charge of the site, and that Mr. Wolf "was hesitant to give me information that would indicate a berm had ever been placed there" (Tr. 24).

Mr. Marrara confirmed that he fixed the abatement time for the violation for Wednesday, November 2, 1988, 2 days after the citation was issued, and that he discussed it with Mr. Wolf. Mr. Marrara believed that abatement could have been achieved within 4 to 6 hours, but since he knew that any work would need the approval of Mr. Pretzel, he allowed additional time. He explained that abatement could have been achieved by providing guardrails or mounds of materials capable of restraining a vehicle. Mr. Wolf advised him that an operational dozer was available, and Mr. Marrara determined that an operational grader was available, and that earth and dirt materials were available at different sections on the roadway (Tr. 26).

Mr. Marrara stated that when he returned to the site on November 2, 1988, he observed that no effort had been made to abate the violation. Mr. Wolf was working in the pit area operating a dozer, and a contract driller had two men drilling in the pit preparing for a shot. These men had to traverse the roadway to reach the pit area. Mr. Wolf told him that he had been instructed by Mr. Pretzel to continue with the operation of the pit (Tr. 27).

Mr. Marrara stated that he spoke with Mr. Pretzel after the violation was abated, and informed him that his failure to take any action to abate the violation was very serious. Mr. Pretzel informed him that the endloader bucket was in disrepair and that he wanted to use it to repair the berm. Mr. Pretzel also informed him that he was only one capable of operating the grader

which was at the site, but that he was hesitant to do the work because he had a job at another site "making money" (Tr. 28).

Mr. Marrara confirmed that Mrs. Pretzel called his office on November 1, 1988, and left a message for him to call her. He had already left his office and was unaware of the message until the end of the day on November 2. He confirmed that he provided his home phone number to Mr. Pretzel, and that Mr. Pretzel has called him at home in the past (Tr. 29). He assumed that Mrs. Pretzel worked for the respondent and that she wanted to discuss the situation. He did discuss the matter with her at the work site after he had issued the order (Tr. 31).

Mr. Marrara confirmed that even if Mrs. Pretzel had spoken with him, he would not have granted an extension for the abatement because he did not believe it would have been warranted. If the site were not in operation, or if he observed work taking place to abate the violation, he would have extended the abatement time. He would also have considered extending the time if there had been some misunderstanding, or Mr. Wolf had shutdown and called Mr. Pretzel. However, in this case, the respondent simply continued to work and there appeared to be no effort made to abate the cited conditions (Tr. 32).

Mr. Marrara stated that he spoke with Mrs. Pretzel after the order was issued, and she informed him that she had called him to inform him that the berm violation was not abated because of some problems with reclamation, but she did not elaborate further. With regard to the unavailability of the endloader, Mr. Marrara did not believe it was necessary because the dozer and grader were more than adequate to build a berm, and he was told the endloader would be out of service for a week or longer (Tr. 34). Mr. Marrara stated that Mr. Wolf was in charge of the site in the absence of Mr. Pretzel, and that when he discussed the abatement time with him, Mr. Wolf would make no commitment as to when he believed the violations would be abated because he needed Mr. Pretzel's approval (Tr. 35-36).

Mr. Marrara stated that the entire haulage road is approximately three-quarters of a mile from the county road to the pit, and less than half of it is elevated. Little effort is needed to determine where to construct berms because they were provided previously and he specifically showed Mr. Wolf the road areas that required berms. Mr. Marrara confirmed that the violation was abated within a day, and that it took several hours. Mr. Marrara confirmed that he based his "unwarrantable failure" finding on the fact that he had discussed the necessity of berms with Mr. Pretzel during his prior May inspection, and that both Mr. Pretzel and Mr. Wolf knew that berms were required (Tr. 39). It was obvious that the three cited locations were in need of berms, and he specifically discussed the need for berms at the "top of the hill" with Mr. Pretzel in the past (Tr. 40).

On cross-examination, Mr. Marrara stated that an "adequate berm" pursuant to the standard is a "mound of material capable of restraining a vehicle" (Tr. 43). He confirmed that because of the weather conditions the road will develop ruts and become marginally eroded and will create the appearance of berms, but he denied that these were the conditions of the roadway at the time the violation was issued (Tr. 45). He explained the methods used to create berms and he conceded that the use of an endloader is the fastest method for constructing a berm (Tr. 48). He believed that there were adequate and available materials and equipment to construct the berms, particularly at the 500 foot location at the top of the hill. The roadway was approximately 20 to 30 feet wide, but the width varied (Tr. 49-50).

Mr. Marrara confirmed that a blasting crew and trucks used the roadway the day after the inspection and that eventually, coal trucks would have been using it. The roadway was posted with speed limit signs and it had established truck passing locations (Tr. 53). He confirmed that he did not measure the berms which had "weathered," and he estimated that they were "less than six inches high." He confirmed that the berms in these areas were adequate in May, and that they simply "weathered down to the point where they were inadequate" at the time of the inspection, and that it was a matter of maintenance. He also confirmed that he still uses the "axle height" standard for berms, and that a coal truck wheel height is about 32 inches, and an axle height berm would be one 16 inches or more in height (Tr. 55). It was clear to him that this standard was not met in this case (Tr. 56).

With regard to the back-up alarm violation, the inspector confirmed that while inspecting the cited dozer he asked the operator to operate it in reverse. Although the alarm sounded, the inspector felt that "the procedure he used was not quite smooth" (Tr. 57). The inspector then got into the operator's cab with the driver and when the machine was placed in reverse, the backup alarm did not sound. The inspector discovered that the operator had to manually engage a toggle switch to sound the alarm. The dozer operator and the person in charge of the work site admitted to the inspector that Mr. Pretzel instructed them to install the toggle switch on the dozer. They further explained that the toggle switch cost \$2, and that a proper switch cost \$27 to \$28. The inspector confirmed that the toggle switch was not standard equipment for the dozer (Tr. 58-59).

The inspector explained the basis for his "significant and substantial" violation finding, and he stated that the dozer was operating in the pit area in and around equipment and men, and that the equipment operators would have occasion to leave their vehicles and would be exposed to a hazard. Although the dozer was not operating near the auger crews, there would be occasions

when it would be operated near them. In addition, coal truck drivers would be exposed to a hazard while they were in the pit where the dozer was working, and they would often be out of their vehicles on foot. He believed that lost time injuries such as broken bones or lacerations would likely occur, and that fatalities have occurred in his district when a backup alarm was not used. He confirmed that the dozer operator does not have a clear view to the rear of the machine, and that one person would be exposed to a hazard (Tr. 60-64).

The inspector confirmed that he made a negligence finding of "moderate" because he was unable to speak directly with Mr. Pretzel about the violation. He stated that he should have made a finding of "high" negligence because Mr. Pretzel deliberately altered the equipment by installing the toggle switch. The inspector believed that Mr. Pretzel should have known that the switch was not lawful because he had discussed it with him on numerous occasions and told him that the backup alarm must be automatic. The inspector could not recall specifically discussing a toggle switch, and he indicated that he had cited the respondent for previous backup alarm violations, but had never cited him for using a toggle switch (Tr. 65-66).

The inspector believed that abatement could have been achieved in 30 minutes or an hour by simply replacing the switch with a pair of pliers, a screwdriver, and wrenches, and that these tools are available at all strip jobs. When he returned after issuing the citation, abatement had not been achieved and the dozer was working in the pit area in and around the endloader and coal trucks which were being loaded, and the backup alarm was not sounding while the dozer was backing up. However, when the operator saw him, he began using it. The person in charge and the dozer operator informed him that they had the new switch with them but were given no tools to install it, and that Mr. Pretzel had instructed them to continue working. Since the abatement time passed, and the condition had not been corrected, the inspector issued the order (Tr. 69).

On cross-examination, the inspector confirmed that when he issued the citation, the dozer and endloader were working in close proximity of each other, and at different times were within a matter of feet apart while working together to prepare for coal loading the next day (Tr. 70). The auger crew was some distance away and were not exposed to any hazard. However, he has known people to stop and talk while on the ground in the proximity of a working dozer, but not at this operation (Tr. 73).

The inspector explained the operation of the toggle switch, and he confirmed that when it was switched to the "on" position, the backup alarm would sound at all times, regardless of whether the dozer was operating backward or forward. The inspector believed that the dozer operator was being deceitful by turning

the switch on when he reversed the machine, and that he did this to make him believe that the alarm was automatic, when in fact it was not (Tr. 77-79). The inspector confirmed that in order to comply with the standard, the switch must be automatic so that the backup alarm sounds when the machine is put in reverse without the operator engaging the toggle switch (Tr. 80-83).

The inspector confirmed that the existence of the toggle switch per se was not a violation, and that he issued the violation because the backup alarm was not automatic and the switch was installed in lieu of the automatic alarm. However, the toggle switch was the only control mechanism for the alarm, and since it was not operating automatically, it was improper (Tr. 85-89).

Respondent's Testimony and Evidence

David A. Pretzel, respondent's owner and operator, confirmed that he strips coal and does excavating work. He stated that he was not at the site when the berm citation was issued and did not discuss it with Inspector Marrara. He confirmed that he has constructed many berms and that a safe berm "is a judgment call" when it is constructed. In his opinion, the cited berms were "good or better than they were on the previous inspection." He stated that he graded the roadway and that there have always been berms on the roadway. The cited hill location was graded and backfilled, and after putting topsoil on it, it raised the outside edge of the roadway 18 inches and "it can still be seen just the way it was then" (Tr. 89-91).

With regard to the backup alarm citation, Mr. Pretzel conceded that the toggle switch was installed on the cited dozer. He explained that it was installed because he also uses the dozer off mine property doing work for the general public and they do not want to hear the horn sounding. He stated that the toggle switch was installed on the machine in 1982, but he could not recall whether that particular dozer had been cited during prior MSHA inspections (Tr. 92).

On cross-examination, Mr. Pretzel stated that he could not recall speaking with the inspector about the berm conditions. He believed that the roadway had been graded "within a month or less" prior to the inspection, and that the berms on the roadway have never been less than 2 feet. He confirmed that the citations were given to his wife, that he did not go to the site to view the cited conditions, and that the roadway was partially fixed when he saw it. He did not discuss the cited berm conditions with Mr. Wolf and could not determine where the berms were constructed because the entire roadway had been regraded (Tr. 94-95).

Mr. Pretzel stated that he asked his wife to call MSHA, and he expected to obtain an extension to abate the cited conditions. He confirmed that he had spoken with the inspector in the past but did not attempt to reach him at home because his wife called his office and left a message for him (Tr. 96-97).

Mr. Pretzel stated that the toggle switch shuts off a "working" automatic alarm which he installed on the dozer. He believed that it was working on the day the citation issued. He confirmed that his wife took a new automatic alarm to the job site, but he could not recall whether it was installed (Tr. 98). He did not speak with Mr. Dean, the person in charge of the work site, because "my wife gave him orders what to do" (Tr. 99).

In response to further questions, Mr. Pretzel stated that he did not know whether the new automatic alarm was ever installed on the cited dozer. With regard to the berm conditions, he confirmed that he was not present when the citation was issued, but that a week earlier the berms were in place on the roadway and it did not storm or rain before the inspection (Tr. 101-104). He did not know if the alarm would stay on all the time when the toggle switch was engaged, and while it was possible that there was a short in the wire, he was not present when the inspector issued the violation (Tr. 105).

Charlene D. Pretzel, confirmed that she keeps the books for her husband's company and helps run the business. She stated that the citations were given to her by the men in charge of the work sites. She stated that she made three telephone calls to the inspector's office in order to obtain an extension for abating the berm citation because the respondent wanted to use the highlift to construct the berm. She confirmed that her husband would have returned to the job site within a week or two and that the repairs to the highlift bucket would have taken at least a week (Tr. 109-111).

With regard to the backup alarm violation, Mrs. Pretzel stated that the morning after receiving the citation, a new switch was purchased, and she took it to the job site and told the dozer operator to install it. She believed that the dozer operator should have been able to install the new switch and she told him "if you can't put it on, park it" (Tr. 113).

On cross-examination, Mrs. Pretzel stated that if the dozer operator were unable to repair the switch, he would have gone home and would not have been paid unless he remained at the site and worked (Tr. 114). She confirmed that the dozer operator told her that the "wrong kind of switch" was on the dozer, and her husband told her what kind of new switch to purchase (Tr. 118).

Mrs. Pretzel had no knowledge of the inspector speaking with her husband in the past with regard to the berms, and she confirmed that she has never discussed the matter with the inspector because she is usually "in and out of the job" (Tr. 118).

Willard Wolf, testified that he was employed by the respondent when the berm violation was issued. He stated that he has 26 years of surface mining experience, and in his opinion the berms on the haulage road in question "were good berms, good enough at least" on the day of the inspection (Tr. 121).

On cross-examination, Mr. Wolf stated that he has worked for the respondent for 3 years and that the mine is a non-union operation. In response to further questions, Mr. Wolf stated that the inspector came back to the site the day after issuing the violation and told him that if he did not fix the berms he would shut the site down. Mr. Wolf confirmed that the inspector "did close us down from working" but that he was permitted to work on the road and constructed the berms that same day. When asked why he not installed them earlier, he responded "I wasn't told to. I mean, there was berms there." He denied that he told the inspector that he made no effort to repair the berms (Tr. 123).

The inspector was recalled by the Court, and he confirmed that while he had no reason to doubt that Mrs. Pretzel made the telephone calls to his office, even if she had connected with him, it would have made no difference since he believed the respondent had an obligation to take care of the berms. He would not have extended the abatement time unless the respondent had stopped work, but once the orders were issued, it made no difference whether the work was shutdown. He confirmed that he informed Mrs. Pretzel that pursuant to the Act there was a "possible potential" for a fine of \$1,000 a day for each of the violations (Tr. 127).

The inspector confirmed that his inspection notes reflect that he issued the prior berm citations to the respondent in August, 1987 and August, 1985, and that he has discussed the berms with Mr. Pretzel on numerous occasions. He further confirmed that he has conducted 15 regular inspections at the respondent's site and that "not one regular inspection goes by that I don't mention berms one way or another to almost all operators that I inspect" (Tr. 128). He specifically recalled speaking to Mr. Pretzel in May, 1988 about berms at the cited locations (Tr. 128).

Petitioner's Arguments

In response to my request, the petitioner submitted a post-hearing argument in support of its position that a section 104(b) withdrawal order may be issued for failure by the respondent to

timely abate a violation cited in a section 104(d)(1) citation. After review of the arguments presented, I agree with the petitioner's position and I conclude and find that the order was procedurally correct.

With regard to the merits of the contested section 104(d)(1) citation regarding the cited berm conditions, the petitioner argued that the evidence presented supports a finding that the berms cited by the inspector at the three locations noted in the citation were "weathered down" and were inadequate. With regard to the cited 500 feet area of the roadway, the petitioner asserts that the evidence establishes that the area was not bermed and that no berms were ever constructed in that area. The petitioner stated that the respondent's testimony that the roadway had been graded and berms were constructed a week prior to the inspection is self-serving. The petitioner points out that Mr. Pretzel's testimony that he wanted to use an endloader to construct the berms and that the endloader was unavailable to timely construct the berms to abate the violation is contradictory because he testified that he used the scraper to construct the berms a week prior to the inspection (Tr. 137-138).

With regard to Mr. Wolf's testimony that he believed the berms adequate, the petitioner argued that Mr. Wolf's recollection was unclear and that he advanced no support for his conclusion that the berms were adequate. Petitioner concludes that the inspector's credible testimony concerning his observations of the condition of the weathered down berms at the three cited roadway locations, and the lack of any berm along 500 feet of the roadway, should be credited over the testimony of Mr. Wolf and that it clearly establishes a violation.

With regard to the inspector's "S&S" finding, the petitioner asserted that the existence of the slopes along the unprotected roadway establishes that there was a reasonable likelihood of an injury and that the respondent has not seriously challenged the inspector's reasonable belief that if a truck were out of control and left the roadway it could roll over and cause at least moderately severe injuries, and under certain circumstances, could reasonably result in serious or fatal injuries to the driver (Tr. 138).

With regard to the respondent's negligence for the violation, and the inspector's unwarrantable failure finding, the petitioner argued that the evidence supports a finding of high negligence and aggravated conduct because the inspector had previously discussed the need for berms along the cited roadway with Mr. Pretzel and advised him as to the need for maintaining and repairing the berms. The petitioner asserted that it was not unreasonable for the inspector to believe that the respondent would heed his advice and take care of the berms in a timely manner (Tr. 139).

The petitioner concedes that the respondent made an attempt to contact the inspector after the citation was issued by calling his office and leaving a message. However, the petitioner takes the position that notwithstanding these telephone calls, the respondent had an obligation to timely correct and abate the cited conditions and could have contacted the inspector at his home, as it had done on prior occasions, if it had problems in timely abating the conditions. The petitioner concluded that the telephone messages left at the inspector's office while he was absent on other inspectors were "belated and halfhearted" and do not meet the standard of making reasonable efforts to abate the cited berm conditions. The petitioner believed that the required abatement was a "fairly simply matter" and that the respondent has not established that it had insufficient time to comply and timely abate the conditions (Tr. 140).

With regard to the backup alarm violation, the petitioner asserts that the evidence and testimony establishes that the cited equipment did not have a working automatic backup alarm and was simply equipped with an alarm operated by a toggle switch which was manually activated to sound the alarm, and that the backup alarm would only sound if the toggle switch were manually turned on. The petitioner pointed out that the cited machine was not in fact equipped with an automatic alarm which would automatically sound when the machine operated in reverse and that the cited standard required the installation and use of an automatic alarm. The petitioner concluded that assuming an automatic alarm was installed on the machine, the evidence clearly establishes that it was not working and was not activated automatically when the machine was operated in reverse (Tr. 140-141). The petitioner pointed out that the toggle switch was being used in substitution for the automatic alarm switch and that this was contrary to the requirements of the cited standard (Tr. 142).

With regard to the respondent's negligence, the petitioner argued that the violation was the result of at least moderate negligence by the respondent (Tr. 143). With regard to the abatement, the petitioner argued that Mrs. Pretzel did not give anyone any clear order to repair the alarm, and that the operator continued to work without the device (Tr. 150).

Respondent's Arguments

The respondent's representative requested that I take into consideration the fact that the respondent is a small coal mine operator with an annual mine production of 30,000 tons. Although he agreed that the payment of the full amount of the proposed civil penalty assessments will not put the respondent out of business, he nonetheless argued that the magnitude of the proposed assessments will have a direct economic cost impact on the respondent's mining operation (Tr. 153-154).

The respondent's representative took the position that the cited berm conditions present an honest difference of opinion and disagreement between the inspector and the respondent with respect to the adequacy of the berms. He further asserted that the use of the dozer by Mr. Wolf to construct the berms resulted in "chopping up" the road and the further deterioration of the berms, but that the violation was abated. He pointed out that the respondent telephoned the inspector in an attempt to explain that he wished to use the endloader rather than the scrapper to abate the violation and construct the berms and to request an extension of the abatement time (Tr. 150-152).

With regard to the backup alarm violation, the respondent asserted that Mrs. Pretzel, gave the equipment operator a new switch and instructed him to fix it, and that if he could not do so, she instructed him to shut the machine down (Tr. 153).

Findings and Conclusions

Fact of Violation - Citation No. 3113190, 30 C.F.R. § 77.1605(k)

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 77.1605(k), which states that "berms or guards shall be provided on the outer bank of elevated roadways." The term "berm" is defined in 30 C.F.R. § 77.2(d) as "a pile or mound of material capable of restraining a vehicle."

In Secretary of Labor v. United States Steel Corporation, 5 FMSHRC 3, 6, January 27, 1983, the Commission noted as follows:

"Restraining a vehicle" does not mean, as U.S. Steel suggests, absolute prevention of overtravel by all vehicles under all circumstances. Given the heavy weights and large sizes of many mine vehicles, that would probably be an unattainable regulatory goal. Rather, the standard requires reasonable control and guidance of vehicular motion.

And, at 5 FMSHRC 5:

We hold that the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard.

* * * * *

Under our interpretation of the standard, the adequacy of an operator's berms or guards should thus be evaluated in each case by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute. When alleging a violation of the standard, the Secretary is required to present evidence showing that the operator's berms or guards do not measure up to the kind that a reasonably prudent person would provide under the circumstances. This evidence could include accepted safety standards in the field of road construction, considerations unique to the mining industry, and the circumstances at the operator's mine. Various construction factors could bear upon what a reasonable person would do, such as the condition of the roadway in issue, the roadway's elevation and angle of incline, and the amount, type, and size of traffic using the roadway.

Respondent's owner, David Pretzel, asserted that the cited roadway locations have always had berms, and that he constructed them by grading the roadway and using topsoil to raise the outside edges to 18 inches. He also contended that the berms have never been less than 2 feet high, and that the roadway had been graded within a month or so prior to the inspection. However, the record reflects that Mr. Pretzel was not present when the inspector viewed and cited the conditions, and Mr. Pretzel conceded that he did not visit the site to view the conditions when they were cited by the inspector, and that he did not discuss the conditions with the inspector.

Mr. Pretzel further testified that the citation was served on his wife. Although she testified in this case, she said nothing about the conditions of the roadway, nor did she dispute the findings of the inspector with respect to the berms. Mrs. Pretzel testified that her husband was working at another site, and that she instructed an employee "to take the dozer and go out and try to get a bigger berm on the road" (Tr. 110). Coupled with her attempts to contact the inspector for an extension to enable the respondent to use another piece of equipment to construct the berms, I believe that it is reasonable to conclude that Mrs. Pretzel, who went to the mine shortly after the inspector arrived, did not disagree with the inspector's observations of the berm conditions which he cited. As for the testimony of Mr. Wolf, he simply believed that "there was berms there," and I find nothing in his testimony to rebut the testimony of the inspector.

I conclude and find that the testimony of the inspector who personally observed the cited conditions during the course of his inspection of the respondent's mining operation is credible and probative, and it clearly supports his finding that no berm or

guard was provided on the right outer bank of the elevated roadway at the location cited by the inspector. I also conclude and find that the inspector's testimony also establishes that the berms at the other locations which he observed and were inadequate. The lack of berms at the one cited location, and the inadequate berms at the other cited locations, constitute violations of section 77.1605(k). Under all of these circumstances, the citation issued by the inspector IS AFFIRMED.

Fact of Violation - Citation No. 3113191, 30 C.F.R. § 77.410

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 77.410, for failing to equip a bulldozer with an automatic warning device (backup alarm) which gives an audible alarm when the equipment is operated in reverse. The cited standard provides as follows:

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

The inspector confirmed that the cited bulldozer was not equipped with an automatic backup alarm which would automatically sound when the machine was operated in reverse. After inspecting the machine, he found that a toggle switch had been installed, and that the machine operator was required to manually activate the alarm by using the toggle switch. Mr. Pretzel did not dispute the existence of the toggle switch, and in fact admitted that it was installed in 1982, so that the backup alarm could be turned off when the machine was used on other jobs off mine property.

The inspector testified that the toggle switch was "simply an off and on switch for the backup alarm," and that the automatic alarm device which was apparently installed on the machine was "wired out" and that the toggle switch was "wired direct so all you had was an off and on switch" (Tr. 147). The inspector confirmed that when the toggle switch was turned on the alarm sounded, and when the switch was turned off, the alarm would not sound. He stated that when the machine operator initially sounded the alarm while backing up the machine he did so by turning the toggle switch on. When the inspector inspected the machine and switch, he found that the operator sounded the alarm by activating the toggle switch manually and that this switch was not an automatic device since the automatic device itself had been "completely wired out of the system" (Tr. 148).

I conclude and find that the credible and probative testimony of the inspector clearly establishes that the cited machine was not equipped with a functional automatic backup alarm or

device that sounded automatically when the machine was operated in reverse. I further conclude and find that a violation of section 77.410, has been established, and the citation issued by the inspector 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).

Citation No. 3113190, 30 C.F.R. § 77.1605(k)

The inspector found that the berms at the three haulage road locations which he described "had weathered down to nothing," and that the location where the grade of the road went up a hill had no berm at all. The inspector's un rebutted testimony establishes that there was a reasonable likelihood of an injury because of the severe unprotected road slopes, and the presence of trees and rocks. He believed that if a truck went off the roadway, particularly at the location of the unprotected hill, there was a danger that the truck would roll over once the truck left the unprotected roadway, and he was aware of a number of accidents at other mines under these same conditions. Under the circumstances, I conclude and find that the violation was significant and substantial. I agree with the inspector's finding, and IT IS AFFIRMED.

Citation No. 3113191, 30 C.F.R. § 77.410

The respondent has not rebutted the inspector's credible testimony that the bulldozer which was not equipped with an automatic audible backup alarm was operating in a pit area in and around other equipment where other employees or a contractor auger crew would have occasion to be present on foot. The inspector also believed that the dozer operator did not have a clear view to the rear of the machine, and that in the event he were to operate the machine in reverse without the benefit of an automatic backup alarm, an employee would likely be exposed to lost time injuries such as lacerations or broken bones if he were struck by the machine. While it is true that the machine sounded an alarm when the inspector requested the operator to operate it in reverse, the inspector found that the operator had manually activated the alarm by using a toggle switch. In my view, reliance on such a device, which required the operator to manually activate the backup alarm, would not insure that the alarm would sound when the machine was operating in reverse and the operator could not see someone on foot to the rear of the machine. If he does not have the toggle switch turned on when he backs up, he could very well run over someone, and that individual would have no assurance that the alarm will automatically sound. Under the circumstances, I agree with the inspector's significant and substantial finding, and IT IS AFFIRMED.

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 subsequent 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." Energy 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. * * *

Violation of 30 C.F.R. § 77.1605(k)

The petitioner takes the position that the violation resulted from a high degree of negligence amounting to aggravated conduct on the part of the respondent. In support of this conclusion, the petitioner relies on the inspector's testimony that he based his high negligence finding on the fact that he had previously inspected the haulage road in May, 1988, and discussed the berm requirements with Mr. Pretzel, and that he previously cited the respondent for violations of the berm standard.

The inspector's notes (exhibit P-3), reflect that he cited the respondent for previous berm violations on August 17, 1987, and August 12, 1985. However, copies of the citations were not produced or offered for the record in this case, and the inspector presented no further details with respect to these previously cited conditions. Although these prior citations may support a conclusion that the respondent had knowledge of the berm requirements found in section 77.1605(k), in the absence of any further information or evidence that the prior citations concerned the same berm locations cited in the instant case, I am not persuaded that they support a finding of aggravated conduct and have given them little weight. I take note of the fact that in this case, the inspector confirmed that the haulage road in question was posted with speed limit signs and that the respondent provided designated truck passing locations along the roadway. This indicates to me that the respondent made an effort to insure safe travel along the haulage road, notwithstanding the absence of berms at one location, and the deteriorated berms at the other cited locations.

With regard to the inspector's prior discussions with Mr. Pretzel concerning the maintenance of the berms, and notwithstanding Mr. Pretzel's lapse of memory that he ever discussed the berm conditions with the inspector, I find the inspector's testimony and corroborating notes, which reflect that he did discuss the matter with Mr. Pretzel, to be credible. Although it may be true that Mr. Pretzel may not have spoken to the inspector immediately following the issuance of the contested citation in this case, I am not convinced that he has never spoken to the inspector in the past about the berms on the haulage road in question, and I believe the inspector's testimony that he spoke to Mr. Pretzel during his prior inspection in May, 1988.

The inspector confirmed that he based his unwarrantable failure finding on the fact that he had discussed the necessity for berms with Mr. Pretzel during his prior May, 1988, inspection, and that he specifically discussed the need for berms at the cited locations. The inspector conceded that the question of what constitutes an "adequate" berm is subject to interpretation, and given the subjective definition of the term "berm" as found

in section 77.2(d), I am of the view that individual judgments may differ from day-to-day as to the "adequacy" of a berm, particularly when they may be subjected to adverse weather conditions.

I take particular note of the fact that in this case the inspector confirmed that the berms at the three locations which he cited during his inspection in this case were adequate when he last observed them during his prior May, 1988, inspection, when he discussed them with Mr. Pretzel, and that "work was being done at the location where the one-tenth of a mile berm was" (Tr. 23). The inspector confirmed that the berm had "weathered down" during the intervening months between inspections, and I believe that his principal concern was that the respondent was not maintaining the berms after they were initially constructed. Although the inspector was of the opinion that no berm had ever been constructed along the one-tenth of a mile elevated area which he also cited during his October 31, 1988, inspection, his prior testimony that work was taking place during his May inspection "where the one-tenth of a mile berm was," suggests that a berm may have at one time been constructed at that location. Further, the apparent failure by the inspector to issue a citation for the lack of a berm at that location raises an inference that a berm was either in place or was being worked on at the time of his May inspection. In these circumstances, I cannot conclude that the prior discussions by the inspector with Mr. Pretzel establishes any basis to support a conclusion of aggravated conduct with respect to the violation in question in this case. To the contrary, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care amounting to "thoughtlessness" and "inattention" for not insuring that the berms were constructed and maintained to the heights required by the cited standard, rather than on "inexcusable" or aggravated conduct. Under the circumstances, the inspector's unwarrantable failure finding IS VACATED, and the section 104(d)(1) citation IS MODIFIED to a section 104(a) citation, with significant and substantial (S&S) findings.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

The available evidence reflects that the respondent is a small strip mine operator who also engaged in excavation work. An MSHA Proposed Assessment Data Sheet, exhibit P-13, reflects that the respondent's total 1988 annual mine production was approximately 31,313 man-hours/tonnage. I conclude and find that the respondent is a small mine operator, and in the absence of any evidence to the contrary, I further conclude and find that the payment of the civil penalty assessments for the violations which have been affirmed in this case will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The petitioner did not submit a computer print-out listing the respondent's prior compliance record. However, the aforementioned exhibit P-13, reflects that the respondent was assessed civil penalties for a total of nine (9) prior violations issued during the years 1986 through 1988. I conclude and find that the respondent has a good overall compliance record and I have taken this into consideration in this case.

Gravity

In view of my significant and substantial (S&S) findings, I conclude and find that Citation Nos. 3119190 and 3119191, were serious violations.

Negligence

I conclude and find that Citation No. 3119190, concerning the violation of the berm standard, 30 C.F.R. § 77.1605(k), was the result of the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence.

With regard to Citation No. 3113191, for the failure by the respondent to provide an automatic backup alarm on the cited bulldozer, the inspector made a finding of "moderate" negligence because he was unable to speak directly with Mr. Pretzel about the violation. I take note of the fact that the inspector testified that "on reflection," he should have made a finding of "high negligence" because Mr. Pretzel deliberately altered the alarm which was provided on the equipment by installing a toggle switch on the alarm. Although the inspector believed that Mr. Pretzel should have known that the toggle switch was not lawful because he had discussed the need for automatic backup alarms with him "on numerous occasions" and had previously cited the respondent for prior backup alarm violations, the inspector could not recall specifically discussing toggle switches with Mr. Pretzel, and he conceded that the prior citations did not involve the use of such a device. Copies of these prior citations were not produced or introduced as part of the record in this case. Under the circumstances, I find no probative evidence to support any finding of "high" negligence. I conclude and find that the violation resulted from the failure by the respondent to exercise reasonable care, and that this amounts to ordinary negligence.

Good Faith Compliance

The record reflects that the inspector issued two section 104(b) orders after finding that the respondent made no effort to timely abate the violations, and there is no evidence that the respondent filed any timely contests challenging the inspector's issuance of the orders.

Although the respondent made an effort to contact the inspector with respect to the order issued for the berm violation, the fact remains that the respondent continued working after the order was issued, and the inspector found no evidence of any attempts by the respondent to repair the berms when he next visited the mine. In my view, and notwithstanding the respondent's efforts to contact the inspector at his office, the respondent had a duty to at least begin work on the berms in order to abate the cited conditions. Mr. Pretzel offered no reasonable explanation as to why he did not attempt to contact the inspector at his home as he had apparently done in the past. Under the circumstances, I cannot conclude that the respondent exhibited good faith in timely abating the berm conditions, and its belated attempts to contact the inspector, rather than proceeding with the abatement work, is no excuse or defense to its failure to take timely abatement action.

With regard to the backup alarm violation, Mrs. Pretzel purchased a new automatic backup alarm, but she simply gave it to the machine operator with instructions to install it or to park the machine. Mrs. Pretzel believed that the operator was capable of installing the new switch, and there is no credible evidence that tools were not readily available to do the job. However, the new switch was not installed, and when the inspector next returned to the mine, he found the machine operating in the pit area with the old switch which was cited still on it.

Mr. Pretzel could not recall whether the newly purchased switch was ever installed on the cited dozer, and he did not speak with the employee who was in charge of the work where the machine was being used. As the mine operators, both Mr. and Mrs. Pretzel had a duty to insure that the newly purchased automatic alarm was timely installed on the machine. I find no credible excuse for their failure to do so. I conclude and find that the respondent failed to exercise good faith in timely abating the cited condition.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalties are reasonable and appropriate for the two contested violations which have been affirmed, and for the two violations which have been settled:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3113190	10/31/88	77.1605(k)	\$500
3113191	10/31/88	77.410	\$400
3100981	01/17/89	50.20	\$ 20
3100743	03/07/89	77.1110	\$ 20


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
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JUN 21 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 88-276
Petitioner	:	A.C. No. 05-00301-03652
	:	
v.	:	Dutch Creek No. 1 Mine
	:	
MID-CONTINENT RESOURCES,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

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

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor (Secretary) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Mid-Continent Resources, Inc. (Mid-Continent) with eight violations of mandatory standards and proposing civil penalties totaling \$10,700 for the violations.

Mid-Continent filed a timely answer to the Secretary's proposal for penalty denying the violations. After notice to the parties an evidentiary hearing on the merits was held in Glenwood Springs, Colorado, on September 20 and 21, 1989. Both parties filed helpful post-hearing briefs and submitted the matter for decision.

I

At the September 1989 hearing the parties reached a settlement of Citation No. 03223646 which alleges a Section 104(a) violation of 30 C.F.R. § 75.301. The parties agreed that Mid-Continent would pay as a civil penalty for this violation \$1,020. In addition, prior to the hearing, the parties agreed to settle six of the eight citations/orders originally charged in this docket by payment of 60 percent of the initial proposed penalty as follows:

<u>Citation/Order No.</u>	<u>Proposed Penalty</u>	<u>Amended Proposed Penalty</u>
03223176	\$ 800.00	\$ 480.00
03223542	\$1,300.00	\$ 780.00
03223598	\$1,700.00	\$1,020.00
03223641	\$1,300.00	\$ 780.00
03223644	\$1,100.00	\$ 660.00
03223647	\$1,300.00	\$ 780.00

The parties agreed that each citation/order accurately reflects a violation of the standard as alleged therein, and that each penalty as amended is appropriate for the corresponding violation under section 110(i) of its Act.

At the hearing, the parties advised that all eight citations/orders have been abated. I have considered the representations and documentation submitted and I conclude that the proffered settlement disposition of the seven citations/orders referenced above is consistent with the criteria in § 110(i) of the Act. I therefore assess the approved amended proposed penalties specified above.

II

Section 104(d)(2) Order No. 3223214

The remaining issues all involve Order No. 322314 which charges a 104(d)(2) violation of 30 C.F.R. § 75.1105.

Issues

The issues presented in these proceedings include the following:

1. Whether the conditions cited constitute a violation of the safety standard as alleged in the order and notice of civil penalty.
2. If a violation is found, whether it is of a "significant and substantial" nature.
3. If a violation is found, whether the contested 104(d)(2) order resulted from an unwarrantable failure by Mid-Continent to comply with the cited standard.
4. The appropriate civil penalty that should be assessed, taking into consideration the statutory civil penalty criteria found in section 110(i) of the Act.

Stipulation

At the hearing the parties entered the following stipulations into the record:

1. Mid-Continent is subject to the jurisdiction of the Act and the Commission;
2. The Dutch Creek No. 1 Mine is located near Redstone, Colorado, and had for the year 1987 - 277,194 tons of coal production.
3. At the time 104(d)(2) Order No. 3223214 was issued Mid-Continent was validly within a so-called "d" series provided for by section 104(d) of the Act.
4. The condition underlying the subject orders have been timely abated.

Factual Background

Federal Coal Mine Safety and Health Inspector Phillip R. Gibson conducted an inspection of Mid-Continent's Dutch Creek No. 1 Mine. At that time, the Dutch Creek No. 1 Mine was one of two underground coal mines actively operated by Mid-Continent--the other was the Dutch Creek No. 2 Mine. The Dutch Creek No. 1 Mine operated solely in the so-called Coal Basin "B" coal seam. The Dutch Creek No. 2 Mine operated in the Coal Basin "M" seam, the upper of the two coal seams mined by Mid-Continent.

These two mines were subsequently consolidated by the interception, at depth, of the two mines by the so-called Rock Tunnels Project/Coal Basin Adit.

During the inspection of the Dutch Creek No. 1 Mine, Inspector Gibson issued 104(d)(2) Order No. 3223214 alleging a violation of mandatory safety standard 30 C.F.R. § 75.1105. The narrative allegations of this order reads as follows:

The underground permanent pump for the air-lock doors between No. 6 and No. 7 slopes in in crosscut No. 64 was not housed in a fire-proof structure or area. The intake air was coursed over the permanent pump installation and not coursed directly into the return (No. 7 slope).

On the order form [MSHA Form 7000-3, Mar-85 (Rev.)], the inspector checked the Gravity (Form Item 10) as follows: Injury or illness as "Reasonably Likely," Injury or illness [which] could reasonably be expected as "Permanently Disabling," and the number of Persons Affected as "10." The inspector checked that the Negligence (Form Item, 11) was "High."

30 C.F.R. § 75.1105, a verbatim restatement of section 311(c) of the Act, 30 U.S.C. § 871, provides:

§ 75.1105. Housing of underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps.

[STATUTORY PROVISIONS]

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

The Situs of the Alleged Violation

In the Dutch Creek No. 1 Mine there are seven slope entries which constitute the slopes section. These entries are driven down-dip into the coal seam from its surface outcrop. The entries are numbered, from left to right (as one faces the coal face) Nos. 1 through 7. Slope Entries Nos. 1 and 7, the two outside entries, are return aircourses through which ventilating air is "sucked" by separate exhausting fans. Entries Nos. 2 through 6 are intake aircourses. No. 4 Entry contained the conveyor belts which had historically hauled mined-coal upward, out of the mine via the portals at the surface outcrop of the coal seam.

The airlock doors referred to in the order consist of two heavy metal doors, each of which standing alone effectively controls the passage of air through the entry in which they are located between Nos. 6 and 7 slopes. These airlock doors are

situated just outby the 103 longwall tailgate return entries at the 64th-crosscut of the slope section. 1/

By raising and lowering the airlock doors mobile equipment can travel through the airlock from the intake side to the return side, or vice-versa, without short-circuiting the mine ventilation between intake and the return air courses. Thus, the doors separate and prevent the interception of the airflow between the number 6 intake air course and the number 7 return air course.

The "permanent pump" identified in the subject order and which definition frames the issue to be decided in this proceeding provides the hydraulic power which raises and lowers the airlock doors. 2/

This hydraulic power unit or pump (sometimes hereinafter referred to as the "unit") is located next to the airlock doors in the number 6 slope which is an intake air course. The air traveling in the number 6 air course passes over the unit and on into the face area, longwall 103, which is the only active area in the mine. The air is then returned to the exhaust fan, away from the working face through the return air course, slope No. 7. It is undisputed that the hydraulic power unit was ventilated into the intake air and not into the return air of the number 7 slope.

When asked how the airlock doors operate, Inspector Gibson testified:

1/ This is not a heavy traffic area; the heavy traffic is in the headgate area.

2/ Mid-Continent asked for and received early on a continuing objection to the reference by the Secretary's witnesses of the hydraulic power unit as a "permanent pump." Therefore, this repeated characterization does not per se carry any evidentiary weight.

A. These doors operate by hydraulic pressure supplied from a hydraulic pump which was powered by an electric motor. The hydraulic pump supplied hydraulic fluid to a cylinder to which one end was attached a wire rope. The other end of the wire rope was attached to the door and a directional valve was engaged causing the cylinder to raise or lower the door.

The hydraulic unit was located approximately 1000 to 1500 feet from the 103 longwall area, the only active working area of the mine. Any air coursing over the unit would normally continue down the six slope entry toward the working face.

The unit was fastened to a metal platform or skid that was resting on the coal floor. The unit had a 10 horse power electric motor, a hydraulic pump with a hydraulic reservoir. The entire unit was 30 inches wide and 36 inches long and approximately 18 to 20 inches high. The unit was stationary, not of the type that is moved around the mine. It contained a control box with circuit breakers and various electrical components. It is undisputed that it was not a permissible pump. At the time of inspection it was not housed nor enclosed in any structure.

The hydraulic unit in question is sold as a stock item by the equipment manufacturer and is described in the manufacturer's sales brochure entitled "Belt Conveyor Systems for Mining and Construction Industry" (Ex. R-4) as follows:

HYDRAULIC POWER UNITS

The Continental hydraulic take-up power unit provides an accurate, reliable system for proper tensioning of your belt system. Improper tensions, whether high or low, are severely damaging to the belt, as well as other components such as pulleys, shafts and bearings. A system of pressure sensing switches provides constant monitoring of the hydraulic circuit. The low pressure switch starts the hydraulic pump when a minimum safe operating level is reached. The high pressure switch stops pump action when the maximum level is attained. This system provides an intermittent operating motor and pump as opposed to a continuous system. This results in greatly reducing maintenance problems. All units are factory set and tested based on the individual customer's tension requirements.

All hydraulic unit components including the accumulator are integrally mounted on a common welded steel skid type base. The unit is designed to be compatible with either water-in-oil type fire resistant fluids or standard hydraulic fluids. Units are available in either 440 volt, 550 volt A.C., or 250 volt D.C. (Emphasis added).

Discussion

The prime issue before me is whether the power unit that raises and lowers the airlock doors is a "permanent pump" within the meaning of 30 C.F.R. § 75.1105. If the inspector's characterization of the power unit as a permanent pump is accurate and proper, 30 C.F.R. § 75.1105 is applicable, and the basic allegations of the subject order must be deemed valid. The facts are uncontroverted that the enclosure and ventilation requirements of this regulation were not met. If, however, this unit is not a "permanent pump" with the meaning of 30 C.F.R. § 75.1105, the section is, of course, inapplicable and the subject order must fail. ^{3/}

Mid-Continent, on the other hand, asserted throughout the hearing and in its briefs that this installation is not a "permanent pump" within the proper meaning of 30 C.F.R. § 75.1105, but rather a "hydraulic power unit" which is not subject to the enclosure and ventilation requirements of this regulation. In support of its position, Mid-Continent presented expert testimony by a registered, professional engineer, a graduate of the Colorado School of Mines, concerning the differences between the operation of the airlock doors' power unit and what is normally associated with a pump. Mid-Continent also introduced an equipment manufacturer's descriptive literature which described this type of unit as a "hydraulic power unit."

Mid-Continent also presented evidence of what it asserts to be the inconsistency between Inspector Gibson's interpretation under 30 C.F.R. § 75.1105 and MSHA's demonstrated enforcement policies over the past 10 years. It was Mid-Continent's position that such inconsistency further demonstrated the inapplicability of 30 C.F.R. § 75.1105 to this airlock door's power unit.

^{3/} Mid-Continent challenges both the "significant and substantial" and "unwarrantable" characterizations of the alleged violation. These issues are reached, however, only if a violation of 30 C.F.R. § 75.1105 is first established.

The Secretary presented the testimony of MSHA Inspectors Gibson and Elswick with regard to the characterization of this installation as a permanent pump. Inspector Gibson testified as follows:

Q. Now, your order refers to this being a pump. Tell us why you called it a pump.

A. It's several components together. It's looked at as a pump. Since the hydraulic pump that pumps the hydraulic fluid out of the hydraulic reservoir is powered by the electric motor, the entire composition is referred to as a pump. [Emphasis added.]

The testimony of the electrical specialist, Inspector Elswick, on this important issue was limited to the following:

Q. The pump that you observed and the one Mr. Gibson described, will you tell us please what--describe that pump. What's its makeup? What does it include?

A. Includes electrical control box, a 10 horsepower electrical motor, hydraulic pump, and a hydraulic tank reservoir mounted on a main frame.

Q. Okay. Now, Mr. Gibson referred to this particular item we're talking about as a pump. Is this something you would refer to as a pump?

A. Common miner's language it's a belt take-up unit.

Q. Okay. Is it a pump, though?

A. Yes, it is a pump.

Q. Okay. And, is it a permanent pump?

A. Yes.

Q. Mr. Elswick, as a mine inspector, do you recognize a permanent pump when you see one?

A. Yes, I do.

Q. Okay. Is there any doubt in your mind that this was a permanent pump?

A. No.

Mid-Continent asserts that no foundation was laid nor evidence presented which would establish that either Gibson or Elswick possessed any expertise in the area of hydraulics. Their opinions were basically ultimate conclusions. It is Mid-Continent's position that their unsupported opinion regarding the designation or characterization of the airlock doors' power unit is not entitled any special or the controlling weight as urged by the Secretary. Mid-Continent argues that the inspector's testimony merely begs the question absent any clear basis for their opinion that this installation is subject to the requirements of 30 C.F.R. § 75.1105.

The designation of the airlock doors' power unit as a "permanent pump" by Inspectors Gibson and Elswick is contradicted by the opinion of Mid-Continent witness David A. Powell, an employee of Mid-Continent, who is a Registered, Professional Engineer in the State of Colorado and a graduate of the Colorado School of Mines. Mid-Continent asserts that contrary to Gibson and Elswick, his education and training, as well as his background in heavy equipment maintenance, establish that Powell possesses expertise in the field of hydraulic equipment and hydraulic systems similar to the air lock doors' power unit in issue.

While describing the functions of the various components of this unit, Powell stated that the airlock door's power unit is, in engineering parlance, normally described as a hydraulic motor. In the literature provided by a manufacturer, this unit is described as a "Hydraulic Power Unit" (Mid-Continent Exhibit R-4).

Mid-Continent contends that, as evidenced by past enforcement, MSHA had not, prior to Gibson's issuance of the subject order, viewed hydraulic power units on either the airlock doors or the belt take-up units as permanent pumps for enclosure and return air ventilation purposes under 30 C.F.R. § 75.1105.

The evidence is uncontroverted that hydraulic power units identical to the one in issue have been used to power airlock doors in the Dutch Creek No. 1 Mine since 1978, and that such units are presently being used throughout the Dutch Creek No. 1 Mine in conveyor belt entries as belt-tensioner or belt take-up units. These belt take-up units are not housed in fireproof enclosures nor is the intake ventilating air specially coursed back into a return air course. This has been the practice since 1983 when Powell came to Mid-Continent Inspector Gibson recalls this practice as far back as approximately 1977.

Prior to the interception of Dutch Creek No. 1 Mine by the Rock Tunnels Project, seven (7) of these hydraulic power units were located in the 4-slope beltline entry; presently, three (3) such units are operated in the Dutch Creek No. 1 Mine. None of these beltline hydraulic power units have been, nor are they currently required by MSHA to comply with the enclosure and ventilation requirements for "permanent pumps" of 30 C.F.R. § 75.1105.

Finally, Mid-Continent contends that Inspector Gibson's interpretation that this hydraulic power unit is a "permanent pump" under 30 C.F.R. § 75.1105 is contrary to MSHA policy set forth in MSHA Program Policy Letter No. P89-V-10, dated April 13, 1989, "Application of 30 C.F.R. § 75.1105." (Mid-Continent Exhibit R-3). In clarifying the regulation section in question, this Program Policy Letter states:

Permissible Pumps

Permissible pumps installed in a permanent manner, with their associated permissible switchgear, are designed, constructed, and tested to assure that such equipment, when properly maintained, will not cause a mine fire or explosion. Therefore, permissible pumps and associated permissible switchgear are of "fire-proof construction" and require no further fireproofing. Permissible pumps and associated permissible switchgear will be required to be ventilated directly into a return aircourse.

Mid-Continent asserts that from this policy letter, it becomes apparent that MSHA intended that the requirements of 30 C.F.R. § 75.1105 affecting permanent pumps applies only to "permissible pumps installed in a permanent manner."

As previously stated, the undisputed evidence clearly shows that the power unit in question is not a permissible pump.

The Secretary's response to Mid-Continent argument that MSHA has not enforced the requirements of the cited standard on other hydraulic power units like the one in question is that this is an argument without substance. The Secretary points out (1) these other pumps may be in violation but are not subject to a current citation, and (2) the other pumps are located in the belt entry, an area that is subject to a separate section of the law, and as is the case here, subject to a petition for modification.

With respect to Mid-Continent's argument, that the unit described in Mr. Gibson's citation is not a pump, the Secretary points to the Bureau of Mines Dictionary of Mining, Mineral, and Related Terms, U.S. Dept. of Interior, which defines pump as "a machine used to impart flowing motion or to accelerate a fluid stream (gas, water, pulp, slurry)." David Powell, a mining engineer for Mid-Continent agreed with this definition and on questioning by Ms. Miller testified in part as follows:

- Q. (by Ms. Miller) ... In general engineering terms, will you tell us what a pump is.
- A. A pump would be a device that would impart acceleration to a fluid stream.
- Q. ... is there any part of this take-up unit that Mr. Gibson cited that does--have that function?
- A. I would say yes, yeah. (Tr. 173).

Conclusion and Finding

Although the hydraulic unit in question has several components, there is no question that at least one significant and essential component of the cited unit is a pump. I find that the unit is a permanent pump and subject to the requirement of the cited regulation. This finding is supported by the testimony of Inspectors Gibson and Elswich, as well as by Mr. Powell, and is consistent with the definition of a pump as defined in the Bureau of Mines Dictionary of Mining, Mineral, and Related Terms, U.S. Dept. of Interior, 1968.

Significant and Substantial

It is the Secretary's position tha Mid-Continent's failure to enclose and vent the airlock doors' power unit in issue in conformance with 30 C.F.R. § 75.1105 constituted a significant and substantial violation of the regulation. The Secretary asserts that the conditions underlying the subject order were such that the electrical components of this airlock doors' power unit could generate a fire which could spread to the working face thereby causing injury to the 10 or more miners working in that area.

Mid-Continent controverts these assertions. It alleges that various mitigating factors, which were not taken into consideration by Inspector Gibson during this overall gravity determination, surround the subject order and reduce the risk of a fire/

smoke hazard being generated by this installation to a de minimus level. 4/ Mid-Continent asserts that the low probability of this hazard was admitted on cross-examination by Inspector Gibson. Mid-Continent argues that the speculative nature of the hazards the inspector relied upon is inconsistent with a significant and substantial hazard as defined in Secretary of Labor, MSHA v. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

Both the Secretary and Mid-Continent correctly cite Cement Division, National Gypsum, Co., 3 FMSHRC, supra, as controlling law regarding the elements of a significant and substantial violation. There the Commission described the nature of such a violation as follows:

[F]or the reasons that follow, we hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

The position advanced by the Secretary--that a violation is of significant and substantial nature, so long as it poses more than a remote or speculative change that an injury or illness will result, no matter how slight that injury or illness--would result in almost all violations being categorized as significant and substantial. Such an interpretation would be inconsistent with the statutory language and with the role we believe the significant and substantial provisions are intended to play in the enforcement scheme. [Emphasis added.].

4/ One important factor is that, should both airlock doors be raised simultaneously, intake air entering the mine via 4-, 5-, and 6-slope entries would short-circuit into 7-slope entry (a return aircourse) and be pulled out of the mine by the exhausting ventilation fan. It would bypass completely the single active mining section in this mine, the 103 Longwall, and never reach the section or the miners working in the section. This location and ability to divert contaminated air (if, for example, containing smoke) directly into the 7-slope return aircourse without exposing the mining section and the miners to the danger or any smoke significantly reduces any potential danger and likelihood of serious injury.

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further 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 reasonable serious nature.

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

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," and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-02 (July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). 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. Texas-gulf, Inc., 10 FMSHRC 498, 500-01 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007, 2011-12 (December 1987). Finally, the Commission has emphasized that 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 Co., 6 FMSHRC 1834, 1836 (August 1984).

The Secretary states in her brief, "The inspectors noted that the hazard--contamination of the escapeway in an emergency situation--was reasonable [sic] likely to occur and that subsequent injuries could be anywhere from smoke inhalation to death. (Secretary Brief, 7-8).

Both Inspectors Elswick and Gibson testified that they are aware of mine fires that have started from electrical equipment/motors "similar" to that in place at the airlock doors' power

unit. If a fire were to start at this power unit, such fire could ignite the surrounding coal ribs. Because the airlock doors' power unit is located on intake air, a fire at this location could contaminate the 103 longwall mining section.

As pointed out in Mid-Continent's brief, the Secretary's analysis overlooks a number of relevant considerations. For example, in her analysis, the Secretary fails to acknowledge that the electrical components of the airlock doors' power unit were equipped with safety features designed to protect against the very malfunctions urged by the Secretary. Under the requirements of Subpart I of 30 C.F.R., the electric motor on the airlock doors' hydraulic power unit possessed ground fault, short-circuit, and motor overload protections; it was subject to regular weekly inspection. There was no evidence that these protection systems were not operating properly.

Also overlooked is the fact that, because of the purpose it served - that of providing access for mobile equipment to the return of the 103 longwall, the airlock doors' power unit operated only intermittently, for short periods of time. It ordinarily operates only in the presence of a mobile equipment operator, which equipment, in accordance with the regulations, was required to have at least one portable fire extinguisher on it.

Given these important factors, the possibility of a fire occurring at this airlock doors' power unit appears to be just that--a mere possibility. Neither inspector in 16 and 18 years of underground coal mining experience had ever seen one of these hydraulic units catch on fire.

When considered with other evidence presented by Mid-Continent, particularly the ability to short-circuit intake air directly into the 7-slope return at these airlock doors, see fn. 4, ante, the possibility that such ignition could adversely affect any miners appears even more remote. As established in part through the testimony of Inspector Elswick, all of the component parts of the airlock doors' power unit were of incombustible steel construction and the hydraulic fluid contained within it was fire-resistant.

Furthermore, although the coal ribs were exposed, the record establishes that Mid-Continent's coal, a medium volatile metallurgical coal, possesses properties which are not susceptible to spontaneous combustion and which, as a general matter, make it extremely difficult to ignite.

Under these facts, the likelihood of a fire/smoke hazard being created by this airlock doors' power unit is nothing more than a possibility. Inspector Gibson testified as follows:

Q. And you say that a fire at this installation was reasonably likely to occur?

A. Yes, sir.

Q. To me, reasonably likely means that it's probable that you're going to have a fire there. Is that what it means to you?

A. I would probably include possible also.

Q. Well, then, if it's possible, what does unlikely mean?

A. That it's not possible.

Q. Well, if unlikely means not possible, what does no likelihood mean?

A. No--not possible.

Q. Okay, then, when you say that the occurrence was reasonably likely, what you're saying is that that occurrence was possible?

A. Yes.

Q. You are not saying that the occurrence was probable?

A. That's right.

Under the Cement Division, National Gypsum Co. requirements, the conditions underlying a given violation must present more than a "mere possibility" of injury to miners. This requirement has not been met in this case. When applying the standard determined by the Commission, judges must assume that the words used must be equated to their normal, ordinary usage. United States v. Raynor, 302 U.S. 540, 58 S.Ct. 353, 82 L.Ed. 413 (1938); United States v. Cooper Corp., 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071 (1941).

The American Heritage Dictionary (Houghton Mifflin, 2d College Ed. 1976) defines "likely" as "possessing or displaying the qualities or characteristics that make something probable" [Emphasis supplied].

Under the precedent cited above and based upon my independent review and evaluation of all the evidence, I find the evidence presented is insufficient to establish that Mid-Continent's violation of the cited standard was significant and substantial in nature. I find the evidence presented fails to show a reasonable likelihood that the hazard contributed to will result in an injury of a reasonable serious nature.

Unwarrantable Failure

In Emery Mining Corp., 9 FMSHRC 1997, 2000-04 (December 1987), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. The Commission stated that, while negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable." Emery, supra, 9 FMSHRC at 2001.

As recognized by the Commission in Emery, the chain of citations and withdrawal orders provided under section 104(d) of the 1977-Mine Act to address an operator's unwarrantable failure to comply is one of the Secretary's most powerful instruments for enforcing mine safety. The heightened negligence standard by the Commission in Emery necessarily limits the application of section 104(d) by the Secretary to situations where an operator's aggravated conduct toward an unsafe condition justifies imposition of severe sanctions.

The Secretary justifies the imposition of this stringent enforcement measure on the basis that Mid-Continent was aware of the violative condition of the airlock doors' power unit prior to the issuance of the present order and did nothing to correct it. In fact, the Secretary asserts that Mid-Continent had, at that time, been "instructed" by MSHA to correct this violative condition.

Responsively, Mind-Continent argues that they had no reason to believe that the airlock doors' power unit had been installed improperly. Mid-Continent further argues that had MSHA, indeed, given Mid-Continent any notice, that oral communication of such notice was wholly inadequate.

In her case in chief, the Secretary asserts Mid-Continent had been informed by MSHA of its change in policy concerning the applicability of 30 C.F.R. § 75.1105 to the hydraulic power unit installations of the type in issue. Such notification was alleged to have been given orally to a former Mid-Continent employee by Inspector Elswick during a prior inspection of this airlock doors' power unit.

According to his testimony, Inspector Elswick gave his oral notification to Mid-Continent after reading the decision allegedly altering the definition of "permanent pump" under 30 C.F.R. § 75.1105 in Judge Fauver's decision in Southern Ohio Coal Co., Docket No. WEVA-86-R, slip op. at 6 (Decision, Aug. 14, 1986) (Mid-Continent Exhibit R-10) (Tr. 110). According to Inspector Elswick, he had received no other policy memoranda or communication which addressed this policy change.

Inspector Elswick's testimony in this regard is questionable. According to Inspector Elswick, this notification was given Mid-Continent about six weeks prior to January 14, 1988. However, as evidenced by the date stamp on the face of Mid-Continent Exhibit R-10, the decision in Southern Ohio Coal Co., was not received by the Denver MSHA District Office until February 14, 1988,--a date post-dating the subject order by 27 days. Further, this decision was not disseminated down to the MSHA field office level by the subdistrict manager until July 5, 1988.

Thus contradicted by the document on which he ostensibly relied, Mid-Continent asserts that it is difficult to grant any credence to Inspector Elswick's testimony concerning the justification for or the oral communication of this ostensible notice which had the net effect of changing at least 10 years past practice and interpretation of 30 C.F.R. § 75.1105 with respect to its applicability to the cited hydraulic power units.

Whether such notice was given by Inspector Elswick, however, is not dispositive of the issue. I agree with Mid-Continent's argument that such informal, conversational notice is wholly inadequate to justify sanctions under section 104(d) of the Act. As established at trial, hydraulic power units identical to the one in issue have been used to power airlock doors in the Dutch Creek No. 1 Mine since 1978. These units have also been and are currently being used in the beltline entries of this mine for belt take-up functions. As Mid-Continent points out, identical hydraulic power units on the 4-slope beltline, approximately 200 feet away from the unit in question, are not housed in fireproof enclosures and vented to a return air course. Cf. Deibold, Inc., v. Marshall, 585 F.2d 1327, 1335-1338 (6th Cir. 1978).

Considering the record as a whole, I find that Mid-Continent had a mistaken but good faith belief that the hydraulic power unit in question was not a pump that was subject to the enclosure and ventilation requirements of the cited regulation. In making this finding and conclusion, I have considered all the evidence including that evidence that fairly detracts from an unwarrantable failure finding. Mid-Continent was negligent but its conduct does not amount to aggravated conduct exceeding ordinary negligence. See Utah Power and Light Co. v. MSHA, Docket No. WEST 89-161-R (May 24, 1990); Florence Mining Co., 11 FMSHRC 747, 752-54 (May 1980); Southern Ohio Coal Company, 10 FMSHRC 138, 142-143 (February 1988). See also Westmoreland Coal Co., 7 FMSHRC 1338, 1343 (September 1985).

Civil Penalty

In accordance with the mandate of section 110(i) of the Act, I have considered the statutory criteria in section 110(i) of the Act. With respect to size, I have considered the parties' stipulation that the Dutch Creek No. 1 Mine produced 277,194 tons of coal during the year prior to the issuance of the citation and that overall, as stated in the joint document the parties filed on August 16, 1989, Mid-Continent produced a total of 666,582 tons of coal during that year. The proposed penalty would not adversely affect Mid-Continent's ability to continue in business.

The computer printout, Exhibit P-1, shows Mid-Continent's assessed violation within the two-year period prior to the inspection.

The operator demonstrated good faith by the timely abatement of the violations cited in this docket. The gravity of the violation and the operator's negligence has been covered under the discussion regarding the issue of whether the violation was of a significant and substantial nature and whether the violation was a result of Mid-Continent's aggravated conduct constituting more than ordinary negligence.

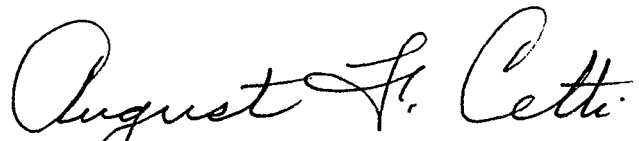
Everything considered, I find \$100 to be the appropriate civil penalty for Mid-Continent's violation of 30 C.F.R. § 75.1105.

ORDER

In view of the foregoing findings and conclusions, it is ORDERED that Section 104(d)(2) Order No. 3223214 be MODIFIED to delete the significant and substantial designation and the inspector's determination that this violation resulted from Mid-Continent's unwarrantable failure to comply with the mandatory safety standard 30 C.F.R. § 75.1105.

Accordingly, this enforcement document (Order No. 3223214) is MODIFIED to change its nature from a Section 104(d)(2) order to a Section 104(a) citation. As modified to a 104(a) citation, it is AFFIRMED.

The remaining seven citations/orders are also AFFIRMED and Mid-Continent is ORDERED to pay the assessed civil penalty of \$5,620 in satisfaction of the eight violations charged in this case. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt or payment, this matter is dismissed.



August F. Cetti
Administrative Law Judge

Distribution:

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

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/ek

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

JUN 21 1990

ARMANDO M. RIVAS, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 89-395-DM
PHELPS DODGE MORENCI, INC., :
Respondent : MD 89-36


DECISION

Appearances: Lisa K. York, Esq., Phoenix, Arizona,
for Complainant,
Michael D. Moberly, Esq., RYLEY, CARLOCK & APPLEWHITE,
Phoenix, Arizona,
for Respondent.

Before: Judge Lasher

This proceeding arose pursuant to the provisions of Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. A preliminary hearing to resolve jurisdictional issues was held in Phoenix, Arizona, on February 6, 1990. Thereafter, and prior to formal hearing on the merits, the parties reached an amicable resolution of this matter, based on a cash payment to Complainant. On June 9, 1990, the parties filed a duly executed stipulation authorizing dismissal of this proceeding with prejudice.

Accordingly, the matter having been settled and the parties so authorizing, this proceeding is dismissed with prejudice, with both parties to bear their own costs and attorneys fees.


Michael A. Lasher, Jr.
Administrative Law Judge

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/ek

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

ORDER OF DISMISSAL

On December 11, 1989, you filed with this Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act 1977. On March 16, 1990, a show cause order was issued directing you to provide information regarding your complaint or show good reason for your failure to do so. The show cause was mailed to you certified mail, return receipt requested, and the file contains the receipt card indicating you received the show cause order. You have however, not responded and complied with the show cause order.

Paul Merlin

/SS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

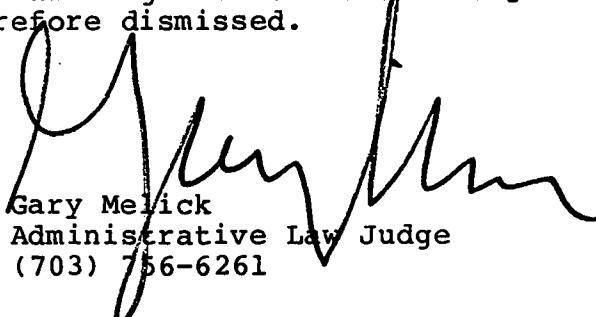
JUN 25 1990

BOBBY STROUTH AND 10 MINERS, : COMPENSATION PROCEEDING
Complainants :
v. : Docket No. VA 90-13-C
CAVALIER MINING CORPORATION, : Mine No. 1
Respondent :

ORDER OF DISMISSAL

Before: Judge Melick

Complainants have requested approval to withdraw their complaints in the captioned case. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed.


Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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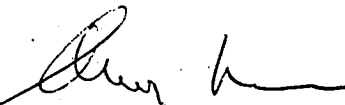
JUN 27 1990

CHARLES SCOTT HOWARD	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 90-98-D
	:	
HARLAN-CUMBERLAND COAL	:	BARB CD 89-25
COMPANY,	:	
Respondent	:	C-2 Mine
	:	

ORDER OF DISMISSAL

The Parties' Agreed Motion to Dismiss filed June 20, 1990, is GRANTED. I find that the Settlement Agreement, General Release and Covenant Not To Sue, fairly resolves of the issues raised by the Complainant, and I approve the Settlement Agreement, General Release and Covenant Not to Sue.

It is ORDERED that, pursuant to 29 C.F.R. § 270.11 and 2700.54, this case be DISMISSED with prejudice. It is further ORDERED that the Parties shall abide by all the terms of the Settlement Agreement, General Release and Covenant Not to Sue.



Avram Weisberger
Administrative Law Judge

Distribution:

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUN 27 1990

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 89-16-R
v.	:	Citation No. 3012039; 10/25/88
	:	
SECRETARY OF LABOR,	:	No. 3 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine I.D. # 01-00758
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 89-42
Petitioner	:	A.C. No. 01-00758-03732
v.	:	
	:	No. 3 Mine
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama
for the Secretary of Labor;
H. Thomas Wells, Jr., Esq., Maynard, Cooper,
Frierson, and Gale, P.C., Birmingham, Alabama
for Jim Walter Resources, Inc.

Before: Judge Melick

These consolidated cases are 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," to contest Citation No. 3012039 issued by the Secretary of Labor pursuant to Section 104(a) of the Act against Jim Walter Resources, Inc., (Jim Walter) and for review of civil penalties proposed by the Secretary for the violation alleged therein. More particularly the underlying issue is whether Jim Walter's proposed change in its Ventilation System, Methane and Dust Control Plan (Ventilation Plan), which was rejected by the Secretary would at all times guarantee no less than the same measure of protection afforded the miners at the subject mine by the existing provisions of the Ventilation Plan.

The citation at bar alleges a violation of the standard at 30 C.F.R. § 75.316 and, as amended, charges as follows:

The Jim Walter Resources No. 3 mine has implemented and adopted the proposed change in the supplement to the Ventilation System, Methane and Dust Control Plan identified as 9-lv-52, which requested a change in the air current of 25,000 cfm be permitted prior to be [sic] construed as a major air change. This request has been denied in writing by the District Manager. On 10/25/88 JWR Inc., was operating the No. 3 Mine without having adopted a Ventilation Plan which had been approved by the Secretary.

By letter dated September 29, 1988, Jim Walter had requested a change in its existing approved Ventilation Plan. That letter, directed to Carl Boone, the Acting District Manager of Mine Safety and Health Administration District No. 7, reads as follows:

Please substitute the attached page for page 9 of the current approved ventilation plan signed September 15, 1988. The only difference between the two pages is that the attached page specifies 25,000 cfm or greater air change on a section split be considered a major change. The supplement will be implemented upon approval.

More particularly Jim Walter sought to add the following language to its Ventilation Plan: "[a] ventilation change of 25,000 C.F.M. or greater of any section split will be considered a major air change and the change will be made according to 75.322."

Acting District Manager Boone rejected this request in the following letter addressed to Mine Manager G.W. Coates:

The proposed supplement to the Ventilation System and Methane and dust Control Plan dated September 29, 1988, which seeks to make a change of 25,000 CFM be considered a major change, has been reviewed and cannot be approved.

Currently any change less than 9,000 CFM can be made. A change greater than 9,000 CFM would not provide the same measure of protection to the miners.

A subsequent request for the same change was again rejected by Mr. Boone in the following letter to Coates:

Your request dated January 19, 1988, that the amount of air considered to be a major ventilation change at the above mine be increased to a maximum of 25,000 cfm has been reviewed by the District

ventilation staff. The National Coal Mine Health and Safety Inspection Manual for Underground Coal Mines states, in part, that any ventilation change in which any split of air is increased or decreased by an amount equal to or in excess of 9,000 cfm is considered a major change. Historically, this 9,000 cfm limit has been established for about 17 years; therefore, this request is denied.

This Commission discussed the underlying legal authority for the litigation of disputed ventilation plans in Secretary v. Carbon County Coal Co., 7 FMSHRC 1367 (1985). It stated in this regard as follows:

The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission. Penn Allegh Coal Co., 3 FMSHRC 2767, 2773 (December 1981). Carbon County proceeded accordingly in this case. The company negotiated in good faith and for a reasonable period concerning the volume of air to be supplied the auxiliary fans. Carbon County's refusal to acquiesce in the Secretary's demand that the plan contain a free discharge capacity provision led to this civil penalty proceeding.

It is not disputed in this case that Jim Walter negotiated in good faith and for a reasonable period concerning the disputed provision. While in this case it was the refusal to approve Jim Walter's proposed change in the plan that led to this contest and civil penalty proceeding the underlying issue is analagous and review under the Carbon County rationale is warranted. The Commission did not designate in the Carbon County decision which party must bear the burden of proof nor did it set forth the standard of proof to be applied. The parties hereto have agreed however that Jim Walter, as the moving party attempting to include the disputed provision into its Ventilation Plan, has the burden of proof. See 5 U.S.C. § 556 (d). I have further determined by analogy that the standard of proof in this proceeding should be the same standard applicable in

modification proceedings under Section 101(c) of the Act.^{1/} Thus I find that Jim Walter bears the burden in this proceeding of proving by a preponderance of the evidence that its alternative method of achieving the result (purpose) of the standard at 30 C.F.R. § 316 and of its Ventilation Plan will at all times guarantee no less than the same measure of protection afforded the miners at its mine by such standard and its existing Plan.^{2/} By applying this standard to the case at bar it is clear that Jim Walter has failed to sustain its burden of proof.

Under current application of the Jim Walter Ventilation Plan and within the framework of 30 C.F.R. § 75.322 any ventilation change in which any split of air is to be increased or decreased by an amount equal to or in excess of 9,000 cfm must be made only when the mine is idle and that before mine power can be restored in all areas affected by the ventilation changes an examination must be performed in accordance with 30 C.F.R. § 75.303. It is acknowledged that during the course of mining operations occasions do arise in which additional air is needed to ventilate methane and dust from a working section. Under MSHA's current application of the standard at 30 C.F.R. § 75.322 Jim Walter is permitted to increase air by 9,000 cfm with miners underground and the mine operating with electrical power. In the event a greater quantity of air is needed, MSHA requires that such changes be made while the mine is idle with the miners outside. The

^{1/} Section 101(c) of the Act reads in relevant part as follows:

Upon petition by the operator or the representative of miners the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine.***

^{2/} The Secretary argues that whatever decision is made by the MSHA District Manager, whether to impose a new plan provision over the operator's objection or whether to refuse to include a provision the operator desires, is to be reviewed under an "arbitrary and capricious" standard. The "arbitrary and capricious" standard is however only applicable under the Administrative Procedure Act to judicial review of final administrative action following the administrative hearing. See 5 U.S.C. § 706(2)(A).

essence of Jim Walter's requested change in its Ventilation Plan is that it be permitted to increase ventilation by as much as 25,000 cfm with miners remaining underground and the mine operating. In other words Jim Walter is requesting to be allowed to make ventilation changes up to 25,000 cfm without having to remove the miners or perform an examination of the affected areas in accordance with 30 C.F.R. § 75.303 before restoring mine power and resuming production. Jim Walter therefore has the burden of proving that making such ventilation changes is at least as safe with miners underground, without cutting power and without performing examinations in accordance with 30 C.F.R. § 75.303.

In support of its position, Jim Walter cites computer simulations and in-mine tests it performed purportedly showing that altering the air flow by as much as 25,000 cfm did not result in what its experts deemed to be significant ventilation changes. It is not disputed however that these simulations and tests cannot possibly address the multitude of potential variables that can and do occur in such a complex system as the Jim Walter No. 3 Mine. The results of a 25,000 cfm air change cannot therefore be reliably predicted. Based on the Secretary's credible evidence, the consequences could be serious including an inundation of excess methane in the working areas. Clearly the safer practice is to make the requested ventilation changes while the mine is idle and then to conduct an inspection before allowing the miners to return underground. Indeed one of Jim Walter's own experts, senior mine engineer Richard Pate, essentially agreed in the following colloquy at hearing:

Q. Mr. Pate, when a change, a ventilation change is made in the mine, let's just assume that a 25,000 change was made during this study, how can you be assured of what the affects of that change are going to be in other areas of that mine without first going and checking and seeing on those conditions?

A. There's no other way to know besides checking, doing a check of the parts of the mine.

Q. So would it be safer from the miners' standpoint for workers down there that when a change such as 25,000 is made to go and examine those areas to see what the conditions are before permitting them in the return?

A. It is a normal practice when any air change is made for us to examine the areas to see what effect it has had on the mines.

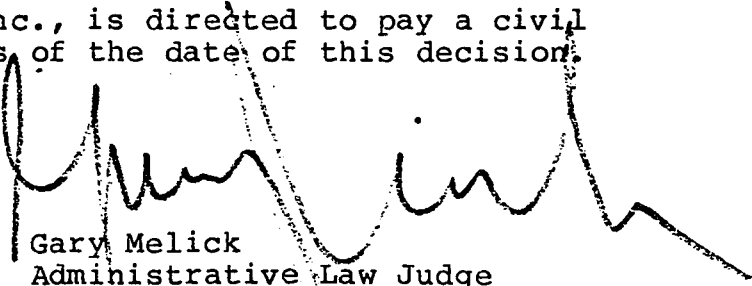
Q. That would be the safest route to go?

A. Yes.
(Tr. 36-37).

The opinion of the operator's expert is reinforced by the Secretary's evidence in this case. Under the circumstances Jim Walter has not sustained its burden of proving that the proposed alternative procedures set forth in its proposed modification to its Ventilation Plan would at all times guarantee no less than the same measure of protection afforded the miners at its mine by the application of the regulatory standards and the existing Ventilation Plan. The violation in the citation is according proven as charged. Considering the absence of any hazard under the limited circumstances of this case and that the purpose of the issuance of the citation in this case was to have the attempted modification to its Ventilation Plan reviewed by the Commission, the proposed civil penalty of \$20 is clearly appropriate.

ORDER

Jim Walter Resources, Inc., is directed to pay a civil penalty of \$20 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

William Lawson, Esq., Office of the Solicitor, U.S.
Department of Labor, 2015 Second Avenue, North, Birmingham,
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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 29 1990

GOLDEN OAK MINING, CO., L.P.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. KENT 90-185-R
	:	Citation No. 3370565;
SECRETARY OF LABOR,	:	4/12/90
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Golden Oak No. 4 Mine
Respondent	:	

DECISION

Appearances: Teresa Taylor, Esq., Cook Law Office, Whitesburg, Kentucky, for Contestant (Golden Oak);
W. F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor (Secretary).

Before: Judge Broderick

STATEMENT OF THE CASE

Golden Oak filed a Notice of Contest on May 17, 1990, challenging a section 104(a) citation issued by MSHA on April 12, 1990, alleging a violation of 30 C.F.R. § 75.1712-1. The citation required abatement of the violation by May 14, 1990. Because Golden Oak had been informed that a withdrawal order would be issued for failure to abate, it sought an expedited hearing on its notice of contest. After the case was assigned to me, MSHA extended the abatement time for 30 days. Pursuant to notice issued May 18, 1990, I called the case for hearing on June 12, 1990, in Hazard, Kentucky. Cecil Davis, Michael Keene, and John Hendley testified on behalf of the Secretary. Willard Back, Hiram Standifur, Jr., and Ross Keegan testified on behalf of Golden Oak. At the conclusion of the testimony, both parties argued their positions on the record. I considered the record and the contentions of the parties in issuing a bench decision in which I modified the citation and affirmed it as modified. I dismissed Golden Oak's contest. Pursuant to 29 C.F.R. § 2700.65, I herewith reduce that oral decision to writing.

FINDINGS OF FACT

1. Golden Oak Mining Co., L.P., is the owner and operator

of an underground mine in Letcher County, Kentucky known as Golden Oak No. 4 Mine.

2. Golden Oak began operating the subject mine in April 1986 under the corporate name Golden Oak Mining Co., Inc. The company's ownership and legal structure were changed in about July 1989 to Golden Oak Mining Co., L.P.

3. The mine is about 3 to 3-1/2 miles deep and crosses a number of abandoned mines as well as a sandstone fault area. It has two mining sections and operates one maintenance and two production shifts.

4. On October 20, 1986, the MSHA District Manager, under 30 C.F.R. § 75.1712-4, granted Golden Oak, upon its written application, a waiver of the requirements contained in 30 C.F.R. § 75.1712-1 for surface bathing facilities at the No. 4 Mine. Approximately 23 miners were employed at the mine.

5. On May 31, 1988, the MSHA District Manager again issued a waiver under § 75.1712-4 to Golden Oak for the No. 4 Mine. Approximately 105 miners were employed at the mine.

6. In about July 1989, after the ownership of Golden Oak and its company name and structure were changed, the mining permits were transferred to the new company. The MSHA mine I.D. number remained the same however.

7. On December 5, 1989, Golden Oak filed a request for waiver of the requirements for surface bathing facilities and clothing change rooms with the MSHA District Manager pursuant to 30 C.F.R. § 75.1712-5. It submitted a petition signed by all the employees of the mine, 85 in number, stating that they did not desire that bathing facilities be made available. The request, on an MSHA form, indicated that the life of the mine is greater than one year, that an adequate source of suitable water is not available on mine property, and that centrally located bathing facilities would not be practical. The reason given for this last conclusion is that "employees prefer to bath at home at present time."

8. Federal inspector Cecil Davis made an evaluation of the request for waiver in January 1990. He determined that the mine had an adequate water supply, that it had a trailer used as a clothing change area, and that it had portable sanitary toilet facilities. He discussed mining projections with Golden Oak management officials and concluded that the mine had a remaining life of four years. Inspector Davis recommended that the waiver be denied.

9. In January 1990, Michael Keene was the Acting District Manager in MSHA District 6. He reviewed Golden Oak's application

and Inspector Davis' evaluation. On January 24, 1990, he denied Golden Oak's request for an extension of the waiver. The letter of denial stated that an investigation at the subject mine disclosed that it was practical to develop a private water supply, that an adequate supply of electricity existed, that there was an adequate area to construct or provide portable bathing facilities and that the life of the mine was approximately four years.

10. On April 12, 1990, Inspector Davis, in the course of a regular safety and health inspection of the subject mine, issued a 104(a) citation for a violation of 30 C.F.R. § 75.1712-1 because bathing facilities, clothing change rooms and sanitary facilities were not provided at the mine and a request for a waiver of these requirements was denied on January 26, 1990. Abatement was required by May 14, 1990.

11. On May 7, 1990, Acting District Manager Keene met with Willard Back, Golden Oak's Safety Director. Back informed Keene that the life of the mine was approximately 2 years. He stated that Golden Oak drilled a well on the mine property but only obtained 5 gallons of water per minute. The mine was using water from an abandoned mine. It was believed that the source of this water was an underground stream. Nothing was brought up to Mr. Keene which in his opinion was sufficient to cause him to change his prior decision denying the waiver.

12. John Hendley, an industrial hygienist employed by MSHA, estimated that the subject mine used at least 36,000 gallons of water per day in its mining operation. Approximately 2700 gallons additionally per day would be needed for bathing facilities for 85 miners.

13. A water sample taken from the subject mine on May 31, 1990, showed that the water was not suitable for drinking, but was suitable for bathing. It could be made suitable for drinking with a slight chlorination treatment.

14. On May 17, 1990, Golden Oak's Vice President wrote to MSHA, asking for reconsideration of the waiver request. The letter estimated the life of the mine at 2 years.

15. At the hearing, Golden Oak's Manager of Engineering, Ross Keegan, estimated the mine life at a maximum of 16 months. He explained that as of May 29, 1990, the estimated life was 2 years, but that recent adverse conditions had resulted in the reduction to 16 months. He stated that although a small quantity of water was taken from a well and an erratic source of water was being used from an abandoned mine, Golden Oak still had to truck in water on occasion to supply the mining equipment. Keene had not been made aware of the fact that water was trucked in; in

fact, Golden Oak's Safety Director was not aware of it until the day before the hearing.

16. Keegan testified that it would take approximately 9 months to get government approval for a bathing facility and approximately 3 additional months to construct one. The estimated nine month period included environmental studies, and the approval of a sewage treatment facility. These allegations were not made to Mr. Keene at the time the waiver was sought, nor at the time reconsideration of the denial was requested.

17. On May 17, 1990, Inspector Davis extended the abatement time to June 18, 1990. The extension was granted because Golden Oak was looking into the feasibility of constructing bathing facilities and had water sampling tests performed.

REGULATIONS

30 C.F.R. §§ 75.1712, 75.1712-1, 75.1712-4 and 75.1712-5 provide as follows:

§ 75.1712 Bath houses and toilet facilities

[Statutory Provisions]

The Secretary may require any operator to provide adequate facilities for the miners to change from the clothes worn underground, to provide for the storing of such clothes from shift to shift, and to provide sanitary and bathing facilities. Sanitary toilet facilities shall be provided in the active workings of the mine when such surface facilities are not readily accessible to the active workings.

§ 75.1712-1 Availability of surface bathing facilities; change rooms; and sanitary facilities.

Except where a waiver has been granted pursuant to the provisions § 75.1712-4, each operator of an underground coal mine shall on and after December 30, 1970, provide bathing facilities, clothing change rooms, and sanitary facilities, as hereinafter prescribed, for the use of the miners at the mine.

§ 75.1712-4 Waiver of surface facilities requirements.

The Coal Mine Safety District Manager for the district in which the mine is located may, upon written application by the operator, waive any or all of the requirements of §§ 75.1712-1 through 75.1712-3 if he determines that the operator of the mine cannot or need not meet any part or all of such requirements, and, upon issuance of such waiver, he shall set forth the facilities which will not be required and the specific reason or reasons for such waiver.

§ 75.1712-5 Application for waiver of surface facilities.

Applications for waivers of the requirements of §§ 75.1712-1 through 75.1712-3 shall be filed with the Coal Mine Safety District Manager and shall contain the following information:

- (a) The name and address of the mine operator;
- (b) The name and location of the mine;
- (c) A statement explaining why, in the opinion of the operator, the installation or maintenance of the facilities is impractical or unnecessary.

ISSUES

1. Whether the Commission has jurisdiction to determine whether a waiver of the requirements of 30 C.F.R. § 75.1712-1 was properly denied by MSHA.

2. Whether a violation of 30 C.F.R. § 75.1712-1 was established:

(a) Whether MSHA's denial of a waiver was arbitrary or capricious.

3. Whether the abatement time for the violation charged in the contested citation is reasonable.

CONCLUSIONS OF LAW

I. JURISDICTION

The Secretary challenges the jurisdiction of the Commission to determine whether MSHA's District Manager properly denied a waiver of the surface bathing requirements of 30 C.F.R. § 75.1712-1. The Secretary argues that this issue can be

considered only in a petition for modification of the standard under section 101(c) of the Act, and that the jurisdiction to consider such a petition is entrusted to the Secretary and not the Commission. I disagree. Golden Oak does not seek to modify a mandatory standard; it asserts that the mandatory standard was not violated because a waiver provided for in the standard was arbitrarily refused. This amounts to a contest of a citation. I conclude that the Commission has jurisdiction to consider such a challenge.

II. VIOLATION

A. 30 C.F.R. § 75.1712-1 requires surface bathing facilities at all underground mines. No such facility has been provided at the subject mine.

B. Michael Keene testified that he was acting District Manager on January 24, 1990, when the waiver was denied. There is no contrary evidence of record. I conclude that his action in denying the waiver was the action of the MSHA District Manager.

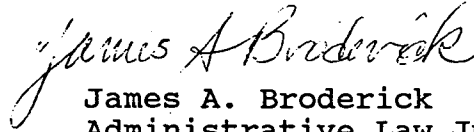
C. Mr. Keene based his denial of the requested waiver on his conclusion that an adequate water supply was available at the mine, since substantial water was being used in the mining process. He concluded that Golden Oak could and should be held to the requirements of the standard. The regulations give the District Manager discretion to grant or deny such a waiver. In exercising that discretion the District Manager may not act arbitrarily or capriciously. I conclude that the evidence establishes that he did not act arbitrarily or capriciously, but, on the contrary, based his denial on substantial evidence before him that Golden Oak was able to meet the standard's requirements. In determining whether he abused his discretion, I have to look to the facts and circumstances which were made known to him at the time. Subsequent developments or changes in the mine situation cannot be used to show an abuse of discretion. I conclude that a violation of the standard was shown.

III. ABATEMENT TIME

Golden Oak was notified on January 24, 1990, that the requested waiver was denied. It took no steps to protest or to comply until after the citation was issued on April 12, 1990. The time for abatement was originally set at May 14, 1990, and later extended to June 18, 1990. So far as the record shows, Golden Oak's efforts to abate the violation have been minimal. I have further extended the abatement time to July 12, 1990. I conclude that under the circumstances the time for abatement is reasonable.

ORDER

Based on the above findings of fact and conclusions of law, citation 3370565 issued April 12, 1990 is MODIFIED to extend the termination date to July 12, 1990. As modified the citation is AFFIRMED. The notice of contest is DISMISSED.



James A. Broderick
Administrative Law Judge

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