

JUNE 1991

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

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. LAKE 91-11.  
(Judge Melick, May 13, 1991)

Eagle Nest, Inc., v. Secretary of Labor, MSHA, Docket No. WEVA 91-293-R.  
(Judge Weisberger, May 20, 1991)

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

Kentucky Carbon Corporation, et al. v. Secretary of Labor, MSHA,  
Docket No. KENT 91-265-R, etc. (Judge Broderick, Interlocutory Review  
of May 16, 1991 Order).



COMMISSION DECISIONS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 11, 1991

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. PENN 89-147-R
	:	PENN 89-148-R
	:	PENN 89-149-R
LANCASHIRE COAL COMPANY	:	PENN 89-192-R
	:	PENN 89-193-R
	:	PENN 90-10

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson  
Commissioners

## DECISION

BY: Holen and Nelson, Commissioners

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act" or "Act"), and involves the validity of three citations and two withdrawal orders issued to Lancashire Coal Company ("Lancashire") concerning conditions at its coal preparation plant at the Lancashire No. 25 Mine. The question before us is whether the Department of Labor's Mine Safety and Health Administration ("MSHA") properly issued citations and withdrawal orders to Lancashire under the Mine Act. Commission Administrative Law Judge George A. Koutras upheld the Secretary's action in proceeding against Lancashire under the Mine Act. 12 FMSHRC 272 (February 1990)(ALJ). Lancashire petitioned for review of that part of the judge's decision holding that the cited working conditions were subject to Mine Act jurisdiction. Lancashire did not petition for review of the judge's rulings with respect to the merits of the withdrawal orders and citations. For the reasons that follow, the judge's decision is affirmed. <sup>1</sup>

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<sup>1</sup> The Commission's vote in this case is evenly split. Acting Chairman Backley and Commissioner Doyle would reverse the judge's decision and Commissioners Holen and Nelson would affirm. For the reasons set forth in Pennsylvania Electric Co., 12 FMSHRC 1562, 1563-65 (August 1990), pet. for review filed, No. 90-3636 (3rd Cir. Sept. 17, 1990), we conclude that the effect of the split decision is to allow the judge's decision to stand as if affirmed.

I.

Factual and Procedural Background

The parties stipulated to most of the key facts in this case. The stipulations that are relevant to this review proceeding are as follows:

1. The subject work site, Lancashire Coal Company Preparation Plant ("the work site") is located in Elmora, Cambria County, Pennsylvania and is owned by the Inland Steel Company ("Inland"), which has an office in East Chicago, Indiana.
2. The work site is adjacent to a sealed mine facility which is owned by Inland and which is known as the Lancashire Coal Company No. 25 Mine ("Lancashire Mine #25").
3. No coal has been mined at Lancashire Mine #25 since June 3, 1983.
4. Until June 3, 1983, the Lancashire Mine #25 was an active, producing underground coal mine with surface coal preparation facilities located adjacent to it on the site ("the Lancashire Coal Company Preparation Plant").
5. On April 17, 1986, the underground mine shafts were sealed by the operator. At that time, the mine operator was Inland Steel Coal Company.
6. Since the mine shafts were sealed, the surface facilities have been inactive with the exception of a small water treatment facility.
7. On September 30, 1986, the MSHA classification of the mine was changed to a surface facility as a result of the underground openings being sealed.
8. During fiscal years 1987 and 1988, the work site was inspected by MSHA as a surface facility. Prior to March 20, 1989, the last MSHA safety and health inspection was April 1, 1988.
9. On September 6, 1988, the Hastings Field Office of MSHA declared the work site permanently abandoned (Joint Exhibit 1).
10. As a result of the action it took on September 6, 1988, MSHA ceased inspection activity at the work

site.

11. After September 6, 1988, Lancashire took no action to indicate that it intended to resume the extraction, production, milling or processing of coal.
12. In late 1988, Lancashire sought bids from contractors to perform work dismantling and removing facilities and structural materials from the work site and reclaiming the area.
13. K&L Equipment Co., Inc. ("K&L"), owned by Kenneth Morchesky, was selected as the contractor and commenced work the week of February 20, 1989.
14. On March 20, 1989, a fatal accident occurred at the work site. One of K&L's employees was killed during operations to raze a silo at the site.
15. On March 21, 1989, MSHA Inspector William D. Sparvieri, Jr. arrived at the work site to conduct an inspection. As part of his activities at the work site on March 21, 1989, Mr. Sparvieri issued the following citations and orders:
  - a. Section 103(k) Order No. 2888399, 3:00 p.m.
  - b. Section 107(a) Order No. 2888400, 3:15 p.m.
  - c. Section 104(a) Citation No. 2891501, 3:30 p.m.
16. On April 17, 1989, Inspector Sparvieri returned to the work site and served Citation Nos. 2891508 (1:55 p.m.) and 2891509 (2:00 p.m.).

12 FMSHRC at 274-75 (Stipulation numbers changed).

Lancashire's No. 25 Mine and associated coal preparation facilities stopped producing or preparing coal on or about June 3, 1983. Subsequently, when Lancashire was unable to sell the mine, it sealed the mine's openings. Lancashire decided to demolish its old concrete coal storage silo and old coal preparation plant (screen house) in late 1988. Under Pennsylvania law, a mine operator is required to reclaim abandoned mine lands, including the lands upon which former preparation facilities are located. The Pennsylvania Department of Environmental Resources ("Pennsylvania DER") requires that surface facilities be removed as part of the reclamation process. The coal preparation facilities in question were built in the late 1950's and were not used after 1971, because new coal preparation and storage facilities were built in an adjacent area.

MSHA continued to inspect the surface facilities until September 1988, at which time MSHA classified the mine as "permanently abandoned." The only continuing activity at the mine site was the operation by Lancashire of a water treatment facility required by the Pennsylvania DER. Only one

Lancashire employee worked at the mine site, supervisor Francis Falger.

Lancashire engaged an independent contractor, K&L Equipment Company, Inc. ("K&L"), to demolish the old coal storage silo and old screen house. On March 20, 1989, during the demolition of the old coal storage silo, an employee of the independent contractor was killed when a portion of the silo prematurely collapsed, crushing him under concrete, coal and other material. Local fire and rescue authorities transported the victim to a local hospital.

MSHA started its investigation the following day. The record does not reveal how MSHA learned of the accident. Francis Falger admitted the MSHA inspectors onto the property but told them that MSHA was without jurisdiction because the mine had been classified by MSHA as "permanently abandoned." Kenneth Morchesky of K&L also told the inspectors that MSHA was without jurisdiction. The MSHA supervisory inspector, John Kuzar, replied that he was not sure if MSHA had jurisdiction but that MSHA was going to investigate the accident. Falger and Morchesky fully cooperated with MSHA Supervisory Inspector Kuzar and MSHA Inspector William Sparvieri, Jr., who was assigned to investigate the accident.

After spending about an hour at the accident site, the inspectors returned to the local MSHA office so that Inspector Kuzar could call the MSHA sub-district manager to discuss the jurisdiction issue raised by Lancashire and K&L. Although the jurisdiction question was not resolved at that time, the inspectors were authorized to return to the Lancashire site to secure the area. Inspector Sparvieri issued an order of withdrawal under section 103(k)<sup>2</sup> of the Mine Act, in order to secure the area, and an order of withdrawal under section 107(a)<sup>3</sup>, because he believed that the structures

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<sup>2</sup> Section 103(k) of the Mine Act states:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

<sup>3</sup> Section 107(a) of the Mine Act states in part:

If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring

to be demolished were in an unstable condition and presented an imminent danger to anyone in the area. Additionally, he issued Lancashire a citation pursuant to section 104(a) of the Act. Inspector Sparvieri also issued the independent contractor citations and orders, which were not contested before the Commission.

On March 23, 1989, MSHA District Manager Donald Huntley wrote a memorandum to Jerry Spicer, MSHA Administrator for Coal Mine Safety & Health, concerning MSHA's jurisdiction at this facility. The memorandum stated that the MSHA district office "determined that both the mine operator and contractor fell under MSHA's jurisdiction and all applicable provisions of the Act and Title 30 Code of Federal Regulations applied."

On April 17, 1989, Inspector Sparvieri returned to the mine site to issue two additional citations under section 104(a) of the Act. Apparently, the MSHA sub-district office had received notification from MSHA's Arlington, Virginia, headquarters that MSHA has jurisdiction over the Lancashire site. In a memorandum to Jerry Spicer dated May 2, 1989, Edward Clair, Associate Solicitor of the Department of Labor, concluded that MSHA had jurisdiction and that "MSHA should plan to conduct appropriate inspection activities of K&L's activities at the Lancashire site."

In his decision, Judge Koutras concluded that "the mine site where the reclamation or demolition work in question was taking place in this case is a 'mine' within the definitional language found in sections 3(h)(1) and 3(h)(2) of the Act, and that at the time of the inspections in question MSHA had enforcement jurisdiction and authority over that mine facility." 12 FMSHRC 295. The judge based his decision on an analysis of the text of the Mine Act, the legislative history, and Commission precedent.

Relying on the language of section 3(h) of the Mine Act <sup>4</sup> and the

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the operator of such mine to cause all persons, except those referred to in section 814(c) of this title, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist....

30 U.S.C. § 817(a).

Section 3(h) of the Mine Act states in part:

(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings

legislative history, the judge concluded that the structures being demolished were the result of the prior active mining of coal, including extraction and processing, and therefore fit within the statutory definition of "coal or other mine." 12 FMSHRC at 292. He concluded that since coal from the previously active underground mine was processed through these structures, one could reasonably assume that a "nexus" existed between the coal that was extracted from the underground mine and the coal that was prepared through these structures. 12 FMSHRC at 293. He held that the fact that these structures had not been used since 1971 was immaterial since the definition of "coal or other mine" is not related to any time factor and since the definition has consistently been given the broadest possible interpretation by the courts as well as the Commission. *Id.* The judge relied upon the Commission's decisions in Alexander Brothers, 4 FMSHRC 541 (April 1982), and Westwood Energy Properties, 11 FMSHRC 2408 (December 1989), in reaching his conclusion. The judge also rejected Lancashire's contention that MSHA's decision to stop inspecting the mine site removed it from the statutory definition of "coal or other mine." 12 FMSHRC at 291.

## II.

### Disposition of Issues

We conclude that the Secretary had jurisdiction to inspect Lancashire's preparation plant under the Mine Act because this facility fits within the Mine Act's definition of "coal or other mine." 30 U.S.C. § 802 (h)(1). Our resolution of Mine Act jurisdiction in this case is governed by the statute and our interpretation is further clarified by its legislative history and by the Commission's decisions. Congress directed the Commission to "give

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ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities....

(2) For purposes of subchapters [titles] II, III, and IV of this chapter [Act], "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

30 U.S.C. § 802(h).

weight" to the Secretary's interpretation of the Mine Act.<sup>5</sup> For the reasons set out below, we believe that the Secretary's reading here of the definition of "coal or other mine" is correct, even if her reading were not entitled to be given weight. We first set forth the basis for this conclusion and then address other issues raised by Lancashire and the dissenting opinion.

A. Definition of "coal or other mine."

Lancashire argues that the only definition of a coal mine applicable in this case is contained in section 3(h)(1) of the Mine Act. 30 U.S.C. § 802 (h)(1). Lancashire contends that the only relevant portion of this definition is contained in part (C), which provides, in pertinent part:

"coal or other mine" means ... (C) lands ... structures, facilities, equipment, machines, tools, or other property ... used in, or to be used in ... the work of preparing coal.

30 U.S.C. § 802(h)(1) (emphasis added). Lancashire maintains that the definition includes lands and facilities resulting from the work of extracting minerals from their natural deposits but does not include lands and facilities resulting from the work of preparing coal.<sup>6</sup> Thus, it argues that because the structures that were demolished and the land on which they were located resulted from the work of preparing coal, rather than the work of extracting minerals from their natural deposits, the work site was not a "coal or other mine" and MSHA was without jurisdiction. It maintains that the definition of "coal or other mine" evidences a Congressional intent to treat facilities resulting from the extraction of coal differently from facilities resulting from the preparation of coal.

Lancashire contends that Judge Koutras improperly supplemented the definition of "coal or other mine" with the definition of "coal mine"

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<sup>5</sup> The legislative history of the Mine Act provides that "the Secretary's interpretation of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (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 637 (1978) ("Legis. Hist.").

<sup>6</sup> Section 3(i) of the Mine Act provides:

"work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine;

30 U.S.C. § 802(i).

contained in section 3(h)(2), which by its own terms is only applicable to titles II, III and IV of the Mine Act. It argues that by incorrectly relying on an inapplicable definition of coal mine, Judge Koutras made the "key limitations" in Section 3(h)(1) "disappear." Lancashire Br. 16.

Lancashire also contends that by confusing the two definitions, the judge improperly found a "nexus" between the extraction and preparation of coal and treated the two activities as though they were one and the same. It states that since the definition in section 3(h)(1) uses the disjunctive "or" to separate the two activities, the definition affords the two activities differing treatment.

The Secretary explains that the two definitions of coal mine in section 3(h) confer Mine Act jurisdiction over property, structures and facilities used in, to be used in, or resulting from the work of extracting or preparing coal. She states that this broad definition is consistent with Congress' intent that the term "mine" be construed expansively as demonstrated by the legislative history of the Act.

The Secretary argues that Lancashire's construction of the definitions in section 3(h) is inconsistent with other provisions of the Mine Act, is contrary to Congressional intent, and is formalistic and at odds with the obvious purpose of the Mine Act. She asserts that the definitions in section 3(h) must be read together. She maintains that the qualifying language of the definition of "coal mine" contained in section 3(h)(2) evidences Congress' recognition that titles II, III and IV of the Mine Act are applicable to coal mines only and not to metal or other mines. She states that Congress did not intend to create two conflicting definitions of coal mine in the same statute.

The Mine Act contains two definitions applicable to coal mines in section 3(h). The definition of "coal mine" contained in section 3(h)(2) is identical to the definition that was in section 3(h) of the Coal Mine Health and Safety Act of 1969 ("Coal Act") except for the addition of the qualifying phrase "For purposes of titles II, III, and IV." The Mine Act amended the Coal Act. The definition of "coal or other mine" contained in section 3(h)(1) of the Mine Act is taken from the definition of the term "mine" contained in section 2(b) of the Federal Metal and Nonmetallic Mine Safety Act ("Metal Act"), 30 U.S.C. § 721 (1976) (repealed). The Metal Act was repealed by the Mine Act.

The Metal Act definition was modified in section 3(h)(1) of the Mine Act as follows:

(A) an area of land from which minerals are extracted in non-liquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to

be used in or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

The underscored phrases in the above definition were not contained in the Metal Act definition and were added by Congress when it passed the Mine Act. The phrase "or to be used in, or resulting from" was added before the words "work of extracting such minerals," while the phrase "or to be used in" was added before the words "the work of preparing coal." It is this disparity that is the crux of Lancashire's argument. Lancashire contends that since the structures to be demolished in this case "resulted from" the work of preparing coal, and were not "used in" or "to be used in" such work at the time of the inspection, these structures do not fit within the Act's definition.

Section 4 of the Mine Act provides that each "coal or other mine" that affects commerce is subject to the Act. 30 U.S.C. § 803. Thus, if the preparation plant at the Lancashire No. 25 Mine is a "coal or other mine" that ends the question because the Secretary has Mine Act jurisdiction over any "coal or other mine."

The fact that the Mine Act contains two somewhat different definitions of covered mining operations and that these definitions are somewhat complex create enough ambiguity to warrant consideration of the legislative history in interpreting these provisions. Burlington Northern R. Co. v. Okla Tax Comm'n, 481 U.S. 454, 461 (1987) ("Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity"). The legislative history, particularly the Senate and House Committee reports, indicate that Congress intended that the definition of the term "coal or other mine" be given a broad interpretation and that any doubts be resolved in favor of inclusion of the facility within the coverage of the Act. More specifically, both Committee reports indicate that Congress intended to treat facilities resulting from the preparation of coal the same as facilities resulting from the extraction of minerals. The legislative history provides no support for Lancashire's position that Congress deliberately excluded from the definition of "coal or other mine" surface structures resulting from the preparation of coal.

When the Senate version of the bill that became the Mine Act was reported by the Committee on Human Resources, the Committee Report described the definition contained in section 3(h)(1) as follows:

[T]he definition of "mine" is clarified to include the areas, both underground and on the surface, from which minerals are extracted (except minerals extracted in liquid form underground), and also, all private roads and areas appurtenant thereto. Also included in the definition of "mine" are lands, excavations, shafts, slopes, and other property, including impoundments, retention dams, and tailings

ponds. These latter were not specifically enumerated in the definition of mine under the Coal Act.... Finally, the structures on the surface or underground, which are used or are to be used in or resulting from the preparation of the extracted minerals are included in the definition of "mine." The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 181, 95th Cong. 1st Sess 14, (1977), reprinted in Legis. Hist. at 602 (emphasis added). It is not clear why the Committee did not include the language "or resulting from" when referring to the work of preparing coal as it did in the Committee Report. This definition remained unchanged when it passed the Senate. Legis. Hist. at 1109.

When the House version of the bill was reported by the House Committee on Education and Labor, the second definition of "coal mine" was added in what is now section 3(h)(2), while the definition in subsection (h)(1) was similar to the definition in the Senate bill. Legis. Hist. at 343-44. The House Committee Report provided the following explanation:

Section 102(b)(2) amends the definition of "Mine" to read "coal or other mine" and to include (1) an area of land from which minerals are extracted in non-liquid form, or if in liquid form are extracted with workers underground; (2) private ways and roads appurtenant to such area; and (3) lands, passageways, facilities, etc., to be used in or resulting from the work of extracting minerals, including custom coal preparation facilities and milling operations....

H. Rep. No. 312, 95th Cong. 1st Sess. 28 (1977), reprinted in Legis. Hist. at 384 (emphasis added). The Committee Report does not state why the Committee did not include the language "or resulting from" in the definition in section 3(h)(1) in reference to the work of preparing coal. The definitions of "mine" in this bill remained unchanged when the bill passed the House. Legis. Hist. at 1261-62.

The two bills were referred to a conference committee. This committee adopted the House bill for purposes of section 3(h). The following explanation is provided in the Conference report:

Both the Senate bill and the House amendment modified the Coal Act to make it the single mine safety and health law, applicable to all mining activity. The Senate bill did this by deleting the word "coal" where applicable in title I. The House

amendment did this by inserting the words "or other" after the word "coal" where applicable. Thus, the Senate bill referred to "mines," the House amendment to "coal or other mines."

The conference substitute conforms to the House amendment. The conferees note that the foundation for the new Mine Safety and Health Act is the Federal Coal Mine Health and Safety Act of 1969. In adopting the provisions of that Act, titles II, III, and IV are retained as exclusively applicable to the coal mining industry. For this reason, it was the decision of the conferees that the use of the term "coal or other mine" in titles I and V, which are applicable to all mining activity, would more clearly delineate the distinction between those titles of the act applicable to all mining and those applicable to coal mining only.

S. Conf. Rep. No. 461, 95th Cong. 1st Sess. 37 (1977), reprinted in Legis. Hist. at 1315.

As discussed above, the Mine Act's definitions in section 3(h) are patterned after the definitions in the Metal Act and Coal Act. It appears to us that the definition of "coal mine" in subsection 3(h)(2) was included, in major part, to make clear that titles II, III and V, which contain coal mine safety and health standards and black lung provisions, are not applicable to metal or nonmetal mines. The term "coal mine" is used in those titles but not in titles I and V. When Congress was considering the bills that became the Mine Act, a critical concern was whether the Secretary would attempt to apply coal mine safety and health standards to noncoal mines, such as sand and gravel pits. Much of the debate centered on this concern. See, e.g., Legis. Hist. at 999-1024, 1056-63, 1161-78, 1231-35. The restriction in the definition of "coal mine" was intended to allay these fears. See Conference Committee Report, supra. As a consequence the term "coal mine" rather than the term "coal or other mine" is used in titles II, III and IV. It does not appear, nor can we credit the contention, that Congress intended to provide an inconsistent definition for coal mines applicable to titles I and V. "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent." 2A Sutherland Statutory Construction, § 46.05, at 90 (Sands 4th ed. 1984 rev.) Consequently, the two definitions should be construed in a way that harmonizes them. Id.

Lancashire admits that the definition of "coal mine" in section 3(h)(2) of the Mine Act "covers structures resulting from the preparation of coal." Lancashire Br. 16. With the exception of the introductory phrase, this definition is the same definition that was in the Coal Act. Thus, Lancashire's work site would have been subject to the jurisdiction of the Coal Act. It is clear that Congress did not intend to reduce the scope of the government's authority when it passed the Mine Act. Congress stated that section 3(h) of the Mine Act "contains amendments to the definitions in the Coal Act, which reflect ... the broader jurisdiction of the[e] [Mine] Act."

S. Rep. No. 181, supra, at 14, reprinted in Legis. Hist. at 602 (emphasis added); Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1554 (D.C. Cir. 1984).<sup>7</sup>

The dissenting opinion concludes that persons engaged in demolition at a mine site such as Lancashire's are not miners. But, the term "miner" is defined broadly in the Act, as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). The term "operator" is defined in the Act to include those performing services or construction at mines. 30 U.S.C. § 802(d). Thus, a construction worker, elevator mechanic, laboratory technician or clerk-typist working at a mine is a "miner" under the Act. See e.g., Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285 (D.C. Cir. 1990); Martha Perando v. Mettiki Coal Corp., 10 FMSHRC 491 (April 1988). Further, the Secretary has defined the term "miner" for purposes of hazard training regulations for surface facilities as "any person working in a surface mine or surface areas of an underground mine ... includ[ing] any delivery, office, or scientific worker, or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine." 30 C.F.R. 48.22(a)(2).

Based on the language of the Mine Act and the legislative history, we conclude that the facilities at issue at the Lancashire No. 25 Mine fit within the definition of "coal or other mine" as set forth in section 3(h)(1) of the Mine Act. We reject Lancashire's attempt "to give the Mine Act a technical interpretation at odds with its obvious purpose." Nacco Mining Co., 9 FMSHRC 1541, 1546 (September 1987).

#### B. Nature of the operation

Lancashire maintains that even if its work site fits within the definition of "coal or other mine," MSHA was without jurisdiction to inspect it because the nature of the operation was not similar to work usually performed by a mine operator. It contends that the demolition and removal of the structures in question from the abandoned mine site were not closely associated with active coal mining. Lancashire argues that the Commission's decision in Oliver M. Elam, Jr., 4 FMSHRC 5 (January 1982), recognizes that an activity does not fall within the coverage of the Mine Act unless the nature of the operation in question is similar to work normally performed by a mine operator.

In Elam, the question presented was whether a commercial dock facility that arguably performed several of the functions included in the Mine Act's definition of "work of preparing the coal" was subject to MSHA jurisdiction.

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<sup>7</sup> Consistent with the thrust of this legislative history, the federal courts have uniformly recognized the extensive reach of the term "coal or other mine." E.g., Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3rd Cir. 1979) ("the statute makes clear that the concept that was to be conveyed by the word ["mine"] is much more encompassing than the usual meaning attributed to it"); Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1118 (9th Cir. 1981).

Having examined the activities carried out at Elam's dock, the Commission concluded that "all of Elam's activities with respect to coal relate solely to loading it for shipment." 4 FMSHRC at 6. The Commission held that "inherent in the determination whether an operation properly is classified as 'mining' is an inquiry not only into whether the operation performs one or more of the listed work activities [in the definition of 'work of preparing the coal'], but also the nature of the operation performing such activities." Elam, 4 FMSHRC at 7 (emphasis in original).<sup>8</sup>

Elam is distinguishable from the present case. If the Lancashire facilities being demolished were still in use, they would be the kind of facilities at which activities within the definition of "work of preparing the coal" would be performed and, as a consequence, would be within the definition of "coal or other mine." Lancashire admits that the facilities in this case "undeniably were designed for and used in the 'work of preparing the coal,' as that term is defined in the Mine Act." Lancashire Br. 11. Thus, the work performed at the facilities at issue at the time the mine was operating was the "work of preparing ... coal as is usually done by the operator of the coal mine." See section 3(i) of the Act. The physical setting in this case is easily recognizable as a mine, while Elam's commercial dock on the Ohio River is not.

Elam applies when an operation is performing some functions normally associated with coal preparation, such as sizing and crushing, at a location separate (and different) from a traditional mine site. See, e.g., Mineral Coal Sales, Inc., 7 FMSHRC 615, 619-20 (May 1985). The issue there is whether such activities are sufficient to be deemed the "work of preparing the coal" so that the operation should be considered to be a mine. In contrast, the issue in the present case is whether demolition activities in aid of reclamation at a former preparation plant located on a mine site are within the statute's coverage. Whether the demolition activities constitute the "work of preparing the coal" is not an issue here.

Lancashire also refers to the judge's finding that the demolition of the structures at issue was not closely related to activities normally associated with active coal mining. The judge made this finding, however, in reaching his conclusion that Lancashire was not required by 30 C.F.R. § 77.1712 to notify MSHA that it was reopening the mine. The judge determined that in order

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<sup>8</sup> In the present case, the judge considered the Commission's decision in Alexander Brothers in reaching the conclusion that Lancashire's work site was subject to MSHA jurisdiction. 12 FMSHRC at 293. In Alexander Brothers, the Commission applied Elam and concluded that the removal and screening of coal and foreign debris from a refuse pile at an abandoned mine site constituted the work of preparing the coal. 4 FMSHRC at 545. The judge noted that although the work being performed by the operator in Alexander Brothers differed from the work performed by "the ordinary preparation plant," the Commission determined that it was subject to the jurisdiction of the Coal Act. 12 FMSHRC at 293. Thus, in applying Alexander Brothers to the facts of this case, the judge analyzed the nature of Lancashire's operation and determined that it was subject to MSHA jurisdiction.

to establish a violation of section 77.1712, there must be "some indicia of active coal mining operations, or at least some evidence that a mine operator intended to resume the active mining [or preparation] of coal." 12 FMSHRC at 303. As a consequence, he vacated the citation. The judge's finding in this regard does not support Lancashire's argument that MSHA was without jurisdiction.

Other activities at a mine site that do not occur at the same time as the extraction or preparation of coal are subject to MSHA jurisdiction. For example, the construction of buildings or other structures at a mine site is subject to MSHA inspection, even if the extraction of minerals has not yet begun. 30 U.S.C. § 802(d); See also, e.g., Bituminous Coal Operators' Association v. Secretary, 547 F.2d 240 (4th Cir. 1977). Nothing in the Mine Act, the legislative history or Elam suggests that MSHA is without jurisdiction to inspect a particular activity at a "coal or other mine" simply because such activity is not contemporaneous with the active extraction or preparation of coal or other minerals.

Moreover, even applying Elam's "nature of the operation" test, Lancashire's position is undercut by its acknowledgment that "operators have a duty to tear down above ground structures as part of the state-mandated reclamation of a permanently abandoned facility." Lancashire Br. 25, n.17. As a consequence, Lancashire effectively concedes that the normal mining process may include the demolition of surface facilities at a coal mine after such mine is closed. To borrow a phrase from section 3(i) of the Act, the demolition of surface facilities at a coal mine constitutes work "usually done by the operator of the coal mine" once the ore body is depleted or mining is halted for other reasons. While demolition is not always associated with active mining, it is related to the overall process of mining coal.

### C. Additional Issues

Lancashire contends that a memorandum written by Associate Solicitor Edward Clair, referred to as the "Huntsville Gob memorandum" supports its position that its reclamation activities were not subject to MSHA jurisdiction. In that memorandum, Mr. Clair determined that reclamation work occurring at another site was not subject to Mine Act jurisdiction. He listed a number of factors that should be evaluated when MSHA determines whether it has jurisdiction over work occurring on previously mined lands.

The Huntsville Gob memorandum does not purport to be a statement of MSHA policy nor does the Secretary state that it is. The contents of the memorandum were not promulgated either as interpretative rules or enforcement guidelines. Rather, the memorandum is an internal document that supports MSHA's decision not to assert jurisdiction over a particular facility at a particular time. Indeed, Mr. Clair had determined that MSHA did have jurisdiction over Lancashire's preparation plant in another memorandum, referred to above, two weeks earlier. The Commission has previously determined that resolution of the question of jurisdiction "is governed by the statute, rather than by which of two conflicting interpretations by the Solicitor is correct." Alexander Brothers, 4 FMSHRC at 543. In any event, the Commission has previously concluded that inconsistent enforcement policies

of the Secretary are not necessarily dispositive of whether a violation occurred but bear on the degree of negligence of an operator and in assessing a civil penalty. King Knob, 3 FMSHRC 1417, 1422 (June 1981).

Lancashire and the dissenting Commissioners contend that Lancashire's activities were covered by the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1988) ("OSHAct"). The OSHAct applies to a workplace unless another federal agency "exercise[s] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. §§ 653(b)(1). When another federal agency has actually exercised its statutory authority to regulate a workplace, the OSHAct does not apply. E.g., Southern Ry. Co. v. Occupational Safety and Health Review Comm., 539 F.2d 335, 336 (4th Cir. 1976). The Mine Act empowers an MSHA inspector to issue a citation or order of withdrawal to any "operator" that violates the Mine Act or a MSHA regulation. (The term "operator" is defined in section 3(d) of the Mine Act as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d).) Thus, "with regard to health and safety in the workplace, the Secretary regulates an employer falling within the Mine Act definition of an operator under that Act, while she regulates an employer not so classified under the OSHAct." Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285, 1287 (D.C. Cir. 1990). In this case, the Secretary exercised her inspection authority under the Mine Act. The Secretary has never attempted to regulate the safety and health conditions at Lancashire under the OSHAct.<sup>9</sup>

The dissenting Commissioners emphasize that Circuit Court holdings in Southern Ry. Co. and in Columbia Gas of Pennsylvania v. Marshall, 636 F.2d 913 (3rd Cir. 1980) would require the issuance of explicit demolition regulations to establish MSHA jurisdiction in this case. But under their rationale, consequences would ensue that are at variance with Congressional intent. OSHA, for example, would be given jurisdiction over demolition at a mine site even when coal was being extracted at the same time, because MSHA would not be able to show that it had promulgated specific demolition regulations.

These cases, moreover, may be distinguished. In Southern Ry. Co., as in other cases with similar holdings, the court required a showing of specificity

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<sup>9</sup> In Pennsylvania Electric Co., 11 FMSHRC 1875 (October 1989), and Westwood Energy Properties, a majority of the Commission determined that MSHA had jurisdiction over certain facilities but were unable to determine whether the Secretary had, in fact, chosen to exercise her authority to regulate them under the Mine Act instead of the OSHAct. In each case, both the Occupational Safety and Health Administration ("OSHA") and MSHA had asserted jurisdiction over the operation in question. These cases were remanded to the judge to determine whether the Secretary had properly invoked Mine Act jurisdiction. As OSHA has never attempted to assert jurisdiction over any facility associated with the Lancashire operation, holdings in Pennsylvania Electric and Westwood are not applicable to this case.

in an agency's regulations in order to establish grounds for preemption or exemption from OSHA's residual regulatory authority. At issue in this case is the Secretary's direct assertion of statutory authority for MSHA. This is not a case where OSHA has asserted authority and where that authority is being challenged. This is not a case where OSHA's residual regulatory authority derives from a lack of exercise of regulatory authority by another agency.

Southern Ry. Co. and other cases with similar holdings may be further distinguished in that the jurisdictional question at issue in those cases lies between separate departments or agencies, rather than within a single cabinet-level department, under a single Secretary, as in this case. A jurisdictional question may be resolved with greater ease when it falls within the authority of one Secretary. The Secretary of Labor, in regulating Lancashire's demolition activities under the Mine Act rather than the OSHA Act, is "not determining the outer limits of [her] own authority, but [is] merely 'adjusting the administrative burdens between [her] various agencies.'" Otis Elevator, 921 F.2d at 1288 n. 1 (quoting Carolina Stalite, 734 F.2d at 1553). Lancashire is "unquestionably subject to regulation by the Secretary under one Act or the other." Otis Elevator, 921 F.2d 1288 n. 1.

Lancashire's final argument is that MSHA's jurisdiction over its coal preparation plant ceased when MSHA stopped inspecting it in September 1988. It contends that MSHA stopped inspecting the facility because MSHA determined that the facility was no longer a mine subject to its jurisdiction. Lancashire maintains that it did not reestablish itself as a mine subject to MSHA jurisdiction when it demolished the structures because it took no action, after MSHA declared the mine to be "permanently abandoned," to resume the extraction or preparation of coal.

Lancashire argues that MSHA has taken the position that such reclamation activities at abandoned mines are not subject to the jurisdiction of the Mine Act. Lancashire points to the testimony of MSHA Inspector Leroy Niehenke and retired Inspector Thomas Simmers in addition to the Huntsville Gob memo. The two inspectors stated that they have never known MSHA to attempt to exercise jurisdiction over demolition work being performed as part of reclamation at a "permanently abandoned" facility. In addition, Morchesky (the independent contractor) testified that he performed similar work at another abandoned mine site in the area (Barnes & Tucker No. 20) with the knowledge of MSHA and that MSHA never attempted to assert jurisdiction over this work.

The Secretary responds that it is irrelevant whether the mine was reopened to extract or prepare coal, or to demolish surface mine facilities. She maintains that MSHA's "permanently abandoned" classification is for administrative convenience to conserve inspection resources and that such classification does not divest MSHA of jurisdiction if new work is commenced at the site. We note that the inspection occurred less than seven months after MSHA classified the mine as "permanently abandoned."

Neither party disputes that MSHA would have jurisdiction at a mine previously classified as "permanently abandoned" if the operator took actions to recommence the extraction or preparation of coal. What is contested is whether MSHA has jurisdiction at a site previously mined when old surface coal

preparation facilities are demolished. Lancashire asserts with no authoritative basis that MSHA's jurisdiction at a "permanently abandoned" mine can begin again only if steps are taken to resume the extraction or preparation of coal.

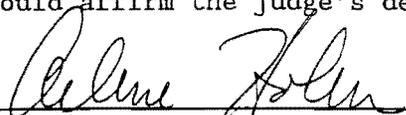
We believe that the Mine Act's definition of "coal or other mine" subjects Lancashire's preparation plant to Mine Act jurisdiction. The Secretary cannot be prevented from asserting Mine Act jurisdiction at the Lancashire operation simply because she may not have exercised such jurisdiction at other locations. In resolving questions of jurisdiction, the Commission must be guided by Congressional intent. Consistent policy and enforcement, nevertheless, would advance the goals of the Mine Act, improving workplace safety and health, while at the same time reducing unnecessary burdens of compliance. Uncertain regulatory enforcement creates confusion and instability for operators and workers, leading to higher costs of production and reduced safety.

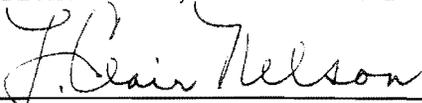
Finally, it is noteworthy that the essential thrust of Lancashire's argument is to urge that no governmental oversight was appropriate for the demolition activity involved in this case. MSHA had exercised jurisdiction over this site while it was a working operation. OSHA never had visited the site and, so far as the record discloses, was unaware of the operation and the demolition. Lancashire does not seek review of the judge's rulings upholding validity of the citations and orders, but seeks review of the judge's decision that the cited working conditions were subject to Mine Act jurisdiction. The judge's decision is reasonable and adequately supported; the argument against that ruling does not comport with the fundamental concern of the operator for safety first, as required by the Congress in Section 2 of the Mine Act.

### III.

#### Conclusion

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

  
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Arlene Holen, Commissioner

  
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L. Clair Nelson, Commissioner

Acting Chairman Backley and Commissioner Doyle, dissenting:

Lancashire Coal Company ("Lancashire") ceased operations at its No. 25 Mine in 1983. The shafts were sealed in 1986, and, in 1988, MSHA classified the work site as permanently abandoned. Subsequently, as part of its reclamation effort, Lancashire contracted with K&L Equipment Co., Inc. ("K&L") to demolish the old coal silo and screen house on the property. On March 20, 1989, during the demolition, one of K&L's employees was killed.

The following day, an inspector from the Mine Safety and Health Administration ("MSHA") inspected the site (under protest from Lancashire and K&L), and issued several citations to K&L. He also issued to Lancashire two control orders and a citation, pursuant to 30 C.F.R. § 77.200,<sup>1</sup> alleging that Lancashire had failed to maintain the coal silo and screen house in good repair. The inspector then consulted with his Subdistrict Manager, and subsequently the District Manager sought clarification from the MSHA Administrator "as to MSHA's jurisdiction and the operator's responsibility to comply with the Act and Title 30 [C.F.R.] and the jurisdiction over contractor activities at the mine site." Exh. R-36 at 1. The Associate Solicitor, in a memorandum dated May 2, 1989, advised that K&L's activities were "mining activities within the meaning of the 1977 Act." Exh. R-37 at 3. In the meantime, the inspector had returned to the mine and issued two additional citations, one pursuant to 30 C.F.R. § 45.4(b),<sup>2</sup> alleging that Lancashire had failed to keep required records with respect to K&L in its office (name, address, telephone number, nature

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<sup>1</sup> Section 77.200 provides as follows:

Surface installations; general.

All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

30 C.F.R. § 77.200.

<sup>2</sup> Section 45.4(b) provides as follows:

§ 45.4 Independent contractor register.

(b) Each production-operator shall maintain in writing at the mine the information required by paragraph (a) of this section for each independent contractor at the mine. The production-operator shall make this information available to any authorized representative of the Secretary upon request.

30 C.F.R. § 45.4(b).

of work to be done, etc.) and the second pursuant to 30 C.F.R. § 77.1712,<sup>3</sup> alleging that Lancashire had failed to notify MSHA "prior to reopening."

Lancashire challenged the citations and orders on the grounds that MSHA did not have jurisdiction over the mine site. The administrative law judge concluded, based on his reading of the legislative history and on the Commission's decision in Westwood Energy Properties, 11 FMSHRC 2408 (December 1989),<sup>4</sup> that Lancashire's property was a "mine" as defined in the Mine Act and that, therefore, MSHA had jurisdiction at the time of the inspections. 12 FMSHRC at 291, 295, 303. He upheld the violation of 30 C.F.R. § 77.200, finding that Lancashire had failed to maintain the mine in good repair, as required by that regulation. He also sustained the recordkeeping violation charged under 30 C.F.R. 45.4(b). The judge vacated the citation with respect to section 77.1712, based on his conclusion that, in order to establish a violation of that section, "there must be some indicia of active coal mining operations, or at least some evidence that a mine operator intended to resume the active mining of coal." 12 FMSHRC at 303. The Secretary of Labor ("Secretary") did not petition for review of that determination.

Our two colleagues would affirm the judge's decision that Lancashire's demolition project is subject to Mine Act jurisdiction. In doing so, they state that they rely on the language of the statute, as "further clarified by its legislative history and by the Commission's decisions" (slip op. at 6) but they refuse to apply the Commission's earlier framework for determining Mine Act coverage as set forth in Oliver M. Elam, Jr., Co., 4 FMSHRC 5 (January 1982). Slip op at 12-14. They refuse to consider the so-called Huntsville Gob Memorandum, which is part of the record, because it

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<sup>3</sup> Section 77.1712 provides as follows:

Reopening mines; notification; inspection prior to mining.

Prior to reopening any surface coal mine after it has been abandoned or declared inactive by the operator, the operator shall notify the Coal Mine Health and Safety District Manager for the district in which the mine is located, and an inspection of the entire mine shall be completed by an authorized representative of the Secretary before any mining operations in such mine are instituted.

30 C.F.R. § 1712.

<sup>4</sup> Following the Commission's decision in Westwood, the Secretary filed a Motion to Approve Settlement with the Commission, whereby MSHA agreed not to "assert jurisdiction over Westwood in the future, as long as Westwood does not materially change the manner in which it [operates]." Sec.'s Motion to Dismiss in Westwood at 2.

"... does not purport to be a statement of MSHA policy...." Slip op. at 14. <sup>5</sup> They further find that Lancashire's operations are exempt from coverage under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1988) ("OSHAct") pursuant to section 4(b)(1) thereof. 29 U.S.C. § 653(b)(1). Slip op. at 15-16. We disagree that Lancashire's demolition project is subject to regulation under the Mine Act rather than under the OSHAct.

In reviewing the Mine Act and its legislative history in an attempt to glean precisely what Congress intended to regulate, our colleagues focus exclusively on the definition of "coal or other mine" set forth in section 3(h)(1) and the definition of "coal mine" set forth in section 3(h)(2) and the legislative history of those sections. That legislative history, which has been widely quoted in advocating Mine Act coverage, indicates that the definition of a mine is to be "given the broadest possibl[e] interpretation" and that "doubts [should] be resolved in favor of inclusion...." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977) reprinted in Legis. Hist. at 602. While that language is expansive, it is not without bounds and one must also consider that the Mine Act was intended to establish a "single mine safety and health law, applicable to all mining activity." (emphasis supplied) S. Rep. No. 461, 95th Cong., 1st Sess. 37 (1977) reprinted in Legis. Hist. at 1315. <sup>6</sup> More importantly, section 2(g) of the Mine Act makes clear that "it is the purpose of [the Mine Act] ... to protect the health and safety of the Nation's coal or other miners." 30 U.S.C. § 801(g) (emphasis supplied.) Nowhere in the Mine Act or in its legislative history is there any indication that Congress intended the Mine Act, no matter how broadly it is to be interpreted, to govern the building demolition industry or its employees, any more than there is indication that Congress intended the Mine Act to govern other industries engaged in reclamation or in post-reclamation use of abandoned mines, as our colleague's decision would dictate. <sup>7</sup>

We also view our colleagues's decision to be inconsistent with the

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<sup>5</sup> In the Huntsville Gob Memorandum, dated May 24, 1989, the same Associate Solicitor who had supported Mine Act jurisdiction in this case opined that "[o]ther activities more remote from mining, such as reclamation work occurring on previously mined abandoned lands are not subject to the Mine Act." Huntsville Gob Memorandum at 1.

<sup>6</sup> As noted by the D.C. Circuit, statutes "are not to be read over-literally" and must be interpreted in light of the spirit in which they were written and the reasons for their enactment." General Serv. Emp. U. Local No. 73 v. N.L.R.B., 578 F.2d 361, 366 (D.C. Cir. 1978).

<sup>7</sup> It should be noted that there were no Lancashire miners on the property who could have been endangered or otherwise affected by K&L's activities.

Commission's holding in Elam, 4 FMSHRC 5.<sup>8</sup> In this case the judge accepted joint stipulations which confirmed that, after September 6, 1988, Lancashire took no action to indicate that it intended to resume the extraction, production, milling or processing of coal. Stip. 13, Exh. ALJ-1. September 6, 1988, was of course, the day MSHA officially declared the subject work site permanently abandoned. Indeed, after reviewing all the evidence, and in support of his decision to vacate the citation of 30 C.F.R. § 77.1712, the judge concluded:

On the basis of the facts and evidence adduced in these proceedings, I cannot conclude that the demolition and removal of the structures in question from the abandoned mine site in question were closely associated with activities normally associated with active coal mining. It is undisputed that active coal mining had not taken place at the site for at least 6-years prior to the demolition activities in question, and the underground shafts were permanently sealed in 1986, and MSHA declared the mine permanently abandoned in 1988. Mr. Falger's un rebutted credible testimony suggests that the structures which were being demolished and removed from the site had not been used in any mining activity for at least 18 years prior to their demolition. There is no evidence that Lancashire ever intended to resume any active coal mining activities at the time the demolition work was taking place. The site was dormant, and there is no evidence that Lancashire had taken any action to resume the extraction or processing of any coal after the site was declared permanently abandoned. Further, the demolition work was being done by K&L, and there is no evidence that any Lancashire employees were performing any of this work.

12 FMSHRC at 302. (emphasis supplied.)

The foregoing determination of the judge provides compelling support for Lancashire's argument that the principle enunciated by this Commission in Elam, 4 FMSHRC 5, dictates a conclusion that, under the facts of this case, MSHA did not have jurisdiction over Lancashire's work site.

In Elam, the Commission eschewed a mechanical, reflexive determination

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<sup>8</sup> While we do not disagree that the "'work of preparing the coal' is not an issue" in this case (slip op. at 13) or that "Elam applies when an operation is performing some functions normally associated with coal preparation" (slip op. at 13), we disagree that its application is so limited.

of jurisdiction under the Mine Act. Notwithstanding the fact that Elam actually performed many of the functions expressly included in the Mine Act's definition of coal preparation, i.e., storing, breaking, crushing, and loading, the Commission concluded that Elam was not "mining" but, rather, was performing those functions incidentally to its business, which was the commercial loading of coal and other material at a dock. Significantly, the Commission held:

... inherent in the determination of whether an operation properly is classified as "mining" is an inquiry not only into whether the operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities.

Elam, 4 FMSHRC at 7.

In deciding thusly, the Commission reconciled a broad jurisdictional mandate in a way that was not obscured by the existence of superficial conditions which could have been seized upon to support a contrary conclusion. We seek to do no less in resolving the instant case.

Clearly the record in this matter establishes that Lancashire's operation, at the time MSHA asserted jurisdiction, was exclusively demolition. In our colleagues view, Lancashire's acknowledgement that Pennsylvania state law mandates the demolition of above ground structures of permanently abandoned facilities is a concession that such demolition is part of "the normal mining process." Slip op. at 14. Thus, they conclude that, even under Elam, Lancashire is subject to the Mine Act. Id. We do not agree. There are many activities incidental to the establishment and winding down of a mining business that are not regulated by the Mine Act. Certainly, the acts of leasing coal reserves, obtaining permits, securing financing and insurance, purchasing mining equipment, obtaining electrical power, and marketing the coal produced are all activities "related to the overall process of mining coal" but are all clearly not subject to Mine Act jurisdiction. Moreover, in construing the breadth of the jurisdiction of this federal statute, it is clearly error to rely upon the existence of a particular state law. Obviously our holding today applies nationally, irrespective of the provisions of a particular state's reclamation requirements.

Proper application of the Elam test compels a determination that, under the facts of this case, MSHA erroneously asserted jurisdiction over the demolition activities at the Lancashire work site.

The affirming Commissioners also conclude that Lancashire is exempt from OSHA coverage because "the Secretary exercised her inspection authority under the Mine Act" and the "Secretary has never attempted to regulate the safety and health conditions at Lancashire under the OSHA." Slip op. at 15. Evidently they are of the opinion that, anytime MSHA conducts an after-the-fact inspection of an accident site, the operator of that site becomes subject to a retroactive application of Mine Act

jurisdiction and regulations and is automatically exempted from the OSHAct pursuant to the provisions set forth in section 4(b)(1) thereof.

The Secretary generally regulates safety and health under the OSHAct, but regulation thereunder does not extend to "working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). The court in Southern Ry. Co. v. OSHRC, 539 F.2d 335 (4th Cir. 1976), cert. denied, 429 U.S. 999 (1976), relied on by the affirming Commissioners (slip op. at 14), emphasizes that the legislative history of the OSHAct clearly indicates that it is not the mere existence of the authority of another agency to act, but its adoption and enforcement of rules and regulations that exempts employees from coverage under the OSHAct. 539 F.2d at 336, 337. In that case, Southern argued that all its employees were exempt from OSHAct coverage because the Federal Railway Administration ("FRA") had promulgated regulations affecting the working conditions of railway employees. The Secretary of Labor contended that, although FRA had authority to regulate all areas of employee safety for the railway industry, section 4(b)(1) of the OSHAct exempts only those areas of railway employee safety in which FRA had actually exercised its authority. Finding that the safety regulations of FRA were confined almost exclusively to over-the-road transportation operations, and that FRA had not issued regulations with respect to offices, shops and repair facilities, the court rejected both the broad "industry wide" exemption urged by Southern, as well as the narrow "particular discrete hazards" exemption urged by the Secretary. 539 F.2d at 338, 339. Rather, it found that the exemption from OSHAct coverage applies where another agency "has exercised its statutory authority to prescribe standards" for the "environmental area in which an employee customarily goes about his daily tasks." 539 F.2d at 339 (emphasis added). Accordingly, the court found no exemption from the OSHAct for those areas of Southern's operation with respect to which FRA had not issued regulations. 539 F.2d at 339-40.<sup>9</sup>

Notwithstanding our colleagues' unsupported assertion to the contrary (slip op. at 16), MSHA has not exercised regulatory authority. It has not addressed either the "environmental area" or the "precise hazards" involved with this demolition project as evidenced by the fact that MSHA could cite Lancashire only for (1) its failure to maintain the mine in good condition, when it was actually demolishing the structure in issue, (2) for its failure to notify MSHA that it was reopening a mine, when it was actually taking further steps to preclude ever reopening (a citation that was vacated by the

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<sup>9</sup> It is informative to note that the Secretary has maintained the position asserted in Southern Ry. as recently as December, 1990, in a brief filed in the pending case of Pennsylvania Electric Company v. FMSHRC, No. 90-3636, (3d Cir.). In that brief, she states that she "continues to maintain that OSHA is preempted under section 4(b)(1) only if another agency has addressed the precise hazard at issue." Sec. Br. in Pennsylvania Electric Company at 40, n. 32. (emphasis supplied).

judge), and for (3) a recordkeeping violation. OSHA, on the other hand, has issued specific regulations with respect to demolition, 29 C.F.R. § 1926.850 et seq. (1988). Included is a regulation requiring that an engineering survey be conducted prior to the commencement of demolition to determine, among other things, the possibility of unplanned collapse. 29 C.F.R. § 1926.850(a).<sup>10</sup>

The Fifth Circuit has also addressed this issue in Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5th Cir. 1976). Relying on the legislative history of the OSHAct, the court found that the "Senate proceedings clearly demonstrate that the Senate language [which was substituted for the House version] was not intended to create an industry-wide exemption." 539 F.2d at 390-91. The court further found that "interpretation of section 4(b)(1) as an industry-wide exemption becomes ... an assertion inconsistent with an announced statutory purpose," i.e., "to assure so far as possible to every man and woman in the nation, safe and healthful working conditions." 539 F.2d at 391, 29 U.S.C. 651(b).

The Third Circuit has also concluded that "section 4(b)(1) preemption requires a two-part showing; first, that a coordinate federal agency has 'exercised' authority by promulgating regulations in the area and second, that these concurrent regulations cover the specific 'working conditions'...." Columbia Gas of Pa., Inc. v. Marshall, 636 F.2d 913, 915-16 (3d Cir. 1980). "The preempting agency must actually promulgate regulations, mere declaration of authority is not enough." 636 F.2d at 916, n. 7.

It appears that the affirming Commissioners have equated MSHA's post accident inspection and shoe-horn attempts at citations with "regulation," and have ignored OSHA's final regulations in concluding that no attempts have been made by OSHA to regulate this demolition project. However, the Secretary herself recognizes, albeit in other cases, that "regulation" sufficient to exempt an operator from OSHAct coverage does, in fact, require the promulgation of regulations.

In rejecting the third, fourth and fifth circuits' holdings in Southern Ry. Co., Columbia Gas of Pa., and Southern Pacific Transportation

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<sup>10</sup> Section 1926.850(a) of the OSHA regulations provides, in relevant part, as follows:

Preparatory operations.

(a) Prior to permitting employees to start demolition operations, an engineering survey shall be made, by a competent person, of the structure to determine the condition of the framing, floors, and walls, and possibility of unplanned collapse of any portion of the structure....

29 C.F.R. § 1926.850(a).

Co., our colleagues state that, under such a rationale (requiring the issuance of demolition regulations to establish MSHA jurisdiction), "consequences would ensue that are at variance with Congressional intent." Slip op. at 15. Obviously they are ignoring Congress' intent in enacting the OSHAct, and in particular section 4(b)(1) thereof, i.e., to remove jurisdiction from OSHA only when another agency with authority to regulate safety in the workplace has actually taken steps in that direction by issuing regulations.

In attempting to distinguish this case, our colleagues state that we are dealing here with "the Secretary's direct assertion of statutory authority for MSHA" as opposed to her defense of jurisdiction "where OSHA has asserted authority and where that authority is being challenged." Slip op. at 16. While we do not disagree with that statement, we do not see that it provides a basis for a different interpretation of the same law. Nor do our colleagues enlighten us as to why this should be the case. They also assert, without support, that "[t]his is not a case where OSHA's residual regulatory authority derives from a lack of exercise of regulatory authority by another agency." Slip op. at 16. In fact, this is just such a case if one recognizes, as have the courts as well the Secretary, that "regulation" does, in fact, require the issuance of regulations. In this case, no MSHA regulations exist.<sup>11</sup>

Our colleagues also seem to be of the opinion that MSHA is not a separate agency from OSHA because they are "within a single cabinet-level department, under a single Secretary." Slip op. at 16. Whether the preempting agency is within or without "a single cabinet level department under a single Secretary" is totally irrelevant to the purpose of section 4(b)(1) of the OSHAct, i.e., that protection of the OSHAct is not to be pre-empted unless another agency has specifically regulated at least the "environmental area" in question.<sup>12</sup>

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<sup>11</sup> In our view, our colleagues misread the Commission's decision in King Knob Coal Company, Inc., 3 FMSHRC 1417 (June 1981). That case does not deal with "inconsistent enforcement policies of the Secretary" (slip op. at 14-15) nor did the Commission "conclude[] that inconsistent enforcement policies of the Secretary are not necessarily dispositive of whether a violation occurred." Id. at 15. The issue in that case was whether the Secretary was estopped from enforcing a regulation as written because MSHA's Manual set forth a different interpretation of what the regulation required. 3 FMSHRC at 1417. The Commission rejected King Knob's argument on the grounds that "equitable estoppel generally does not apply against the government." 3 FMSHRC at 1421.

<sup>12</sup> Even the Secretary has not advocated this approach, either in this case or in Pennsylvania Electric Company, where she argues that her promulgation of an MSHA standard applicable to the working conditions in issue triggers pre-emption of OSHAct jurisdiction. Sec. Br. in Pennsylvania Electric Company at 37.

Finally, our colleagues assert that "the essential thrust of Lancashire's argument is to urge that no governmental oversight was appropriate for the demolition activity involved in this case." Slip op. at 17. A careful reading of Lancashire's Brief and its Supplemental Brief prove otherwise. In its initial Brief, Lancashire states:

... While MSHA's expertise in the extraction, milling and preparation of minerals may be of use when dealing with an underground tunnel or even possibly the construction of a structure that is to be used in the mining process, it would be of little use in connection with the demolition of above ground structures at an abandoned mine site. The proper demolition of a storage silo does not depend on whether it used to be filled with coal or grain. Thus, it makes perfect sense for the more general agency, OSHA, and not MSHA, to have jurisdiction over the demolition of such structures.

Lanc. Brief at 12, n.10.

In its Supplemental Brief, Lancashire states:

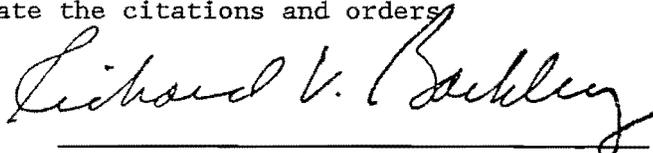
... Thus, enforcement of health and safety standards in connection with such demolition can and should be carried out by the more generalized Occupational Safety and Health Administration ("OSHA"), and not by MSHA. Furthermore, as explained in Petitioner's Brief at 12 n.10, exclusion from Mine Act coverage for the demolition of these structures is entirely consistent with the OSHA-MSHA interagency agreement.

Lanc. Supplemental Brief at 5. The thrust of Lancashire argument is that OSHA should regulate reclamation-oriented activities such as demolition at abandoned mine sites.

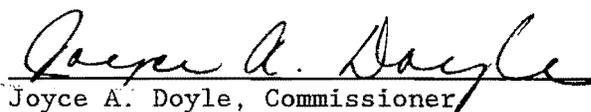
In this case, there is no evidence that the safety of any miners (the group Congress intended to protect when it enacted the Mine Act) was involved. The Secretary has issued no regulations under the Mine Act that enhance safety in the circumstances at issue, which is, after all, the goal of both the Mine Act and the OSHAct. Had the engineering survey required under the OSHAct been done, perhaps Lancashire and K&L would have been alerted to the fact that the procedure being contemplated was unsafe. (MSHA's regulations do not tell us what it would have required had Lancashire advised MSHA that it was "reopening" the building it was planning to demolish.) The Secretary's position here is not only inconsistent with her position in other projects (as evidenced by the Huntsville Gob Memorandum) and other cases (as evidenced by her argument in Southern Ry. and her brief in Pennsylvania Electric), but the record is devoid of evidence indicating any previous attempts to enforce the Mine Act in this

fashion.<sup>13</sup> In addition, the inspector, who was uncertain of whether MSHA had jurisdiction, was apparently unable to get clarification from either his Subdistrict or District Managers, as evidenced by the memo from the District Manager to the MSHA Administrator requesting a determination.

In summary, we are of the opinion that Congress did not intend to regulate the demolition industry under the Mine Act, that neither this "hazard" nor "environmental area" is addressed in Mine Act regulations so as to trigger the section 4(b)(1) preemption from the OSHAct, and that the Secretary's assertion of jurisdiction under the Mine Act, even if entitled to weight, is unreasonable in this case. Accordingly, we would reverse the administrative law judge and vacate the citations and orders.



Richard V. Backley, Acting Chairman



Joyce A. Doyle, Commissioner

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<sup>13</sup> In fact, the evidence of record is to the contrary. MSHA Inspector Sparvieri testified that once a mine site has been permanently abandoned, MSHA's duty to inspect it ceases. Tr. 94. MSHA inspector Leroy Nienenre testified that, although he had conducted at least one inspection at the Lancashire site during the time of the demolition project, he had been told by the supervisor not to inspect it. Tr. 234-37. He was not aware of any time that MSHA had asserted jurisdiction at an abandoned mine because of demolition work taking place. Tr. 237. The affidavit of retired MSHA inspector Thomas J. Summers, received into evidence as Exhibit C-3, states that in his eighteen years experience with MSHA he was unaware of any cases in which a permanently abandoned mine was again inspected by MSHA except where steps were taken by the operator that indicated the resumption of production or processing of coal. Exh. C-3 at ¶ 3.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 25, 1991

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. WEVA 89-192  
 :  
EASTERN ASSOCIATED COAL CORPORATION :

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

DECISION

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" or "Act"). It involves the validity of two orders of withdrawal issued for the same violative condition to Eastern Associated Coal Company ("Eastern"), by the Department of Labor's Mine Safety and Health Administration ("MSHA"), pursuant to sections 104(d)(2) and 107(a) of the Mine Act. 30 U.S.C. §§ 814(d)(2) & 817(a). Commission Administrative Law Judge Avram Weisberger affirmed both withdrawal orders. In an Order denying Eastern's Motion for Summary Decision, he concluded that neither the Mine Act nor its legislative history prohibits MSHA from issuing a section 104(d)(2) order of withdrawal in conjunction with a section 107(a) imminent danger order of withdrawal. 11 FMSHRC 1868 (September 1989)(ALJ). On the basis of stipulated facts, the judge granted the Secretary of Labor's Motion for Summary Decision, affirmed the withdrawal orders and assessed a civil penalty of \$1,500. Unpublished Decision dated April 20, 1990. For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

Eastern operates a surface coal facility at the Federal No. 2 Mine in Monongalia County, West Virginia. On January 26, 1989, MSHA Inspector Joseph Migaiolo issued several withdrawal orders at the mine including Order No. 3106731, under section 107(a) of the Mine Act, and Order No. 3106732,

under section 104(d)(2), for a violation of 30 C.F.R. § 77.400.<sup>1</sup> The inspector issued the section 107(a) imminent danger order because he determined that a guard for the tail roller of a conveyor belt had been removed and that miners had cleaned spillage from both sides of the unguarded tail roller while the belt was operating. The section 104(d)(2) order alleged a violation of 30 C.F.R. § 77.400 for the same unguarded tail roller that was described in the imminent danger order. The order also stated that "[t]his is a repeat violation at this location identical in nature from a previous inspection as well as repeated when observed at least twice by safety committee inspections [sic]." Order No. 3106732.

The orders were issued at 8:21 a.m. The cited condition was abated at 8:45 a.m. on the same day, when Eastern installed the guards at the cited locations and "presented education and training to the miners on safe work procedures." Orders 3106731 and 3106732. Eastern contested both orders.

On August 21, 1989, Eastern filed a Motion for Summary Decision with the judge on the basis that "as a matter of law, only a 104(a) citation may be issued in conjunction with a 107(a) imminent danger order." Eastern asked the judge to modify the section 104(d)(2) order to a section 104(a) citation. It conceded that the conditions set forth in the orders existed but denied that they were the result of its unwarrantable failure. Eastern contended that section 107(a) of the Mine Act<sup>2</sup> allows an inspector to issue a citation

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<sup>1</sup> Section 77.400 entitled "Mechanical equipment guards" provides, in pertinent part:

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

\* \* \*

(d) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

<sup>2</sup> Section 107(a) provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine through out which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104(c)] of this [Act], to be withdrawn from, and to be

under section 104(a) along with an imminent danger order but prohibits him from issuing another withdrawal order for the same condition. Eastern further argued that section 104(d)(1) of the Mine Act <sup>3</sup> also supports its position that only a section 104(a) citation may be issued with an imminent danger order because section 104(d)(1) expressly limits the issuance of a citation under that section to circumstances in which "the conditions created by such violation do not cause imminent danger." 30 U.S.C. § 814(d)(1). Eastern reasoned that because section 104(d)(2) of the Mine Act <sup>4</sup> is dependent upon

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prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section [104] of this [Act] or the proposing of a penalty under section [110] of this [Act].

30 U.S.C. § 817(a)(emphasis added).

<sup>3</sup> Section 104(d)(1), in relevant part, provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standard, he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. § 814(d)(1)(emphasis added).

<sup>4</sup> Section 104(d)(2) provides:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1)

104(d)(1), the prohibition in (d)(1) against an inspector finding an imminent danger in conjunction with issuing a section 104(d)(1) citation also applies to (d)(2). Eastern argued that "as only 'violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1)' may result in a (d)(2) order, and as paragraph (d)(1) citations may be issued only when there is no imminent danger, it follow[s] that a (d)(2) order may not be issued in conjunction with the 107(a) order." Memorandum of Law in Support of Respondent's Motion for Summary Decision at 4 (emphasis in original).

In response to Eastern's motion, the Secretary stated that she is not precluded from issuing a section 104(d)(2) unwarrantable failure order in conjunction with a section 107(a) imminent danger order for two basic reasons. First, she contended that the language of the Mine Act and the legislative history do not preclude the conjunctive issuance of such orders. Second, she maintained that her position on this issue is based on a permissible construction of the statute, is reasonable, and furthers the purpose of the Act. She concluded by arguing that "[o]ne order addresses the heightened negligence of the operator while the other addresses the heightened gravity of the condition cited, and an inspector should not be made to choose which order he will issue." Secretary's Response to Motion for Summary Decision at 12.

The judge rejected each of Eastern's arguments and denied Eastern's motion. 11 FMSHRC at 1868. First, the judge stated that he could find no support in the language of section 107(a) or the legislative history for Eastern's argument that by expressly not precluding the issuance of a citation under section 104(a), Congress intended thereby to preclude the issuance of a section 104(d) order. 11 FMSHRC at 1868-69. Second, he determined that the language referred to by Eastern in section 104(d)(1) was "insufficient to base a conclusion that Congress intended that a section 104(d)(2) order may not be issued in conjunction with a section 107(a) order." 11 FMSHRC at 1869. The judge agreed with the Secretary that if Eastern's interpretation is adopted, "it will result in the frustration of the statutory scheme embodied in section 104(d)(1) and (2), as an inspector would be prevented from issuing orders required by section 104" whenever an imminent danger exists. Id. He concluded that "it has not been established, that, as a matter of law, the section 104(d)(2) order herein was improperly issued, and should be amended to a section 104(a) citation." 12 FMSHRC at 1870.

Eastern petitioned the Commission for interlocutory review of the judge's order (29 C.F.R. § 2700.74), and the Commission denied the petition on October 26, 1989. Eastern's petition to reconsider the denial was also denied by the Commission on November 30, 1989.

After the judge set the case for hearing, the parties stipulated to the following key facts: (1) "An imminent danger as defined by Section 107(a) of the Act existed at the belt roller;" (2) "A violation of 30 C.F.R. § 77.400 existed at the belt roller;" (3) "The violation was of such a nature as to

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shall again be applicable to that mine.

30 U.S.C. § 814(d)(2) (emphasis added).

significantly and substantially contribute to the cause and effect of a mine safety hazard;" and (4) "The violation was the result of an unwarrantable failure on the part of [Eastern]." Stipulated Facts, filed March 27, 1990, at 2.

The Secretary filed a Motion for Summary Decision, asserting that the Stipulated Facts disposed of all issues except whether section 107(a) and 104(d)(2) orders can be issued for the same condition. She argued that since the judge decided that issue in his Order of September 12, 1989, the judge should issue a decision affirming the orders and assessing a penalty.

In an unpublished decision dated April 20, 1990, the judge held:

The Secretary ... on March 27, 1990, filed a Motion for Summary Decision concerning Order Nos. 3106731 and 3106732. This Motion was not opposed by Respondent. Accordingly, and based on the stipulated facts filed along with the Motion, the Motion is GRANTED.

The judge assessed a civil penalty of \$1,500.

## II.

### Disposition of Issues

Eastern's position before the Commission is essentially the same as it was before the judge. First, it argues that the last sentence of section 107(a) prohibits the issuance of a companion section 104(d)(2) order of withdrawal. It contends that the terms "order" and "citation" are not used interchangeably in the Act because each has "a precise meaning and precise ramifications." Eastern Br. 3. It maintains that a court may not insert words or phrases into a statute and that if Congress had intended that section 104(d) orders could be issued in conjunction with 107(a) orders, it would have so stated. Eastern argues that because the language of section 107(a) is clear on its face, the Commission cannot expand that section beyond its plain meaning and that resort to the legislative history to aid construction is proper only where the language of the Mine Act is ambiguous.

Second, Eastern contends that the judge read section 104(d) in isolation, without considering "the balance of the enforcement scheme contained in 104" of the Mine Act. Eastern Br. 5. As an example, Eastern offers the fact that conditions supporting the issuance of a withdrawal order pursuant to section 104(b), 30 U.S.C. § 814(b), may also support the issuance of a section 104(d) order. Eastern argues that "MSHA correctly makes no effort to issue concurrent withdrawal orders at that point for the obvious reason that they would be in derogation of the statutory scheme of enforcement." Eastern Br. 6. Likewise, Eastern asserts that issuing concurrent 107(a) and 104(d) orders would be "in derogation of the statutory scheme of enforcement." *Id.* In addition, Eastern maintains that the only plausible explanation for the last sentence of section 107(a) is that it enables the Secretary to propose a penalty should any violation be found.

Finally, Eastern argues that the statutory purpose of protecting the safety of miners will not be frustrated if a 104(d)(2) order cannot be issued with a 107(a) order because a withdrawal of miners will be required by the imminent danger order in any event.

The Secretary's position also is essentially the same as it was before the judge. First, she argues that the language of the last sentence of section 107(a) is permissive, not restrictive. She argues that had "Congress meant to restrict the type of enforcement action the Secretary may issue in conjunction with a section 107(a) order, it would have stated that 'only' section 104(a) citations may be issued, or that 'citations, but not orders' may be issued." Sec. Br. 6. She concurs with the judge's conclusion that Eastern's interpretation is not supported by a plain reading of section 107(a) or its legislative history. She states that the disputed language in section 107(a) was included merely to make clear that the enforcement mechanisms available under section 104 and 110 are available to the Secretary even when the particular violation creates an imminent danger.

The Secretary maintains that "Congress could not reasonably have intended that [an operator's unwarrantable] misconduct be removed from the reach of section 104(d) sanctions merely because of the happenstance that such misconduct resulted in conditions that arose beyond merely 'significant and substantial' and created an imminent danger." Sec. Br. 9. She maintains that, if an operator could evade the sanctions of section 104(d) on the basis that the violation was so egregious as to result in an imminent danger, "the incentive to improve conduct, which the 104(d) withdrawal order threat places on an operator, would be lost." Id. Finally, she concludes that, because her interpretation of the disputed language of section 107(a) is reasonable, the Commission should hold that the issuance of a section 107(a) order does not affect her ability to issue orders under section 104(d).

A. Section 107(a)

Each party argues that the plain meaning of the last sentence of section 107(a) supports its respective position in this case. By its terms, the disputed sentence permits an inspector to issue a section 104 citation in conjunction with an imminent danger order. The language of this sentence, however, does not address the issuance of other orders. Consequently, we believe that the language is sufficiently ambiguous to require a more thorough analysis than that provided by the parties.

The legislative history of the last sentence of section 107(a) is instructive. The imminent danger provision of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977) ("Coal Act"), was contained in that statute's section 104(a). That provision was very similar to section 107(a) of the Mine Act of 1977 but did not contain the language in dispute in this case.<sup>5</sup> Section 104(b) of the Coal Act authorized an

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<sup>5</sup> Section 104(a) of the Coal Act provided:

If, upon any inspection of a coal mine, an

inspector to issue to an operator a notice of violation (the equivalent of a citation) if he found a violation of a safety or health standard that did not create an imminent danger. <sup>6</sup> Under the Coal Act, if an inspector found that a violation created an imminent danger, he issued an imminent danger order under section 104(a) and the same order also charged the operator with a violation of a safety or health standard. A civil penalty was assessed for the violation alleged in the order. Eastern Associated Coal Corp., 1 IBMA 233, 236, 1 BNA MSHC 1046, 1048-49 (December 1972). In such a case, a separate notice of violation (citation) was not issued by the inspector.

The version of the Mine Act that passed the House in 1977 did not amend the imminent danger provision of the Coal Act. Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1260 et seq. (1978) ("Legis. Hist."). Thus, the House bill did not purport to change the above-described method of charging operators with violations in imminent danger orders and assessing civil penalties for such violations. The Senate bill, on the other hand, moved the imminent danger provision to a separate section of the Act. From the outset, the Senate bill contained the disputed language permitting the issuance of a citation for a violation under what became section 104 of the Mine Act. Legis. Hist. at 150, 551 & 1121. In addition, the section of the Senate bill that became section 105(a) of the Mine Act, 30 U.S.C. § 815(a), provided for the assessment of a penalty "after ... the Secretary issues a citation or order under section [104]...." Legis. Hist. at 1118.

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authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

30 U.S.C. § 814(a) (1976) (amended).

<sup>6</sup> Section 104(b) of the Coal Act provided, in pertinent part:

[I]f, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation.

30 U.S.C. § 814(b) (1976) (amended) (emphasis added).

The Conference Report states:

Under both [the Senate and House] versions, the issuance of an imminent danger withdrawal order would not preclude the issuance of a notice (or citation) or the proposal of a civil penalty assessment.

The conference substitute conforms to the Senate bill....

S. Rep. No. 461, 95th Cong., 1st Sess. 55 (1977) reprinted in Legis. Hist. at 1333. Thus, under the structure of the Mine Act, the Secretary's allegation of a violation must be issued under section 104 rather than section 107(a) because section 105(a) provides for the assessment of a penalty only after "the Secretary issues a citation or order under section 104...."  
30 U.S.C. § 815(a).

Further analysis of the language of the disputed sentence in section 107(a) through intrinsic aids to construction helps explain its purpose. 2A Sutherland Statutory Construction, § 45.14, at 70 (Sands 4th ed. 1984 rev.). One frequently used principle of statutory construction provides that "the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius." 73 Am Jur. 2d, Statutes, § 211, at 405. This principle of construction provides that the "[l]egislative prescription of a specified sanction for noncompliance with statutory requirements ... exclude[s] the application of other sanctions." Sutherland, supra, § 47.23 at 194. In essence, Eastern relies upon this principle to support its view that Congress knew the difference between citations and orders so that its failure to include orders in the disputed language means that it intended to exclude them.

This principle of statutory construction, however, "cannot apply when the legislative history and context are contrary to such a reading of the statute." U.S. v. Castro, 837 F.2d 441, 442-43 & n. 2 (11th Cir. 1988). It is also clear that this principle is not a rule of law. Loc. Union 2274 UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493, 1502 (November 1988), aff'd sub. nom. Clinchfield Coal Co. v. FMSHRC, 895 F.2d 773 (D.C. Cir. 1990); Sutherland, supra, § 47.23 at 194. As a consequence, it can be overcome by indications of contrary legislative intent or policy. Id. In addition, when the word "include" or "including" is used in a statute, "it is generally improper to conclude that entities not specifically enumerated are excluded." Sutherland, supra, § 47.23 at 194.

As a matter of statutory construction, we believe that the "shall not preclude" language is, as the Secretary maintains, permissive and not restrictive. This language does not expressly exclude or otherwise address the issuance of orders of withdrawal. Rather, this language is similar to statutory provisions that contain the word "include" or "including," with the result that "entities not specifically enumerated" are not to be excluded unless such exclusion is warranted by the context or legislative history.

Nothing in the legislative history suggests that the purpose of the

disputed language was to restrict the authority of the Secretary. As noted, this language was apparently added because section 105(a) provides a mechanism for assessing civil penalties only for citations and orders issued under section 104. Thus, at a minimum, this language was included to permit the Secretary to allege violations of safety and health standards in conjunction with imminent danger closure orders and to assess civil penalties for these alleged violations. We conclude from the legislative history that Congress did not intend the last sentence of section 107(a) to circumscribe the Secretary's enforcement authority under section 104 of the Act.

We also conclude from the Mine Act's remedial purpose that the disputed language should not be construed to limit the Secretary's enforcement authority. The Act's enforcement scheme provides for "increasingly severe sanctions for increasingly serious violations or operator behavior." Cement Division, National Gypsum Company, 3 FMSHRC 822, 828 (April 1981). Congress viewed section 104(d) as a key element in the overall attempt to improve health and safety practices in the mining industry. See S. Rep. No. 181, 95th Cong., 1st Sess. 30-32, reprinted in Legis. Hist. 618-20. The threat of a chain of section 104(d) orders "provides a powerful incentive for the operator to exercise special vigilance in health and safety matters" because this sanction is triggered by the unwarrantable conduct of the operator. Nacco Mining Co., 9 FMSHRC 1541, 1546 (September 1987). A determination that an operator's conduct in relation to a violation is unwarrantable is as relevant to situations where the violation creates an imminent danger as to violations involving lesser hazards. To read out of the Act the protections and incentives of a section 104(d)(2) order on the basis that the hazard created by the violation is so great that it creates an imminent danger would seem peculiar on its face and would blunt the effectiveness of this sanction.

The importance of section 104(d)(2) orders stems from the fact that the chain of withdrawal order liability continues under that section until broken by an intervening clean inspection. UMWA v. FMSHRC and Kitt Energy Corp., 768 F.2d 1477, 1479 (D.C. Cir. 1984). The fact that the section 104(d)(2) order would not require the actual withdrawal of miners, inasmuch as they would be withdrawn by the imminent danger order in any event, does not render the unwarrantable failure order meaningless. The unwarrantable failure order "would not be pointless, for it would serve to place or keep the mine operator on the section 104(d)(2) probationary chain." Emerald Mines Co. v. FMSHRC, 863 F.2d 51, 57 (D.C. Cir. 1988)(footnote omitted).

Based on the legislative history, the remedial purposes of the Act and the role of section 104(d) orders in the statutory scheme of enforcement, we conclude that the Secretary is not prohibited by the disputed language from issuing the two orders in this case.

B. Section 104(d)

Eastern also argues that section 104(d) itself prohibits the issuance of an imminent danger order in conjunction with a section 104(d)(2) order. The judge held that neither the language nor the legislative history supports Eastern's position. 11 FMSHRC at 1869. He further stated that he did not find merit in Eastern's argument that "inasmuch as section 104(d)(1) citations

may be issued only where there is no imminent danger, it follows that similarly a section 104(d)(2) order may not be issued in conjunction with a section 107(a) order." Id. We agree with the judge.

We reach our conclusion based on the plain meaning of the text of the Mine Act. Section 104(d)(1) provides, in pertinent part, that [1] if an inspector "finds that there has been a violation of any mandatory health or safety standard, and [2] if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and [3] if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act." (Emphasis and bracketed numbers added). We read the language in clause [2] to mean that the conditions created by an S&S violation "need not be so grave as to constitute an imminent danger." National Gypsum, 3 FMSHRC at 828. Because a section 104(d)(2) order need not be S&S, we conclude that the "do not cause an imminent danger" language contained in (d)(1) is not relevant to the issue of whether a (d)(2) unwarrantable failure order can be issued in conjunction with an imminent danger order.

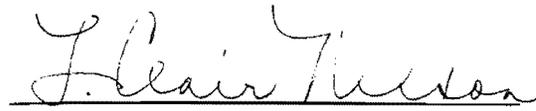
III.  
Conclusion

Accordingly, on the foregoing basis, the judge's decision is affirmed.

  
Richard V. Backley, Acting Chairman

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 25, 1991

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. WEVA 89-278  
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 :  
SOUTHERN OHIO COAL COMPANY :

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

DECISION

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)(the "Mine Act"). The issue is whether Southern Ohio Coal Company ("SOCCO") violated 30 C.F.R. § 77.404(a), a mandatory safety standard applicable to surface coal mines and surface work areas of underground coal mines. <sup>1</sup> Also at issue is whether the alleged violation was of a significant and substantial nature and whether it was caused by SOCCO's unwarrantable failure to comply with the cited standard. Commission Administrative Law Judge George Koutras determined that SOCCO violated section 77.404(a), that the violation was of a significant and substantial nature, and that it was caused by SOCCO's unwarrantable failure to comply. 12 FMSHRC 1627 (August 1990)(ALJ). The Commission granted SOCCO's Petition for Discretionary Review. For the reasons set forth below, we affirm the judge's decision.

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<sup>1</sup> 30 C.F.R. § 77.404(a) provides:

(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

I.

Factual Background and Procedural History

The focus of the proceeding is on a D-7 Caterpillar bulldozer ("dozer") that SOCCO operated with two broken cat or track pads between May 15, 1989 and May 19, 1989, at the surface refuse dump of its Martinka No. 1 Mine in West Virginia. SOCCO operated the dozer during the day and at night to move waste product at the dump.

The dozer, which is approximately 13 feet long, moves on two crawler tracks (often called caterpillars) consisting of metal plates called track pads. There are 38-42 pads on each track and each pad is 32 to 36 inches wide. Four bolts attach each pad to the track. The top portion of the loop formed by the crawler tracks is often used as a walkway by the dozer operator to enter and exit the cab. This walkway is estimated to be 32 to 34 inches above the ground.

The dozer cab may be entered or exited from either side. Normally, the operator climbs onto the dozer from the back and walks on one of the crawler tracks to the cab. The distance from the back of the dozer to the cab door is approximately eight feet. There is a fender along each side of the cab, which acts as a platform above the track and may be used to step into the cab. The fender covers part of the track pads along the cab. It is also possible to reach the cab by climbing up onto one of the crawler tracks from either side of the dozer or by climbing up the front and walking on one of the crawler tracks to the cab. Travel on the dozer's left track is necessary to check the oil, transmission fluid, and water level. Similarly, travel on the dozer's right track is necessary to check the fuel.

The two broken track pads on the dozer had been reported to SOCCO management on Monday, May 15, 1989. Dozer operator Bill Jones reported in the "operator's check list of vehicle condition," dated May 15, 1989, that two pads were broken and needed replacement and SOCCO acknowledges that it first became aware of the defective cat pads on that day. Sec. Exh. 1 (SOCCO's Answer to Interrogatory 11). On May 16, 1989, dozer operators Delbert Barnett and Jones again reported in the operator's check list that two pads on the left side track of the dozer were broken. That same day Barnett tripped on, and almost fell through, one of the broken pads but was able to catch himself. Replacement pads were ordered on May 15 and were received on or about May 17. Other operators reported the broken pads in the operator's check list on May 18th and before the replacements were installed, on May 19th.

Mine Safety and Health Administration ("MSHA") Inspector Bretzel Allen arrived at the mine site on May 23, 1989, to investigate a complaint made by a representative of miners under section 103(g), 30 U.S.C. § 813(g), which alleged that SOCCO had been operating a D-7 Caterpillar dozer with two broken pads on the left track. Allen did not personally observe the violation because the track pads had been replaced before his inspection. Allen verified the accuracy of the complaint through discussions with SOCCO's equipment operators, Jim Richards (a SOCCO foreman), and Wesley Dobbs (SOCCO's accident prevention officer). He also reviewed SOCCO's daily "operator's

check list," which contained the notation dated May 16, 1989, that Barnett had reported to mine management that two track pads on the left track of the dozer were broken. Allen determined that a broken pad would leave an opening approximately 9-1/4 inches wide by 12 inches long, based on the assumption that the pads normally break off at the bolts. Allen further found that several months earlier, on March 2, 1989, dozer operator Bill Bice, while exiting from a dozer cab, had stepped into a hole created by a broken pad, strained his back and lost one day of work.

As a result of his investigation, Allen issued a section 104(d)(2) withdrawal order charging a violation of section 77.404(a). The withdrawal order alleged that the D-7 dozer had been operated from May 15, 1989, to May 19, 1989, with two broken track pads, that these pads were part of a platform on which the machine operators walked to mount and dismount the machine, and that this condition had been known by Richards, the foreman in charge, and had been recorded in the operator's check list on May 16, 1989. Allen determined that the violation was significant and substantial, relying, in part, on Bice's March 2, 1989, accident. Allen also determined that the violation was the result of SOCCO's high negligence, because SOCCO's management knew that the pads were broken but nonetheless continued to operate the dozer.

Before the judge, SOCCO argued that it did not violate section 77.404(a) because the two broken track pads did not render the dozer unsafe to operate. SOCCO emphasized that the primary purpose of the track pads is to provide traction and the dozer's traction was not affected by the two broken pads. SOCCO argued that section 77.404(a) did not apply to a stumbling or tripping hazard created by the broken pads. In challenging the withdrawal order, SOCCO also contested Allen's significant and substantial and unwarrantable failure findings.

Judge Koutras found that SOCCO violated section 77.404(a) because the dozer tracks, including the pads, are an integral and functional part of the machine, and that the tracks were used by dozer operators to mount and dismount the machine and to service the machine as required. 12 FMSHRC at 1648, 1649. He concluded that these uses could not be divorced from the safety requirements found in section 77.404(a). *Id.* He also found that the testimony of three of SOCCO's equipment operators, including Barnett and Bice, established that the broken pads on the cited dozer rendered it unsafe to operate, requiring its immediate removal from service. 12 FMSHRC at 1648-49. Judge Koutras also determined that the violation was of a significant and substantial nature. He credited the testimony of Inspector Allen and the dozer operators concerning the hazards created by broken track pads and their testimony about previous incidents involving broken pads. 12 FMSHRC at 1655-56. With respect to the unwarrantable failure issue, Judge Koutras found that the violation was caused by SOCCO's aggravated conduct. 12 FMSHRC at 1659. He found that the broken pads were reported by Barnett to Richards, SOCCO's foreman, on May 16, 1989, that SOCCO continued to use the dozer with the broken pads and that the dozer was not repaired until May 19, 1989. 12 FMSHRC at 1658. He also relied upon the fact that SOCCO was aware of Bice's March 2, 1989, injury and Barnett's "near miss." Judge Koutras concluded that, under such circumstances, immediate action was necessary to fix the broken pads. 12 FMSHRC at 1658-59.

## II.

### Disposition of Issues

On review, SOCCO contends that: (1) it did not violate section 77.404(a); (2) the alleged violation was not significant and substantial; and (3) the alleged violation was not the result of SOCCO's unwarrantable failure. We consider each of these contentions in turn.

#### A. Whether there was a violation of section 77.404(a)

SOCCO takes the position that "the condition of two-half broken cat or track pads on the D-7 dozer does not render the machine inoperable." SOCCO Br. at 5-6. (emphasis in original). Hence, "the machine's condition ... would not render this equipment unsafe to operate and, therefore, would not require SOCCO to remove it from service under 30 C.F.R. 77.404(a)." Id. at 6. SOCCO asserts that citing a "stumbling and tripping hazard under 30 C.F.R. 77.404(a)," is an "inappropriate and incorrect utilization of said standard." Id.

Focusing on the word "operating" in the standard, SOCCO contends that, for section 77.404(a) to apply, the unsafe condition must render the equipment unsafe to operate. Since use of the tracks as a walkway does not involve the "operating condition" of the dozer any stumbling or tripping hazard created by broken pads is not within the scope of section 77.404(a).

In the Secretary's view, substantial evidence supports the finding that the broken track pads created a safety hazard. Citing Ideal Cement Co., 12 FMSHRC 2409 (November 1990), the Secretary asserts that SOCCO's use of the equipment in such condition created a slip and fall hazard for miners using the track 'walkway' when mounting to or dismounting from the operator's compartment, and that such hazards are within the purview of the standard. We agree.

As the Commission observed in Ideal Cement "[t]he integrity of a machine is not defined solely by its proper functional performance but must also be related to the protection of miners' health and safety." 12 FMSHRC at 2414-15. (emphasis in the original). If a machine cannot be used safely by miners, the machine is not in "safe operating condition." Thus, a dozer is not in "safe operating condition" if miners are unable to enter and exit the dozer's cab without risking injury. Because the dozer's tracks serve as the only walkway for the operator to mount and dismount the dozer and to check the fuel, oil, transmission fluid and water level, we conclude that the dozer's track pads were within the scope of section 77.404(a) and that the dozer was not in "safe operating condition." In so concluding we find that a "stumbling and tripping hazard" is covered by the standard.

Substantial evidence supports the judge's finding that the two broken

track pads presented an unsafe condition.<sup>2</sup> Inspector Allen testified that the condition was unsafe. Tr. 28. Dozer operator Barnett testified that missing track pads pose a safety risk. Tr. 67, 93-94. Barnett also testified that sometimes the pads are so full of mud that the pads cannot be seen. Tr. 68. Bill Kincell, also a dozer operator, testified that a missing pad poses a safety risk and that when mud from the refuse area adheres to the tracks, he would be unaware of a broken pad unless he stepped on it or the mud fell out of it. Tr. 101. Dozer operator Bice testified that a broken track pad presents a risk or hazard. Bice also testified that sometimes it is not easy to see whether a track pad is broken when the dozer is covered with gob. Tr. 134.

We further note that Bice was injured on March 2, 1989, as a result of a broken track pad. Tr. 128. In response to his injury, SOCCO's safety department set forth a policy (not observed in this case) that dozers were not to be operated if a pad was broken, and that broken pads would be fixed before the dozer was put back into service. Tr. 61, 89, 99-100, 107, 131-32.

Accordingly, we affirm the judge's conclusion that SOCCO violated section 77.404(a).

B. Whether the violation was significant and substantial

We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard

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<sup>2</sup> The Commission has held that equipment is "unsafe" under 30 C.F.R. 75.1725(a), which is identical to section 77.404(a), when a "reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982). Although the judge did not analyze this case using the "reasonably prudent person" analysis, we conclude that a reasonably prudent person familiar with the facts would recognize that the broken pads presented an unsafe condition.

contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). 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)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)).

At the outset, SOCCO argues that Allen did not satisfy MSHA's Program Policy Letter No. P89-I-3 for determining S&S violations. SOCCO raised this issue for the first time in its petition for review. Under the Mine Act and the Commission's regulations, "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge ha[s] not been afforded an opportunity to pass." Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. 823(d)(2)(A)(iii); see also 29 C.F.R. 2700.70(d). SOCCO has not proffered any reason why it did not present the argument before the judge. We therefore decline to consider whether Allen satisfied MSHA's Program Policy Letter No. P89-I-3. See Midwest Minerals, Inc., 12 FMSHRC 1375, 1378 (July 1990); Ozark-Mahoning Co., 12 FMSHRC 376, 379 (March 1990).

SOCCO also argues that the significant and substantial finding cannot stand because the inspector did not personally observe the alleged violation. In Nacco Mining Co., 9 FMSHRC 1541, 1546 (September 1987), the Commission found that an inspector can issue a section 104(d)(1) citation notwithstanding the fact that the violation was not personally observed by the inspector. A section 104(d)(1) citation requires, as one of its elements, that the violation be of a significant and substantial nature. An inspector's personal observation is therefore not a predicate to a significant and substantial finding.

We now turn to the four elements of the Commission's significant and substantial analysis. With respect to the first Mathies element, we have concluded that the judge properly found that SOCCO violated section 77.404(a). The second element, that a measure of danger to safety was contributed to by SOCCO's violation, is also established. The hazard of tripping or falling through a broken pad has been amply demonstrated. The testimony of the inspector and the dozer operators, discussed above, confirms the hazard.

With respect to the third Mathies element, SOCCO argues that there was only one injury at this mine associated with this type of alleged violation, which occurred three to four years earlier to Bice. The record establishes, however, that on March 2, 1989, Bice also suffered a strained back when he stepped through a hole created by a partially broken pad. Tr. 23, 56; Sec. Exh. 4-D. Bice lost one work day as a result of the accident. On May 16, 1989, Barnett also tripped on and almost fell through one of the broken pads

but caught himself before going over the dozer. Tr. 64-65; Sec. Exh. 4-E.

The judge determined that the partially broken pads in question constituted a condition that would be reasonably likely to contribute to an injury, and that it was reasonably likely that the injury would be one of a reasonably serious nature. 12 FMSHRC at 1656. We find that substantial evidence supports the judge's conclusions.

In reaching those conclusions the judge relied, in part, upon the testimony of Inspector Allen, which he found to be credible. 12 FMSHRC at 1655. Allen testified that the presence of caked mud could fill the hole created by a missing pad to the point that one would not notice that it was missing. Tr. 21. The inspector analogized the hazard as similar to that created by removing steps from a stairwell. Tr. 19. Allen referred to the back injury incurred by one of SOCCO's employees in just such a track pad incident and believed that serious injuries such as sprains, strains and fractures could result. Tr. 22-23. The judge also found credible, and relied upon, the testimony of dozer operators Bice and Barnett that a broken pad exposed them to hazards. 12 FMSHRC at 1656.

With respect to the fourth Mathies element, the severity of Bice's recent accident provides substantial evidence to support the judge's finding. As previously indicated, Bice strained his back and lost one day of work. The inspector also testified that strains, sprains or fractures could result if someone slipped or fell because of a broken pad. As stated above, the judge credited the inspector's testimony. 12 FMSHRC at 1655.

We have considered other evidence in the record relied upon by SOCCO that mitigates the degree of danger created by the violation. We conclude, however, that substantial evidence supports the judge's finding that the violation was of a significant and substantial nature.

C. Whether the violation was unwarrantable failure

In Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987) and Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987), this 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." 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.

SOCCO argues that it had a good faith belief that it was not prohibited from using the dozer and that it attempted to replace the cat pads without undue delay. We reject SOCCO's arguments.

SOCCO's first argument is premised on the ground that an ambiguity in the regulation justifies its conduct. However, we conclude that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific requirement of the standard. See Ideal Cement Co., supra, 12 FMSHRC at 2416; n.2, supra.

The Commission has recognized that if an operator reasonably believes in good faith that the cited conduct is the safest method of compliance with applicable regulations, even if it is in error, such conduct is not aggravated conduct constituting more than ordinary negligence. Utah Power and Light Company, 12 FMSHRC 965, 972 (May 1990); Florence Mining Co., 11 FMSHRC 747, 752-54 (May 1989); Helen Mining Co., 10 FMSHRC 1672, 1675-77 (December 1988); Southern Ohio Coal Co., 10 FMSHRC 138, 142-43 (February 1988). SOCCO's actions here, however, do not manifest safety consciousness. To the contrary, SOCCO knowingly permitted the dozer to continue operating from May 15, 1989,<sup>3</sup> to May 19, 1989, with the two broken pads, even though it knew that, in addition to an earlier accident, there had been one recent accident caused by broken pads on March 2, 1989, and one close call on May 16, 1989.

We find that substantial evidence supports the judge's unwarrantable failure finding and that the violation was the result of SOCCO's aggravated conduct. SOCCO knew of the two defective cat pads on May 15, 1989. The record also shows that five reports ("operator's check lists"), dated May 15 through May 19, 1989, made by at least three different operators, advised SOCCO that the pads were broken. SOCCO also knew of Bice's March 2, 1989, injury caused by a broken pad and Barnett's May 16, 1989, near miss. Replacement pads were received on or about May 17, 1989. Nevertheless, SOCCO continued to operate the dozer with knowledge of the two broken pads through the day shift on May 19.

Finally, the record establishes that replacement of the broken pads was not a complicated or time consuming operation. Tr. 72, 104-05. A mechanic could change a pad in three-quarters of an hour. Tr. 72, 104-05. SOCCO's witness Ware stated "[a]nybody can bolt on a track pad" and that "[t]here is nothing to it." Tr. 203. We therefore reject SOCCO's argument that it attempted to replace the track pads without undue delay.

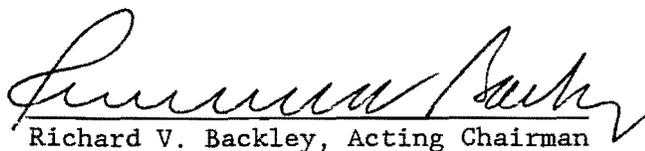
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<sup>3</sup> The judge found that Barnett reported the broken pads to his foreman, Richards, on May 16, 1989. 12 FMSHRC 1658. However, SOCCO acknowledges that it knew about the broken pads on or about May 15, 1989, and the record establishes that the broken pads were reported in the "operator's checklist" for the afternoon shift on May 15. SOCCO PDR at 8; SOCCO Br. on Rev. at 9; SOCCO Post H. Br. at 5; Sec. Exh. 1 (SOCCO's Answer to Interrogatory 11(a)); Sec. Exh. 4E.

III.

Conclusion

Accordingly, the judge's decision is affirmed.

  
Richard V. Backley, Acting Chairman

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 4 1991

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 89-72-D
ON BEHALF OF	:	MSHA Case No. NORT CD-89-18
AMOS HICKS,	:	
Complainant	:	
v.	:	
COBRA MINING, INC.,	:	
JERRY K. LESTER and	:	
CARTER MESSER,	:	
Respondents	:	

DECISION ON REMAND

Before: Judge Weisberger

In a decision in this matter, (Amos Hicks v. Cobra Mining, Inc., Docket No. VA 89-72-D, 13 FMSHRC \_\_\_\_\_, April 1, 1991), the Commission, pursuant to Complainant's petition for discretionary review, vacated and remanded my decision which had been issued March 22, 1990. The bases for the Commission's decision are set forth in its analysis of two issues presented in this case i.e., the timing of Complainant's (Hick's) complaints, and Respondent's affirmative defense.

I. The Timing of Hick's Complaints.

On remand, the Commission directed me to reconsider all areas of Hick's complaints as motivating factors in his discharge. The Commission further directed me to reconsider this issue in light of the principles expressed in Secretary o.b.o. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510, (November 1981), rev.d on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983), and Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984).

In Chacon, the Commission listed various indicia of discriminatory intent including "coincidence in time between the protected activity and the adverse action" (3 FMSHRC 2510). In this connection, the D.C. Circuit Court of Appeals in Stafford, supra, took notice of the fact that 2 weeks had elapsed between

the alleged protected activity and the adverse action and held that "[T]he fact that the company's adverse action against [the miner] so closely followed the protected activity is itself evidence of an illicit motive." (732 F.2d at 960).

Upon reconsideration I find, for the reasons previously stated in my initial decision, that a week before his discharge, Hicks had complained to Sutherland about the failure to use safety jacks. I do not accept Hick's testimony that he complained to Sutherland about loose rock 2 days before he was fired. As stated in my previous decision, neither Ray nor Lester, who rode the mantrip along with Hicks, corroborated his testimony that he had made a complaint about the loose rocks 2 days before he was fired. Both Hicks and Sutherland essentially indicated that an incident had occurred when Hicks, who had complained to Sutherland about loose rock, was told by the latter to get off a mantrip and pull the rock down. Hicks did not specifically indicate when this occurred, but Sutherland said in essence that it was about a month before Hicks was fired. I conclude that the firing of Hicks occurred approximately a month after he complained to Sutherland about loose rock.

Hicks indicated on direct examination that he complained about improper ventilation a week before he was fired. I do not accord much weight to this testimony because, upon cross-examination, it was elicited that in his responses to interrogatories taken on October 16, he did not say that he had made such complaints a week before he was fired. Also, although Ray indicated she heard Hicks complain about ventilation to Sutherland a couple of times, she did not pinpoint when these complaints were made.

The Commission further indicated that an error was made in assessing Complainant's prima facie case by adhering to ". . . an overly restrictive time frame in deciding whether certain of Hicks' complaints were 'within close proximity to his discharge.'" (13 FMSHRC, supra, slip op., at 9). In addition, the Commission found error in assessing complaints about safety jacks, loose rock, ventilation, and riding in the scoop bucket, in isolation with regard to proximity in time between the complaint and the adverse action and that "under the circumstances, it would have been appropriate to consider the complaints as a whole in order to establish whether a pattern of protected conduct existed that might have provided sufficient motivation for the May 11, 1989, discharge." (13 FMSHRC, supra, slip op., at 9).

Being guided by the Commission's directives, I note that Hick's complaints about jacks were made a week before his discharge, and complaints about loose rock were made approximately a month before the discharge. Further, Sutherland indicated that Hicks had complained about rocks one or two times,

and Ray indicated that he had made complaints 2 to 3 times a week. Payne indicated that Hicks made such complaints "several times" (Tr. 140). Ray in corroborating the testimony of Hicks that he had complained about ventilation problems to Sutherland, indicated that he made such complaints "a couple of times" (Tr. 204). In this connection, further, it is significant to note that with regard to complaints about the safety of riding in the scoop, Hicks indicated that he made such complaints whenever he rode the scoop, which was up to five times a week, and indicated that he complained on a "consistent" basis (Tr. 201). Ray indicated that she heard Hicks making these complaints to Sutherland more than just a couple of times. Sutherland acknowledged Hick's complaints in this regard, and did not rebut the testimony of Hicks and Ray with regard to the numerous times these complaints were made.

Hence, upon reconsideration, I take into account the totality of the circumstances presented herein, i.e., the fact that complaints were made about jacks a week before Hicks was fired, the fact that complaints were made about loose rock about a month before complainant was fired, and the fact that numerous complaints were made about the loose rock, ventilation, and the riding in the scoop bucket. I find that due to the proximity of complaints to the adverse action, and the repetitive nature of these complaints, there was a pattern of protected conduct that did establish that the firing of complainant was motivated in some part, by the safety complaints that he had made.

## II. Respondent's Affirmative Defense

In its decision, the Commission directed that an evaluation of Respondent's affirmative defense be made in terms of the criteria set forth in Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1983), and Secretary o.b.o. John Cooley v. Ottawa Silica Corp., 6 FMSHRC 516.

In Bradley, supra, the Commission set forth general principles for evaluating an operator's affirmative defense, and indicated that proof that the operator would have disciplined the miner in any event but for the unprotected activity alone, can be established by showing "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." (4 FMSHRC at 993).

The Commission in its decision (13 FMSHRC, supra, slip op., at 10), referred to certain factors set forth in Cooley for determining whether the use of profanity "in and of itself," was grounds for dismissal as follows: "Had there been previous disputes with the miner involving profanity? Had anyone ever been discharged or otherwise disciplined for profanity? Was

there a company policy prohibiting swearing, either generally or at a supervisor?"

In its decision, the Commission, in indicating that it was unable to determine "at this state," whether substantial evidence supports my initial conclusion that Hick's use of profanity warranted discharge in any event, commented as follows: "This is particularly true in view of the testimony as to widespread use of profanity in Cobra's No. 1 Mine, management's general tolerance of that profanity, and the lack of discipline meted out to Hicks for an earlier incident of profanity . . . ." (13 FMSHRC; supra, slip op., at 11).

Upon reconsideration, considering these comments by the Commission, I give considerable weight to the fact that the record herein contains corroborated testimony that swearing was a common occurrence, and that some of it was directed at supervisors. Further, I note that the record does not indicate that there was any published oral or written policy prohibiting swearing either in general or directed to a supervisor. Also, I take cognizance of the fact that Sutherland indicated that in a prior incident Hicks directed an obscene comment to him, and he "shrugged it off" (Tr. 272).

The Commission further directed me to resolve the conflicting testimonies of Hicks, Douglas Lester and Sutherland with regard to whether the use of profanity by Hicks occurred in the process of defying Sutherland's order to return to work as Sutherland testified, or whether it was made after he had already boarded his shuttle car and had started back to the face as Hicks and Lester testified. I find the version testified to by Hicks to be credible in light of the fact that it was corroborated by Lester.

The Commission, (13 FMSHRC, supra, Slip op., at 10), indicated that my original finding that complainant's discharge for use of profanity was not pretextual because Sutherland had previously fired Ray for swearing, "needs to be explained further." The Commission elaborated as follows: "First, the record discloses that Ray's discharge was quickly rescinded on the instructions of Payne. Second, the Ray incident could also be viewed as an aberration rather than as a precedent in support of the adverse action taken against Hicks. Given the context of wide spread use of profanity in the No. 1 Mine, the severe disciplinary action taken against both Ray and Hicks could be viewed as disparate treatment insofar as swearing was neither prohibited nor, apparently, discouraged."

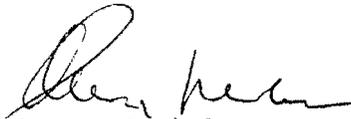
In light of the Commission's concerns, and its evaluation of the record, I am constrained to conclude, upon reconsideration, that reliance upon Ray's discharge for swearing as evidence that complainant's discharge was not pretextual, is unwarranted given

the fact that Ray's discharge was rescinded and given evidence of widespread use of profanity in the mine at question. Hence, upon reconsideration, and addressing myself to the concerns raised by the Commission in its decision, I conclude that respondent has not established that it would have dismissed Hicks based on the unprotected activity i.e., swearing, alone. Hence, I conclude that respondent has not rebutted complainant's prima facie case.

ORDER

1. Complainant shall file a statement within 20 days of this Decision indicating the specific relief requested. This statement shall show the amount he claims as back pay, if any, and interest to be calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984). The statement shall also show the amount he requests for attorney's fees and necessary legal expenses if any. The statements shall be served on Respondent who shall have 20 days from the date service is attempted to reply thereto.

2. This decision is not final until a further order is issued with respect to Complainant's relief and the amount of Complainant's entitlement to back pay and attorney's fees.



Avram Weisberger  
Administrative Law Judge

Distribution:

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/fb

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**JUN 4 1991**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 91-47  
Petitioner : A. C. No. 46-01455-03812  
v. :  
CONSOLIDATION COAL COMPANY, : Osage No. 3 Mine  
Respondent :

**DECISION**

Appearances: Page H. Jackson, Esq., Office of the Solicitor,  
U. S. Department of Labor, Arlington, Virginia,  
for the Secretary of Labor (Secretary);  
Walter J. Scheller III, Esq., Pittsburgh,  
Pennsylvania, for Consolidation Coal Company,  
(Consol).

Before: Judge Broderick

The above case was called for hearing in Morgantown,  
West Virginia, on April 17, 1991. Counsel for the Secretary  
proposed on the record that a settlement be approved for one of  
the two violations alleged in this docket, namely a violation of  
30 C.F.R. § 75.1105 alleged in Order No. 2711965. The settlement  
provided that Consol would pay the full amount of the assessment,  
\$1,000.

A hearing was had on the other violation, that charged in  
Order No. 2712041. This order alleged a violation of 30 C.F.R.  
§ 75.303 because of an inadequate preshift examination. The  
order charged that the violation resulted from Consol's  
unwarrantable failure to comply with the mandatory standard.  
Inspector Richard Jones testified on behalf of the Secretary.  
Todd McNayer and Richard Conrad testified on behalf of Consol.

After the parties rested and the case was submitted for  
decision, the Secretary filed a motion to approve a settlement  
with respect to the violation involved. The motion proposes an  
order modifying the 104(d)(2) Order to a 104(a) Citation, and the  
payment by Consol of the penalty originally proposed, \$1,200.

The motion states that the Secretary agrees to drop the unwarrantable failure finding because the evidence introduced at trial did not clearly establish that the violation resulted from aggravated conduct constituting more than ordinary negligence.

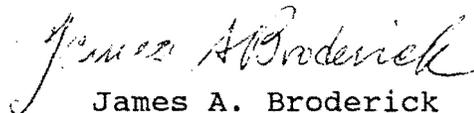
I have considered the motion in the light of the evidence introduced at the trial and the criteria in Section 110(i) of the Act, and conclude that it should be approved.

Accordingly, **IT IS ORDERED:**

1. Order No. 2712041 issued under Section 104(d)(2) of the Act is **MODIFIED** to a 104(a) Citation.

2. Consol shall, within 30 days of the date of this Decision, pay the following civil penalties:

<u>CITATION/ORDER</u>	<u>30 C.F.R.</u>	<u>AMOUNT</u>
2711965	75.1105	\$1,000
2712041	75.303	<u>1,200</u>
	Total	\$2,200



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 1991**

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 91-1
Petitioner	:	A. C. No. 15-16151-03507
v.	:	
	:	No. 1 Surface Mine
SUNNY RIDGE MINING COMPANY,	:	
INC.,	:	
Respondent	:	

**DECISION**

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,  
U. S. Department of Labor, Nashville, Tennessee,  
for the Secretary of Labor;  
Reed D. Anderson, Esq., Pikeville, Kentucky, for  
Respondent Sunny Ridge Mining Company, Inc.,  
(Sunny Ridge).

Before: Judge Broderick

**STATEMENT OF THE CASE**

The Secretary seeks a civil penalty for an alleged violation of 30 C.F.R. § 48.26(a) because 11 miners had not received newly employed experienced miner training. The citation charging the violation was issued in conjunction with a 104(g) withdrawal order directing the employees to be removed from the mine site until the training is provided.

Pursuant to notice, the case was called for hearing in Prestonsburg, Kentucky, on April 9, 1991. Federal Mine Inspector Prentiss O. Potter testified on behalf of the Secretary. Hobert Potter, co-owner of Sunny Ridge was called for cross-examination by the Secretary and testified on behalf of Sunny Ridge. Both parties were given the opportunity to file post-hearing briefs. Sunny Ridge filed a brief; the Secretary did not. I have considered the entire record and the contentions of the parties in making the following decision.

## FINDINGS OF FACT

### I

Sunny Ridge was at all pertinent times the owner and operator of a surface coal mine in Pike County, Kentucky, known as the No. 1 Surface Mine. The mining method followed at the subject mine was mountain top removal. Explosives were used to loosen the coal and the overburden, and it was removed using bulldozers and end loaders. As of September 6, 1990, Sunny Ridge produced approximately 214,121 tons of coal annually. It was therefore of moderate size. During the 24 month period from August 28, 1987 to August 27, 1989, 14 violations were assessed and paid by Sunny Ridge. Eight of these were violations of the regulations having to do with miner training. Because of the number of training regulation violations, this history is such that a penalty otherwise appropriate will be increased because of it.

### II

On August 28, 1989, Federal Coal Mine Inspector Prentiss Potter issued a citation charging a violation of 30 C.F.R. § 48.26(a) because 11 of the 17 miners at the mine site had not received the newly employed experienced miner training required by the regulation. The citation charged a significant and substantial violation. The inspector also issued an order of withdrawal under Section 104(g) ordering the named miners to be removed from the mine site until provided with the required training. Sunny Ridge had a training plan in effect and a designated MSHA approved instructor. The plan showed an 8 hour course of training for newly employed experienced surface miners.

I find as a fact that the 11 miners named in the citation were newly employed experienced miners, and had not received the training prescribed in the regulation and in Sunny Ridge's plan. The citation and order were terminated on August 29, 1989, when the listed employees received the newly employed experienced miner training by an MSHA approved instructor.

## REGULATION

30 C.F.R. § 48.26(a) provides as follows:

(a) A newly employed experienced miner shall receive and complete training in the program of instruction prescribed in this section before such miner is assigned to work duties.

(b) The training program for newly employed experienced miners shall include the following:

(1) Introduction to work environment. The course shall include a visit and tour of the mine. The methods of mining or operations utilized at the mine shall be observed and explained.

(2) Mandatory health and safety standards. The course shall include the mandatory health and safety standards pertinent to the tasks to be assigned.

(3) Authority and responsibility of supervisors and miners' representatives. The course shall include a review and description of the line of authority of supervisors and miners' representatives and the responsibilities of such supervisors and miners' representatives; and an introduction to the operator's rules and the procedures for reporting hazards.

(4) Transportation controls and communication systems. The course shall include instruction on the procedures in effect for riding on and in mine conveyances; the controls for the transportation of miners and materials; and the use of the mine communication systems, warning signals, and directional signs.

(5) Escape and emergency evacuation plans; firewarning and firefighting. The course shall include a review of the mine escape system; escape and emergency evacuation plans in effect at the mine; and instruction in the firewarning signals and firefighting procedures.

(6) Ground controls; working in areas of highwalls, water hazards, pits, and spoil banks; illumination and night work. The course shall include, where applicable, an introduction to and instruction on the highwall and ground control plans in effect at the mine; procedures for working safely in areas of highwalls, water hazards, pits, and spoil banks, the illumination of work areas, and safe work procedures for miners during hours of darkness.

(7) Hazard recognition. The course shall include the recognition and avoidance of hazards present in the mine, particularly any hazards related to explosives where explosives are used or stored at the mine.

(8) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

## ISSUES

1. Whether the evidence establishes a violation of the cited standard?

2. If so, what is the appropriate penalty?

## CONCLUSIONS OF LAW

### I

Respondent is subject to the provisions of the mine act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

### II

The operator does not seriously contest the violation charged. The evidence clearly establishes that the listed miners did not receive the prescribed training. I conclude that a violation of 30 C.F.R. § 48.26(a) was shown.

### III

Failure to provide the training prescribed by the regulations is, in my view, a serious violation. However, the evidence presented in this case does not establish that the hazard contributed to by the violation is reasonably likely to result in a serious injury. Mathies Coal Co., 6 FMSHRC 1 (1984); United States Steel Mining Company, Inc., 7 FMSHRC 1125 (1985). The miners here were experienced. The mine environment is, according to the evidence, not particularly dangerous or threatening. I conclude that the finding in the citation that the violation was significant and substantial is not supported by the evidence.

Sunny Ridge had been cited on a number of prior occasions for training regulation violations. Seventeen miners were on the job site; six had received the required training; 11 had not. These facts indicate that the violation resulted from a high degree of carelessness on Sunny Ridge's part.

The citation was abated promptly and in good faith. Respondent stipulates that the proposed penalty will not affect the ability of Sunny Ridge to continue in business.

Based on the criteria in Section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$2200. This amounts to a basic penalty of \$100 for each miner not properly trained, which I increased to \$200 because of the history of similar violations.

ORDER

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

1. Citation 3364393 is **MODIFIED** to a nonsignificant and substantial violation and, as modified, is **AFFIRMED**.

2. Sunny Ridge shall, within 30 days of the date of this Decision, pay to the Secretary a civil penalty in the amount of \$2200 for the violation found herein.

  
James A. Broderick  
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 5 1991**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 90-188  
Petitioner : A. C. No. 36-02402-03805  
v. :  
 : Greenwich Collieries  
ROCHESTER & PITTSBURGH COAL :  
COMPANY, :  
Respondent :

**DECISION**

Appearances: Thomas Brown, Esq., U. S. Department of Labor,  
Office of the Solicitor, Philadelphia,  
Pennsylvania, for the Secretary of Labor  
(Secretary);  
Joseph A. Yuhas, Esq., Ebensburg, Pennsylvania,  
for Rochester & Pittsburgh Coal Company (R&P).

Before: Judge Broderick

**STATEMENT OF THE CASE**

In this proceeding, the Secretary seeks civil penalties for four alleged violations of mandatory health and safety standards. On November 26, 1990, the Secretary filed a motion to approve a partial settlement with respect to three of the citations. The first involved a violation of 30 C.F.R. § 75.1704 because two air lock doors were permitted to remain open. A penalty of \$247 was originally assessed. The parties proposed a reduction to \$125 because further investigation revealed that miners had coincidentally moved equipment through the area, using the two doors. The violation was inadvertent and had not existed for a significant period of time. The parties agreed further to delete the significant and substantial finding.

The other two citations involved violations of 30 C.F.R. § 75.1107-1(a)(3) because two items of electrical equipment were left unattended within 2 feet of the coal rib. They were originally assessed at \$112 each. The parties requested a reduction to \$50 each because the likelihood of a fire was found to be less than originally believed. The parties also agreed to delete the significant and substantial findings. I stated on the record that I approved the motion.

The case involving the remaining alleged violation was called for hearing in Johnstown, Pennsylvania, on March 7, 1991. Samuel Brunatti testified on behalf of the Secretary. William Shaner and Dennis Homady testified on behalf of R&P. I granted the Secretary's motion to permit the submission of a posthearing deposition of Anthony Turran. However, the deposition was not filed and is not a part of this record. Both parties have filed Posthearing Briefs. I have considered the entire record and the contentions of the parties in making the following decision.

#### FINDINGS OF FACT

1. Rochester & Pittsburgh is the owner and operator of an underground coal mine in Cambria County, Pennsylvania, known as Greenwich Collieries No. 2 Mine.
2. The mine produces more than one million, five hundred thousand tons of coal annually. Rochester & Pittsburgh produces more than 8 million tons annually. It is a large operator.
3. In the 24 months prior to the citations involved in this proceeding, the mine had 958 violations in 1,293 inspection days; 42 of the violations were of 30 C.F.R. § 75.1704. This history shows approximately .75 violations of all standards per inspection day, and 1.25 violations each month of the standard involved in this case. I consider this an unfavorable history of prior violations, and will increase any penalty assessed herein because of it.
4. Rochester & Pittsburgh demonstrated good faith in attempting to achieve rapid compliance after the citation was issued.
5. Federal Coal Mine Inspector Samuel Brunatti conducted a Section 103(i) spot inspection of the subject mine on May 1, 1990. He found that the alternate escapeway track entry for the M11K Section of the subject mine was not being maintained so as to permit miners to escape quickly to the surface in the event of an emergency, in that the clearance from supply cars to rib in several locations was 3 feet, 5 feet and 4.5 feet. He issued a citation charging a violation of 30 C.F.R. § 75.1704. The original citation stated that "these areas are to be maintained at a width of at least 6 feet." (G. Ex 2, p. 1). The citation was modified on May 1, 1990, to delete references to the reduction in width and to the requirement that a 6 foot width be maintained. (G. Ex. 2, p. 4).
6. From the end of the track outby for a distance of approximately 200 feet, supply cars were parked along the track. The width of the entry from the supply cars to the rib varied from 3 feet to 6 feet: at some points it was 3 feet, at some 4 feet, 4-1/2 feet, 5 feet, and 6 feet depending on the rib,

which was not regular. These distances were measured by Inspector Brunatti. The inspector was uncertain as to the extent of the narrowed areas. He stated that the area of the 3 feet width extended only 4 or 5 feet (Tr. 30), but that he would "be guessing" at the other narrowed areas because of the irregularity of the rib. (id.) The cars were 2-1/2 feet to 3 feet high but, when loaded, could with their contents reach the roof.

7. There is a dispute as to the height of the entry. Inspector Brunatti testified that it was approximately 4 or 4-1/2 feet. William Shaner, UMW Representative on the Mine Accident and Violation Reduction Program, estimated the height of the entry to be "over five foot." (Tr. 51.) The mine safety inspector for R&P, Dennis Homady testified that the average height of the coal seam varied from 48 inches to 60 inches, but that the track entries were cut slightly higher than average. The entry height was not measured at the time the citation was issued or afterwards. The entry no longer exists. Inspector Brunatti is 6 feet, 1 inch, or 6 feet, 2 inches tall. He weighs about 280 or 290 pounds. He testified that he walked through the cited area bent over at about a 45 degree angle. Shaner is approximately 5 feet, 7 inches tall. He testified that he had to bend his head to walk in the entry. Considering all the testimony, I find that average height of the cited portion of the entry was approximately 5 feet.

8. The stretchers used at the subject mine were 18 inches to 22 inches wide. These were measured by Inspector Brunatti after he issued the citation. The stretchers are 7 feet long.

9. Respondent conducted a test on March 5, 1991, in an underground area of the mine where the entry height ranged from 5 feet, 8 inches to 6-1/2 feet, and the distance from supply cars to ribs ranged from 34 inches to 6 feet, for a distance of approximately 150 feet. Four people were carrying another person on a stretcher and experienced no delays in carrying the stretcher through the area. The stretcher was 20-1/2 inches wide and 7 feet long.

#### REGULATION

30 C.F.R. § 75.1704 provides in part as follows:

. . . at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways . . . shall be provided from each working section continuous to the surface escape drift opening or continuous to the escape shaft or slope facilities to the surface, and shall be

maintained in safe condition and properly marked . . . . Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

## ISSUES

1. Whether the standard requires that the entire escapeway be maintained so as to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency?

2. Whether the escapeway involved in this proceeding was maintained in accordance with the standard?

3. If a violation is established by the evidence, what is the appropriate penalty?

## CONCLUSIONS OF LAW

### I

Rochester & Pittsburgh is subject to the provisions of the Mine Act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

### II

The standard in question requires in its first sentence that designated escapeways be maintained to insure passage of any person including a disabled person. The third sentence provides that escape facilities, approved by the Secretary and properly maintained and frequently tested, from the shaft or slope to the surface shall be present to allow all persons including disabled persons to escape quickly to the surface in case of an emergency. The Secretary argues that "escape facilities" include the entire escapeway from the working section to the surface, and therefore the adverb "quickly" must be taken to modify the phrase "to insure passage" used in the first sentence of Section 75.1704. The wording of the standard will not permit such a construction. The third sentence obviously refers to mechanical facilities, such as elevators, lifts, etc., designed to bring miners to the surface. See Utah Power & Light Company, 11 FMSHRC 1926, 1930 (1989).

The question remains, however, whether on May 1, 1990, the alternate escapeway track entry was being maintained so as to insure passage of a disabled person in case of an emergency. The travelable passageway between the supply cars and the rib was from 3 to 6 feet wide. The stretchers were from 18 inches to 22 inches wide. Thus, there was a minimum clearance of 14 inches, or 7 inches on each side. Inspector Brunatti has had experience evacuating people on a stretcher from an underground mine. He testified that if a disabled person were evacuated through the passageway involved herein it would be necessary to put the stretcher down and readjust it in the narrowed areas, and valuable time might be lost in an emergency. He stated that the height of the entry would dictate that four persons would be necessary to carry a disabled person on a stretcher, because the carriers would have to carry the stretcher while bent over. Inspector Brunatti conceded that the 3 foot wide area was "passable" by four people carrying a disabled person on a stretcher, but "they'd have to probably set the stretcher down or shift around, come to a complete stop and maybe get an individual on each end to shift the stretcher through." (Tr. 45.)

The height of the passageway in the entry where R&P simulated a rescue was significantly higher (5 feet, 8 inches to 6-1/2 feet), although of approximately the same width as the cited area. For this reason, I discount the testimony that the rescuers experienced no difficulty or delay in transporting a person on a stretcher.

Inspector Brunatti's testimony must also be discounted because he significantly understated the height of the escapeway, and relied on the reduced height in concluding that rescuers would have difficulty in transporting a disabled person on a stretcher. He also relied on the MSHA policy that escapeways must be maintained at a width of at least 6 feet. Finally, he conceded that the areas involved were passable, but not rapidly (Tr. 46).

I conclude that the weight of the evidence does not establish that the cited escapeway was not maintained to insure passage at all time of any person, including a disabled person.

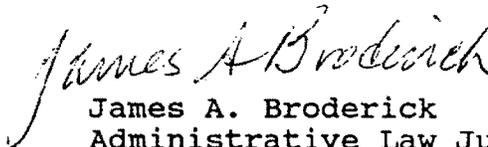
#### ORDER

Based on the above findings of fact and conclusions of law, and relying on the motion to approve a partial settlement, IT IS ORDERED:

1. Citation Nos. 3302406, 3302407, and 3302408 are **MODIFIED** to delete the findings that the violations are significant and substantial, and as modified, are **AFFIRMED**.
2. Citation No. 2892777 is **VACATED**.

3. Rochester & Pittsburgh shall, within 30 days of the date of this decision, pay the following civil penalties:

<u>CITATION</u>	<u>30 C.F.R.</u>	<u>AMOUNT</u>
3302406	75.1704	\$125
3302407	75.1107-1(a)(3)	50
3302408	75.1107-1(a)(3)	50
	Total	\$225

  
James A. Broderick  
Administrative Law Judge

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

JUN 6 1991

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 90-168-M  
Petitioner : A.C. No. 24-01841-05507  
: :  
v. : Lexington Mine  
: :  
NEW BUTTE MINING INCORPORATED, :  
Respondent :

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Mr. David W. Kneebone, Esq., Consultant, New Butte  
Mining, Butte, Montana,  
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent, New Butte Mining, Incorporated ("New Butte") with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (the "Act").

A hearing on the merits was held in Butte, Montana, on April 23, 1991.

The parties filed post-trial briefs.

STIPULATION

At the commencement of the hearing the parties filed a written stipulation providing as follows:

1. New Butte is engaged in the mining of gold in the United States, and its mining operations affect interstate commerce.
2. New Butte is the owner and operator of the Lexington Mine, MSHA I.D. No. 24-01841.
3. New Butte is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801, et seq. (the "Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violation.

9. New Butte is a small operator of a gold mine with 106,950 control hours in 1989.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citations.

11. On June 27, 1989, David Kneebone contacted Darrel Woodbeck, MSHA inspector, to report the accident. After that, Darrel Woodbeck contacted Jack Petty, former MSHA Assistant District Director, who directed Darrel Woodbeck and Siebert Smith to investigate the company because of the accident.

#### THE EVIDENCE

On June 27, 1989, Darrell Woodbeck, an MSHA inspector experienced in mining, issued Citation No. 2650622. The citation alleged a violation of 30 C.F.R. § 57.1101. On the same date, in a subsequent modification, the citation was modified to allege a violation of 30 C.F.R. § 57-11008.<sup>1</sup> (Exhibit P-2).

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<sup>1</sup> The cited regulation provides as follows:

**§ 57.11008. Restricted clearance.**

Where restricted clearance creates a hazard to persons, the restricted clearance shall be conspicuously marked.

The uncontroverted evidence shows that on June 26, 1989, miner Rick A. Walter was swamping<sup>2</sup> for Dana Lentz, the assigned motorman. The two miners in this conventional stope mine were joined by miner Conda Sluga. The men were spotting ore cars under the #3 chute. In the process, a one-inch air hose had become entangled in the rail cars. Messrs. Sluga and Walter proceeded to untangle the hose. In the process, Mr. Walter and the train moved slowly backwards. Mr. Walter backed into the rib. At that point, he was pinched by the ore car and sustained injuries to his neck, chest, and back. Mr. Lentz saw that something was wrong and he immediately pulled the train forward. Mr. Walter was hospitalized for his injuries.

The company took photographs (Exs. P-3 through P-7). Copies of the photographs were later given to the MSHA investigators. However, the photographs were given to MSHA in a spirit of cooperation and the inspector at the scene had indicated there was no reason to write a citation. Subsequently, a citation was issued.

It is agreed the restricted clearance was not marked with any reflectors or warnings. At the most restricted point, as a ground control device, the protrusion of the granite slab had been overlaid by a steel mat. The mat showed evidence that, at times, it had been struck by the ore cars. At this point, there was no clearance between ore cars and the wall.

#### DISCUSSION

The Commission in Ideal Cement Company, 11 FMSHRC 2409 at 2416 (Nov. 1990), stated that in interpreting and applying broadly worded standards, the appropriate test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard, citing Canon Coal Co., 9 FMSHRC 667, 668 (April 1987), Quinland Coal, Inc., 9 FMSHRC 1614, 1617-1618 (Sept. 1987).

The requirements of 30 C.F.R. § 57.11008 are clear. Re-stated, it requires that restricted clearance shall be conspicuously marked under two circumstances. These are where the clearance is restricted and a hazard exists due to the restriction.

---

<sup>2</sup> A swamper directs the movements of the underground ore haulage train.

As a threshold matter, it is uncontroverted that the area of restricted clearance was not marked in any manner. The restricted space went to zero distance between the ore cars and the wall. A ground control mat at this point showed evidence that it had been struck by the ore cars. The hazard was apparent: the swamper backed against the rib and was struck by the side of the ore car. (Exs. P-3 through P-7).

New Butte raises several defenses. New Butte objects to MSHA using the company's photographs which were originally given in a "spirit of cooperation." New Butte's objections are without merit. MSHA legally acquired the photographs and may use them as evidence in a later hearing. The operator objected to the Secretary's proceeding under 30 C.F.R. § 57.11008 when the company had been originally cited under § 57.11001.<sup>3</sup> Such amendments are permitted under the Federal Rules of Civil Procedure. See Rule 15(a), Fed. R. Civ. P.

The operator also argues the area of this stope was not a travelway. Therefore, by virtue of the headnote of the regulation, Subpart J does not apply.

I disagree, 30 C.F.R. § 57.2 defines a travelway as "a passage, walk, or way regularly used and designated to go from one place to another." On this issue I credit the inspector's testimony. New Butte, in fact, recognized this area as a travelway since a walkway existed on the side away from the side of the protrusion. In short, the passage from wall to wall constituted the travelway.

New Butte also contends the accident was not thoroughly investigated by MSHA. The company is not in a position to complain that the inspectors did not go underground. It is uncontroverted that the company blasted the protruding rib before the inspectors arrived to conduct their inspection. MSHA's investigation (Ex. P-2) may contain some errors, but I find it is a thorough outline of the accident. Further, an inspector does not have to observe a violation to issue a citation, Emerald Mines Co. v. Federal Mine Safety and Health Review, 863 F.2d 51 (D.C. Cir. 1988).

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<sup>3</sup> The standard reads as follows:

§ 57.11001 Safe access.

Safe means of access shall be provided and maintained to all working places.

New Butte also contends, and its evidence supports the argument, that the primary cause of the accident could have been miner Sluga's activities in distracting the ore train operator and giving him unauthorized signals.

This case is not a hearing to balance the causes of the accident. Even if miner Sluga or the crew's negligence contributed to the accident, the ultimate issue is whether New Butte violated the regulation.

New Butte also contends it did not receive a copy of MSHA's investigation although it requested that information. However, it is uncontroverted that New Butte received the report. While there was some delay, the operator did not establish any prejudice by reason of the delay. New Butte's contentions are without merit and for the foregoing reasons, Citation No. 2650622 should be affirmed.

#### CIVIL PENALTIES

The statutory criteria to assess civil penalties are contained in Section 110(i) of the Act, 30 U.S.C. § 820(i).

The operator's history is favorable, inasmuch as the company has only been assessed eight violations in the two years ending June 26, 1989. The company had no violations before October 15, 1987.

It is stipulated that the company is small and the proposed penalty will not affect its ability to continue in business.

The company was negligent inasmuch as a protrusion was apparent. A mat had been placed at the protrusion as a ground control device, hence the company should have known of it.

The injuries sustained by Rick Walter are indicative of the gravity of this violation.

The operator blasted the protrusion before the MSHA inspectors arrived. However, this action generally falls under the broad umbrella of "good faith."

On balance, I consider the proposed penalty to be appropriate.

For the following reasons, I enter the following:

ORDER

Citation No. 2650622 and the proposed penalty of \$750 are  
**AFFIRMED.**

  
John J. Morris  
Administrative Law Judge

**Distribution:**

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

Mr. David W. Kneebone, Consultant, NEW BUTTE MINING, P.O. Box  
188, Butte, MT 59703 (Certified Mail)

ek

**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 1991

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 90-122-M  
Petitioner : A.C. No. 41-02319-05511-A  
v. :  
: Espey Pit and Plant  
EDWIN E. ESPEY, JR., :  
EMPLOYED BY ESPEY SILICA :  
SAND COMPANY, :  
Respondent :

**DECISION**

Appearances: J. Philip Smith, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, VA, for the  
Petitioner;  
Mr. Edwin E. Espey, Jr., San Antonio, Tx, for  
Respondent.

Before: Judge Fauver

The Secretary seeks a civil penalty under § 110(c) of the  
Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et  
seq.

This case was heard in San Antonio, Texas, on May 22, 1991.

Having considered the evidence, oral arguments, and the  
record as a whole, I find that a preponderance of the  
substantial, reliable, and probative evidence establishes the  
following Findings of Fact and additional findings in the  
Discussion below:

**FINDINGS OF FACT**

1. Espey Silica Sand Company, Inc., a corporation, owns  
and operates an open pit mine and plant, known as Espey Pit and  
Plant, in San Antonio, Texas, where it produces silica sand for  
sales in and affecting interstate commerce.
2. Respondent, Edwin E. Espey, Jr., is vice president and  
superintendent of the subject mine and plant.
3. The mine and plant, at all times relevant, employed  
about four employees.

4. On April 26, 1989, Federal Mine Inspector Joseph P. Watson inspected the mine and plant. In the dry screen tower, a four-story building, he found holes and openings in the upper floors that were unguarded and not dangered off. He also found, on the second floor, a wooden purlin (a support beam for a large part of the floor) that was broken and bowed. The floor supported by the purlin was not dangered off. Based on these conditions, the inspector issued a combination imminent danger order and citation, known as Order/Citation No. 3280352, charging a violation of 30 C.F.R. § 56.11001, which provides:

§ 56.11001 Safe access.

Safe means of access shall be provided and maintained to all working places.

5. The unguarded holes, openings, and broken purlin presented an imminent danger of persons or material falling through a floor and causing permanently disabling or fatal injuries.

6. The conditions observed and cited by the inspector were obvious and evident by the exercise of ordinary attention. The purlin break and bow were obvious. All of the cited conditions were known by the respondent or, by the exercise of reasonable care, should have been known by him, substantially long before the inspection on April 26, 1989.

7. Respondent's father, Edwin E. Espey, who is President and majority stockholder of the corporation, interfered with inspector Watson's performance of his official duties on April 26, 1989, by preventing him from posting a red tag forbidding access to the dry screen tower. As a result of such interference an injunction action was brought in the United States District Court for the Western District of Texas (Secretary of Labor v. Edwin E. Espey, and Edwin E. Espey, Jr., Individually and Espey Silica Sand Co., Inc., a corporation, Civil Action No. SA 89 CA 1416), resulting in a consent decree enjoining defendants from interfering with the Secretary or her agents in carrying out the provisions of the Act.

8. Respondent in this proceeding did not aid his father in interfering with inspector Watson on April 26, 1989, and in general has demonstrated a cooperative attitude toward MSHA inspectors.

DISCUSSION WITH FURTHER FINDINGS

Section 110(c) of the Act provides that:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act

or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The word "knowingly" as used in this section does not have any meaning of bad faith or evil purpose or criminal intent. "It's meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such informations would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." United States v. Sweet Briar, Inc., 92 F. Supp. 777,779 (D.S.C. 1950), quoted approvingly in Secretary v. Kenny Richardson, 3 FMSHRC 8 (1981), affirmed, Richardson v. Secretary of Labor and FMSHRC, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).

The facts show that Respondent knew or should have known the existence of the conditions cited by the inspector, and should have corrected them, long before the inspection on April 26, 1989.

In reaching this finding, I have not found it necessary to resolve the conflict in the testimony between Respondent and his nephew, John Espey McDaniel. I find that McDaniel's testimony does not show greater weight than Respondent's testimony and therefore does not preponderate in establishing any fact disputed by Respondent. However, the inspector's testimony and the physical facts observed by him preponderate to show that Respondent knew or should have known the cited conditions before the inspection.

I therefore find that Respondent knowingly permitted the violation as alleged by the Secretary.

Considering the Respondent's overall cooperative attitude toward MSHA inspectors, and the fact that the corporation was assessed a civil penalty of \$600 for the same violation as that charged against Respondent, and considering all of the criteria for civil penalties in § 110(i) of the Act, I find that a civil penalty of \$450 is appropriate for the violation found herein.

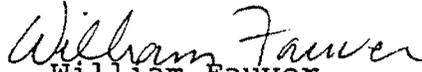
#### CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. Respondent knowingly authorized, ordered or carried out

a violation of 30 C.F.R. § 56.11001 as alleged in the Petition for Assessment of Civil Penalty.

ORDER

Respondent shall pay a civil penalty of \$450 within 30 days of the date of this decision.

  
William Fauver  
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, 4th Floor, Arlington, VA 22203 (Certified Mail)

Mr. Edwin E. Espey, Jr., Plant Manager, Espey Silica Sand Company, Route 7, Box 500, San Antonio, TX 78221 (Certified Mail)

fas

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

JUN 12 1991

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 90-207  
Petitioner : A.C. No. 15-06268-03538  
v. :  
AGIPCOAL USA, INC., : Pevler Preparation Plant  
Respondent :

**DECISION**

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee, for  
the Petitioner ;  
C. Gregory Ruffennach, Esq., Smith, Heenan &  
Althen, Washington, D.C., for the Respondent.

Before: Judge Maurer

**STATEMENT OF THE CASE**

This civil penalty case is before me, initiated by the petitioner against the respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". Respondent is contesting both a section 104(a) citation and a related, subsequent section 104(b) order of withdrawal issued by the Mine Safety and Health Administration (MSHA).

Pursuant to notice, a hearing on this matter was held in Paintsville, Kentucky, on January 17, 1991. The parties have both filed posthearing briefs and I have considered their respective arguments in the course of my adjudication of this case.

**STIPULATIONS**

The parties stipulated to the following (Govt. Ex. No. 1):

1. The operator processes approximately 1.35 million tons of coal per year at the preparation plant.
2. The operator employs 16 active hourly employees.
3. The civil assessment will not affect the operator's ability to continue in business.

4. Citation No. 3365153 and Order No. 3365158 were issued by an authorized representative of the Secretary.

5. The presiding administrative law judge has jurisdiction to hear and decide this case.

#### The Underlying Section 104(a) Citation

Section 104(a) Citation No. 3365153, issued on December 21, 1989, charges a violation of the mandatory standard found at 30 C.F.R. § 77.202 and alleges:

The No. 3 dump has an accumulation of loose coal and float coal dust up to about 1/2" in depth on the floor, wall stringers, motors, electrical cabinets, and conduits, which can create a fire/explosion hazard in the event of an electrical defect or short.

The facts surrounding the issuance of this citation are essentially undisputed. On December 21, 1989, Inspector Reed, accompanied by John Dillon, the Plant Superintendent, inspected the No. 2 and 3 Coal Dumps as a part of his regular Triple A inspection at the Pevler Preparation Plant Complex. After inspecting the dumps, the inspector cited both as violating the standard at 30 C.F.R. § 77.202. He found the violative conditions throughout the entire dump on all three floors of the facility (in this case, however, we are concerned with the No. 3 Dump only).

The No. 3 Dump is a raw coal dump large enough for two 10-wheel coal trucks to dump simultaneously. It holds 500 to 550 tons of coal and it is primarily a bypass dump to run coal into the No. 3 silo bypassing the preparation plant.

Inspector Reed testified that all three floors of the dump had loose coal and float coal dust on the floors and walls, as well as on the motors and electrical conduits. Further, the most significant accumulations were found in the breaker room of the dump. In his opinion, these accumulations presented two hazards; a stumbling and tripping hazard, which I discount, and a danger of explosion.

The breaker room at the dump contained a great deal of electrical equipment, such as motor controllers, circuit breakers and contactors. The inspector was particularly concerned with the contactors. They constantly open and close each time a piece of equipment is energized or deenergized and thereby create a danger of igniting the float coal dust by the arcing and sparking that is produced.

The company essentially admits the basic violation existed on December 21, 1989. The plant superintendent himself conceded the dump was dusty, but he didn't perceive any immediate danger to anyone. He maintains that there is a lot of ventilation throughout the dump and that none of the employees are physically in the dump when it is operating. Mr. Dillon also opined that a fire or explosion hazard was unlikely since there are no exposed sources of ignition. The greatest potential source of ignition was the contactors in the breaker room, but they were all sealed inside metal boxes in order to minimize contact between any potential source of ignition and any existant float coal dust. Furthermore, all the wiring to the various motors and starter components in the breaker room is enclosed in metal conduit.

The company, therefore, contests Inspector Reed's "significant and substantial" finding in the original section 104(a) citation.

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).

There is no doubt that there was a violation of the mandatory safety standard cited, 30 C.F.R. § 77.202, and I concur with the existence of an enhanced measure of danger to safety caused by the dust accumulations. However, the Secretary must also establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. This latter she has failed to do. The No. 3 Dump is an unmanned facility. It is remotely controlled from an operator's room on the side of the No. 2 Dump some 100-150 feet away. There are no employees needed in the dump while it is operating and indeed the employees are instructed not to enter them while they are in operation. I therefore find that the instant violation does not meet the "S&S" criteria because it is unlikely that any injury to anyone would occur as a result of this violation, and the citation will be so modified.

In assessing a civil penalty in this case, I have considered the foregoing stipulations, findings and conclusions and the requirements of section 110(i) of the Act. I concur with the inspector's negligence finding of "moderate". Under these circumstances, I find that a civil penalty of \$100 is appropriate.

#### The Subsequent Section 104(b) Order

Section 104(b) Order No. 3365158, was issued on January 2, 1990 and alleges:

The cited float coal dust is still present on the electrical conduits & tops of the electrical component cabinets. Additional cleaning is still required on the cabinet faces, wall beams & the floor.

The original citation set a date of December 24, 1989 as the time when the violation was to be abated. On January 2, 1990, Inspector Reed returned to the preparation plant to inspect and terminate the citations written for both the No. 2 and No. 3 Dumps. He found the No. 2 Dump cleaned to his satisfaction and abated the citation. The instant problem, however, arose in the No. 3 Dump.

Although the majority of the No. 3 Dump had been cleaned to the inspector's satisfaction, he was not satisfied with the cleanup of the breaker room. The breaker room is the electrical

room for the No. 3 Dump and is approximately 8 feet by 12 feet (96 square feet) in area located on the second level of the dump. It constitutes a small but significant portion of the total area originally cited.

The breaker room contains the electrical components for the machinery in the Dump. At the center of the breaker room are metal cabinets which enclose the breakers and starters. The breakers and starters are thus enclosed and covered by metal doors with two lock-in type screws. These cabinets are designed to minimize the amount of coal dust entering the metal cabinets from the outside and to contain the arcing or sparking of the breakers and starters inside. There is virtually no potential for an ignition in the breaker room when these cabinets are clean and closed.

All the wiring to the motors and to the starter components in the breaker room is enclosed in conduit. These conduits are located near the ceiling of the breaker room approximately 10 feet high.

The greater part of the accumulations of coal dust which the inspector found on January 2, 1990 were located on top of these cabinets and conduits.

When Inspector Reed returned on January 2, he was accompanied by Mr. Don Hall, the company safety director and Mr. Fannin, the union representative. After Inspector Reed indicated that the breaker room needed additional cleaning, Mr. Hall left the dump and went to find Mr. Cantrell (the Mine Manager) to inform him that the area had not been cleaned to Inspector Reed's satisfaction. Cantrell went to the No. 3 Dump to meet with Inspector Reed. When he arrived, Inspector Reed indicated to him at that time that he was going to shut down the No. 3 Dump because the breaker room needed additional cleaning. In an attempt to avoid the threatened "b" order, Hall, Cantrell and Fannin quickly cleaned up the coal dust which the inspector had found in the breaker room. It took the three men about fifteen minutes to clean it to his satisfaction, and involved wiping the dust off the top of the conduits and cabinets and sweeping the floor of the breaker room.

The company had previously made a considerable effort to abate the citation. A contractor's cleaning crew worked approximately 19 man-hours to clean the No. 3 Dump on December 23, 1989. At this time, Mr. Cantrell inspected the dump and specifically inspected the breaker room and in his opinion, as of December 23, 1989, the breaker room was sufficiently cleaned to abate the citation.

On the next regularly scheduled cleanup day, December 31, 1989, after another week of operation, the No. 3 Dump was cleaned

again. On December 31, 1989, the cleanup crew worked approximately 18 hours. Cantrell again inspected and was generally satisfied that the breaker room was clean. However, he did find some dust inside the electrical cabinets where the breakers and starters are located. He ordered the cleanup crew to turn off the power and blow the dust out of the cabinets and reseal the doors.

The coal dust later found by the inspector on top of these cabinets and on top of the overhead conduits was above eye level and was admittedly missed by the clean up crew as well as by Mr. Cantrell.

It is the operator's position that Inspector Reed, in these circumstances, should have extended the abatement period to allow them a quick clean-up rather than issue the section 104(b) order.

Section 104 of the Mine Act provides in relevant part:

(a) If, upon inspection or investigation, the Secretary... believes that an operator... has violated this Act, or any mandatory health or safety standard, rule, order, or regulation... he shall... issue a citation.... The citation shall fix a reasonable time for the abatement of the violation....

(b) If, upon any follow-up inspection... an authorized representative of the Secretary finds (1) that a violation described in a citation... has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall... promptly issue an order requiring the operator... to immediately cause all persons... to be withdrawn from, and to be prohibited from entering, such area....

The inspector is thus required to make a finding as to whether or not the abatement period should be extended prior to issuing a section 104(b) withdrawal order. The reasonableness of his actions must be determined on the basis of the facts confronting him at the time he issued the order. United States Steel Corporation, 7 IBMA 109 (1976).

Three factors are generally considered or at least should have been considered by Inspector Reed to determine whether the abatement period should have been extended:

(1) The degree of danger that any extension would have caused to miners;

(2) The diligence of the operator in attempting to meet the time originally set for abatement; and

(3) The disruptive effect an extension would have had upon operating shifts.

Of these, the first two are the most pertinent to the case at bar.

I have already found and concluded earlier in this decision that the condition cited by Inspector Reed in the original section 104(a) citation was not a "significant and substantial" violation of the mandatory standard and I now find that the "left-over" condition he found on January 2, 1990, did not pose any particular hazard to miners. In this case, the additional cleanup to fully abate the citation to his satisfaction took only fifteen minutes and since no miners actually work in the No. 3 Dump, no miners were in fact withdrawn by the order. It appears to me that the inspector issued the order for record purposes only.

In assessing the company's good faith in attempting to abate the original citation it is necessary to take into account the totality of the company's efforts. The original citation, as issued, applied not only to the breaker room but also to the entire No. 3 Dump. Moreover, the original citation was issued in conjunction with another Section 104(a) citation issued for accumulations in the No. 2 Dump.

The company's efforts in abating these citations, set out earlier, within the prescribed abatement period were substantial and, with the exception of the breaker room, Inspector Reed was satisfied with the company's abatement efforts. The employees assigned to clean the breaker room apparently missed the coal dust on top of the conduit and cabinets. And although Mr. Cantrell personally inspected the breaker room afterwards he also did not notice these accumulations of coal dust. The tops of the conduit and cabinets are obscured from view by their position above eye level, and although this is no excuse for not cleaning up there, I believe it was the reason these accumulations were left behind.

I therefore find that the accumulations remaining in the breaker room on January second did not represent a lack of diligence on the part of the company's cleanup effort but rather were an understandable "oversight", that was capable of being corrected in a mere fifteen minutes without causing any particular hazard to miners.

Inspector Reed himself testified that if he had believed that a truly diligent effort had been made to clean the room he would have extended the time for abatement of the citation.

After reviewing the evidence in this case, I do believe the company made a truly diligent effort to clean the breaker room and I also believe that Inspector Reed failed to give due and serious consideration to their efforts to abate or to extending the period for abatement.

Furthermore, I find that his failure to extend the period for abatement was unreasonable and contrary to section 104(b) of the Act. Accordingly, the subject order will be vacated herein.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED THAT:

1. Citation No. 3365153 IS AFFIRMED as a non-S&S violation of 30 C.F.R. § 77.202.
2. Section 104(b) Order No. 3365158 IS VACATED.
3. The respondent IS HEREBY ORDERED TO PAY a civil penalty of \$100 within 30 days of the date of this decision.

  
Roy J. Maurer  
Administrative Law Judge

Distribution:

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C. Gregory Ruffennach, Esq., Smith, Heenan & Althen, 1110 Vermont Avenue, N.W., Suite 400, Washington, DC 20005-3593 (Certified Mail)

/ml

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

JUN 12 1991

LINDA LESTER, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. VA 91-26-D  
: :  
GARDEN CREEK POCAHONTAS : NORT CD 90-14  
COMPANY, :  
Respondent : Virginia Pocahontas #6 Mine

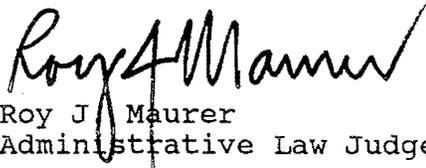
**ORDER OF DISMISSAL**

Appearances: Susan Oglebay, Esq., Castlewood, Virginia, for  
the Complainant;  
Charlie R. Jessee, Esq., Yearly, Tate, Lowe &  
Jessee, P.C., Abingdon, Virginia, for the  
Respondent.

Before: Judge Maurer

At the hearing in Abingdon, Virginia, on April 25, 1991,  
Complainant, by counsel, moved to withdraw her complaint, with  
prejudice, and dismiss this case. Respondent does not object.

Accordingly, the Motion is **GRANTED**, and this proceeding is  
**DISMISSED**, with prejudice.

  
Roy J. Maurer  
Administrative Law Judge

Distribution:

Susan Oglebay, Esq., P. O. Box 28, Castlewood, VA 24228  
(Certified Mail)

Charlie R. Jessee, Esq., Yearly, Tate, Lowe, & Jessee, P.C.,  
P. O. Box 1685, 161 E. Main Street, Abingdon, VA 24210 (Certified  
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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 13 1991

AVIS B. PERKINS, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEVA 91-23-D  
: MSHA Case No. MORG CD 90-12  
MORNINGSIDE DEVELOPMENT :  
CORPORATION, : Little Falls Mine  
Respondent :

ORDER

On April 25, 1991, an order was issued directing Complainant to file a Statement indicating the specific relief requested. It was further provided in the order that Respondent shall have 20 days from the date service of the Statement is attempted, to reply to the statement. Complainant's statement was received by the Commission on May 17, 1991. In its statement, Complainant's counsel certified that he mailed Respondent a copy of the statement on May 14, 1991. Respondent has not filed any response to Complainant's Statement.

Complainant seeks the imposition of punitive damages in the amount of \$10,000. The complaint in this case was filed pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (the Act). Neither section 105, *supra*, nor the Rules of the Commission, 29 C.F.R. § 2700 *et seq.*, provide for the imposition of punitive damages. Further, such relief is not proper in this case. The record does not contain any evidence surrounding the alleged discriminatory acts, as there was no evidentiary hearing in this matter, because Respondent had defaulted in not filing an Answer. Hence, there are no facts before me to support the imposition of punitive damages.

The balance of relief sought by Complainant is proper under the Act.

Accordingly, it is ORDERED that, within 30 days of this Order, Respondent shall pay Complainant the following sums:

- |   |                    |
|---|--------------------|
| (1) Backpay from July 13, 1990 totalling  | \$24,000.00        |
| (2) Attorney Fees                         | \$ 950.00          |
| (3) Travel expenses in seeking employment | \$ 286.50          |
|   | <u>\$25,236.50</u> |

It is further ORDERED that Respondent shall, within 30 days of this Order reinstate Complaint to his prior position.



Avram Weisberger  
Administrative Law Judge  
(703) 756-6210  
FAX (703) 756-6201

Distribution:

Harley E. Stollings, Esq., Breckinridge, Davis, Sproles & Stollings, 509 Church Street, Summersville, WV 26651  
(Certified Mail)

Mr. J. Douglas Crane, President, Morningside Development Corporation, 153 Walnut Street, Morgantown, WV 26505  
(Certified Mail)

/fb

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 17, 1991

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 90-198  
Petitioner : A.C. No. 46-03805-03978  
v. :  
: Martinka No. 1 Mine  
SOUTHERN OHIO COAL COMPANY, :  
Respondent :

## DECISION

Appearances: Glenn M. Loos, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;  
Rebecca J. Zuleski, Esq., Furbee, Amos, Webb & Critchfield, Morgantown, West Virginia, for the Respondent.

Before: Judge Koutras

### Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed an answer contesting the alleged violations, and pursuant to notice, a hearing was held in Morgantown, West Virginia. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

### Issues

The issues presented in this proceeding are (1) whether the respondent has violated the standards as alleged in the proposal for assessment of civil penalty, (2) whether the violations were "significant and substantial," and (3) the appropriate civil penalties that should be assessed based on the civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

### Discussion

Section 104(a) "S&S" Citation No. 3118460, issued on March 14, 1990, by MSHA Inspector Virgil M. Brown, Jr., cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.508, and the cited condition or practice is described as follows:

The elect (sic) map of the DC trolley system is not accurate in that trolley knife blade switches with handles are used where dead block insulators are shown.

Section 104(a) "S&S" Citation No. 3312067, issued on May 1, 1990, by MSHA Inspector Virgil M. Brown, Jr., cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.1403, and the cited condition or practice is described as follows:

The short circuit protection for the trolley wire outby #30 block was not set properly and was not in compliance with the 75% safeguard. The 18 left rect. (sic) was set on 47/or 2834 amps. Load drop tests revealed that the rect. (sic) outby end should have been set on 37/or 2224 amps.

In issuing the citation, Inspector Brown relied on a previously issued safeguard Notice No. 2258189, dated November 14, 1983, and he included this information in the appropriate places on the face of the May 1, 1990, citation.

### Discussion

#### Citation No. 3118460

After the completion of the testimony of Inspector Brown, the petitioner's counsel was granted a short recess. He then advised the court that the parties had settled the alleged violation and that based on the testimony of the inspector, the petitioner decided to vacate the citation. The respondent raised no objection, and the petitioner's disposition of the alleged violation was approved from the bench (Tr. 146-148).

#### Citation No. 3312067

## Petitioner's Testimony and Evidence

MSHA Inspector Virgil M. Brown, Jr., testified that he is an electrical specialist with prior mine experience as a mine manager, foreman, fire boss, and maintenance person, and that he holds a bachelor's degree in mining engineering and has attended the MSHA Academy at Beckley, West Virginia, which included 2 weeks of electrical training. He has also taken electrical correspondence courses (Tr. 15-16). He confirmed that he conducted an electrical inspection at the mine on May 1, 1990, and that he inspected the short circuit protection for the DC trolley system. He confirmed that he performed a load drop test, and he explained the results of his test (Tr. 159-162). He also identified exhibit P-8 as a copy of his inspection notes, exhibit P-9 as a copy of the citation he issued, and exhibit P-10 as the prior safeguard notice issued by Inspector Wayne Fetty on November 14, 1983.

Mr. Brown stated that the results of his load drop test indicated that the fault protection for the circuit in question was set "nearly at 100 percent setting or just a little bit below 100 percent setting," and he explained that the slight discrepancy in the test results recorded in his notes and those shown on the citation were due to the fact "that 37 is the closest thumb wheel setting to that value, and, you're either going to go 60 below this value or 60 above this value" (Tr. 161).

Mr. Brown stated that the respondent had conducted prior load drop tests on April 10, 1990, as reflected by exhibit P-11, and he confirmed that he based his low negligence finding on the fact that the respondent did not ignore the tests and was trying to maintain the required circuit protection settings on their DC trolley system (Tr. 165). He further confirmed that the respondent was in violation of the previously issued safeguard because the circuit protection setting was at 100 percent, rather than the 75 percent required by the safeguard. If the setting were over 100 percent there would have been a violation of mandatory safety standard section 75.1001, rather than the safeguard (Tr. 165).

Mr. Brown explained what was required under the safeguard issued by Inspector Fetty, and he believed that a trained electrician who has worked around a DC trolley system would be familiar with the requirements of the safeguard notice and the load drop tests. Mr. Brown confirmed his belief that the conditions he cited constituted a violation of the requirements of the safeguard notice (Tr. 168).

Mr. Brown stated that the hazards created by the cited conditions included the probability and likelihood of a bolted short circuit, and a fire caused by arcing which could ignite the

combustible materials used in the roof support system. He explained that wooden header boards or planks are within inches of the trolley wires, and that a prior fire had occurred in the mine when a head board caught fire and he and Inspector Fetty came upon a motorman trying to extinguish the fire over the motor which had caused the fire (Tr. 50-51). He was aware of a trolley wire which fell on another section and did not trip the circuit breaker, indicating that it was not set appropriately. He was also aware of approximately 22 accidents over a 7-year period that resulted in 11 lost time injuries and 12 fatalities, as reported in an MSHA study (Tr. 168-169). He believed that "the situation and the mining methods and the settings that the rectifiers are . . . its likely for a problem to occur that would be S and S" (Tr. 169).

Mr. Brown further explained how a fire could start as a result of inadequate short circuit protection, and he indicated that the 75 percent setting required by the safeguard notice came from an MSHA report and studies which were done showing that arcing faults could occur and not open any circuit interrupting devices. He also explained the difference between an arcing fault and a bolted fault, and he believed it was reasonably likely that a fault would occur because of the metal overcast arches used for roof support. He confirmed that he has observed at least three occurrences, including a recent incident, where the insulation was melted off the trolley wire. He believed that a bolted fault would definitely trip if the circuit protection were set at 100 percent, but that an arcing fault would not trip and would remain open until it was cleared or burned far enough so that the flame path is extinguished or someone saw it and repaired it. He confirmed that he has personally observed six or eight mine fires caused by arcing faults, including one at the subject mine, over the past 20 years (Tr. 171-177).

Mr. Brown stated that the issuance of a "75 percent safeguard notice" such as the one he relied on to support the violation is not based on any MSHA district wide policy at mines with trolley systems. He confirmed that he inspects five mines with trolley systems and that the Martinka and Robinson Run mines are the only ones with safeguard notices (Tr. 177). Mr. Brown confirmed that he was familiar with the requirements of mandatory safety standard section 75.1001 and 75.1001-(b), and he explained his understanding of these regulations. He stated that if he finds any short circuit protection settings over 100 percent, he will cite section 75.1001, but if the setting is between 75 and 100 percent he will cite the safeguard notice (Tr. 179, 183-184). He explained that the 100 percent setting requirement is based on section 75.1001, and it is an industry standard based on the load drop test. The 75 percent safeguards lower the mandatory 100 percent setting based on special mine conditions (Tr. 185-186).

On cross-examination, Mr. Brown stated that he normally selects a mine area which has advanced the furthest to conduct his load drop tests because such an area would be the likely area to be out of compliance or have a problem which the mine electrical department would be aware of. He agreed that loose trolley wire "fish plates" could cause the rectifier settings to be set at less than the 2,224 amps required by the safeguard notice, and that this does occur in a mine, and if it does, it would result in a change in the load drop tests (Tr. 190). He confirmed that the 22 accidents which he previously referred to did not occur at the Martinka Mine, and he stated that "those were just separate safeguards" (Tr. 191). He also confirmed that the melted trolley wire guard fire caused by arcing was not a reportable fire because it was extinguished in less than 30 minutes, and that he was not personally aware of any reportable fires at the mine (Tr. 192).

Referring to section 75.1001-1(b), Mr. Brown explained his understanding of the testing and calibration language found in that regulation (Tr. 192-195). He confirmed that under MSHA's guidelines and policy manuals, it is appropriate for an inspector to issue a safeguard to address specific conditions or problems that have resulted in, or could result in, lost time accidents (Tr. 195-196). He confirmed that any safeguard issued by an inspector must go through the district manager in order to avoid "blanket covering" mines, and that he was so instructed by a supervisor during several meetings (Tr. 197). He confirmed that mine safeguard notices are a matter of record in the uniform mine file that he is required to review, and that such information can be retrieved on a computer at the district or sub-district office. However, he did not know how many safeguards have been issued at the subject mine. He stated as follows with respect to the safeguard he relied on in support of the citation (Tr. 200-201):

Q. Mr. Brown, do you know the reason that safeguard 2258189 which was issued by Inspector Wayne Fetty to Martinka Mine, do you know why it was issued?

A. It was issued I guess after he did a look at the study that was done on the arcing faults and the --- after a study was done of what was there at that mine, of the conditions there as specific to that mine.

Q. And you're just getting this information by reading the actual safeguard; is that correct?

A. Out of the safeguard and the actual printout and I also talked with the inspector.

Q. Mr. Brown, would you agree with the statement that a duly authorized representative of the Secretary such

as yourself, may issue a safeguard if it addresses hazards related to the transportation of men and materials?

A. Definitely. Yes, ma'am.

Q. All right. And that a safeguard would be issued on a mine by mine basis?

A. Mine by mine.

Q. Due to a peculiar or particular circumstance at that particular mine?

A. That's right.

Mr. Brown stated that he has inspected approximately 45 mines in district three, and that approximately 10 percent of them are trolley powered mines. He indicated that safeguards have been issued at mines with large amp capacities, and these mines are "more apt to have arcing faults and their settings would be higher," and they have combustibles close to the trolley wire and associated switching gear. He also indicated that the Martinka Mine uses trolley haulage on the longwalls with rather large motors that pull the trolleys on the trolley wire and that "they're more apt to have a fault at Martinka" (Tr. 202). Referring to the respondent's pre-trial discovery requests and replies by the petitioner (exhibits R-2-A), Mr. Brown confirmed that 11 of the 17 listed mines in his district have been issued 75 percent safeguard notices (Tr. 203-205).

Mr. Brown confirmed that he did not cite a violation of section 75.1001-1(b), "because it was in compliance with this as far as the 100 percent setting goes" (Tr. 207). In response to a question as to whether MSHA is holding the respondent to a higher standard of care under section 75.1001, by requiring a safeguard setting of 75 percent, Mr. Brown responded "I guess you can see it as that if that's the way you want to look at it. I view it as a violation of a safeguard" (Tr. 208). The parties stipulated that at a 100 percent setting, the mine was within the "plus or minus 15 percent" language found in section 75.1001-1(b) (Tr. 217). Mr. Brown confirmed that the difference between the 75 percent safeguard requirement and section 75.1001-1(b), is the percentages (Tr. 218).

Mr. Brown confirmed that he based his low negligence finding on the fact that the respondent had performed the load drop test, and he did not believe that there was any intent to place the setting beyond 75 percent. He believed that the violation was an oversight resulting from driving and advancing so far and that "it just slipped by them" and "they were trying to do a good job" (Tr. 219).

On re-direct, and after further review of the listing of mines with and without safeguard notices (exhibits R-2-A), Mr. Brown stated that 23 of the mines listed do not have safeguard notices, and that two do (Tr. 225-226).

MSHA Inspector Edwin W. Fetty testified that he is an electrical inspector, has worked for MSHA for 16 years, and has 25 years of mining experience. He has also attended the MSHA mine academy and periodically assists in electrical retraining and conducting mine hoisting classes. He is familiar with the subject mine and was initially assigned there to conduct electrical inspections when he was hired as an inspector. Based on a review of his files, he confirmed that he conducted an electrical spot inspection at the mine on November 14, 1983, and issued a section 104(a) Citation No. 2258188 at 11:00 a.m., after conducting a voltage drop test at the diagonal track haulage switch in the 025 section. He also issued safeguard Notice No. 2258189 at 1:00 p.m. that same day (exhibit P-10) (Tr. 227-231).

Mr. Fetty stated that he issued the citation on November 14, 1983, after finding that a device on a 500 KW rectifier was set at approximately 2,800 amps, which was 100 percent in excess of the 1,700 amps required by section 75.1000-1. Mr. Fetty explained that during a previous electrical spot inspection on September 22, 1983, he found the same condition in another area of the mine and issued a section 104(a) citation. Upon his return to the mine in November, 1983, and after finding the same condition existing again, he decided that he was justified in issuing the safeguard notice. He confirmed that due to problems involving accidents and fatalities associated with trolley circuits and mine fires, district manager Ron Keaton authorized the issuance of safeguard notices, on a mine-by-mine basis, requiring settings of 75 percent in lieu of 100 percent. The specific conditions that warranted the issuance of the safeguard were those stated in Citation No. 2258188, namely, the setting of the breakers "in the neighborhood of 100 percent above the compliance of 75.1000-1" (Tr. 234).

Mr. Fetty stated that at the time he issued the citation and safeguard, he believed that an unplanned roof fall or a piece of mining equipment contacting a trolley wire could cause an arcing fault to occur and this could cause a mine fire, with resulting smoke inhalation, asphyxiation, or burns. In those mine areas where wooden boards are used above the trolley or feeder wires to keep rock and debris from falling down on the track haulage, a fire would be likely (Tr. 234). Mr. Fetty explained the requirements of the safeguard notice which he issued as follows at (Tr. 235-236):

A. The way the safeguard is written it is required that the automatic circuit interrupting device

installed on a 300 volt DC track haulage system shall be provided with devices to detect short circuits which are at least 75 percent of the minimum voltage short circuit current available as determined by periodic voltage current load drop test.

Q. Okay. In layman's terms, something that I'd understand, what does that require?

A. That requires that you go out and put the amount of current on your DC trolley system and whatever your value is at 100 percent what is available, reduce it to 75 percent of the available fault current.

Q. Okay. Reduce what to 75 percent?

A. The available fault current. Like if it was 1,000, reduce it down 25 percent of 1,000.

Q. And what purpose does that serve?

A. That would be an increase --- a better safety factor and should something happen it would detect and cause the device to trip quicker.

Q. Okay. What device?

A. The interrupting device on the trolley circuit.

Q. Short circuit protection?

A. Right.

Q. Now, would you say the requirements of that safeguard are readily understandable to a person experienced on trolley systems?

A. Someone that has been given proper training at the mine to go out and conduct and perform these required voltage drop tests, yes, but an average run-of-the-mine electrician, I would have to do it to say no.

Mr. Fetty confirmed that he has reviewed the citation issued by Inspector Brown and he agreed that the condition cited violated the requirements of the contested safeguard notice (Tr. 237). He further confirmed that there are approximately 28 to 30 mines in his district that have trolley systems, and he guessed that nine or 10 of these mines were covered by a 75 percent safeguard. He stated that three of the safeguards which he issued were issued at different times, but were based on basically the same condition, and he explained the reasons for the safeguards which were issued at the Consolidation Coal

Company's Loveridge No. 22 Mine, the Robinson Run No. 95 Mine, and an Island Creek Coal Company mine (Tr. 238-240).

Mr. Fetty stated that section 75.1001-1(b) requires the testing of automatic circuit breaker devices at intervals not exceeding 6 months, and also provides that the devices "be in calibration to plus or minus 15 percent with the associated relay to that circuit and if the authorized representative feels that more tests are required" (Tr. 241). He did not believe that this standard has any bearing on the safeguard, and he confirmed that he issued the safeguard because it was justified in light of the problems that he encountered (Tr. 241).

On cross-examination, Mr. Fetty explained the problems he had encountered at the mine with respect to section 75.1001-1 and the trolley short circuit protection. He stated that "after issuing the violations and running through that pattern that I had ran through and reading and making more in-depth studies and seeing what the conditions was, I figured that the 75 percent, which I had permission to issue the safeguard, shouldn't be reduced. It should be maintained at that setting" (Tr. 244). Mr. Fetty stated that there is no "blanket coverage" for issuing safeguards, but if anything is not spelled out under section 75.1403, an inspector must request permission from the district manager to issue a safeguard under the "other safeguards" language found in that section (Tr. 245). Mr. Fetty confirmed that he was not familiar with all of the safeguard notice guidelines set out in the National Gypsum case, but indicated that prior to that decision, he encountered compliance problems at the mine with respect to sections 75.1001, 75.516, and energized trolley wires contacting wooden materials. Although these problems did occur at other mines, they were more frequent at the Martinka Mine (Tr. 248).

Mr. Fetty confirmed that based on his review of MSHA accident and fire reports concerning problems with trolley wires he believed that a way to prevent these occurrences at the subject mine would be to reduce the circuit protection from 100 percent to 75 percent, and even though accidents or fires may not have occurred at the mine, he believed that the safeguard was a preventive measure to preclude those events at the mine (Tr. 251). He believed that he was justified in issuing the safeguard to gain a higher margin of safety by lowering the circuit protection device by 25 percent and establishing a 75 percent requirement (Tr. 253).

Mr. Fetty stated that the 75 percent short circuit protection setting was established from information he obtained through district manager Keaton, and seminar materials and information which he (Fetty) obtained. Mr. Fetty "guessed" that the value setting of 75 percent was established by Mr. Keaton and "whomever made the request to have the permission to issue the

safeguard on a mine by mine basis" (Tr. 256). Mr. Fetty confirmed that those mines which do not have the 75 percent safeguard must comply with sections 75.1001 and make the tests mandated by section 75.1001-1(b) (Tr. 259). He also confirmed that the respondent "learned to live with the 75 percent" safeguard with additional feeder and ground wire, and he has inspected other mines where the available fault current is maintained at 50 percent (Tr. 265). He further explained the establishment of a 75 percent value as follows (Tr. 266):

A. Because the people in our meetings, my supervisor, other people, prudent engineers, which I'm not, I'm not an engineer, they felt that this safety factor of 25 percent would greatly be in aid and assistance to the health and safety of the miners and to prevent fires in the coal mines and that's why they came up and went with the 75 percent.

Mr. Fetty confirmed that section 75.1001 relates to the circuit device trip setting margin of plus or minus 15 percent, and that mines without the 75 percent safeguard must comply with this section. He still believes that the safeguard which has been in effect for 7 years is still valid because the conditions that prompted him to issue it are still occurring at the mine (Tr. 269, 271-272). He further confirmed that there have been 14 violations of section 75.1001, issued at the mine since 1985, and while he did not know the details, he indicated that they would all pertain to trolley circuit short circuit and overcurrent for various reasons (Tr. 273-274). He stated that these violations could also have been issued under the safeguard notice if the circuit setting was in excess of 100 percent and not in compliance with the 75 percent requirement (Tr. 278).

In response to further questions, Mr. Fetty confirmed that he issued the safeguard notice in question as "a preventative measure," as well as the previously stated mine conditions and problems which he had encountered, and the information and studies pertaining to trolley wire fires (Tr. 276-77, 281).

#### Respondent's Testimony and Evidence

John R. Cooper testified that he has been employed with the respondent for over 15 years, and has served at the Martinka Mine for over 2 years as the general maintenance superintendent. His duties include the maintenance of all mine equipment and support systems for the mine, ventilation plans, the DC track trolley system, and the safety of all equipment and mine personnel. He is a magna cum laude graduate of the Ohio University, with a Bachelor of Science degree in electrical engineering, and his prior experience includes 3 years as an associate professor of electrical engineering at the Decry Institute of Technology in Columbus (Tr. 286).

Mr. Cooper stated that he reviewed the citation issued by Mr. Brown and discussed it with him briefly after it was issued. He informed Mr. Brown of his belief that the violation was not "S&S" because the actual rectifier setting was below the available short circuit currents, and if a short circuit were to develop any place on the line, the overcurrent devices would recognize the fault condition and trip the circuit breaker off-line, and there would be no safety concern whatsoever. Since there was no possibility or probability of any unsafe condition or injury, Mr. Cooper did not believe that the "S&S" finding was justified (Tr. 287).

Mr. Cooper stated that he did not discuss his belief that the condition cited was not a violation under the 75 percent safeguard notice with Mr. Brown, but that he always had a question about it because it was "something new to me . . . that I had inherited here at Martinka since I was transferred over" (Tr. 288). He explained that in his prior 14 years experience at the Meigs Division, no safeguards of the type issued by Mr. Brown ever pertained to the DC track trolley system (Tr. 288). Mr. Cooper did not believe that the safeguard was valid, and he explained his reasons for this conclusion as follows at (Tr. 289-290):

A. Well, there are many stipulations I understand that should be addressed or be satisfied before a safeguard is issued. I'm not fully familiar with all the legal stipulations of that but a lot of them have to do with being a mine specific type requirement which I was never clear on why that was --- this was a mine specific type situation. I really wasn't clear on where this 75 percent limitation was arbitrarily set and where that came from. I was never familiar with any policy memorandum issued from any of the MSHA districts or headquarters or division offices saying that this is something that should be done or what the guidelines were for issuing it. So I had a lot of questions really that were never answered why we had this safeguard saying that we could only set our protection to 75 percent of the indicated value.

Q. Did you ever try and find out from any of the MSHA people why the safeguard was issued?

A. Not to any great length.

Q. I mean, was that just because there wasn't a violation issued in connection with the safeguard or what was the reasoning?

A. Well, the violation that was issued at the time, the one that we're discussing here, I believe is the

first time that this was issued under a safeguard condition and not a 75.1001.

Q. When you were a general maintenance superintendent at Martinka?

A. That's correct. And so when this came up, that's when I started having the questions on where did this come from and why did we have it, what are we accomplishing by looking under the safeguard as opposed to what is set forth with that 75.1001.

Mr. Cooper explained the operation of the DC trolley haulage system and he confirmed that it is operated by "300 volts DC, being conducted down a bare trolley wire conductor," and that the "power is picked off by a sliding carb or shoe arrangement" (Tr. 291). The system is an underground mine railroad with large high force power equipment which moves on rails and smaller personnel carriers with lower horsepower requirements (Tr. 290). He sketched out the system and stated that "the whole trick of the system is keeping it properly protected so that if there's a fault on the line, or short circuit, that the protection devices in the rectifier will recognize that and open up under a fault condition but yet will still allow you to have the proper amount of power to operate these large horsepower pieces of equipment in the mine" (Tr. 292).

Mr. Cooper explained the electrical track system and he stressed the concern with protecting the system or limiting the current under a fault condition, and the importance of knowing the resistance of each feedline on the system and the available short circuit current that will flow so that the trip devices can be set accordingly. He confirmed that circuit breakers are located at every rectifier in the mine, and he explained how they functioned. He explained that a bolted fault could occur if there were a roof fault which took the trolley wire down onto the rail, or a jackknifed piece of equipment into the wire could also be touching the rail and creating a short circuit (Tr. 296).

Mr. Cooper explained how a load drop test is conducted in order to "set the thumb wheels on the rectifier" with the appropriate overcurrent amps setting (Tr. 296-299). Referring to the load drop tests conducted within a month prior to the issuance of the citation by Mr. Brown, Mr. Cooper stated that the load drop measured by the respondent was 3,779 amps, and the rectifier was set at 2,834 amps. Mr. Brown's test showed a short circuit of 2,965 amps, and a 75 percent setting would be 2,224 amps. Since Mr. Brown's test indicated an available fault current of 2,965 amps, and since the respondent's system was set on 2,834 amps, Mr. Cooper concluded that the mine setting was under the available short circuit current, and that any bolted fault would have been recognized and the relay would have tripped

"as soon as we passed the 2,834" (Tr. 300). He confirmed that certain factors could effect a load drop test by changes which occur to the resistance of the system, and the resistance could be affected by atmospheric conditions, the mechanical integrity of the "fish plates" used to join the rails together, and the electrical connections in these devices (Tr. 302).

Mr. Cooper stated that during his years at the Meigs Division, his standard practice and instructions to the electrical department was to set the overcurrent protection at 15 percent below the indicated short circuit current values, and that this was accepted by the local mine inspectors. This instruction was in compliance with section 75.1001, and although the standard allowed a plus or minus of 15 percent of indicated value, his policy was to set the trip protection devices at the lower side to insure a margin of safety in the event of any loosened connections or if the system resistance increased (Tr. 304). He explained the computation for the trip device setting made by the respondent, and he concluded that under the "worse case scenario," at the setting of 2,834, which was in the middle of the allowable setting under section 75.1001-1(b), the circuit device would have tripped before reaching the 2,965 setting established by Mr. Brown's test (Tr. 305).

Mr. Cooper was of the opinion that the safeguard notice in question is not valid because section 75.1001-1(b) establishes the range of acceptable rectifier tripping settings for overcurrent protection, and even without a safeguard, the thumb wheel rectifier settings must comply with this standard. He did not believe that there was any need for any additional 75 percent setting and stated that "I don't know why 75 percent is some magical number or where it came from" (Tr. 306). He confirmed that the mandatory standard section in question provides for load drop tests every 6 months to measure the system resistance, and this is the only way to validly establish this. He confirmed that he conducts such tests on a more frequent basis, and the trip relay is set to trip within plus or minus 15 percent of the indicated load drop value. He believed that the mine was in compliance with section 75.1001-1(b) because the rectifier settings were essentially at the mid-point of the regulatory range, and it would have tripped at the same level. He did not believe that any injury would have occurred because the rectifier trip setting was at 2,834 amps (Tr. 306-309).

Mr. Cooper confirmed that he was unaware of any injury or illness to any miner attributable to the Martinka Mine trolley system, or any reportable mine fire associated with the system short circuit protection (Tr. 309). The cited condition was abated "by setting our thumb wheeling setting to the 75 percent setting of 2,965 amperes, which was the 2,224 . . . it was immediately abated by reducing our trip current setting," which then complied with the 75 percent safeguard. In his opinion, the

mine was already in compliance with section 75.1001-1(b) (Tr. 310).

On cross-examination, Mr. Cooper confirmed that although other safeguards were issued at the Meigs Mines, none of them pertained to the 75 percent short circuit protection setting for the trolley system. He further confirmed that he was not working at the Martinka Mine when the 1983 safeguard notice was issued, and he did not observe the conditions which prompted Mr. Fetty to issue it (Tr. 311). He explained that an "arcing fault" could occur where there is no "dead metal on metal contact" and current is jumping across an air gap, creating a spark or an arc. Such an event could occur on the trolley system by poor connections, or by damaged or open "knifeblades," but he has seen very few actual arcing faults. He confirmed that the trolley wire hangers have faulted and grounded and could cause an arc for a brief period of time. However, it is unlikely that such an arc would occur at the roof because the wires are secured on insulators, but it could occur on the hangers connected to metal arches and to the rail (Tr. 312-313).

Mr. Cooper stated that his "worse case scenario" testimony pertained to voltage faults, and not arcing faults, and that it is difficult to measure or simulate arcing faults. He confirmed that wood is used for timbering and cribbing, but that the mine roof is not generally beamed with wooden posts or timbers (Tr. 314).

In response to further questions, Mr. Cooper stated that the "overcurrent protection" referred to in section 75.1001, in this case is the relay incorporated inside the rectifier and it senses the current that is being pulled from the rectifier at all times. After making a load drop test, an inspector would then take 75 percent of that result to establish the required tripping setting pursuant to the safeguard notice. In the absence of the safeguard, the setting could be plus or minus the results of the load drop test formula (Tr. 315-317).

Mr. Cooper stated that the "testing language" found in section 75.1001-1(b), specifically the phrase "calibration of such devices shall include adjustments of all associated relays to plus or minus 15 percent" is intended to refer to the setting of the rectifier trip device. If this phrase were interpreted to apply only to the calibration of the testing device, there would be no restrictions as to settings of the rectifier, in the absence of a safeguard. Since section 75.1001, makes no reference to any required specific setting, he has always understood section 75.1001-1 to require a setting of plus or minus 15 percent of the indicated value, namely, the load drop results. He agreed that subsection (a) of section 75.1001-1, only requires circuit interrupting devices, and does not mention setting percentages or how the devices are to be tested or set,

and that subsection (b) establishes the calibration frequency and the degree to which the circuit interrupting devices will be set or activated (Tr. 320).

### MSHA's Arguments

MSHA asserts that the plain wording of section 314(b) of the Act evidences Congress' intent that MSHA inspectors have broad authority to issue safeguards relative to the transportation of men and materials. MSHA points out that the instant case does not involve a "mine-by-mine" criteria-based safeguard such as those provided for in section 75.1403-2 through 75.1403-11, and that the safeguard issued by Inspector Fetty is based on the "other safeguards may be required" language found in section 75.1403-1(a). MSHA maintains that the only specific limitation placed by Congress on the "other safeguards" language found in section 314(b) is that they address hazards relating to the transportation of men and materials, and that an inspector's use of such safeguards are not restricted to only those transportation hazards which are mine-unique--i.e., hazards which generally do not exist at other mines.

MSHA takes the position that Judge Weisberger's decision in Secretary of Labor v. Rochester & Pittsburgh Coal Co., 11 FMSHRC 2007 (October 1989), invalidating a safeguard notice because it was not mine specific and not promulgated pursuant to the rulemaking provisions found in section 101 of the Act is incorrect. In support of this conclusion, MSHA argues that section 314(b) does not require MSHA to engage in notice and comment rulemaking before issuing a safeguard of general applicability. By choosing not to place safeguards under section 101 rulemaking, and allowing an individual inspector to issue safeguards on a mine-by-mine basis, MSHA concludes that Congress made a deliberate choice in permitting a more informal, and flexible, approach for identifying and remedying mine transportation hazards. MSHA further concludes that to hold that safeguards which address specific hazards at a mine are invalid solely because similar hazards exist at other mines would be to preclude an inspector from issuing safeguards designed to remedy transportation hazards, no matter how obvious or dangerous the hazard, and regardless of the lack of care exercised by the operator, if that hazard exists at other mines. MSHA believes that had Congress intended this result, it would not have written section 314(b) as broadly as it did and it would have placed the "other safeguards" provision where Judge Weisberger did in Rochester & Pittsburgh Coal Co., i.e., in section 101.

Citing the Commission's decision in Southern Ohio Coal Co., 7 FMSHRC 509, 512 (April 1985), MSHA asserts that at most, a safeguard need only identify the nature of the hazard at which it is directed and the conduct required of the operator to remedy the hazard. In the instant case, MSHA believes that the

safeguard notice issued by Inspector Fetty meets these requirements in that it states that the hazard presented concerns arcing faults which will not deenergize the circuit, and that the conduct required of the operator is that all circuit interrupting devices be set at 75% of the bolted short circuit current available. MSHA further points out that both Inspector Fetty and Brown testified that the language found in the safeguard notice would be readily understandable to a trained electrician who is knowledgeable of trolley systems.

MSHA concludes that the conditions cited by Inspector Brown clearly fit within even the narrowest construction of the language of the safeguard issued by Inspector Fetty. MSHA points out that Mr. Brown cited the respondent because the short circuit protection for the trolley system outby the #30 block of the 18 Left Section was not in compliance with the 75% safeguard, and he obviously felt that the safeguard applied to this situation. Further, Mr. Fetty reviewed Mr. Brown's citation and agreed that the conditions cited violated the requirements of the safeguard. Under these circumstances, MSHA concludes that the safeguard was validly issued and in force when Mr. Brown issued his citation, and that they were both valid.

MSHA asserts that Mr. Fetty's safeguard addresses mine hazards specific to the Martinka No. 1 Mine and is valid even under the strict test set forth in Rochester & Pittsburgh Coal Co., supra. In support of this conclusion, MSHA points to the testimony of Mr. Fetty concerning the conditions which he observed at the mine when he issued the safeguard. MSHA asserts that these conditions include combustible head coal and wooden structures above the trolley wires, with little or no clearance between the trolley wire and mine roof (Tr. 234, 280), grounded metal support arches which are in close proximity to both the trolley wire and the combustible materials over the trolley wire, and combustible materials and metal arches contacting the trolley wire at times due to roof falls, sagging roof, and accidents involving the track haulage equipment (Tr. 255, 276). Mr. Fetty also noted "an ongoing problem" regarding the trolley system short circuit protection (Tr. 231-232, 243, 276).

MSHA further asserts that Mr. Fetty testified that the Martinka No. 1 Mine is the only mine in his area that has the strata and roof conditions it has (Tr. 280), including head coal and wooden structures in close proximity above the trolley wire (Tr. 280-281). MSHA also makes reference to Mr. Fetty's testimony concerning "unique repeated and frequent violations and other problems" with the trolley system which he does not have at other mines, the fact that he issued the safeguard in part because of a violation concerning a "burnt up line switch", (Tr. 248, 233, 276), and his statement that he did not find this same combination of conditions in any other mine he had inspected (Tr. 233, 248, 276-277).

MSHA maintains that the disputed safeguard does not "impose general requirements of a variety well-suited to all or nearly all coal mines ...", and that the evidence and testimony in this case clearly shows that only a small percentage of coal mines in MSHA District 3 have a safeguard similar to the one issued by Inspector Fetty. MSHA points out that only 11 of the approximately 130-140 mines in the district are under a safeguard notice similar to the one issued by Mr. Fetty, and that the respondent's own witness (Cooper) admitted that there are "many, man mines in this country that do not operate under a safeguard of this type" (Tr. 318-319). MSHA also points out that only 11 of the approximately 28 to 30 mines in the district which utilize trolley wire systems have a safeguard which was issued on a mine-by-mine basis due to specific conditions noted at those mines (Tr. 177-178, 201, 238-240). MSHA points to the fact that these safeguards were issued over a large period of time, beginning in 1983, and ending in 1990, and that the wide disparity in dates tends to indicate that each safeguard was issued due to particular circumstances arising in each mine. Finally, based on these numbers, MSHA concludes that it seems clear that no MSHA district wide policy exists requiring such a safeguard at all mines or even at mines with trolley systems.

MSHA maintains that the contested safeguard is not preempted by mandatory safety standard section 75.1001-1(b), because the safeguard and the standard refer to different concerns. MSHA asserts that the safeguard requires that the short circuit protection on the trolley system be set at 75% of the maximum short circuit current available, while the regulation requires that the "calibration of such devices shall include adjustment of all associated relays to + - 15 percent of the indicated value". In short, MSHA concludes that the safeguard refers to the value at which the thumb wheel on the rectifiers must be set (or the indicated value), and that section 75.1001-1, refers to the calibration of the rectifier or the amount of mechanical error allowed at that setting. Since the calibration refers to the amount of error present in the setting mechanism of the rectifier and has no affect on what setting is required by the safeguard, MSHA concludes that the regulation does not preempt the safeguard.

MSHA concludes that the uncontradicted testimony of Inspector Brown establishes that the respondent violated the requirements of the safeguard when it allowed the short circuit protection in question to be set at 100 percent of the maximum short circuit current available. MSHA further concludes that the violation was significant and substantial within the guidelines established in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). In support of this conclusion, MSHA asserts that a discrete safety hazard was contributed to by the violation in that the failure to properly set the short circuit protection presented a fire hazard (Tr. 169), and that the uncontradicted testimony of

Inspectors Brown and Fetty show that a reasonable likelihood existed that a fire would occur at the Martinka No. 1 Mine in the course of normal mining operations if this violation was left uncorrected, and that this fire would result in reasonably serious injuries to at least one miner.

MSHA points out that Inspector Brown testified that an arcing fault was likely to occur along the trolley wire between the wire, the metal roof support arches, and the metal wire hangers in close proximity near the roof of the mine (Tr. 57, 58, 167, 169, 173-174), and that such an arcing fault would not deenergize the circuit with the rectifiers set at 100% (Tr. 172, 175). MSHA further points out that Inspectors Brown and Fetty testified that flame or arc from the fault would likely ignite the combustible materials including wood and head coal on the roof of the Martinka No. 1 Mine, because the combustible materials are in close proximity to, and at times even touching, the trolley wire (Tr. 50-51, 57-58, 167, 169, 175, 202, 234, 280). Both inspectors also testified that the mine fire resulting from this ignition is reasonably likely to result in serious injuries, including burns and smoke inhalation, to at least one miner (Tr. 58, 168-169, 234; Exhibit P-9).

#### Respondent's Arguments

During the course of the hearing, the respondent argued that existing mandatory safety standard section 75.1001, adequately covers the short circuit hazard situation which prompted Mr. Fetty to issue the disputed 1983 safeguard notice. The respondent took the position that since an existing mandatory standard has already been duly promulgated after rule-making pursuant to the Act, MSHA is without authority to refine or modify the existing standard by issuing a safeguard. Respondent maintained that by requiring it to adhere to the safeguard, MSHA is attempting to hold it to a higher standard than that required by the existing applicable standard. Respondent asserted that in order to hold it to a higher standard of care and compliance than that required by the existing standard, MSHA must do so through rulemaking, rather than simply issuing a safeguard that effectively imposes a greater burden than that required by the existing standard (Tr. 208-212).

The respondent further argued that since it was in compliance with the existing standard as duly promulgated by MSHA's rulemakers, MSHA should be preempted from enforcing the safeguard issued by Mr. Fetty. Respondent argued that it has been adversely affected by the safeguard because it is forced to deal with two different requirements for maintaining short circuit protection on its track trolley system. The respondent pointed out that its rectifier thumb wheel settings were correctly fixed pursuant to section 75.1001, since the settings fell within the plus or minus 15 percent requirement found in

section 75.1001-1(b), and that its track equipment would not "drop out" at this higher short circuit protection level. However, by lowering the level to 75% pursuant to the safeguard, the respondent pointed out that the equipment would "drop out" (Tr. 264-265).

In its post-hearing brief, the respondent argues that the safeguard is invalid because section 75.1403 does not specifically provide for short circuit protection on the cited DC trolley system; that section 75.1000, which is found in Subpart K of MSHA's mandatory regulatory standards, specifically incorporates "Trolley Wires and Trolley Feeder Wires"; that the safeguard is preempted by section 75.1001-1(b), which specifically addresses trolley wire overcurrent protection; and that the safeguard does to meet the guidelines discussed by chief Judge Merlin in his decision of March 29, 1982, in United States Steel Mining Co., Inc. 4 FMSHRC 526, 530 (March 1982).

The respondent asserts that it is undisputed that on the day Mr. Brown issued his citation, the mine's previous load drop test was in compliance with the plus or minus fifteen percent of the indicated value according to section 75.1001-1(b), and that the trip setting was set lower than the fault current, and set safely (Tr. 165, 308). The respondent points out that although Inspector Brown agreed that the respondent was in compliance with section 75.1001, he nonetheless believed that the respondent was not in compliance with the 75 percent safeguard, and issued the citation for this reason (Tr. 165). The respondent asserts that according to Mr. Brown's interpretation, sections 75.1001 and 75.1001-1(b), refer to "the calibration of the interrupting device", but that in the event the short circuit is over 100 percent Mr. Brown would cite a violation of section 75.1001-1(b), rather than the safeguard. Respondent points out that although Mr. Brown is an electrical inspector he does not hold an electrical engineering degree and interprets the standard on the basis of his MSHA training.

The respondent further points out that its electrical engineering expert Cooper is a magna cum laude graduate in electrical engineering, has taught this subject, and has 15 years of experience in electrical engineering. Mr. Cooper was of the opinion that section 75.1001-1(b), specifically addresses the DC trolley system short circuit protection, and he confirmed that during his 15-year tenure with the respondent it has been a standard practice to set the overcurrent protection at minus 15 percent below the indicated short circuit current values in compliance with section 75.1001-1(b). Mr. Cooper also testified that section 75.1001-1(b), establishes the acceptable rectifier tripping ranges for the coal mining industry. Under the circumstances, he believed that the additional restriction imposed by the arbitrary 75 percent safeguard is invalid and preempted by section 75.1001-1(b).

Respondent maintains that MSHA has failed to establish that the alleged violation was significant and substantial in that Inspectors Fetty and Brown, as corroborated by Mr. Cooper, both testified that there were no reportable mine fires at the mine, nor were there any injuries or accidents relating to any such fires.

Respondent further argues that there is no substantive evidence in this case to establish that the Martinka No. 1 Mine has any mine-specific or peculiar hazards relating to the transportation of men and materials, and that the alleged conditions described by Inspector Fetty were not mine-specific to the mine and were present in other mines. The respondent does not dispute the fact that section 314(b) of the Act grants the Secretary a unique authority to create what are in effect mandatory safety standards on a mine-by-mine basis without resorting to otherwise required rulemaking procedures. However, in the instant case, respondent takes the position that the conditions which MSHA claims justified the issuance of the contested safeguard in question are specifically addressed by mandatory safety standard 75.1001 and § 75.1001-1(b), and are not mine specific. Respondent further argues that the safeguard is of general application and was not issued to minimize specific mine hazards connected with the transportation of men and material and that the safeguard may not serve to hold it to a higher standard than that required by section 75.1001-1(b).

#### Findings and Conclusions

30 C.F.R. § 75.1403 repeats section 314(b) of the Act and provides as follows: "other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided".

Section 75.1403-1 provides:

(a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under section 75.1403. Other safeguards may be required.

(b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to section 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

(c) Nothing in the sections in the section 75.1403 series in this Subpart O precludes the issuance of a withdrawal order because of imminent danger.

The Commission has examined the safeguard provisions found in section 314(b) of the Act and 30 C.F.R. 75.1403, and has noted with approval that the broad language of this provision "manifests a legislative purpose to guard against all hazards attendant upon haulage and transportation in coal mining". Jim Walters Resources, Inc., 7 FMSHRC 493, 496 (April 1985). Although the mandatory safety standards found in Title 30, Code of Federal Regulations, normally are developed and promulgated in accordance with section 101 of the Mine Act and the rule-making provisions contained in the Administrative Procedure Act, 5 U.S.C. 551 et seq., the Commission has observed that section 314(b) of the Act grants the Secretary extraordinary authority to essentially create mandatory safety standards on a mine-by-mine basis without resorting to the normal rule-making procedures, and it has approved the issuance of safeguards without rule-making for a particular mine, Southern Ohio Coal Co., 7 FMSHRC 509 (April 1985). However, the Commission went on to state as follows at 7 FMSHRC 512:

\* \* \* We believe that in order to effectuate its purpose properly, the exercise of this unusually broad grant of regulatory power must be bounded by a rule of interpretation more restrained than that accorded promulgated standards. Thus, we hold that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard. We further hold that in interpreting a safeguard a narrow construction of the terms of the safeguard and its intended reach is required. See, e.g., Consolidation Coal Co., 2 FMSHRC 2021, 2035 (July 1980) (ALJ); Jim Walter Resources, 1 FMSHRC 1317, 1327-28 (September 1979) (ALJ). See also Secretary's Brief to the commission at 11 n. 1. ("Accordingly, while the language of safeguard notices should be narrowly construed, the Secretary's issuance authority must be interpreted broadly").

It seems clear to me from several Commission decisions that adequately written safeguards are mandatory standards or requirements which are enforceable on a mine-by-mine basis. See: Southern Ohio Coal Company, 7 FMSHRC 509 (April 1985); U.S. Steel Mining Company, Inc., 4 FMSHRC 526, 529-530 (March 1982); Jim Walter Resources, Inc., 6 FMSHRC 1815 (July 1984); Mathies Coal Company, 4 FMSHRC 1111 (June 1982); Jim Walter Resources, Inc., 8 FMSHRC 220 (February 1986).

Several Commission Judges have invalidated citations and the supporting safeguard notices on the ground that the safeguards

were of a general, rather than mine-specific, application. See: Rochester & Pittsburgh Coal Co., 11 FMSHRC 2007 (October 1989) (Judge Weisberger); Southern Ohio Coal Company, 10 FMSHRC 1564 (November 1988) (Judge Weisberger); Beth Energy Mines, Inc., 11 FMSHRC 942 (May 1989) (Judge Melick); Southern Ohio Coal Company, 11 FMSHRC 1991 (October 1989) (Judge Maurer); Mettiki Coal Corporation, 12 FMSHRC 92 (January 1990) (Judge Fauver); U.S. Steel Mining company, Inc., 4 FMSHRC 526 (March 1982) (Chief Judge Merlin). The "mine specific" issue in these cases is now pending on appeal before the Commission for decision in the October 1989 Rochester & Pittsburgh Coal Co., and Southern Ohio Coal Company, decisions rendered by Judge Weisberger and Judge Maurer.

In the case at hand, the respondent is charged with a violation of section 75.1403, for failing to adhere to the requirements of a safeguard notice issued by Inspector Fetty on November 14, 1983. The safeguard states as follows:

The automatic circuit interrupting device installed on the 300 volt DC trolley track haulage system between the track haulage switch and spad station 20 + 00 was not set to deenergize the trolley system during arcing fault. This mine has head coal incorporating combustible material and the construction of steel roof support structure.

All protecting circuit interrupting devices installed on the 300 volt DC trolley haulage system shall be provided with devices to detect short circuits which are at least 75 percent of the minimum bolted short circuit current available as determined by periodic voltage current (load drop) test.

The safeguard in question required that the automatic circuit interrupting devices installed on the mine 300 volt DC trolley track haulage system to be provided with devices to detect and interrupt short circuits which are at least 75 percent of the minimum bolted short circuit current available as determined by periodic voltage/current (load drop) tests. Inspector Brown testified that he conducted a load drop test on the cited trolley system circuit during the course of his electrical inspection on May 1, 1990, and found that the fault protection on one of the rectifier relays was set "nearly at 100 percent setting or just a little bit below 100 percent setting". Since this circuit protection setting exceeded the 75% requirement mandated by Mr. Fetty's previously issued safeguard notice, Mr. Brown issued the citation.

Mr. Fetty testified that as a result of accidents and fatalities associated with mine fires on trolley circuits, district manager Ronald Keaton authorized the issuance of

safeguards, on a mine-by-mine basis, requiring short circuit protection settings at 75% of the settings required by section 75.1001. Mr. Fetty confirmed that when he issued the 1983 safeguard he relied in part on certain information and knowledge which he obtained at safety seminars and conferences concerning trolley wire system accidents and fires which occurred in mines in general. He believed that a way to prevent these incidents at the Martinka Mine was to reduce the short circuit protection requirements found in section 75.1001-1 to 75 percent (Tr. 250, 254). He conceded that the reports of prior accidents and fires which he had reviewed concerned incidents which had taken place "country wide" in mines other than the Martinka Mine, and he was not aware of any reportable mine fires at the Martinka Mine (Tr. 254).

Mr. Fetty confirmed that he also based the safeguard in part on the "numerous problems at that mine" with respect to section 75.1001-1 violations associated with short circuit protection for the trolley service. He stated that during electrical spot inspections which he conducted in September and November, 1983, he found that certain rectifier short circuit devices were set at approximately 100% above the settings required by mandatory safety standard 30 C.F.R. 75.1001-1, and after issuing two section 104(a) citations for these violations, he concluded that he was justified in issuing the safeguard requiring all future rectifier settings to be set at 75 percent. When asked why he issued a safeguard when non-compliance was already addressed by promulgated standard section 75.1001-1, Mr. Fetty responded as follows (Tr. 266):

A. Because the people in our meetings, my supervisor, other people, prudent engineers, which I'm not, I'm not an engineer, they felt that this safety factor of 25 percent would greatly be in aid and assistance to the health and safety of the miners and to prevent fires in the coal mines and that's why they came up and went with the 75 percent.

Mr. Fetty identified the prior violations of section 75.1001-1, as the specific "mine conditions" which prompted him to issue the safeguard (Tr. 232-234). However, he conceded that any continued non-compliance problems with respect to section 75.1001-1, could have been addressed by issuing section 104(d)(1) and (d)(2) citations and orders (Tr. 252). In my view, simply because an inspector finds repeated violations of a mandatory safety standard does not ipso facto justify or warrant the issuance of a safeguard. If this were the case, an inspector could effectively amend any existing trolley wire standard found in Subpart K of the regulations simply by issuing a safeguard based on one or more prior violations of these standards.

Mr. Fetty also believed that an unplanned roof fall or a piece of mining equipment contacting a trolley wire were additional "hazards" which could have occurred in the area where he issued a citation at the same time the safeguard was issued (Tr. 234). He believed that these conditions could result in a mine fire and that the likely source of the fire would be the head coal or wooden boards located above the trolley wire to keep rock and other debris from falling on the track haulage. However, he indicated that these wooden head boards would only be at "some locations" and not throughout the mine (Tr. 234).

Mr. Fetty also alluded to violations of other standards, such as section 75.516, which prohibits energized trolley wire contacting combustible wooden materials, as examples of other "problems" he found at the mine at the time he issued the safeguard. Although conceding that these "problems" occurred at other mines, he believed that "they repeated and occurred more frequently in those days at Martinka Mine more than they did anywhere else", and he felt justified in issuing the safeguard (Tr. 247-248; 253).

Mr. Fetty agreed that roof falls, dislodged roof arches, and DC trolley accidents have occurred at other mines, and he conceded that he issued the safeguard as a preventive measure to preclude such occurrences at the Martinka Mine (Tr. 249-251; 255). However, I find no credible evidence to establish the existence of any roof falls, dislodged roof arches, or trolley accidents affecting the transportation of men or equipment at the Martinka Mine at the time the safeguard was issued. Indeed, Mr. Fetty confirmed that his prior knowledge of any accidents or other such incidents pertained to mines other than the Martinka Mine (Tr. 251).

Mr. Fetty alluded to one non-reportable fire which he and Inspector Brown found when a motorman caused some combustibles to ignite. Mr. Brown confirmed that the fire occurred two or three years ago, well after the safeguard was issued by Mr. Fetty, and that it was quickly extinguished and was not considered a reportable fire (Tr. 169, 176, 192). Mr. Brown alluded to an additional "hearsay fire" at the mine, but no evidence was forthcoming to confirm or document this event. Further, although Mr. Brown indicated that he has observed 6 or 8 mine fires caused by arcing faults in the past 20 years, only one occurred at the Martinka Mine, and it was the non-reportable one which he and Mr. Fetty found (Tr. 176). Mr. Brown also mentioned an unspecified study which reported 22 accidents over a seven-year period which resulted in 11 or 12 lost time injuries and fatalities, but he confirmed that none of these incidents occurred at the Martinka Mine (Tr. 169, 191).

Mr. Brown stated that MSHA's policy manual guidelines authorize the issuance of a safeguard if an inspector "should

find they have a problem at that mine that specifically addresses the conditions at the mine that have resulted or could result in a lost time accident" (Tr. 195). Mr. Brown confirmed that the safeguard in question came from an MSHA report which concluded that arcing faults could occur and not open any circuit interrupting devices (Tr. 172). However, the report was not further identified or offered in evidence, and Mr. Brown "guessed" that Mr. Fetty issued the safeguard after reviewing "the study that was done on the arcing faults" (Tr. 200).

Respondent's maintenance superintendent Cooper, a magna cum laude graduate electrical engineer, was of the opinion that the safeguard issued by Mr. Fetty is invalid because section 75.1001-1(b), properly and appropriately establishes a range of acceptable rectifier settings for overcurrent protection on the mine trolley system (Tr. 306). Mr. Cooper further testified that during his 15 years of employment with the respondent he was not aware of any reportable mine fires or injuries associated with the short circuit protection on the trolley system (Tr. 309). He confirmed that the trolley wires are supported by insulated belt hangers suspended from metal hangers which are attached to metal pipes anchored into the mine roof (Tr. 313). He also confirmed that as a general practice wooden posts or timbers are not used as beams to support the roof (Tr. 314).

Mr. Cooper further testified that the respondent's Meigs No. 31 and 2 mines, which are also in the same district as the Martinka Mine, and which have underground trolley systems, have never been subject to the kind of safeguard issue by Mr. Fetty and that those mines are subject to the load drop test and short circuit protection requirements found in section 75.1001-1 (Tr. 310-311).

I agree with the aforementioned decisions of the Commission judges who concluded that a safeguard notice must be mine-specific and based on hazardous conditions peculiar or unique to the mine where it is issued and enforced. On the facts of this case, and after careful review of Inspector Fetty's testimony, I cannot conclude that MSHA has established that the safeguard issued by Mr. Fetty was based on any mine conditions or hazards peculiar to the Martinka No. 1 Mine, or conditions that could not have been addressed or remedied by reliance on other existing standards. I am convinced that Mr. Fetty issued the safeguard as a general preventive measure to address possible arcing faults which may or may not occur, rather than to address any unique or inherently hazardous mine conditions, and Mr. Fetty tacitly conceded that this was the case.

It seems obvious to me that Mr. Fetty was also influenced by the fact that the Martinka Mine had received citations or violations of sections 75.1001-1, and section 75.516, the standards applicable to trolley wire short circuit protection and

power wires contacting combustible materials, and he admitted that this was the case when he identified these violations as the specific "mine conditions" which prompted him to issue the safeguard. However, as noted earlier, I do not believe that such prior violations can justify the issuance of a safeguard. Those particular standards address the hazardous conditions which resulted in the issuance of the violations, and coupled with the civil penalty assessments which followed, provided an adequate enforcement tool for MSHA. In addition, as Mr. Fetty readily conceded, an inspector may also resort to the use of section 104(d) citations and orders in appropriate cases to deal with a recidivist mine operator.

In addition to the existing requirements found in sections 75.516, and 75.1001.1, I take note of the fact that section 75.1003 requires the insulation and guarding of trolley wires at certain mine locations, and that sections 75.1003-1 and 75.1003-2, require certain precautions and procedures to prevent equipment being moved along haulageways from contacting trolley wires, and to insure that proper short circuit protection exists on the associated automatic circuit interrupting devices. I also take note of the fact that MSHA's Section 75.1003 Policy Manual guidelines require trolley wires to be guarded with wood, plastic, or other nonductive material.

Mandatory safety standard 30 C.F.R. § 75.1001 states as follows: "Trolley wires and trolley feeder wires shall be provided with overcurrent protection".

Mandatory safety standard 30 C.F.R. § 75.1001-1, states in relevant part as follows:

(a) Automatic circuit interrupting devices that will deenergize the affected circuit upon occurrence of a short circuit at any point in the system will meet the requirements of § 75.1001.

(b) Automatic circuit interrupting devices described in paragraph (a) of this section shall be tested and calibrated at intervals not to exceed six months. Testing of such devices shall include passing the necessary amount of electric current through the device to cause activation. Calibration of such devices shall include adjustment of all associated relays to  $\pm 15$  percent of the indicated value. An authorized representative of the Secretary may require additional testing or calibration of these devices.

I find merit in the respondent's contention that existing mandatory section 75.1001-1, adequately covers the short circuit protection requirements for the mine trolley wire system. Based on the testimony of Inspectors Brown and Fetty, and the credible

testimony of respondent's witness Cooper, I conclude and find that MSHA's contention that section 75.1001-1 and the safeguard issued by Mr. Fetty address different concerns is not well taken and it is rejected. Based on the evidence and testimony of the witnesses, I conclude that section 75.1001-1, addresses short circuit protection for trolley wires, and copies of some of the prior citations issued for violations of this section specifically refer to improper "thumbwheel" settings for the cited trolley wire circuit interrupting devices (Exhibit R-2B).

The parties stipulated that at the 100 percent short circuit protection setting found by Inspector Brown, the respondent was in compliance with the plus or minus 15 percent requirement found in section 75.1001-1(b), but that it was not in compliance with the 75 percent safeguard issued by Inspector Fetty (Tr. 217). Mr. Fetty confirmed that those mines which do not have the safeguard are required to comply with sections 75.1001 and 75.1001-1, and he indicated that as long as a mine is in compliance with these standards there is no reason for any safeguard (Tr. 259, 267).

MSHA's section 75.1001-1 Program Policy Manual guidelines, July 1, 1988, at page 88 contain the following statement:

The setting of an automatic circuit-interrupting device should not exceed 75 percent of the minimum available short-circuit current in the protected circuit to compensate for inaccuracies in the setting and the voltage drop across arcing faults. This safety factor is consistent with accepted engineering practice; however, in determining whether a violation of this Section exists, the safety factor shall not be used.

MSHA's section 75.1001-1, policy guidelines language with respect to the 75 percent setting of an automatic circuit-interrupting device is practically identical to the language found in Mr. Fetty's safeguard notice. Although the statement goes on to state that the 75 percent setting is a safety factor consistent with accepted engineering practice, I find the admonition that such a safety factor should not be used in determining whether a violation exists to be inconsistent, and it remains unexplained.

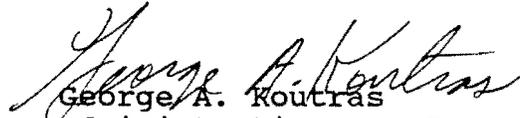
In view of the foregoing findings and conclusions, I conclude and find that the safeguard notice issued by Mr. Fetty was not based on any mine specific conditions or hazards, and that any transportation hazards associated with the trolley wires which may have existed in the mine were adequately covered by existing mandatory safety standard sections 75.1001 and 75.1001-1. Accordingly, I further conclude and find that the safeguard is not valid and IT IS VACATED. Since I have concluded that the safeguard is invalid, the citation issued by Inspector Brown,

which is based on the safeguard, cannot stand, and it too IS VACATED.

ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED THAT:

1. Section 104(a) "S&S Citation No. 3118460, March 14, 1990, citing an alleged violation of 30 C.F.R. § 75.508 IS VACATED.
2. Section 75.1403 safeguard Notice No. 2258189, issued on November 14, 1983, IS VACATED.
3. Section 104(a) "S&S" Citation No. 3312067, May 1, 1990, citing an alleged violation of 30 C.F.R. § 75.1403, IS VACATED.
4. MSHA's proposed civil penalty assessments for the citations which have been vacated ARE DISMISSED.

  
George A. Koutras  
Administrative Law Judge

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OFFICE OF ADMINISTRATIVE LAW JUDGES  
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JUN 21 1991

HOMESTAKE MINING COMPANY, : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. CENT 90-108-RM  
: Citation No. 3632346; 4/19/90  
SECRETARY OF LABOR, : Mine I.D. 39-00055  
MINE SAFETY & HEALTH :  
ADMINISTRATION (MSHA), :  
Respondent : Homestake Lead Mine

DECISION

Before: Judge Lasher

Respondent, MSHA seeks dismissal of this matter, and on May 30, 1991, has withdrawn its answer opposing the Notice of Contest in this matter. In so doing, it has specifically vacated the subject Citation, No. 3632346, by virtue of a "Subsequent Action" dated May 30, 1991, stating:

This citation is vacated at the direction of the Office of the Solicitor with the position that future enforcement of this standard at this mine site is not waived and enforcement action will continue, if necessary, after appropriate MSHA policy is established concerning the application of mandatory safety standard, 30 C.F.R. § 57.11002.<sup>1</sup>

In both its "Notice of Vacation and Motion to Withdraw and Dismiss" filed by Fax on May 30, 1991, and its "Response in Opposition to Contestant's Motion for Declaratory Relief or in the Alternative to Dismiss with Prejudice," the Secretary of Labor (MSHA) indicates that its proposed withdrawal of prosecution of the citation does not constitute in any way a waiver of future enforcement actions (applications) under the subject safety standard at the subject mine site or any other mine site.

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<sup>1</sup> Section 57.11002 provides:

**Handrails and toeboards.**

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

Within the 24-hour period after the Secretary issued its "Subsequent Action" and moved to withdraw its answer in this proceeding, Contestant Homestake Mining Company (Homestake) filed its "Motion for Declaratory Relief, etc." <sup>2</sup> It is apparent that when this latter motion was filed by Contestant, the exact terms of the MSHA "Subsequent Action" document were not known to it, nor was some of the thinking later reflected in MSHA's "Response in Opposition to Contestant's Motion for Declaratory Relief" within its knowledge. The question remains for resolution, however, whether MSHA's motion to withdraw its answer under Commission Procedural Rule 11 (29 C.F.R. 2700.11) or whether Contestant's responsive motion for declaratory relief should be granted.

Contestant apparently seeks at this juncture to resolve whether it is vulnerable to future 30 C.F.R. § 57.11002 citations rather than acquiesce in MSHA's abandonment of its prosecution of the subject citation. <sup>3</sup> We note these facts. There is no allegation by Contestant, or other indication, that it took measures to abate the condition cited, or that MSHA issued any withdrawal order, including a Section 104(b) "failure to abate" order in this matter. <sup>4</sup> There is no indication that Contestant Homestake is presently charged with a violation of 30 C.F.R. § 11002 in connection with the pertinent area of the mine referred to in Citation No. 3632346.

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<sup>2</sup> This motion again makes various unilateral assertions of fact which would be in litigation should the matter proceed to hearing on the substantive merits of the issues raised by the violation charged in the Citation. Contestant's prior motion to dismiss and/or for summary decision was denied by my Order dated May 23, 1991, and to the extent that such issues are raised again in its present motion for Declaratory Relief, such motion is denied.

<sup>3</sup> It alleges: "None of the elevated walkways, located around RBC's (rotating biological concentrators), at the water treatment plant were provided with handrails to prevent employees from falling to surfaces below. Walkway measurements varied from five feet to seven feet wide and the height varied from 20 inches to 43 inches."

<sup>4</sup> In its "Response in Opposition to Contestant's Motion" MSHA points out that "No undue abatement expense has occurred here since the abatement time has been extended for this citation."

Preliminarily, it is noted that the action of the Secretary in vacating the citation does not automatically moot the substantive issues extant in the contest proceeding by depriving the Commission of jurisdiction. Once a mine operator contests a citation before the Commission, the Secretary cannot by vacating the citation itself deprive the Commission of jurisdiction. Climax Molybdenum Company v. Secretary of Labor and Oil, Chemical and Atomic Workers' International Union, 2 FMSHRC 2748 (October 1980). Motions by MSHA to vacate citations are granted only where adequate reasons to do so are present. Kocher Coal Co., 4 FMSHRC 2123, 2124 (December 1985); Secretary v. Youghiogheny & Ohio Coal Company, 7 FMSHRC 200, 203 (February 1985).<sup>5</sup> As shown subsequently, MSHA has in apparent good faith presented such "adequate reasons."

Likewise, Commission Procedural Rule 11, permitting "a party" to withdraw a pleading at any stage of a proceeding, is not absolute, since such must be accompanied by the "approval of the Commission or the Judge." Thus, Commission discretion is invoked here by both rule and precedent.

If, of course, Contestant is entitled to declaratory relief, such would constitute reason for not granting MSHA's motion to withdraw its answer and to vacate the citation.

Turning now to Contestant's various contentions, we first take up its alternative plea to declaratory relief, i.e., "dismissal with prejudice." MSHA's initial motion, in seeking to withdraw its answer did not specifically deal with the concept of "with prejudice," but simply qualified the withdrawal to the extent of not waiving future enforcement of the safety standard. However, in its Response in Opposition on May 31, the Solicitor clarified its motion to withdraw by stating it "is intended to request a dismissal with prejudice of the subject citation... ." This would be the usual meaning attributable to the idea of dismissal with prejudice and I conclude that MSHA's agreement not to seek future action on the subject citation is reasonable and a proper adjunct to its abandonment of the instant prosecution by withdrawal of its answer. Contestant does not specify if it has some other purpose in mind in seeking "dismissal with prejudice,"

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<sup>5</sup> The ultimate determination to be made is whether "adequate reasons" do exist, and/or whether Contestant is entitled to declaratory relief.

such as (1) enjoining MSHA from future use of Section 57.11002, or (2) preventing MSHA from applying this standard to the same mine area described in the subject Citation. Expanding "with prejudice" to these latter concepts would in effect be (a) granting the Contestant's declaratory relief request (b) without benefit of due process, hearing, and normal adjudication processes. To the extent that Contestant's contention may be so intended, it is denied.

The Commission, in Secretary of Labor v. Mid-Continent Resources, Inc., and UMWA, 12 FMSHRC 949 (May 1990), has provided a thorough and superbly-crafted statement of the principles governing invocation of declaratory relief, stating inter alia:

The Commission has noted that "the primary purpose of declaratory relief is to save parties from unnecessarily acting upon their own view of the law." Beaver Creek, supra, 11 FMSHRC at 2430, quoting Climax, supra, 2 FMSHRC at 2752. Additionally, for any grant of Commission declaratory relief, the complainant must show that there is an actual, not moot, controversy under the Mine Act between the parties, that the issue as to which relief is sought is ripe for adjudication, and that the threat of injury to the complainant is real, not speculative.

While the language of the first sentence of this holding is found applicable to this proceeding, it also could apply to the majority of the proceedings before the Commission. What is meant by it is a preamble or introductory statement setting forth the "purpose" in a grant of declaratory relief. The second sentence is the one which sets forth the prerequisite showing to be made by a contestant for actually obtaining declaratory relief. It is concluded that Contestant Homestake has not carried its burden of establishing any of these prerequisites in this matter.

The Secretary (MSHA) on May 31 specified the reasons for withdrawal of the answer and its prosecution of the Citation:

The Secretary vacated this citation because information obtained during discovery revealed various opinions of MSHA staff as to what constitutes an "elevated walkway or travelway" under standard 30 C.F.R. § 57.11002. <sup>6</sup> The Secretary recognizes that MSHA policy relating to "elevated walkways" needs (to be) clarified and therefore decided that this citation should be vacated on that basis. This is similar to the "feasibility" question in the Climax Molybdenum Company, 2 FMSHRC 2748 (October 1980) at 2753.

... And, there is no 'substantial likelihood of recurrence of the claimed enforcement harm or the imminence of repeated injury' to the Contestant, Homestake Mining Company (Homestake). Mid-Continent Resources, Inc., 12 FMSHRC at 956. As indicated in MSHA's action to vacate, enforcement of mandatory safety standard 30 C.F.R. § 57.11002 will continue after MSHA policy is established concerning the standard's application. No undue prejudice or harm will occur to Homestake because of this action to vacate.

The Secretary's recognition of the need for clarifying its policy as to application of the standard and the fact that no subsequent enforcement of the standard as to the mine area described in Citation No. 3632346 has been initiated are found to be "adequate reasons" for the vacation of the Citation.

Since the enforcement agency is re-evaluating its position with respect to enforcement of the standard and applying it to Contestant's aqueducts, it is first concluded that this issue is not ripe for adjudication. Contestant contends: "declaratory relief is appropriate because 30 C.F.R. § 57.11002 is unconstitutionally vague and, in this case, did not give fair notice that it was applicable. In short, Homestake faces a continuing legal dilemma in being forced to act at its peril in light of MSHA's inconsistent interpretation of this provision." Both these contentions are directly addressed by MSHA's admitted recognition of "various opinions" existing among its staff, intended re-evaluation and clarification of its policy in enforcing the standard, and vacation of the citation issued to the mine operator involving application of the standard. I find no basis established by Contestant that the standard is unconstitutionally vague on its face. The "vagueness" contention would have raised both questions of fact and law insofar as its application to the mine area specified in the citation is concerned--had not the citation been vacated and MSHA withdrawn its prosecution thereof. In view of MSHA's actions, however, I conclude the general question of vagueness of the standard also is now moot in this proceeding.

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<sup>6</sup> The Secretary concedes the essence of the information contained in Contestant's "Supplement to Memorandum of Points and Authorities" which was received by the undersigned on June 4, 1991, and considered in the formulation of this decision.

To paraphrase the United States Court of Appeals, Tenth Circuit in Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 451 (1985), the government's vacation of the citation eliminated the prospect that Homestake would be held liable for the charged violation and rendered moot the specific issues that this administrative proceeding was intended to adjudicate, including unconstitutional vagueness. As a result, this case "has lost its character as a present, live controversy." The prospect of future citations for the same condition or practice is purely conjectural at this time. See Beaver Creek Coal Company, 11 FMSHRC 2428 (December 1989). Again, as the Court also noted in Climax, supra, there is no indication in the record that MSHA has made a practice of citing Homestake or other companies for safety violations, only to subsequently vacate the citations. More specifically, there is no indication of bad faith on the enforcement agency's part in this proceeding in withdrawing its prosecution. Finally, it is noted that Contestant Homestake has obtained the remedy originally sought in its Notice of Contest, extension of abatement time, and finally, vacation of the Citation itself.<sup>7</sup> Accordingly, Contestant's motion for declaratory relief is found to lack merit.

Contestant also seeks set-off of its litigation expenses "against future penalties." Application of the set-off principle in general could have deleterious consequences to mine safety enforcement since it would diminish - if not vitiate - the deterrent effect of the Act's most prominent deterrent, civil fines. Contestant has achieved its original objectives in this proceeding. To in effect insulate it from future mine safety penalty imposition would undermine the enforcement system envisaged by Congress. This remedy, being discretionary, and the stated rationale for rejecting it being "acceptable,"<sup>8</sup> Contestant's petition therefor is also found to lack merit.

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<sup>7</sup> Vacation of the Citation negates the possibility that the violation charged will become part of Contestant's history of previous violations.

<sup>8</sup> Climax Molybdenum Co. v. Secretary, 703 F.2d 447 at 453. See also Climax Molybdenum v. Secretary, 2 FMSHRC 2748 at p. 2753.

ORDER

1. Contestant Homestake's motion for declaratory relief and prayer for set-off of litigation expenses are DENIED.

2. Citation No. 3632346 is VACATED.

3. Respondent MSHA's motion to withdraw its answer pursuant to Rule 11 is GRANTED, and this proceeding is DISMISSED WITH PREJUDICE to Respondent MSHA to renew its prosecution of Citation No. 3632346.

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

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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 1991

LARRY E. BURNS, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEST 90-166-DM  
: MD 89-118  
: Basin Creek Mine  
D.H. BLATTNER & SONS, INC., :  
Respondent :

DECISION

Appearances: Eula Compton, Esq., Bozeman, Montana,  
for Complainant;  
Thomas E. Hattersley III, Esq., Michael S. Lattier,  
Esq., GOUGH, SHANAHAN, JOHNSON & WATERMAN, Helena,  
Montana,  
for Respondent.

Before: Judge Lasher

This proceeding arises under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (herein the Act). Complainant's initial complaint with the Labor Department's Mine Safety and Health Administration (MSHA) under section 105(c)(2) of the Act was dismissed.

Complainant contends that he was discharged on August 13, 1989, for refusing to drive an unsafe truck. (I-T. 72-73).

Respondent contends inter alia that Complainant did not make safety complaints and was discharged for abuse of equipment and unacceptable behavior.

Complainant contends that he informed his foreman Ted Roberts of three separate safety concerns he had with respect to the "A" model truck No. 583 (with 3-speed automatic transmission) which he was directed to drive on the day he was discharged (August 13, 1989) involving the transmission, the canopy, and exhaust fumes. (I-T. 42).

Respondent (1) denies that any safety concerns were communicated by Complainant Burns to any of Respondent's management personnel on the day he was terminated (I-T. 26) and (2) contends that he was discharged primarily for abuse of equipment (II-T. 104, 114, 126, 130, 176) together with his belligerent conduct toward supervisors and his unexplained refusal to drive Truck No. 583 (II-T. 104, 126, 130, 150, 176-177, 202-203, 214).

Order Substituting Estate.

The Complainant, Larry E. Burns, passed away subsequent to the hearing in the matter.<sup>1</sup> It appears that his estate was opened on April 1, 1991, under a special administrator who has requested an order substituting the estate for the decedent as a party in this matter. Respondent, having no objection (see Complainant's motion received April 12, 1991), the Estate of Larry Burns is hereby substituted as complainant in this section. See Secretary of Labor v. Metric Constructors, Inc., 4 FMSHRC 791, 808 (April 1982). Rule 25(a) F.R.C.P.

It is well-established that the Act is remedial and clothed in the public interest. Since the remedy provided for a discriminatee represents reimbursement of a lost property right, i.e., back pay, it is found to survive his death and to be subject to an award in an action brought by the appropriate government agency on his behalf. See Secretary of Labor v. Metric Constructors, Inc., 4 FMSHRC 791, 808 (April 1982).

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<sup>1</sup> The Federal Mine safety and Health Act contains no provision with respect to whether the claim of an employee for back pay and other monetary remedies survives his subsequent death. With some few exceptions, the federal statutes contain no express provisions for survivability of causes of action in the federal courts (1 Am. Jur. 2d, Abatement, Survival and Revival, S 112, p. 128), and where no specific provision for survival is made by federal law, the cause survives or not according to the common law. At common law, the basic principle of survivability is that survivable actions are those in which the wrong complained of affects principally property and property rights, including monetary interests, and in which any injury to the person is incidental, whereas nonsurvivable actions are those in which the injury complained of is to the person and any effect on property or property rights is incidental. Pierce v. Allen B. Du Mont Laboratories, Inc., 297 F.2d 323 (3d Cir. 1961); 1 Am. Jur. 2d Abatement, Survival and Revival, S 51, p. 86.

## FINDINGS 2

### A. GENERAL

Respondent at material times was a Minnesota corporation engaged in highway, mining, and heavy construction and was the mining contractor for the Basin Creek open pit gold mine engaged in constructing roads, leach pads, pad extensions and ponds, and excavating and hauling ore from pits.

Complainant Burns was hired by Respondent on July 10, 1989, as a haul-truck driver (I-T. 57) and was discharged on August 13, 1989 (I-T. 74).

In August 1989, Respondent's management personnel at the mine site were Superintendent Lance Power, overall operational Foreman Rusty Giulio, Head Mechanic Randolph R. "Randy" Wiener, and Ted Roberts (who served as acting foreman when Rusty Giulio was absent). (I-T. 57, 58, 60; II-T. 6, 19, 140).

On August 13, 1989, Complainant Burns was assigned to drive truck No. 583, a spare truck (I-T. 215). His normally assigned truck was No. 589 (I-T. 32) which had "broken down" and was "being worked on." (I-T. 215).<sup>3</sup> His work assignment was first to haul overburden (common excavation) from the leach pad extension to a dump one-half mile away. (I-T. 32, 215, 218).

On August 13, 1989, Complainant's immediate supervisor was leach pad foreman Ted Roberts. (I-T. 57, 214; II-T. 140). The hours of his shift were 6 a.m to 4:30 p.m. (I-T. 147, 214) seven days a week. On this day, when Mr. Roberts assigned Mr. Burns to drive Truck 583, Mr. Burns made no complaint about driving it. (I-T. 84, 85, 216). Mr. Burns had operated the truck on two or three prior occasions (I-T. 35-36, 75). When Mr. Roberts made the assignment, he told Mr. Burns that 583 was an older truck and was the only one available, and thus Mr. Burns "could take it

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<sup>2</sup> The hearing was held on two hearing days, January 30 and 31, 1991. For both days of hearing there is a separate transcript beginning with page one. Accordingly, the transcript citations will be prefaced with "I" and a "II" for January 30 and January 31, respectively.

<sup>3</sup> No. 583 was an "A" model with a three-speed automatic transmission; No. 589, a "B" model, was equipped with an automatic seven-speed transmission. (I-T. 32, 76, 215; II-T. 152).

easy" and didn't have to "cycle," i.e., keep up with another truck. After Mr. Burns had been making his runs on a fairly regular schedule, at some point he did not show up, and Mr. Roberts got in his pickup and drove up the haul road looking for along his route. (I-T. 217-218).

After hauling overburden for one and one-half hours, Complainant parked the truck allegedly because "the canopy on the truck was unsafe" (I-T. 32) and he was due to start working in a more dangerous area called the PPD. (I-T. 85).

Before Mr. Roberts found Complainant, a significant incident happened resulting in a conversation between Complainant and Head Mechanic Wiener.

Mr. Wiener was on the haul road near the maintenance department and saw Complainant pull off the road and talk to another truck driver. After finishing the talk, Complainant "let the truck roll back ... revved the engine up and dropped it into first gear and took off." When he dropped it into first gear, the front of the truck raised up on the suspension approximately six inches. (II-T. 19, 24-27). The truck had a full load at the time. Complainant then drove off. On what appears to be the Complainant's next load, Mr. Wiener stopped him and told him that he (Mr. Wiener) didn't want him to do that again, and that if it happened again, Complainant would be sent home, to which Complainant responded, "Do me a favor." Mr. Wiener gave this account:

A. He told me, do him a favor. That was his words.

Q. Did he say anything else to you?

A. No, he didn't.

Q. Did he say anything about why he started the truck that way, why he revved it up and put it into gear?

A. No.

Q. Did he say anything to you about problems or concerns that he had with the safety of the truck?

A. No, he didn't.

Q. Did he say anything to you about a hole in the canopy or problems with the exhaust?

A. No.

Q. So the only thing he said to you was, "Do me a favor."?

A. Yes.

Q. What did he do after that?

A. What did I do or what did he do?

Q. What did Larry do after that. Did he drive off?

A. He drove off, yes. (II-T. 21).

On August 13, 1989, Mr. Wiener was not aware of problems with Truck 583 and in his conversation with Complainant on that date, Complainant made no safety complaints or reference to problems with the truck (II-T. 35, 42, 75-79, 83). Mr. Wiener did not authorize Complainant to park the truck (II-T. 49).

Later in the day in a conversation with Mr. Roberts, Mr. Wiener learned that Mr. Roberts had sent Complainant home, and that evening Mr. Wiener received a call from Rusty Giulio (II-T. 48) inquiring if he had observed Complainant abuse the truck.<sup>4</sup> At this point, Mr. Giulio had not made up his mind about discharging Complainant. (II-T. 23)<sup>5</sup>

At approximately 7:30 a.m. (I-T. 220), Mr. Roberts came upon Mr. Burns approximately midway along the one-half mile route between the leach pad and the dump--near a junction of haul roads and near the employee parking lot. (I-T. 218, 222). Mr. Roberts remained in this pickup and Mr. Burns approached him in agitated fashion, stating as he came up, "I am not driving that piece of

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<sup>4</sup> Complainant's action in revving up the engine of the truck "real high" and throwing it into gear, as observed by Mr. Wiener, is found to constitute severe abuse of the power train (I-T. 224; II-T. 20, 24-32) which could have resulted in repair costs of \$5,000 to \$15,000. (II-T. 31, 32).

<sup>5</sup> The record is clear that Mr. Roberts' sending Complainant home earlier did not constitute a discharge.

s\_\_\_ anymore." Mr. Roberts credibly denied that Mr. Burns expressed any safety problems or concerns with truck 583 in this conversation. (I-T. 219, 220, 228). <sup>6</sup>

Mr. Roberts replied to Mr. Burns that "If you are not going to drive the truck, then you'd just as well take your stuff and go home." Mr. Burns made no offer to do other work. (I-T. 220). Mr. Roberts had no other work for Mr. Burns to do. (I-T. 120, 214, 215, 220, 222, 223).

Complainant, whose testimony I have found unreliable, testified that he gave Mr. Roberts three reasons for not driving the truck, i.e., "the canopy, the transmission, and the smoke from the exhaust." (I-T. 42). <sup>7</sup>

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<sup>6</sup> Mr. Roberts explained the reasons for his certainty in this connection:

Q. You have stated that Larry Burns just described this truck in general terms, and you have stated that he did not tell you about any of the problems with the truck.

A. No, he didn't.

Q. Are you sure that he didn't, or do you not recall him doing so?

A. I am sure he didn't, and the reason that I am sure is because it was brought to my attention the first thing the next morning.

Q. Who was that brought to your attention by?

A. Lance Power asked me what had taken place, and he wanted to know word for word of what he said, because an MSHA inspector was coming up on the job. (I-T. 228).

<sup>7</sup> Of the three reasons allegedly given to Mr. Roberts, the hole in the canopy was the most serious. After being discharged in the evening of August 13, 1989, Complainant made a complaint to MSHA and the following day (August 14) two citations were issued on the canopy and transmission, and on August 16, a citation was issued on the exhaust (Exs. C-1 through 9). It is found that Truck 583 was in unsafe condition on August 13, 1989.

After Mr. Burns left, two other employees (oilers) approached Mr. Roberts and asked him what had happened. Mr. Roberts told them that he had sent Larry Burns home and they informed Mr. Roberts that Head Mechanic Randy Wiener had, just previously, "jumped" Mr. Burns about abusing the truck. (I-T. 221). As above noted, later in the day Mr. Roberts discussed the matter with Randy Wiener who confirmed "he had said something" to Mr. Burns about abusing the truck, i.e., revving it up and dropping it into gear. (I-T. 223).

That evening Mr. Roberts called Rusty Giulio and advised him of the problem he had with Mr. Burns, of what Mr. Wiener had told him, and that he had sent Mr. Burns home "because he refused to drive the old truck." (I-T. 224). Mr. Roberts also mentioned the language Complainant used in referring to the truck (II-T. 147). Mr. Giulio then contacted Randy Wiener and discussed the truck abuse incident. He also called Superintendent Lance Power and told him what he heard about the incident. Mr. Power advised Giulio to do "whatever was necessary." (II-T. 149).

Giulio then telephoned Complainant to discuss the matter, and get Complainant's "side of the story." (II-T. 149, 168).<sup>8</sup> Giulio recounted the conversation as follows:

A. I said I had heard there was a problem on the job today, and he said, "Yeah, there was, I'm not going to run that piece of s\_\_\_."

Q. He used the same language as with Mr. Roberts?

A. That's correct.

Q. What did you reply?

A. I said, "If you're not going to run a truck, then I guess we don't have any use for you."

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<sup>8</sup> Giulio specifically testified that at this juncture he had not made up his mind what action to take regarding Complainant. (II-T. 150, 167, 168, 169, 177).

Q. Did you discuss the abuse he had done to the equipment?

A. No, he hung up on me then. <sup>9</sup>

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Q. Was he hostile in talking with you?

A. Yes, he got a little heated.

Q. At any time during your discussion with Mr. Burns ... did he raise any concerns to you at all about the condition of the truck or any safety and mechanical problems whatsoever?

A. No. At no time that Larry worked on the mine site did he ever raise questions concerning safety. (II-T. 149-150).

Mr. Giulio, whose testimony I credit over that of Complainant Burns for the reasons indicated in this decision, also indicated that Complainant did not, during his conversation, tell him anything to justify his actions (II-T. 150), and that his impression was that Complainant simply was not going to drive the truck. Thus, on cross-examination he gave these answers:

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<sup>9</sup> While Mr. Giulio subsequently added to his testimony that he also told Complainant that "we couldn't handle equipment abuse." (II-T. 150, 167, 168, 169, 177). I do not consider this an inconsistency in his testimony since discussion of equipment abuse was cut off by Complainant's hanging up the phone. Complainant's accounts of this conversation are essentially the same as Mr. Giulio's, other than when testifying as a rebuttal witness Complainant did not mention that it was for safety reasons that he refused to drive the truck (I-T. 44, 71, ; II-T. 214-215). On the issue of whether Complainant voiced safety complaints concerning Truck 583, it is also observed that the accounts of Messrs. Giulio, Weiner, and Roberts, are relatively steady throughout, whereas Complainant engaged in a major "perfecting" of his testimony on rebuttal (II-T. 213-214) from that on his case in chief. ( I-T. 42, 71).

- Q. Had he agreed to drive the truck, would he have come in the next day?
- A. He wasn't going to drive it. As far as I could get out of him, he wasn't going to drive the truck anyway.
- Q. My question is, if he agreed to drive the truck, would you have said, "Show up at 6:00 tomorrow?"
- A. Yes.
- Q. You didn't inquire what his complaints were at all as to the truck?
- A. No, we didn't get that far. (II-T. 168-169).

Mr. Giulio denied ever giving Complainant authority to rev up the truck and drop it into gear. (II-T. 151). Mr. Giulio's primary reason for terminating Complainant was for "abuse of equipment (II-T. 150-151). He also took into consideration Complainant's "conduct toward the other supervisors and personnel and his attitude basically was smart and belligerent, and also for the refusal to drive a truck." (II-T. 150-151).

Truck No. 583 on August 13, 1989, was unsafe.<sup>10</sup> (I-T. 175-176; Ex. C-1 to C-9; II-T. 129). On August 13, 1989, supervisory personnel Roberts, Wiener, and Giulio were unaware of the unsafe condition of Truck 583. (I-T. 216, 220, 229, 231; II-T. 9-10, 13, 35, 184).

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<sup>10</sup> Nevertheless, as noted elsewhere in this decision, this does not excuse Complainant's abuse of the truck, neutralize the legal effect of the failure of Complainant to communicate safety concerns to his supervisors, or justify his belligerent, provocative behavior toward supervision. There is considerable evidence in the record overall that Complainant's essential motivation in refusing to drive the truck was less of a safety concern than it was for some personal, subjective resentment and desire to terminate employment. It is ultimately concluded herein that Respondent's motivation in discharging Complainant was not due to anti-safety motivation or other discriminatory intent cognizable under the Act.

B. RESPONDENT'S POLICIES AND PROCEDURES

Respondent at material times had no "formal step" disciplinary procedure or structured termination policy. (II-T. 135).

Respondent relies to a considerable extent on so-called "bitch slips" (shift tickets) to identify problems with equipment. Equipment operators, including truck drivers, are required to fill out bitch slips after each shift whether or not a truck has problems, and a lack of problems is indicated by checking a box thereon labeled "satisfactory." (I-T. 76, 103-104, 109-110; II-T. 11-12). The majority of bitch slips which were turned in contain no request for repairs. (II-T. 97).

Under Respondent's maintenance program, approximately 50 percent of equipment problems are detected through inspection. Significantly, the rest are discovered through the participation of equipment operators and drivers who either fill out shift tickets, inform their supervisor, or bring equipment directly to Chief Mechanic Randy Wiener and his personnel. (I-T. 76, 109, 112; II-T. 7-14, 87-88). 11

Complainant, a short time prior to August 13, 1989, had brought his regularly assigned truck (No. 589) directly in to the maintenance shop for repairs and, at that time, referred to it as "a piece of s\_\_\_." It was repaired immediately. (II-T. 16-18). It is inferred from this and other evidence (I-T. 55, 77) that (a) Complainant knew he could have had the canopy on No. 583 repaired on August 13, 1989, by taking the truck directly to the maintenance shop, and (b) Complainant, in conversations with management personnel, repeatedly referred to the equipment he was assigned to drive as a "piece of s\_\_\_," or other disparaging way. In this connection, it is noted that Complainant conceded at hearing that he was not aware of a single person who was ever fired by Respondent because of having made a safety complaint about equipment. (I-T. 76).

C. RESOLUTION OF CREDIBILITY

I have generally credited the testimony of Respondent's witnesses over the testimony of Complainant with respect to whether Complainant made a safety complaint to Leach Pad Foreman Roberts

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11 During Mr. Wiener's three-year tenure as head mechanic, there were no accidents at the mine due to unsafe equipment. (II-T. 13).

on August 13, 1989, and whether supervisors Rusty Giulio and Randy Wiener were aware of any safety problems with Truck 583. Specifically, I have credited the denials of Roberts, Wiener, and Giulio (1) that Mr. Burns made safety complaints about the truck on August 13, 1989, and (2) that they were aware of safety problems, including the hole in the canopy, at the time Complainant Burns was discharged.

Based on observation at the hearing of the demeanor of the witnesses, the various reasons appearing in this decision, and the convincing testimony of Respondent's witnesses, the accounts of Complainant Burns have been determined not to carry the same degree of reliability as those of Respondent's primary witnesses, Roberts, Giulio, and Wiener.

Additional factors weakening Complainant's testimonial trustworthiness follow.

Respondent established prior instances where Complainant had quit a number of jobs when he had "cash in hand" and was dissatisfied with working conditions. Thus, he quit one truck-driving job after three months because he felt the trucks were "junk." He quit another truck-driving job after five months because he was unhappy with his tax burden while his sister was on welfare. He quit another job partly because of what appears to be problems with other persons and threats. (I-T. 80-85).<sup>12</sup>

Although Complainant testified that being assigned to work in the PD-44 area (an hour or so after he had commenced work on August 13, 1989) increased the danger of driving the truck, (I-T. 32, 78), he thereafter saw Randy Wiener and made no safety complaint to Mr. Wiener, much less asking that the truck be repaired--a procedure he accomplished previously and which, I infer from this record, would have been feasible for him to have followed on the day he was discharged had he had genuine safety concerns. (I-T. 83-87; II-T. 16-18).

Complainant considered refusing to drive Truck 583 the first time he was assigned to do so in July 1989. (I-T. 69). He also considered complaining about it another time before August 13, 1989 (he only drove the truck two or three times during his 31-day employment) but alleged he thought he might be discharged if

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<sup>12</sup> Complainant was employed by Respondent only a total of 34 days. (I-T. 80).

he did. (I-T. 69, 76). Yet, he admitted he was not aware of anyone being discharged for making a safety complaint about equipment. (I-T. 76).<sup>13</sup>

### DISCUSSION AND ADDITIONAL FINDINGS

In order to establish a prima facie case of mine safety discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom., and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-1938 (November 1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test); and Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986).

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<sup>13</sup> Complainant's own witness, Project Office Manager Opal Holsworth, also conceded this major point in Respondent's favor in the following colloquy:

Q. Would you believe any employee who refused to drive a piece of equipment or a truck because it was unsafe would be fired?

A. I don't believe that any employee would have been fired, because sometimes employees did more severe things than refused to drive a truck and got fired, and other people didn't do hardly anything and got fired. It just depended on the person that was been taken into consideration. (I-T. 140).

The disposition of this case turns on whether Complainant's refusal to drive the truck was based on a belief (and reasonable communication) that the truck was unsafe or whether it was due to some subjective reasons and attitude, and whether Complainant communicated any safety concerns to management personnel prior to being discharged and, assuming that he did, whether he was discharged for this protected activity or for the reasons assigned by Respondent, meaning his non-protected activities, abuse of equipment, insubordinate conduct, <sup>14</sup> and unexplained refusal to drive the truck.

Under the Mine Safety Act, discriminatory motive may not be presumed but must be proved. Simpson v. Kenta Energy, Inc. and Jackson, 8 FMSHRC 1034, 1040 (1986).

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, 2510-2511 (November 1981), rev'd on other grounds sub nom Donovan v. Phelps Dodge, 709 F.2d (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-1399 (June 1984). The instant record contains no reliable direct evidence that Respondent was illegally motivated nor does it support a reasonable inference of discriminatory intent.

In reaching the conclusion that Complainant failed to establish a prima facie case by failing to establish that his discharge was discriminatorily motivated, consideration also has been given to the fact that the instant record does not reflect a disposition on the part of Respondent's management personnel, individually, or collectively, to engage in such conduct. A history of, or contemporary action indicating antagonism or retaliatory reaction to the expression of safety complaints was not shown.

Although not elaborated on herein, Respondent established in this record that it has at least a reasonable approach to safety and that operators and drivers are encouraged to bring safety

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<sup>14</sup> The use of profanity in the belligerent context Complainant used it in on August 15 can itself be an unprotected activity sufficient upon which a discharge can be legitimately based. Hicks v. Cobra Mining, Inc., 18 FMSHRC 623, 532 (April 1991).

problems into its repair shop immediately and directly for repair. (I-T. 16, 108-110, 112-114, 131-132, 140, 224-226; II-T. 7-10, 13, 36-37, 87, 88).

Further, I have credited the version of the facts of Respondent's supervisory witnesses with respect to the question of whether Complainant made safety complaints concerning Truck No. 583 on August 13, 1989, and find that no such complaints were registered.<sup>15</sup> Thus, in this respect also, Complainant failed to establish the prerequisites of a prima facie case under the Act, since the unexplained work refusal is not an activity protected under the Act. Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987).

Finally, even assuming for the sake of argument that such complaints were made, Respondent established by a preponderance of credible and reliable evidence that its reasons for discharging Complainant were his abuse of equipment together with his hostile conduct and approach to driving Truck No. 583.<sup>16</sup> Stated another way, Respondent carried its burden--even under the hypothesis that a safety complaint had been made--that it was motivated by Complainant's unprotected activities and that it had good reasons and would have taken the adverse action in any event for such.

It is concluded that Complainant Burns was discharged for the reasons assigned by Respondent, abuse of equipment, together with his accompanying belligerent attitude and conduct toward his supervisors and the circumstances of his refusal to drive Truck No. 583. It is further found that Respondent's management had

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<sup>15</sup> Since Complainant, at the time he refused to drive the truck, did not communicate his alleged safety concerns to Mr. Roberts (or later to Mr. Giulio) Respondent had no opportunity to understand the basis for the refusal and to take any corrective action. See Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989).

<sup>16</sup> Rather than taking the truck to the maintenance department for repair, Complainant parked it, refused to drive it, was insubordinate, and this attitude and conduct precipitated his discharge. By analogy to the concept of a mine operator's constructive discharge of an employee, Complainant's actions approached being a constructive resignation. In this case, it appeared that Complainant forced the issue, that is, he forced the adverse action taken against him.

sufficient basis in terms of both business and disciplinary reasons to justify the discharge of Complainant.

As the Commission stated in Bradley v. Belva Coal Company, 4 FMSHRC 981, 991 (June 1982): "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."

The record in this matter is convincing that Respondent was motivated for the reasons and justifications it claims. Complainant's evidence was not found to be persuasive that his discharge was due in any way to any alleged expression of safety complaints.

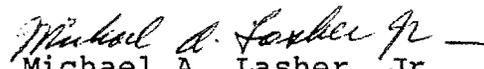
### CONCLUSIONS

Respondent's motivation in discharging Complainant was for his unprotected activities and the decision to take such adverse action was justified. This adverse action was not wholly or in part discriminatorily motivated. Thus, Complainant has failed to establish a prima facie case of discrimination under Section 105(c) of the Mine Act.

Even assuming arguendo, that it was established by a preponderance of the reliable probative evidence, that Complainant's discharge was motivated in part by protected activities, Respondent established by a clear preponderance of such evidence that it was also motivated by Complainant's unprotected activities and that it would have taken the adverse action in any event for such. Gravelly v. Ranger Fuel Corp., 6 FMSHRC 729 (1984).

### ORDER

Complainant, having failed to establish Mine Act discrimination on the part of Respondent, the Complaint herein is found to lack merit and this proceeding is **DISMISSED**.

  
Michael A. Lasher, Jr.  
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 21 1991

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 91-30  
Petitioner : A. C. No. 46-01436-03825  
v. :  
 : Shoemaker Mine  
CONSOLIDATION COAL COMPANY, :  
Respondent :

DECISION

Appearances: Page H. Jackson, Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Petitioner;  
Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

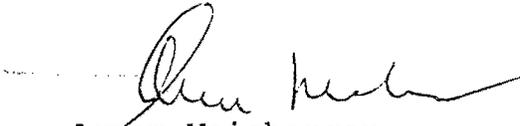
Statement of the Case

This case is before me based on a petition for assessment of civil penalty filed on November 5, 1989, alleging a violation of 30 C.F.R. § 75.1403. Subsequent to the filing of an Answer and pursuant to notice, the case was heard in Pittsburgh, Pennsylvania, on February 20-21, 1991. Joseph Yudasz, Louis Paul Jones, Nelson Thomas Blake, Thomas Dale Updegraff, and Dennis O'Neil testified for the Secretary (Petitioner). Edward Roy Pride, II, Michael Blevins and James A. Deems testified for the Operator (Respondent).

Subsequent to the hearing on May 30, 1991, Petitioner filed a Motion to Approve Settlement. In its motion, counsel for Petitioner asserts that the language in the notice to provide safeguard, which provided the basis for the issuance of the citation at issue herein, ". . . may not provide Consol with sufficient notice of what is required to comply with the safeguard under the various mining conditions encountered at the Shoemaker Mine." This assertion is consistent with the evidence that was adduced at the hearing.

The motion seeks an order vacating the safeguard and citation at issue, and ordering Respondent to issue instruction for safe travel, and conduct a safety meeting concerning these instructions. Based on the record before me, I conclude that such an order fairly disposes of the issues in this case, and is consistent with the purposes of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Accordingly, the motion is granted.

It is ordered that: (1) Consol shall issue at the Shoemaker Mine, within thirty (30) days of the date of the order, the safe work instruction attached as Exhibit 1; (2) Consol shall conduct a safety meeting, which concerns the contents of the safe work instruction attached as Exhibit 1, with all miners working on the longwall section at the Shoemaker Mine within thirty (30) days of the date of the order; and (3) Notice to provide Safeguard No. 3326026, and section 104(a) Citation No. 3326035 shall be vacated.



Avram Weisberger  
Administrative Law Judge

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/fb



**Safe Work Instruction**  
Consolidation Coal Company

Mine Shoemaker Mine

Page 6 of 6

Job Code

Longwall

Occupation

Job Duty

Approved (Miner) Camp

Approved (Miner) Dir.

Date 4/24/91

*E. R. Clark*

Approved (Miner) Dir.

Date 4-11-91

Safe Work Instructions

Key Points

Safety Precautions Special Safety Approval Required

Moving Shields

(C) Moving Past Shields

(F) All persons traveling along the longwall face must be aware of materials being transported by the moving face conveyor chain.

(G) If the travelway becomes restricted the following precautions should be taken.  
(a) Crawl through the area if necessary or  
(b) Wait for the face conveyor to be advance, for adequate travelway or  
(c) If the event of an emergency use the pull cord to deactivate the face conveyor.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 24 1991

MICHAEL P. DAMRON, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. CENT 89-131-DM  
: REYNOLDS METALS COMPANY, : MD 89-04  
Respondent :  
: Sherwin Plant

DECISION ON REMAND

Appearances: R. Michael LaBelle, Esq., Powers & Lewis,  
Washington, D.C., for Complainant;  
Jean W. Cunningham, Esq., Richmond, Virginia,  
for Respondent.

Before: Judge Broderick

On April 16, 1991, the Commission remanded the case to me, (1) for further findings and analysis of the testimony of Complainant Michael Damron and his foreman Arlon Boatman concerning Boatman's order to operate the mill on September 7, 1988; and (2) for an explanation of my finding that General Supervisor Glenn Reynolds on September 5, 1988, authorized Damron to run the mill from a safe distance. 13 FMSHRC 535 (1991). Following the remand counsel for Complainant and Respondent filed briefs which I have carefully considered in making this decision on remand. I will first address the question of the Damron-Reynolds conversation.

I

When the protective shelter was torn down, Damron protested the action to Reynolds, the general supervisor in the precipitation and calcination areas of the plant. A safety procedure meeting was called and convened on September 2, 1988, which addressed some of the safety complaints advanced by Damron and the Union. On September 5, Damron approached Reynolds and stated that the company had agreed to erect an overhead plywood shelter for the ball mill. Reynolds denied that such an agreement had been made. On page 4 of my decision I quoted Reynolds' testimony that he told Damron that "if he had any real safety concerns regarding the operation of the belt line, without that temporary shed, that he should go outside the building, down the tunnel,

and operate the belt standing in that position." On rebuttal Damron denied that Reynolds had given him the "option of working down in the pit next to the conveyor belt." 12 FMSHRC 417-418 (1990).

Neither of these statements is inherently incredible. Because they are contradictory, however, only one can be credited. I chose to credit the testimony of Reynolds. It seemed (and still seems) highly unlikely that he would manufacture out of the whole cloth a rather detailed conversation including the phrase "down the tunnel." I therefore reiterate my finding of fact that Reynolds on September 5, 1988, gave Damron permission to operate the mill away from the building.

## II

There is no dispute that Foreman Boatman, who was not at the safety meeting, told Damron on September 6, that he could operate the mill by turning the belt switch on, and stepping back to monitor the belt from a distance where he would not be subject to the possible hazards of falling objects. Damron protested that metal objects could get by the metal detector and damage the hammer mill. "If one of them things would have gotten by, gone into the hammer mill, it would have tore that whole thing up. . . so that was not a very acceptable way for me to run my job properly" (Tr. 225). Boatman told Damron (and I find as a fact that he did tell him) "that should anything go through the detector, if for any reason it failed and we did not get metal in the mill, that it would be my responsibility" (Tr. 352). Damron did not work on the mill on September 6, because of problems in the tray area. In my original decision, I found that Respondent erected a guardrail on the upper floor and agreed to erect a metal shed over the area where the magnet was located.

When Damron reported for work on September 7, Boatman directed him to run the ball mill. Boatman did not change or revoke the authorization given the previous day permitting Damron to monitor the belt from a distance. His testimony, which I quoted on page 5 of my decision, that ". . . I gave him the direct order to operate the facility under normal conditions, standing where needed to, if he needed to stand at the metal detector, if he needed to clean conveyor belts, tail pulleys or whatever, it would be the general operator, the regular operation of the facility" must be considered together with the testimony concerning the conversation on the previous day, which I quoted above. Taking into consideration the two conversations, I conclude that Boatman's order to run the mill included his authorization to monitor the belt from a position away from the building, and that Damron understood this. His refusal to comply with the order resulted more from his belief that the mill could not properly be operated in that fashion, rather than because of any safety concerns. This conclusion is reinforced by my finding

above that Reynolds authorized Damron to operate the belt away from the building. On the basis of these findings, I conclude that Damron's work refusal was not reasonable, nor did it result from a good faith belief that the work he was ordered to perform was hazardous.

I conclude therefore that Respondent's action in discharging Complainant for refusal to obey an order to perform on work September 7, 1988, was not in violation of Section 105(c) of the Act.

Accordingly, the complaint and this proceeding are **DISMISSED.**

  
James A. Broderick  
Administrative Law Judge

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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 25 1991

MELVIN BURKHART, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 90-184-D  
FOSSIL FUEL, INC., :  
Respondent : BARB CD 90-13  
: No. 2 Mine

## DECISION

Appearances: Mr. Melvin Burkhart, Kenvir, Kentucky, pro se;  
Otis Doan, Jr., Esq., Harlan, Kentucky, for the  
Respondent.

Before: Judge Maurer

## STATEMENT OF THE CASE

This proceeding concerns a discrimination complaint filed by the complainant, Melvin Burkhart, against the respondent pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Mr. Burkhart filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA). Following an investigation of his complaint, MSHA determined that a violation of Section 105(c) had not occurred, and Mr. Burkhart then filed his pro se complaint with the Commission. A hearing was conducted in London, Kentucky on February 14, 1991.

Essentially, the complainant maintains that he was hired to operate the continuous miner machine and that the respondent's request for him to go and muck the mainline belt was in retaliation for him making safety-related complaints about conditions in the mine. Mr. Burkhart quit his job rather than perform this admittedly "dirty" job. He now seeks reinstatement and back pay.

Mr. Burkhart's discrimination complaint states as follows:

I operated the miner at Fossil Fuel, Inc. During the last three (3) months, I have complained numerous times about failure to take CH4 checks, cutting without line curtains, roof control plan not being conformed to, and methane monitor being bridged out during operating. These were safety hazards to myself and fellow

employees. These hazards was not corrected. On January 31, 1990, I complained to Tony Bailey about the above mentioned conditions. I was then instructed to go muck the main belt heading and the miner helper was going to operate the miner. I was told he could cut cleaner coal. The miner helper has approximately 12 hrs. experience operating the miner. I then stated I would just go home. Therefore, I feel I have been discriminated against for complaining about my rights to a safe work area.

I request my job back as a miner operator, and any backpay due me.

The complainant testified at length at the hearing. He began work at Fossil Fuel as a miner operator in April of 1989. Between then and January 31, 1990, he alleges there was no effort made on the part of mine management to fix anything. Things just kept building up and building up until finally on January 31, 1990, the situation had gotten to the point where he complained to Tony Bailey, the assistant superintendent, about the conditions he felt were unsafe. More specifically, he testified he had complained about loose and inadequate (short) roof bolts, cutting coal without line curtains to get fresh air to the face, a malfunctioning methane monitor, and basically his feeling is that management thought he was instigating trouble and holding up production. And that is the reason he believes he was told to go and muck the belt line.

As further evidence of this, he points out that the man who was going to replace him on the miner, while he went to muck the mainline belt, had only 12 hours of experience running this type of continuous miner.

In a nutshell, complainant felt he was being punished because he wanted a decent place to work. He maintains that an assignment to muck the belt line is well recognized in the coal mining industry as a punishment tour, and he feels in this particular case, it constitutes harassment.

After complainant balked at mucking the belt line, Mr. Bailey then offered him a chance to run the roof-bolting machine instead, but Mr. Burkhart didn't feel like he was qualified to do that so he declined. At that point he quit and never went back. It was his last day working for Fossil Fuel.

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,

1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mine 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 and would have taken the adverse action in any event for the unprotected activity 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, however, 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, 462 U.S. 393, 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.

It is clear that Mr. Burkhart has a right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him; Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a section foreman constitute protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. However, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management; MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

Mr. Bailey testified that Mr. Burkhart was hired by Fossil Fuel on April 24, 1989, at a starting pay of \$9.00 per hour. He was hired primarily to run the continuous mining machine, and he did run it until January of 1990, when he quit. At that point in time, he had progressed to making \$12.00 per hour.

Mr. Thomas J. Davis owns a coal business associated with Fossil Fuel. They contract mines from him. There came a time in January of 1990, when he had a problem with quality control of the coal they were producing. He wanted "blockier" coal and he discussed this with Tony Bailey. Mr. Bailey then decided to try an "experiment." He would put a different operator on the mining machine. He and Mr. Davis happened to notice that on January 29, 1990, a day that Mr. Burkhart was off, the coal run that day was "blockier." It was more lumpy. Ed Napier and Terry Wells were running the miner that day. So, on January 31, 1990, the decision was made to have Terry Wells run the miner that day and Mr. Burkhart was asked to go to the No. 2 belt head, service it, service the tailpiece, and then start mucking the mainline belt.

Bailey states he fully explained the reason for this job change to Burkhart at the time, and told him they were merely trying something new to try to improve the quality of the coal for Mr. Davis. If it didn't work after 2 or 3 days, he might put Burkhart back on the mining machine. There was no loss of pay involved. His same rate of pay (\$12.00 per hour) applied to either job.

Mucking the belt line is a disagreeable, dirty job in the mine. There is no dispute about that. But even Mr. Burkhart admits that "somebody had to do it." Mr. Bailey testified that he has done it himself. "Everyone does," he added.

In any event, when Bailey saw that Burkhart was getting upset about the mucking assignment, he offered him something else. As Mr. Davis testified at Tr. 117-118:

Q. Did you hear Tony [Bailey] offer Mr. Burkhart the job on the roof bolter?

A. I sure did.

Q. And what did Mr. Burkhart say?

A. He said, "No, I ain't no bolting machine man."

Q. Did he offer him any other job?

A. Yes. He said, "Why don't you be a helper?" He said, "No, they don't like my kind of work."

Q. What kind of helper?

A. Bolt machine helper.

Q. Okay. He was offered the bolt machine helper job?

A. Yes, he was.

Q. Did he turn that down?

A. Yes, he did.

Q. Did he ever say he quit?

A. No. He said he believed he was going to the house. That's what he said.

Q. Why did he say he was going to the house?

A. He said something about if they didn't like the way he was running the miner or didn't like his work, he'd just go to the house. I told him--I said, "Melvin, why don't you think about it before you quit?" He said no, he'd just go home.

Q. Did Mr. Bailey also ask him to stay?

A. Yes, of course he did.

Importantly, if Mr. Burkhart had done the mucking of the belt or running the roof bolter or being a roof bolt helper, his pay would have remained the same as if he were operating the miner.

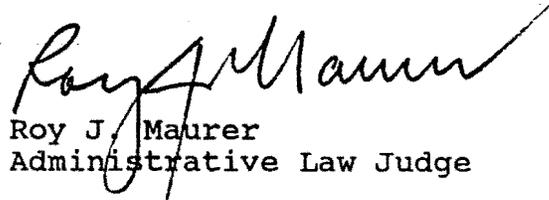
Even more importantly to his case here, I believe that Mr. Burkhart brought up the majority of his complaints to Bailey after he was told to go and muck the belt line. I believe his pride was wounded and he was hurt by what he perceived to be "harassment." However, even giving him the benefit of the doubt as to the existence of some prior protected activity, as the complainant in this case, Mr. Burkhart has the burden of establishing by a preponderance of the evidence that he not only communicated safety complaints to mine management, or that management knew or had reason to know about safety complaints to MSHA, but that the adverse action he complains of was the result of the complaints and therefore discriminatory. In essence, Mr. Burkhart must prove a connection between the complaints and the adverse action complained of.

I conclude that the required connection has not been proven. I find the testimony of Bailey and Davis to be credible on the "quality of the coal" issue and furthermore, the Company's offer of other coal mine employment at no loss of pay demonstrates good faith in my opinion. Complainant was not given a "take it or leave it" ultimatum to muck the belt line. He was offered not one, but two alternatives to mucking the belt line. He chose to avail himself of neither and quit his job.

Whether the respondent wisely chose to replace a more experienced miner operator with a less experienced one is not an issue properly before me in this case. My jurisdiction is limited to considering whether the respondent discriminated against the complainant for activity protected under the Federal Mine Safety and Health Act of 1977. I conclude that the evidence before me establishes that it did not. An employee's mere conjecture that the employer's explanation is a pretext for intentional discrimination is an insufficient basis upon which to base a successful claim of discrimination.

**ORDER**

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the complainant here has failed to establish a prima facie case of discrimination on the part of the respondent. Accordingly, the Complaint is **DISMISSED**, and the complainant's claims for relief are **DENIED**.

  
Roy J. Maurer  
Administrative Law Judge

Distribution:

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

JUN 27 1991

SECRETARY OF LABOR, MINE SAFETY : DISCRIMINATION PROCEEDING  
AND HEALTH ADMINISTRATION :  
(MSHA), : Docket No. WEST 90-271-D  
ON BEHALF OF LOUIS C. VASQUEZ, :  
Complainant :  
v. : Deserado Mine  
WESTERN FUELS-UTAH, INC., :  
Respondent :

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Complainant;  
Richard S. Mandelson, Esq., Baker & Hostetler,  
Denver, Colorado, for Respondent.

Before: Judge Cetti

This discrimination proceeding is before me upon the Com-  
plaint of the Secretary of Labor on behalf of Louis C. Vasquez  
under Section 105(c)(2) of the Federal Mine Safety and Health Act  
of 1977, 30 U.S.C § 801 et seq. the "Act". The complaint alleges  
that Louis C. Vasquez, an underground coal miner was unlawfully  
transferred from the crew he had been working with to a different  
crew on another shift at the same mine in retaliation for his  
safety complaints in violation of Section 105(c)(1) of the Act. <sup>1</sup>

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

No person shall discharge or in any manner  
discriminate against or cause to be discharg-  
ed or cause discrimination against or other-  
wise interfere with the exercise of the sta-  
tutory rights of any miner, representative of  
miners or applicant for employment in any coal  
or other mine subject to this Act because such  
miner, representative of miners or applicant  
for employment, has filed or made a complaint  
under or related to this Act, including a com-  
plaint 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 sub-  
ject of medical evaluations and potential trans-

The complaint requests a finding that Mr. Vasquez's transfer was the result of unlawful discrimination because he exercised his statutory rights under the Act and requests reinstatement, back pay plus interest, and the expungement of all matters relating to the transfer from Mr. Vasquez's employment records. The Secretary proposes a civil penalty of \$2,000 for the alleged violation of Section 105(c) of the Act.

Western Fuel contends that the transfer complained of was not motivated in any part by Complainant's protected activity and that, even had the Complainant established a prima facie case, a preponderance of the evidence established that Western Fuel had a valid business reason for transferring Complainant and for this reason alone transferred Complainant to the other crew.

The hearing was held before me at Glenwood Springs, Colorado, on the merits of Mr. Vasquez's complaint. Helpful post-hearing briefs were filed by both parties which I have considered along with the entire record in making this decision.

### Stipulations

At the hearing, the parties stipulated to the following:

1. Western Fuels-Utah, Inc. is engaged in mining and selling of coal in the United States and its mining operations affect interstate commerce.

2. Western Fuels-Utah, Inc., is the owner and operator of Deserado Mine, MSHA I.D. No. 05-03505.

3. Western Fuels-Utah, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").

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cont'd fn.1

fer under a standard published pursuant to section 101 or because 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 of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

4. The Administrative Law Judge has jurisdiction in this matter.

5. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

6. The proposed penalty will not affect respondent's ability to continue business.

7. Western Fuels-Utah, Inc., is a large operator of a coal mine. The total production tons of the controlling company are 1,375,174 tons per year. The total production tons of the mine are 1,375,174 tons per year, and it has 177 production workers.

#### Complainant's Case

Messrs. Louis Vasquez, Gary Belveal, Stanley Kretoski, and Roland Heath (as an adverse witness) were called to testify by the Complainant.

Mr. Louis Vasquez testified substantially as follows:

LOUIS VASQUEZ began working for Western Fuels on December 13, 1985, as a continuous mine helper. Five or six months later, he became a continuous mine operator, and became a shear operator approximately seven months after that. (Tr. 13-15).

In December 1988, Norm Wallace became the section boss or foreman on Vasquez's crew. To Vasquez's knowledge, Norm Wallace did not have any prior experience on the longwall, and at that time the crew was having problems with the methane gas on the wall. Beginning in August 1989, Vasquez and his fellow crew members began checking for methane gas every 20 minutes during their shift because they were having more gas problems. These gas problems continued from August 1989 to December 1989, when Vasquez was transferred to a different crew on another shift. (Tr. 19-20, 24-26).

Between August and December 1989, Vasquez talked to Rick Kendall, Norm Wallace's immediate supervisor, nearly every day about the gas problems. Vasquez reported the gas problems to Roland Heath, the mine superintendent in early December 1989. (Tr. 28-29).

On December 18, 1989, Rick Kendall picked Vasquez up in a company truck approximately an hour before the end of his shift. Kendall told Vasquez that he was being transferred to a different crew on another shift. Vasquez asked why he was being moved in-

stead of someone else, and Kendall replied that there were problems on the crew. Vasquez asked whether it was because he was causing trouble on the crew or on the shift. Kendall simply said that he was doing what the superintendent Roland Heath told him to do, and Vasquez would have to take up the details with Roland Heath. Vasquez believes that he had complained about gas problems that day at the beginning of the shift. (Tr. 31).

The next day, Vasquez talked to Roland Heath because he did not want to be moved off of his shift, as a transfer would interrupt his carpool arrangements. Vasquez also asked Roland Heath why he was the one being transferred instead of someone else. Heath replied that there were problems on the crew and that he had to solve the problems. Vasquez asked whether he had been causing any problems. Vasquez testified that Heath stated that Vasquez was the problem and that was why he and Norm Wallace, the foreman, were being transferred off the shift. (Tr. 34).

On the same day, Vasquez complained to Gary Belveal, the Union president in his district. Gary Belveal went to speak to Roland Heath on Vasquez's behalf, but the situation was not changed. Then Vasquez called the MSHA and spoke to Stanley Kretoski, because he did not think that the transfer was fair to him. Vasquez believed that he had been transferred off his shift "just because" he was following his "work procedures as operator" of shutting the wall down when the methane readings required it. (Tr. 35-36).

Vasquez remained a shear operator after he was transferred, and received the same rate of pay. However, he did not receive as much overtime on his new shift. (Tr. 36-38).

Prior to the transfer he worked five days at the wall. After the transfer he worked three days at the wall and two days in the "miners' section". (Tr. 35-36).

Because of his transfer, Vasquez rotated to the graveyard shift instead of to the day shift with his old crew. As a result, he had to drive himself to work the next two week period because he only had a carpool when he was on the day shift. (Tr. 39).

Vasquez stated that he is also claiming damages for wear and tear on his car based on oil changes and other things that he had to do himself. He is also requesting reimbursement for long distance telephone calls he made to the Bureau of Mines in December 1989. (Tr. 44).

Norm Wallace, Vasquez's former foreman, was transferred to a different "miner section" at the same time Vasquez was transferred. A man named John Claybaugh, who had a temporary shear bid at the time, replaced Vasquez on his old crew. Scott Nepp replaced the foreman Norm Wallace. (Tr. 45).

Jon Hawkins, the other shear operator on Vasquez's former crew, shut down the longwall for gas problems more frequently than Vasquez did. Vasquez received training in MSHA regulations, and one of the items covered in the training is that continuous miners and shear operators are expected to shut down the longwall if there is a gas build-up. Vasquez was instructed to shut down the longwall anytime he had methane in tailgates or headgates-- 1 percent on the returns and 2 percent on the bleeders. Vasquez was never disciplined under the collective bargaining agreement for reporting a gas build-up which resulted in shutting down the face. There were six people on his crew who had responsibility for gas readings. To Vasquez's knowledge, no member of his crew was disciplined for shutting down because of a gas build-up. (Tr. 50-53).

There is a 40-cent differential per hour for working the graveyard shift, and a 30-cent differential per hour for working the swing shift. Vasquez believes that he was told about his transfer the week before Christmas, and that he started working on his new crew the first week in January 1990. Under a normal rotation process, he would have been on the day shift the first two weeks of January 1990, but after his transfer he was on the graveyard shift instead. Because of the transfer, Vasquez received a 40-cent differential per hour for working the graveyard shift the first two weeks in January 1990, although he lost his carpool arrangements for those two weeks. Vasquez does not recall taking off the 40 cents extra per hour when he did the damage calculations on his damage report. (Tr. 56-63).

Vasquez had problems with Norm Wallace when he first became his crew foreman. Vasquez thought that Wallace was not doing his job, that he was not keeping a constant gas watch on the tailgates and bleeders, and that Wallace got upset whenever someone tried to explain anything to him. Vasquez believes the first time he talked to Norm Wallace about gas problems was in August or September 1989. Wallace did not write Vasquez up for complaining, nor did he consider Vasquez's complaints to be insubordination. The gas problems occurred from August to November 1989, because a borehole that ventilates gas on the face of the longwall was not operating properly. (Tr. 64-70).

Between June and December 1989, three other people asked to be transferred off Vasquez's old crew. One man, Dewey King, asked to be transferred because Vasquez gave him a hard time. Vasquez testified "we were on his (Mr. King's) case because he had the smell of liquor on his breath." (Tr. 74-76).

Vasquez admitted he has no knowledge or information that Roland Heath used any criteria other than seniority in deciding whom to transfer off his old crew. Jon Hawkins had more seniority than Vasquez on his old crew. (Tr. 78).

Vasquez had carpool arrangements during 1989 with a man who worked only day shifts. Thus, Vasquez only drove his car one week out of two when he was on the day shift. However, he drove by himself every day when he worked the swing and graveyard shifts. (Tr. 79-82).

Petitioner's Exhibit P-1, showing Vasquez's damages, was prepared by Stanley Kretoski. Vasquez does not have copies of phone bills to substantiate the amount claimed for long distance telephone calls. Vasquez's claim for lost overtime is based solely on what another miner on Vasquez's old crew told him about how much overtime he was getting. (Tr. 83-84).

Vasquez worked the swing shift during the middle two weeks of December 1989. The mine was closed for Christmas week, and Vasquez began working the graveyard shift the first two weeks in January 1990. Vasquez worked the swing shift January 15 through January 28, 1990, (Tr. 89-92), and after that rotated back to the day shift.

Vasquez's problem with his transfer to the new crew is the way the company went about doing it, and that Roland Heath called Vasquez a troublemaker. The transfer also cost Vasquez travel expenses when he lost his carpool for two weeks and a loss in overtime pay. Vasquez did not think he received as much overtime on his new crew assignment. (Tr. 93-94).

Mr. Gary Belveal testified substantially as follows:

GARY BELVEAL runs a roof bolter at the Deserado Mine and is President of Local 1984 of the United Mine Workers. He has been involved with the safety committee at the mine since mid-1987. (Tr. 99-100). Belveal believes that Vasquez talked to him about gas problems on the longwall, but could not recall any specific conversations with Vasquez on this subject before he was transferred. Belveal refreshed his recollection about conversations with Vasquez by looking at his handwritten notes from

December 1989. (Tr. 102-03). Belveal became aware that Vasquez was being transferred the week of December 20, 1989, when Vasquez spoke to him about the transfer. Vasquez told Belveal that he thought he was being transferred because of safety issues he had brought up on his old crew, and thought it was unfair that he was being singled out for the transfer. Other members of Vasquez's former crew, including Jon Hawkins, told Belveal that they felt Vasquez was being transferred because of his complaints about gas problems on the wall. (Tr. 104-05).

Belveal testified that he spoke to Roland Heath about Vasquez's transfer, and Heath told him (Belveal) that the whole crew was insubordinate and that Vasquez was the cause, which was why he was being transferred. Belveal then went back to see Heath again with Al Payne, another miner's representative on the safety committee. Heath again stated that the entire crew had been insubordinate and that transferring Vasquez would take care of the problem. Belveal then asked Roland Heath if the code-a-phone call had anything to do with Vasquez's transfer, and Heath's response was "No, partly." Belveal had heard through word of mouth at the mine that a code-a-phone call had occurred on December 8, 1989. (Tr. 106-08).

Belveal discussed the situation with Jon Hawkins and Harold Putney after his conversations with Roland Heath. The first week in January 1990, Belveal called Stanley Kretoski to see if Vasquez had a justifiable discrimination complaint. (Tr. 109-10).

Under Article 13 of the Collective Bargaining Agreement, Belveal understands that seniority and ability to do work govern who is transferred when a transfer needs to be made. Belveal feels that the company has a broad range in choosing who is transferred under these guidelines, and he did not raise Article 13 with Roland Heath when discussing Vasquez's transfer. As far as Belveal knows, Vasquez's transfer was made on the basis of seniority. (Tr. 114-17).

Belveal's handwritten notes from December 1989 did not reflect that Roland Heath said "No, partly," in response to the question as to whether the transfer was based on the code-a-phone call. Al Payne, who was with Belveal at the time of Roland Heath's statement, wrote that response in his notes. (Tr. 117).

Belveal remembers speaking to Bob Hanson, Director of Safety at the mine, and stating that they needed to do something about Vasquez's crew and its supervision prior to December 8, 1989, when the code-a-phone call occurred. (Tr. 123).

Belveal again told Bob Hanson that something had to be done about the crew and supervisor situation on Vasquez's crew after December 8, 1989. (Tr. 123-24).

Belveal also talked to Mike Weigand, his manager, about the fact that Vasquez's crew and supervision needed to be changed. (Tr. 128).

Although Vasquez complained to Belveal about gas problems on the longwall, the most vocal person on this subject was Jon Hawkins. Jon Hawkins is a member of the Safety Committee. No safety grievance was filed when the gas problems became acute in August 1989. (Tr. 129-31).

**MR. STANLEY KRETOSKI**, a federal Coal Mine Inspector headquartered in Denver, Colorado, testified substantially as follows:

Vasquez first called Kretoski in early January 1990 to discuss his transfer, and Kretoski told Vasquez that he had a right to file a discrimination claim. Kretoski conducted the actual investigation at the Deserado mine. He spoke to Vasquez, Mike Yocum, Jon Hawkins, Roland Heath, and Rick Kendall during the investigation. (Tr. 137, 151, 152, 154).

During his investigation, Kretoski learned that Vasquez had been transferred to a different crew and that he had a discrimination claim against management. This conclusion was based solely on a statement made by Heath to Belveal and Al Payne that the transfer was "partly" based on the code-a-phone call. (Tr. 138-39). However, Kretoski did not interview or talk to Al Payne. He did not completely interview or take a statement from Gary Belveal. He did not ask Roland Heath or Rick Kendall whether the transfer was based on the code-a-phone call. (Tr. 152, 154).

Kretoski prepared Petitioner's Exhibit 1, which itemizes Vasquez's damages. Vasquez told him that his damages were the expenses of traveling to and from work four times a week, \$200 for wear and tear on his car, and \$20 for long distance phone calls. Vasquez also said that he had lost overtime when he was transferred. Kretoski calculated the lost overtime based on five hours lost per pay period. He has no documentation for using five hours per pay period. Vasquez claims that during the first three quarters of 1990, the total lost overtime and interest totals \$225.57. (Tr. 141-146).

Kretoski did not look at any records from the Deserado Mine in compiling the overtime figures delineated in Petitioner's Exhibit 1. He is aware that management keeps records of overtime, but did not request to see these records when he was conducting his investigation at the mine, or in preparation for his hearing testimony. Kretoski spent one afternoon at the Deserado Mine in making his investigation. (Tr 155-56, 157).

#### Respondent's Case

MR. ROLAND HEATH the Mine Superintendent at the Deserado Mine for approximately one and one-half years testified substantially as follows:

Heath was aware that there were gas problems in one section of the mine beginning approximately in August 1989. He does not specifically recall talking to Vasquez about the gas problems, but does recall discussing concerns about gas buildups with some of the crew members. He spoke to Norm Wallace many times about this problem--especially from late September to mid-November 1990. (Tr. 161-63).

Heath testified he thought that Norm Wallace was having problems with his crew from August through December 1989. Heath felt that Norm Wallace was generally ineffective with the crew in getting things accomplished. However, Heath left Norm Wallace on the crew for four months because he wanted Wallace to have the chance to work with the crew and solve the problems on his own. (Tr. 164-65).

Both Rick Kendall and Norm Wallace mentioned to Heath that Vasquez's crew was giving them problems. The crew was not doing what it was told, it was taking over and directing other workers, and generally causing problems. The crew heckled Dewey King, and eventually it came to a point where King asked to be transferred to another crew. (Tr. 165).

Vasquez and two other members of the crew, Jon Hawkins and Mike Yocum, were called the "cartel" by management because of the problems they were causing. (Tr. 178). Heath testified that "these three guys were pushing people around". They were "doing things and kind of pushing Norm (their foreman) out of the way." They "bullied everybody else around and paid little attention to the foreman." (Tr. 161).

On December 12, 1989, there was a meeting between Roland Heath, Gary Belveal, Mike Weigand, Harold Putney (another member of the safety committee) and possibly a few others to determine

what to do about the personnel problems on Vasquez's crew. Gary Belveal, UMW local 1984 President, made a strong push for changes on the crew because of the personnel problems. (Tr. 166-67).

After this meeting, Roland Heath spoke to Mike Weigand, his boss, and they decided to make some moves on the crews. They decided that the problems on the crew centered on the foreman Norm Wallace, Mike Yocum, Jon Hawkins and Louis Vasquez.

Roland Heath met with his three shift supervisors (including Rick Kendall) on Monday, December 18, 1989, to decide what changes to make. (Tr. 167).

The first decision made was to transfer Norm Wallace onto another crew. Roland Heath and the shift supervisors then decided to break up the "cartel" by transferring one of the members onto the other longwall crew. There are only two longwall crews in operation, so it made sense to transfer only one member of the "cartel," since two members of "cartel" would still end up together in any event. (Tr. 169).

Asked by the Solicitor "Why did you only move one man if you wanted to split up the crew?" Mr. Heath replied as follows:

I'll go through it again. You got two crews that are very essentially all bid positions, in except for a few positions. But the guys that we're talking about have bid positions. Okay? You got three guys, you got two crews. All right? The only thing you can do, effectively --I mean you can't--you're moving two of them is crazy, so, because you got more people to move around. So really, the best thing to do is move one guy, leave the other two together. So it's--we just want a logical thing that helped to break this group up. We needed to move them. We can only move one. Now, we didn't go on discipline or anything like this. It was how to do this thing so that the foreman coming in don't have to contend with this group of three guys.  
(Tr. 179).

Heath's first choice was to move Mike Yocum, but he was the "papered man" on the shift and had to remain there to take over if the foremen were sick or there was an emergency. Having a papered foreman on each production shift is required by statute. (Tr. 168-69, 183-84).

Because Mike Yocum could not be transferred, the only two other choices were Jon Hawkins and Louis Vasquez. From a seniority standpoint, Jon Hawkins had more seniority, and thus Vasquez was transferred to the other crew. (Tr. 168-69).

A few days after Rick Kendall told Vasquez about his transfer, Belveal and another miner came in to speak to Heath. Heath explained that Belveal had already been aware that they were going to change the foreman and change the crew from the meeting on December 12, 1989. Sometime during this discussion, Vasquez stuck his head in the door and asked why he had been transferred. Heath tried to explain to him that he was not being singled out, but they were trying to split up the crew so that things would work out with the new foreman coming in. Heath did not tell Vasquez that he was the problem on the crew. He also did not say that Vasquez was transferred because of the code-a-phone call. (Tr. 175).

After the transfer decisions were made, Heath wrote a letter to Norm Wallace explaining what he needed to do to improve his management skills. In this letter, Heath said that it was evident things weren't going very well down on the longwall face, and mentioned various problems which had been brought to his attention, including the code-a-phone call. (Tr. 177-78).

Heath is aware that there was a code-a-phone call on December 8, 1989, but he does not know who made the call. (Tr. 185-86).

Vasquez has never asked to be transferred back to his former crew. (Tr. 187).

Heath had no objection to Vasquez's shutting down the longwall because of gas problems on his old crew. This was part of the job and in accordance with company policy. However, Vasquez would double check Norm Wallace's safety checks as soon as Wallace had finished. This amounted to distrust of the foreman and this lack of respect and trust was one of the problems on the old crew. (Tr. 193).

It was part of Vasquez's job as a shear operator to monitor and shut down the machine when it reached too high a methane gas level. Vasquez was never disciplined for carrying out this portion of his job. (Tr. 195-96).

**GARTH CONDIE**, Human Resources Director at the Deserado Mine, testified substantially as follows:

Part of Condie's job is to maintain overtime turnsheets in order to try and equalize overtime among the employees in a particular department. The Collective Bargaining Agreement requires the mine to split up overtime among the workers. (Tr. 197-198, 207).

Condie's testimony was based upon the mine's records of overtime worked (or offered and refused by workers) from November 1989 through the end of the third quarter of 1990. These overtime records were admitted as Respondent's Exhibit 4. (Tr. 205). The overtime worked (or offered to and refused) by Jon Hawkins and Vasquez is as follows:

<u>Period Ending</u>	<u>Overtime Hours</u>	
November 30, 1989	82	Hawkins
	72	Vasquez
First Quarter, 1990	110	Hawkins
	96	Vasquez
April 30, 1990	123.75	Hawkins
	107	Vasquez
June 22, 1990	18.5	Hawkins
	12.5	Vasquez
September 28, 1990	38	Hawkins
	71.5	Vasquez

#### FINDINGS AND CONCLUSIONS

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of proving by a preponderance of the evidence that (1) he engaged in activity protected under the Act; and (2) the adverse action complained of was motivated in any part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall 663 F.2d, 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803, 817-818 (April 1980).

The mine operator may rebut a prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was

motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity. Pasula, supra, Robinette, supra; see also Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194 (6 Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). See NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), approving a nearly identical test under the National Labor Relations Act.

At the relevant time beginning about December 1988, Norm Wallace was the section boss or foreman of Complainant's crew. Complainant Louis C. Vasquez was the shear operator in that crew consisting of six underground miners working on a longwall face in the mine. Roland Heath, the mine superintendent, became aware of problems on the Complainant's crew when workers on that crew began complaining about personnel problems after Norm Wallace became the foreman. (Tr. 160-61). These workers told Heath that there was a group of guys on the crew (including Complainant) who bullied crew members and pushed the foreman around. (Tr. 160-61). Three crew members asked to be (and were) transferred off this crew after the personnel problems began. The personnel problems became so bad that mine management began calling Complainant and two of his co-workers, Jon Hawkins and Mike Yocum, the "cartel" because of the problems they were causing. (Tr. 178). The "cartel" would double check the procedures and directions of their foreman as soon as he had finished. This showed a distrust of the foreman.

Management also had another personnel problem on this crew. Superintendent Heath regarded foreman Norm Wallace as ineffective when it came to getting things accomplished with his crew. (Tr. 163). Although Superintendent Heath became aware of escalating problems on the crew in August 1989, he left Norm Wallace on the crew for four more months in order to give him a chance to work things out and solve the problems.

The personnel problems on Complainant's crew were also well known to the Union officials at the mine. Gary Belveal, president of Local 1984, discussed the problems on the crew with Bob Hanson, the Director of Safety at the mine on at least two occasions in early December, 1989. Belveal stated that they needed to do something about Complainant's crew and its supervision. (Tr. 123). Belveal also told Mike Weigand, his manager, that something needed to be done to change the workers on Complainant's crew and the supervisor.

During the same time period as the personnel problems on Complainant's crew, there were also problems with methane gas on the section of the longwall where the crew was working. (Tr. 24-5, 162-3). Complainant, in accordance with the operator's policy of complying with the methane safety regulations, would when the methane gas readings required it ask for all power on the longwall face to be shut down several times during his shift. Jon Hawkins requested shutdowns of the long wall because of this problem even more often than Complainant did. Neither was reprimanded or disciplined for doing this. It was a part of their job. From August to December 1989, Complainant talked to Rick Kendall, Norm Wallace's immediate supervisor, every day concerning the gas problems on the longwall. Jon Hawkins spoke to Gary Belveal, the Union president, about these gas problems during the fall of 1989, but Belveal cannot recall Complainant's talking to him on this subject prior to December 18, 1989. No one on Complainant's crew was ever reprimanded for complaining about the gas problems to their foreman or other members of mine management.

On December 12, 1989, Roland Heath decided to solve the personnel problems on Complainant's crew by transferring two people, the Complainant and foreman Norm Wallace, to different crews. (Tr. 166). The first decision was to transfer Norm Wallace to another crew because he had never overcome his problem in dealing effectively with Complainant's crew. The next decision centered on breaking up the "cartel" so that the new foreman would not have to walk into the same situation that Norm Wallace could not control. (Tr. 167). There are only two longwall crews, so the only solution was to move one of the three workers onto the other crew (because in any event, two members of the so-called cartel would still be on the same crew).

Roland Heath and the shift supervisors wanted to move Mike Yocum, but Yocum was the "papered man" on the crew (the only one who could take over for the foreman in case of illness or an emergency). Thus, the only candidates for transfer were Jon Hawkins and the Complainant, and Complainant was chosen because he had less seniority than Hawkins.

On December 8, 1989, someone from the mine made an anonymous "code-a-phone" call to MSHA to report a safety violation. Although Complainant alleges that members of the mine management connected him with the phone call, the uncontroverted evidence at the hearing established that Roland Heath did not, and still does not know who made the phone call and there is no evidence that anyone in management knows to this day who made the call.

Complainant, as a result of the transfer, remained a shear

operator at the same rate of pay. (Tr. 37). Although he claims to be getting less overtime than he did on his old crew, this claim is not entirely accurate. The overtime records for the mine (Respondent's Exhibit 4) indicate that although Complainant had slightly less number of overtime hours on his new crew through the third quarter of 1990 as Jon Hawkins had on the old crew (Tr. 203-05) during the period from May 5, 1990, through September 28, 1990, Complainant received 71.5 hours of overtime, while Jon Hawkins received only 38. It is also noted that Complainant has never requested, and is not now requesting, a transfer back to his former crew. (Tr. 208).

On careful review of the evidence, I find there is no credible evidence linking the decision to transfer Complainant to another crew and any safety complaints or other protective activity in which he may have engaged.

There is no reliable or credible evidence in the record to establish that Complainant was transferred to another crew because of protected activity such as complaining about gas problems on the longwall or because anyone thought that he may have made the code-a-phone call. I find no persuasive evidence on which to base an inference that Complainant's transfer was motivated by any protected activity.

I credit the testimony of Superintendent Heath who made the decision to transfer Mr. Vasquez. He testified that the transfer was a business decision which had no relation to Complainant's safety complaints. The uncontroverted evidence at the hearing established that Mr. Heath did not know who made the code-a-phone call when he made the decision to transfer Complainant and still does not know who made the code-a-phone call.

The sole reference to a possible connection between Complainant's transfer and the code-a-phone call occurred when Gary Belveal used notes allegedly taken by another miner, Al Payne (who was not present at the hearing and did not testify), following a discussion between Belveal, Al Payne, and Roland Heath. However, these notes were not offered into evidence, and Gary Belveal did not testify that he had an independent recollection of what Roland Heath said at that meeting.

I find Mr. Vasquez has failed to establish a prima facie violation of § 105(c). He has not shown that his transfer was motivated in part by his safety complaints or other protected activity. There is no reliable evidence tending to show that Complainant was ever harassed or punished for his safety concerns, which everyone who testified agreed were part of his job

duties. It is also noted that the uncontroverted evidence established that Jon Hawkins (who was not transferred) and not the Complainant, was the most vocal safety complainer on the crew.

## II

Once a complainant has established a prima facie case of a violation of § 105(c), an employer may affirmatively defend by proving that although part of the motive in the discrimination was unlawful: (a) the employer was also motivated by the miner's unprotected activities; and (b) the employer would have taken the same adverse action against the miner in any event for the unprotected activities alone. Pasula v. Consolidation Coal Co., 2 MSHC at 1010. This affirmative defense must be established by a preponderance of the evidence and is known as the "mixed motive" test. Chacon v. Phelps Dodge Corp., 2 MSHC 1505, 1509 (1980). Once an employer establishes that it had a valid business reason for the alleged discrimination, then the court reviews only the credibility of the business decision--not its fairness. Id. at 1511; Johnson v. Scotts Branch Mine, 4 MSHC 1631, 1632 (1987). Thus, the narrow issue is whether the proffered reason was enough to have legitimately motivated the employer to have disciplined or as in this case transferred the miner. Chacon, 2 MSHC at 1511.

In Johnson v. Scotts Branch Mine, 4 MSHC 1631 (1987), a miner alleged he had been transferred to a less favorable position in retaliation for making safety complaints. Although safety complaints are obviously a protected activity under the Act, the Judge held that there was no evidence that the miner had been transferred for making them. In contrast, the evidence established that the miner was transferred as a part of a larger plan to eliminate problems on his former areas of complaints and lagging production. The Judge dismissed the complaint, holding that the miner's transfer was "well within the managerial and discretionary authority of mine management," and that mine management had sustained its burden of proof on its affirmative defense by establishing a valid business reason for the transfer.

Like the Johnson case, mine management in the instant case had a valid business reason for transferring the Complainant. The evidence at the hearing established that mine management made a business decision to transfer the Complainant in order to solve the personnel problems on his crew. Further, Complainant was not singled out in any way--his foreman was also transferred to another (different) crew. These two transfers were made only after management decided that they were the best way to solve serious

personnel difficulties on the crews (Tr. 166-69). In fact, the evidence also established that Complainant was not the first candidate for transfer-- but he was the final choice because the first choice was the "papered man" on the crew who had to remain because he alone could take over for an absent foreman, and the other member of the "cartel" had more seniority than Complainant. Because of this factual situation, Mr. Vasquez was the logical member of the cartel who could be transferred and the transfer would have occurred whether or not Complainant had made safety complaints or engaged in other protected activity. Thus, the transfer of Vasquez plus that of a supervisor was clearly part of a larger plan to solve a bad working situation on Complainant's former crew.

Western Fuels made a valid business decision in transferring the Complainant to another crew. Western Fuels has met its burden of proof under the mixed motive test by establishing that the transfer was based upon a valid legitimate, business decision. It was not a mere pretext. In Secretary of Labor/Chacon v. Phelps Dodge Corp. supra, the Commission in reversing the Administrative Law Judge's finding of discrimination stated as follows:

Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise."

#### ORDER

Based on the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and most reliable evidence adduced in this case, I conclude and find that the Complainant has failed to establish that his transfer to another crew was discriminatory, or was motivated by the Respondent's intent to prevent him, discipline him or retaliate against him for exercising any protected rights with respect to his employment as a miner. Even had the Complainant established a prima facie case, I conclude that it was rebutted by the Respondent's credible evidence which established that the transfer constituted a reasonable and plausible business-related and non-discriminatory effort by management to solve longstanding concerns

about personnel problems on Complainant's former crew. It was a valid business decision. Accordingly, the complaint is DISMISSED.



August F. Cetti

August F. Cetti  
Administrative Law Judge

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

JUN 27 1991

CYPRUS EMPIRE CORPORATION, : CONTEST PROCEEDINGS  
Contestant :  
 :  
v. : Docket No. WEST 91-454-R  
 : Citation No. 3410886; 6/3/91  
 :  
SECRETARY OF LABOR, : Docket No. WEST 91-455-R  
MINE SAFETY AND HEALTH : Citation No. 3410887; 6/3/91  
REVIEW ADMINISTRATION, :  
Respondent : Docket No. WEST 91-456-R  
 : Citation No. 3410889; 6/4/91  
UNITED MINE WORKERS OF :  
AMERICA (UMWA) : Eagle No. 5 Mine 05-01370  
Intervenor :

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll Profes-  
sional Corporation, Pittsburgh, Pennsylvania,  
for Contestant;  
Margaret A. Miller, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Respondent;  
Robert L. Jennings, Representative of United Mine  
Workers of America, Price, Utah,  
for Intervenor.

Before: Judge Morris

This is a contest proceeding arising under the Federal Mine  
Safety and Health Act, 30 U.S.C. § 801, et seq. (the "Act").

An expedited hearing on the merits was held in Denver,  
Colorado, on June 11, 1991.

The parties waived receipt of the complete transcript but  
filed post-trial briefs and further requested an expedited  
decision.

ISSUE

Whether striking employees who selected Dean Carey to repre-  
sent them as a walk-around representative are considered to be  
"miners" as defined in § 103(f) <sup>1</sup> of the Act.

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<sup>1</sup> Section 103(f) of the Act provides as follows:

"(f) Subject to regulations issued by the  
Secretary, a representative of the operator

Enforcement activities: on June 3, 1991, MSHA Inspector Ervin St. Louis issued Citation No. 3410886 for a violation of § 103(f) of the Act. The text of the citation is set forth in paragraph 5 of the stipulation, infra.

On the same day, approximately 40 minutes later, the inspector issued Order No. 3410887. The text of the order is set forth in paragraph 6 of the stipulation, infra.

On June 4, 1991, the inspector issued Order No. 3410889. The text of the order is set forth in paragraph 11 of the stipulation, infra.

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fn. 1 continued

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

The inspector later modified the order to state that Order No. 3410887 had not been modified, vacated, or terminated (with the exception of a time correction).

#### STIPULATION

At the hearing the parties stipulated as follows:

1. Empire operates Eagle Number 5 Mine, I.D No. 05-01370, located in Craig, Colorado. It is an underground bituminous coal mine 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 under Section 105(a) of the Act.

3. The citations, orders, and modifications thereto were properly served by a duly authorized representative of the Secretary upon an agent of Empire at the dates and places therein, and may be admitted into evidence for the purpose of establishing their issuance.

4. Citation No. 3410886 was issued on June 3, 1991, at 6:05 a.m., pursuant to Section 104(a) of the Act, 30 U.S.C. 814(a), and alleged a violation of 103(f) of the Federal Mine Safety and Health Act of 1977.

5. Under the heading and caption, condition, or practice, Citation No. 3410886 alleges as follows:

The representative of the miners requested at the mine office the right to accompany an MSHA authorized representative of the Secretary during an MSHA Triple A inspection. Mine management refused entry to the mine property. The miners are on strike and have pickets on the road to the mine outside of the mine property. Mine management denied the representative of the miners entry on mine property to accompany the authorized representative during the inspection conference. The citation was not designated significant and substantial and the time for abatement was set of 6:45 a.m.

6. The contest of Citation No. 3410886 is docketed at number WEST 91-454-R. After Citation No. 3410886 was issued, Order No. 3410887 was issued pursuant to Section 104(b) of the act for failure to abate Citation No. 3410886. Under the heading and caption, condition, or practice, Order No. 3410887 alleges as follows:

Mine management would not allow the representative of the miners to accompany the authorized representative of the Secretary during the Triple A inspection of the mine. Cyprus Empire Corporation management refused admittance of the United Mine Workers of America, Local 1799, members to be present as miners representatives in the course of the Triple A regular inspection, and any MSHA discussion of actions during this period UMW membership is on strike.

7. The miners on the job have elected Mr. Jim Shubin as their representative.

8. A subsequent modification was issued, modification number 3, to the order amending the body of the order and putting the words at the beginning of the second paragraph. The company's position is that the miners on the job have elected Mr. Jim Shubin as their representative.

9. The contest of Order No. 3410887 is docketed at WEST 91-455-R.

10. Citation No. 3410889 was issued on June 4, 1991, pursuant to Section 104(b) of the Act for a failure to abate Citation No. 3410886.

11. Under the heading and caption, condition, or practice, Citation No. 3410889 alleges as follows:

The operator, Cyprus Empire Corporation, continues to refuse the miners' representative the right to accompany authorized representative of the Secretary during the Triple A inspection being conducted at the Eagle No. 5 Mine, I.D. 05-01370. The operator continues to maintain the mine in operable condition and operates the long wall when needed to protect the tailgate and the long wall itself from adverse conditions.

The inspector subsequently issued a modification and added that Order No. 3410887 had not been modified, vacated, or terminated (with the exception of the time correction).

12. The contest of Citation No. 3410889 was docketed at WEST 91-456-R.

13. On May 12, 1991, the collective bargaining agreement between Empire and its hourly employees expired. The hourly employees are represented by the United Mine Workers of America for the purpose of collective bargaining. There is presently no collective bargaining agreement in effect. The hourly employees commenced the strike on or about May 13, 1991, related to the negotiations over a new collective bargaining agreement. Thereafter, Empire resumed mining operations utilizing its salaried employees.

14. The mining operations include operation of the longwall mining equipment in order to move the long wall face forward to avoid adverse mining conditions. Other mining activities include mine maintenance-type work, including pumping and building of ventilation control.

15. The employees working at the Eagle No. 5 Mine on June 3, 1991, selected James A. Shubin as their representative for the purpose of accompanying MSHA inspector Irvin St. Louis during his AAA inspection of the Eagle No. 5 mine on those days and all subsequent days. Mr. Shubin accompanied Mr. St. Louis on his inspections.

16. Prior to May 13, 1991, the following hourly employees, who are members of the United Mine Workers and who worked at the mine, were designated pursuant to 30 C.F.R. § 40.30 as representative of the employees: Dean Carey, Eugene Vezie, and Chencho Salazar. Such persons are currently on strike and, moreover, the persons who designated such persons as their representatives are currently on strike.

17. On Monday, June 3, 1991, Inspector St. Louis arrived at the Eagle No. 5 Mine for the purposes of conducting a regular quarterly inspection. At that time he indicated that Dean Carey wished to accompany him as a walk-around.

18. Empire refused to permit Dean Carey or any other UMW official or representative to enter the mine and accompany Inspector St. Louis during the inspection.

19. At the time of his inspection on June 3, 1991, Inspector St. Louis was informed of Empire's position and that conversations with MSHA's District 9 office had been conducted previously.

20. On June 3, 1991, Solicitor Margaret Miller informed Counsel for Empire, R. Henry Moore, that if Empire contested the citation, and requested an expedited hearing, MSHA would not implement Section 110(b) of the Act nor propose a civil penalty of up to \$5,000 for each day that a failure to correct occurred.

## THE EVIDENCE

The evidence is uncontroverted: IRVIN ST. LOUIS of Craig, Colorado, has been an MSHA inspector for 11 years. He is experienced in mine safety.

On June 3, 1991, Inspector St. Louis intended to conduct an AAA inspection at Eagle No. 5 Mine. This was the first inspection since the miners, represented by UMWA, had gone on strike at the mine.

On June 3, 1991, the inspector met Dean Carey of the UMWA and Bill Ivy, Mine Manager. Mr. Carey requested the right to travel with the inspector, but Mr. Ivy refused. Mr. Ivy stated that the miners had elected Jim Shubin as the miners' safety representative.<sup>2</sup> On previous occasions, Carey, Shubin, and Ivy had traveled with the MSHA inspector.

After some discussion, the inspector wrote a 104(a) citation. When the Company did not agree to let Mr. Carey travel with him, a Section 104(b) was issued. (See Exs. S-1, S-2, S-3).

Mr. Ivy gave no indication the Company would comply and the original citation remains in effect at the time of the hearing.

On May 30, 1991, a UMWA picket line had been set up at the mine.

Inspector St. Louis conducted his normal inspection on June 3, 4, and 5, 1991.

DEAN CAREY, a person experienced in mining, is currently on strike at the Eagle No. 5 Mine.

Mr. Carey is a bargaining representative of the UMWA and the chairman of the Mine Safety Committee. He has accompanied federal inspectors and has been the walk-around representative at the mine of nine years.

The entire bargaining unit of the UMWA went on strike at the mine on May 13. No UMWA member has crossed the picket line.

Mr. Carey learned from the picket line that Mr. St. Louis was to conduct an inspection. He requested permission from Mr. Ivy to accompany the inspector. Mr. Ivy refused the request.

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<sup>2</sup> Mr. Shubin is a safety inspector for Empire.

The mine has been a strike four weeks and one day. The last bargaining session was May 10, 1991. Mr. Carey expects further bargaining sessions; further, he expects to resume work.

A strike six years ago lasted 79 days. The striking miners receive compensation from the union strike fund.

Mr. Carey wants to do a walk-around inspection to be sure the mine is safe when the miners return. As a miners' representative, Mr. Carey can request a Section 103(g) inspection.

JOHN CAYLOR, a person experienced in mining and safety, works for Empire's parent company, Cyprus Coal.

After the citation and order were issued, Mr. Caylor contacted William Holgate, MSHA's District 9 manager. He was attempting to avoid additional failure to abate orders. He further advised Mr. Holgate that Empire intended to challenge the citations.

The company has had good relations with MSHA and, if possible, he hoped that litigation could be avoided.

The witness believed there was a principle involved. The safety of the miners was not at risk since they were not underground. Further, he felt a failure to abate order would indicate Empire was a recalcitrant operator. The company wanted to avoid such an impression.

Mr. Caylor acknowledged that Mr. Carey had been designated as a walk-around representative by the UMWA. Mr. Shubin had been so designated before Inspector St. Louis and Mr. Carey arrived at the mine office.

DALE IVY, the mine general manager, has been engaged in mining since 1969.

The collective bargaining agreement expired on May 12, 1991. Since then, coal has been mined on a limited basis, one shift a day. The salaried workers underground are not members of the UMWA. The hourly employees have not been replaced.

The underground workers have rock-dusted, conducted weekly examinations, and run the longwall once a week to prevent adverse roof conditions from developing.

On June 3, Mr. Ivy talked to Inspector St. Louis. He further read Section 103(f) of the Act and stated that Jim Shubin of

the safety department had accompanied the MSHA inspector. He further decided Mr. Carey should not accompany the inspector because the UMWA was on strike. On June 3, and 4, Mr. Shubin in his walk-around was representing both the miners and the operator.

When the citation was issued, Mr. Ivy told the inspector the company was complying with the Act.

JERRY TAYLOR, an engineering coordinator for MSHA, processes all of the requests submitted to MSHA that require approval.

In Mr. Taylor's opinion, Inspector St. Louis gave the operator a reasonable time to abate the citation. Abatement could be accomplished by the company's agreeing to Mr. Carey's request to accompany the inspector.

For various reasons, MSHA does not allow a hearing on the merits before issuing a failure to abate order.

The paperwork supporting Mr. Shubin as a walk-around representative was received by MSHA on June 10, 1991.

It is MSHA's view that Mr. Shubin does not represent the miners. He represents the operator since he was chosen by salaried management employees and not miners.

MSHA's policy manual and publications do not address situations where the miners are on strike. At the time of the hearing, the striking employees are not doing anything at the mine.

#### DISCUSSION

The issue, as set forth above, can be simply restated: Are striking employees entitled to walk-around rights under Section 103(f) of the Act?

There is no exact precedent controlling in this factual situation but several cases have considered closely related issues.

As a threshold matter: Section 3(g) of the Act defines a "miner" as "... any individual working in a coal or other mine." It is further uncontroverted that no union miners had worked underground since the strike had begun.

In Westmoreland Coal Company, 11 FMSHRC 960 (1989), the Commission reviewed the issue of whether individuals who obtained

training at their own expense during a layoff were entitled to reimbursement. The Commission held that individuals in a layoff status are not miners. 11 FMSHRC at 964.

In Emery Mining Corporation v. Secretary of Labor, 783 F.2d 155 (C.A. 10 1986), the operator refused to compensate its miner employees for training they received before they were hired. In ruling that the company's policy did not violate the Act, the Court noted that none of the Complainants therein were miners or employed by the operator at the time they took the training. If they were not "miners," they were not entitled to compensation, 783 F.2d at 159.

In Brock on behalf of Williams v. Peabody Coal Company, 822 F.2d 1134 (D.C. Cir. 1987), the operator, in rehiring laid-off employees, passed over some individuals at the top of the list because they had not received safety training. In ruling against the Secretary's position, the Court determined that the miners were on layoff and not working in a coal mine. In sum, individuals in layoff status are not miners. See also the recent final decision of Commission Judge Avram Weisberger involving miners on strike in Aloe Coal Company, 12 FMSHRC 2113 (October 1990).

In support of their positions, the Secretary and the Intervenor rely on an oral order of Commission Judge James A. Broderick in Clinchfield Coal Company, <sup>3</sup> Va 89-67-R.

In Clinchfield the operator was contesting an MSHA closure order. Over the operator's objections, Judge Broderick permitted the UMWA to intervene as a representative of miners under Section 3(g) of the Act.

By way of analogy, Judge Broderick observed that, under the Labor Management Act, striking employees are nevertheless treated as employees and are entitled to the protection afforded by the Labor Act.

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<sup>3</sup> Judge Broderick's decision, published at 11 FMSHRC 1568 (1989), does not discuss his prior oral order. Further, the Commission in its review did not discuss the issue, 11 FMSHRC 2120 (1989). The reference to the rights of the striking miners arises from a transcript containing Judge Broderick's order. The transcript was attached to Petitioner's brief.

The Judge further observed in Clinchfield that the UMWA and the company were engaged in bargaining efforts. In addition, a settlement of the strike could result in miners' returning to work.

Judge Broderick distinguished those cases involving individual rights, claims for compensation, and training provisions. He indicated such cases are essentially different from those situations where miners are entitled to participate in challenges to closure orders.

Judge Broderick's statement as to "training provisions" appears to be a reference to Emery Mining Corporation, supra. However, the training of miners can be just as critical as walk-around rights under Section 103(f) of the Act.

On the basis of Clinchfield, the Secretary presents a strong argument to distinguish five established cases. However, the Commission and the Appellate Court have not gone beyond the plain meaning of the statutory words in Section 3(g).

In short, the miners involved in this case were "not working in a coal or other mine." Hence, they do not qualify as miners under Section 103(f).

For the foregoing reasons, I enter the following:

ORDER

1. The contest of Citation No. 3410886 is SUSTAINED and the citation is VACATED.

2. The contest of Order No. 3410887 is SUSTAINED and the order is VACATED.

3. The contest of Order No. 3410889 is SUSTAINED and the order is VACATED.

  
John J. Morris  
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS



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

May 29, 1991

DONALD NORTHCUTT, GENE MYERS, : DISCRIMINATION PROCEEDING  
AND TED EBERLE, :  
Complainants : Docket No. CENT 89-162-DM  
v. : Ada Quarry & Plant  
IDEAL BASIC INDUSTRIES, INC., :  
Respondent :

ORDER

The Commission, after granting interlocutory review, has remanded the above case and directed the Judge to consider the present Section 105(c)(3) complaint in light of the principles set forth in the Commission decision of Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 4, 1982), 2 MSHC 1729. The order of remand appears at 13 FMSHRC 327 (March 1991).

The parties filed briefs on the issues raised by the order of remand.

It is necessary to analyze the question of whether the dismissal of the Northcutt, Myers, and Eberle counterclaim in the U.S. District Court (Case No. 88-186-C) precludes litigation of their Mine Act claim or issues arising under that claim.

Since this case arises under a federal statute, the federal law of preclusion, rather than state law, must provide the criteria for analysis. Maier v. City of New Orleans, 516 F.2d 1051, 1056 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976).

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

## ISSUES

As specified in the Commission's order of remand, it appears that the Complainants' surviving allegations are that they were illegally discharged because they had engaged in two protected activities: 1) filing workers' compensation claims based on disabilities allegedly caused by hazardous conditions at the Ada Quarry and Plant; and 2) making safety complaints to supervisors and agents of Ideal, 13 FMSHRC at 329.

The order of remand directed the Judge to analyze the issue of res judicata and its impact on matters arising under the Mine Act.

### RES JUDICATA

Bradley v. Belva outlines the legal requirements necessary to support the doctrine.

In part, Bradley requires the following:

1. The party asserting the doctrine must prove all of the elements necessary to establish it.

2. There must be an identity of claims or of issues. The Commission further defines a claim for res judicata purposes as one that looks not only to the operative facts, but also to the substantive legal protection that may be afforded a miner under different statutes.

3. In cases of overlapping federal and state regulation, federal supremacy may, in effect, bar proceedings under a state law that conflicts with a federal statute.

Exceptions to the applicability of the preclusion doctrine include situations where there are reasons to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.

Section 105(c)(1) of the Federal Mine Act statute provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for

employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative or miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miner or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative or miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

The counterclaim filed by Complainants in the U.S. District Court, and later dismissed, alleged as follows:

1. The Defendants incorporate by reference the jurisdictional allegations contained in the Complaint of Ideal Basic Industries, Inc., paragraphs 1, 2, 3, and 4.
2. The individual Defendants in this case have filed workers' compensation claims against the Plaintiff under the Workers' Compensation Act for the State of Oklahoma before the Workers' Compensation before Workers' Compensation Court.
3. The Plaintiff, Ideal Cement Company, Inc., has conducted a pattern of harassment and intimidation against the individual Defendants because they have maintained workers' compensation claims.
4. The individual Defendants were employed by the Plaintiff corporation at cement plant in Ada, Oklahoma; a) that the Defendants, in good faith, have filed workers' compensation claims against the Plaintiff; b) that the Defendants retained a lawyer to represent them in the workers' compensation claims; c) that the Defendants instituted in good faith a proceeding under Title 85 of the Oklahoma Statutes; d) that the Defendants have testified before the Workers' Compensation Court of the State of Oklahoma. Because of this, Defendants' employment with the Plaintiff has been terminated. The Plaintiff terminated the employment of the Defendants in violation of 85 O.S. Section 5, 6, 7.

5. The Defendants, who have been wrongfully discharged in violation of the Workers' Compensation Laws of the State of Oklahoma, are entitled to a sum of money equal to the Defendants' loss of earnings, both past and future.

6. Discharging the Plaintiffs [sic] in violation of the Workers' Compensation Laws of the State of Oklahoma, the Plaintiff subverted the purpose of the Workers' Compensation Laws and has been guilty of oppression and malice for which the Defendants are entitled to punitive damages in the amount of \$400,000.00.

7. As a result of the discharge of the Defendants from the employment of the Plaintiff in violation of the Workers' Compensation Law of the State of Oklahoma, the Defendants have been caused pain, embarrassment, humiliation, and mental anguish, and have been damaged in the sum of \$4,000,000.00.

The counterclaim in the U.S. District Court was dismissed on June 2, 1989.

The Court's order of dismissal provided as follows:

2) Defendants Eberle, Myers, and Northcutt (the only Defendants with any presently pending counterclaims against the Plaintiff Ideal) voluntarily dismiss with prejudice their counterclaims heretofore raised and outstanding in this lawsuit against Plaintiff Ideal under 85 O.S. Sections 5, 6, and 7 for workers' compensation retaliation wrongful discharge. By this voluntary dismissal pursuant to Rule 41(a) F.R.C.P. contained herein, Defendants Eberly, Myers, and Northcutt make no admissions whatsoever regarding liability under, or regarding the validity of any claims heretofore raised or outstanding in this action or hereby dismissed.

The Oklahoma statute 85 O.S. § 5, 6, and 7, under which the counterclaim was brought, provided as follows:

No person, firm, partnership or corporation may discharge any employee because the employee has in good faith filed a claim, or has retained a lawyer to represent him in said claim, instituted or caused to be instituted, in good faith, any proceeding under the provisions of Title 85 of the Oklahoma Statutes, or has testified or is

about to testify in any such proceeding. Provided no employer shall be required to rehire or retain any employee who is determined physically unable to perform his assigned duties.

Section 6 of Chapter 85 relating to damages provides as follows:

§ 6. Penalties--Damages

Except as provided in Section 29 of this act, a person, firm, partnership or corporation who violates any provision of Section 5 of this title shall be liable for reasonable damages, actual and punitive if applicable, suffered by an employee as a result of the violation. An employee discharged in violation of the Workers' Compensation Act shall be entitled to be reinstated to his former position. Exemplary or punitive damage awards made pursuant to this section shall not exceed One Hundred Thousand Dollars (\$100,00.00). The burden of proof shall be upon the employee.

Section 6.1 of Chapter 85 of the Oklahoma Statutes addresses the liability of the State of Oklahoma and Section 7 thereof vests jurisdiction on the district courts of the State of Oklahoma.

As the Commission noted in its order of remand, it is necessary to examine both the facts and the substantive legal protection afforded a miner under both statutes.

DISCUSSION

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 in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom., Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-818 (April 1981).

In examining the respective statutes, I find there are several areas of difference in the legal protection afforded miners.

A comparison of the Federal Mine Act and the Oklahoma statutes indicates that under the Federal Act miners who make safety complaints to a company's supervisors and agents are generally protected in that activity. In its order or remand the Commission noted that the allegations by Messrs. Northcutt, Myers, and Eberle of such complaints survived in the instant case. 13 FMSHRC at 329.

On the other hand, the relevant Oklahoma statutes, cited above, deal with the filing of Workman's Compensation proceedings. The Oklahoma statutes and the cases annotated thereunder do not indicate that safety complaints are an activity protected under Oklahoma law. In enacting the Federal Mine Act, Congress considered the protection of miners making safety complaints to be an important facet of the Act.

Ideal vigorously argues that the filing of the Workman's Compensation cases were not independent from the safety complaints. Rather, "their safety complaint was their Worker's Compensation claim." I reject Ideal's argument. There is no evidentiary record in this case and as presiding judge, I must necessarily deal with the allegations of Complainants.

A further difference lies in the respective burdens of proof. The requirements for a miner to establish a prima facie case are outlined above. By way of a defense:

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-1938 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983); Donovan v. Stafford Const. Co., 732 F.2d 954, 958-159 (D.C. Cir. 1984) (specifically approving the Commission's Pasula Robinette test); and Goff v. Youghio-gheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986).

On the other hand, the Oklahoma burden of proof was described in Buckner v. General Motors Corp., 760 P.2d 803 (Okla.

1988). The Court stated, in reference to the rebuttal of a prima facie case:

the employer need not persuade the Court that it was actually motivated by the proffered reasons. The employer's burden is a burden of production of relevant and credible evidence, not a burden of persuasion. ... if the employer carries this burden of production, the presumption raised by the prima facie case is rebutted and the factual inquiry proceeds to a new level of specificity. 760 P.2d at 807.

A further difference lies in the remedy of temporary reinstatement of a miner. See Commission Rule 44, 29 C.F.R. § 2700.44. The Oklahoma law contains no such remedy.

A further difference lies in the remedy of attorney's fees. The Federal Mine Act authorizes such award but the Oklahoma statutes lack such a provision.

For the foregoing reasons, I conclude that the remedies under the Federal Mine Act are substantially different from those under the Oklahoma Statute.

Ideal contends that the controlling case in this situation is the Supreme Court decision of Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) and on the basis of Kremer its motion to dismiss should be granted.

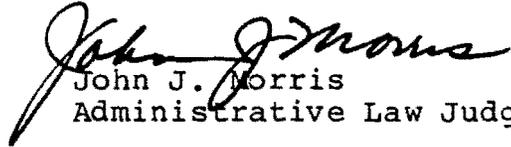
I do not find Kremer to be controlling. Specifically, the Supreme Court decided that a federal court in a Title VII case should give preclusive effect to a decision in a state court upholding a state administrative agency's rejection of an employment discrimination claim.

The EEOC complainant did not prevail in the state proceedings and he thereafter brought a Title VII action claiming discrimination on the basis of national origin and religion.

In Belva, the Commission distinguished Kremer, 4 FMSHRC at 987 fn. 5. It is not necessary for the undersigned to further restate the Commission ruling.

For the reasons stated herein, the motion of Respondent to dismiss on the basis of res judicata is DENIED.

The hearing will commence as scheduled on June 25, 1991, in Tulsa, Oklahoma.

  
John J. Morris  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 05 1991

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 91-63-M
Petitioner	:	A.C. No. 12-00004-05530-A
v.	:	
	:	Atkins Plant
DON FRAZE, Employed by	:	
LITER'S QUARRY OF INDIANA,	:	
INCORPORATED,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 91-73-M
Petitioner	:	A.C. No. 12-00004-05529-A
v.	:	
	:	Atkins Plant
RANDEE LANHAM, Employed	:	
LITER'S QUARRY OF INDIANA	:	
INCORPORATED,	:	

ORDER DENYING MOTIONS FOR SETTLEMENT

On April 19, 1991, these cases were scheduled for hearings to commence on June 12, 1991. On June 4, 1991, the Secretary filed a pleading captioned "Motion to Approve Settlement and to Dismiss" regarding both cases. The Secretary seeks to waive the proposed civil penalty of \$600 for Mr. Lanham's "knowing" violation of the cited standard based upon undisclosed "information received that he is no longer in the mining business and has serious financial problems." Without any factual support for the bald allegations however, they cannot provide a basis for any reduction in penalty. The Secretary is without authority, moreover, to "waive" a civil penalty for violations of a mandatory health or safety standard. See section 110 Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

The Secretary also seeks a 50 percent reduction for the \$500 penalty proposed against Mr. Frazee. The unchallenged assessment notice states in part as follows:

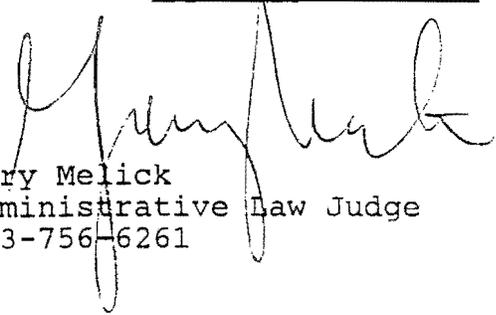
On March 26, 1990, Section 107(a) Order 3441990 was issued to Liter's Quarry of Indiana, Incorporated, at the Atkins Plant. The mine operator was cited for a violation of 30 C.F.R. § 56.11001 because safe means of access was not provided for travel around the primary crusher or to its booth. The flooring had been removed and persons were required to work or travel near the opening around the crusher.

The gravity of the violation was serious, and the violation could have contributed to a fall-of-person accident.

Evidence developed during an MSHA investigation of the circumstances surrounding the issuance of the 107(a) Order indicates that you had been aware of the opening created by the removal of the flooring around the crusher but did nothing to prevent persons from working near the area while the crusher was in operation.

In attempting to justify the proposed reduction in penalty the Secretary does not deny that Mr. Frazee knew of the violative condition and that he did nothing to protect employees required to work in the area from falling into the operating crusher but states only that Mr. Frazee "wanted to observe how . . . new bearings were working before putting back the flooring." I cannot accept this rationale for any reduction in penalty. If anything it is an aggravating circumstance.

Accordingly, the Motion for Settlement is denied and the hearings previously set will proceed as scheduled. Secretary v. Wilmot Mining Co., 9 FMSHRC 684 (1987); Knox County Stone Company, 3 FMSHRC 2478 (1981).



Gary Melick  
Administrative Law Judge  
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