

JUNE 1992

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JUNE 1992

REVIEW WAS GRANTED IN THE FOLLOWING CASE DURING THE MONTH OF JUNE:

Secretary of Labor, MSHA v. Steele Branch Mining Company, Docket No. WEVA 91-2077, WEVA 91-2123. (Judge Weisberger, May 19, 1992)

Secretary of Labor, MSHA v. Gatliff Coal Company, Docket No. KENT 91-1084. (Chief Judge Merlin, Default Decision, May 20, 1992)

REVIEW WAS DENIED IN THE FOLLOWING CASE DURING THE MONTH OF JUNE:

Thomas Mucho v. Beth Energy Mines, Inc., Docket Nos. PENN 91-1382-D, PENN 81-1558-D. (Judge Koutras, May 5, 1992)



## COMMISSION DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 3, 1992

|                        |   |                         |
|------------------------|---|-------------------------|
| SECRETARY OF LABOR,    | : | Docket Nos. SE 89-24-RM |
| MINE SAFETY AND HEALTH | : | SE 89-25-RM             |
| ADMINISTRATION (MSHA)  | : | SE 89-26-RM             |
|                        | : | SE 89-37-RM             |
| v.                     | : | SE 89-60-M              |
|                        | : | SE 89-105-M             |
| ASARCO, INC.           | : | SE 89-108-M             |

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

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 810 et seq. (1988)(the "Mine Act" or "Act"). It involves the validity of four citations issued at Asarco, Inc.'s ("Asarco") Immel Mine, two alleging violations of 30 C.F.R. § 57.3401 for failing to examine and test for loose ground and two alleging violations of 30 C.F.R. § 57.3200 for failing to correct hazardous ground conditions.<sup>1</sup> Two citations were issued as a result of an investigation of a

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<sup>1</sup> The regulations are as follows:

§ 57.3401 Examination of ground conditions.

Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

§ 57.3200 Correction of Hazardous conditions.

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted

fatal accident and the other two citations were issued during the accident investigation, but do not allege that the violations contributed to the accident.

Administrative Law Judge William Fauver affirmed the four citations and concluded that the violations were the result of Asarco's highly negligent conduct. Asarco, Inc., 12 FMSHRC 2073 (October 1990)(ALJ).<sup>2</sup> The Commission granted Asarco's petition for discretionary review and heard oral argument on February 20, 1992.

For the reasons set forth below, we affirm the judge's conclusion that Asarco violated section 57.3401 with respect to one citation and his related finding that Asarco was highly negligent. We reverse his findings of violation with respect to the other three citations.

## I.

### Factual and Procedural Background

Asarco operates the Immel Mine, an underground zinc mine located in Knox County, Tennessee. The zinc is removed by the selective open stope method.<sup>3</sup> This method involves drilling blast holes into the ore body and blasting the drilled area, and then removing the ore.

George Norton, a jumbo drill operator and the accident victim, was assigned to drill blast holes in the heading of the 2C3 stope the morning of October 24, 1988. Carlyle Bales, his foreman, transported Norton, Richard Hubbard, and two other miners to their respective work areas. At about 7:25 a.m., Bales arrived with Norton and the others at the heading of the 2C3 stope, which was about 47 feet wide and 18 feet high. Bales testified that he conducted a visual examination of the area and found no cracks, discoloration, loose ground, or fallen material on the floor. Tr. 1203-04, 1214-15, 1225-26. During the course of his examination, Bales walked to the wall of the heading. Hubbard confirmed that Bales examined the work area that morning and that the ground looked good. Tr. 237, 312. Bales then travelled back down the 2C3 stope and dropped Norton off to pick up the jumbo drill, so that Norton could take it back to the heading of the 2C3 stope. Bales took the other three miners to their work areas.

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with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

<sup>2</sup> The judge also dismissed two citations alleging violations of 30 C.F.R. § 57.3202 requiring the use of a scaling bar where manual scaling is performed. The Secretary did not seek review of these dismissals.

<sup>3</sup> "Stope" is defined as "[a]n excavation from which ore has been excavated in a series of steps.... The term is also applied to breaking ground by drilling and blasting or other methods." Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms 1081-82 (1968) ("DMMRT").

A jumbo drill operator drills holes in the face, rib, or back, to be filled with explosives and blasted. Norton was a veteran miner and drill operator with over 25 years of experience. He generally worked alone.

At about 10:50 a.m., Bales returned to the heading of the 2C3 stope and visited Norton for 20 to 25 minutes while Norton ate lunch. Bales testified that he saw no signs of loose ground.<sup>4</sup> Tr. 1205-07. About 12:10 p.m., Richard Abdella, a haul man, serviced Norton's jumbo drill. Abdella testified that he observed no loose ground and did not hear any ground "working." Tr. 988-99. At about 12:25 p.m., Bales again visited Norton to bring water gaskets needed for drilling. Bales testified that he again looked at the ground in the area and found nothing wrong. Tr. 1208-10.

John Ellis, Jr., the general mine foreman, found Norton at about 1:25 p.m., crushed under a slab that had fallen from the mine roof about seven feet to the right and rear of the jumbo drill and outside the drill's protective canopy. Norton died of the injuries sustained. The drill had been shut down and the drill steel was found in holes that were the last or next to last row scheduled to be drilled in the face of the heading.

The ground failure extended from the right rib to the area above the jumbo drill, a distance of about 22 feet wide and 38 feet high. The fallen rock increased in thickness from less than an inch at the right rib to about two feet near the drill. The rock had been exposed to two blasting cycles, the last on the day shift of October 20, 1988. Norton's work area had not been roof bolted.

Mine Safety and Health Administration ("MSHA") Inspector Charles McDaniel arrived at the mine about 2:15 p.m. on the day of the accident. He went to the accident site to secure the area and issued a section 103(k) order (30 U.S.C. § 813(k)) to preserve it until MSHA's investigative team arrived.

Inspector McDaniel saw chewing tobacco on fallen ground on the left side of the jumbo drill, which indicated to him that Norton had scaled the area.<sup>5</sup> He also saw evidence that Norton had scaled the roof to the right of the jumbo drill near the face. McDaniel testified that Norton had scaled and probably thought the area was safe. Tr. 1363, 1366. However, McDaniel did observe loose ground in the area. He also saw several drill marks, including some near the fall site. McDaniel saw evidence that the ground fall had included a

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<sup>4</sup> The term "loose ground" is defined as "[b]roken, fragmented, or loosely cemented bedrock material that tends to slough.... As used by miners, rock that must be barred down to make an underground workplace safe...." DMMRT at 658. In Amax Chemical Company, 8 FMSHRC 1146, 1148 (August 1986), the Commission interpreted the term "loose ground" to refer "generally to material in the roof (back), face, or ribs that is not rigidly fastened or securely attached and thus presents some danger of falling."

<sup>5</sup> The term "scaling" is defined as the "[r]emoval of loose rocks from the roof or walls." DMMRT at 965.

belly<sup>6</sup> from the roof or back. He testified that drill marks near the fall site indicated that Norton had tried to get the belly down but was unsuccessful. Tr. 1354-55, 1363-64. Inspector McDaniel concluded that the ground fall that killed Norton was unpredictable. Tr. 1363, 1366, 1373.

On the day after the accident, MSHA Supervisory Mine Inspector Vernon Denton and MSHA Mine Inspector William Erickson, the lead investigator, visited the mine to investigate the fatality. Erickson issued Citation No. 3253415 that same day, charging Asarco with a violation of section 57.3401 for its failure to examine and test for loose ground in the 2C3 stope prior to the accident. Denton modified the citation on December 8, 1988, to clarify the narrative section of the violation. At that time, Denton also issued Citation No. 3253702, charging Asarco with a violation of section 57.3200, for its failure to properly address the hazardous ground conditions with respect to the loose ground that fell and killed Norton. Erickson also wrote Citation No. 3253416 charging Asarco with a violation of section 57.3200 because loose ground had not been removed from the ribs and back in places along the driller's travelway between the 2C3 stope and the 2C3 heading (back stope). Further, Erickson wrote Citation No. 3253417, charging a violation of section 57.3401, because he observed two miners directly below and in close proximity to loose ground in the 3C4 stope.

The MSHA inspectors determined that each of these four violations were of a significant and substantial nature and that Asarco's negligence was high.

In his decision, the judge concluded that Asarco violated section 57.3401 (Citation No. 3253415) at the accident site. 12 FMSHRC at 2087. The judge found that Norton and Bales failed to properly examine and test the roof in the heading of the 2C3 stope. 12 FMSHRC at 2083-84. The judge concluded that, had Norton and Bales properly examined the roof, they would have seen the belly and the loose ground observed by the Secretary's witnesses. 12 FMSHRC at 2083. The judge emphasized that, where loose ground is present and left uncorrected, there is a prima facie indication that the roof was not properly examined. 12 FMSHRC at 2084.

The judge further found that the roof should have been tested before the accident because loose ground was observed by the Secretary's witnesses and because the mine's blasting-mucking-drilling cycle created a duty to test the roof. 12 FMSHRC at 2084. The judge rejected Asarco's contention that its method of testing the roof with the jumbo drill was a competent method of testing a mine roof. The judge credited the testimony of the Secretary's witnesses that sounding the roof with a steel bar was the only effective method to test a mine roof. 12 FMSHRC at 2084-87. The judge found Asarco highly negligent in permitting and encouraging its drillers to use the jumbo drill instead of a scaling bar to test the roof. 12 FMSHRC at 2087.

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<sup>6</sup> The term "belly" is defined as "[a] bulge, or mass of ore in a lode." DMMRT at 95.

With respect to the other section 57.3401 citation (No. 3253417), the judge found that the undisputed evidence supported the violation. 12 FMSHRC at 2091. He credited the inspectors' opinions that the loose material that they observed above the two miners in the 3C4 stope was hazardous and obvious. Id. He further found that the fact that the miners were sitting beneath loose, hazardous materials was a prima facie indication that the rib had not been properly examined. Id. He also found that the violation was the result of Asarco's high negligence. Id.

The judge also concluded that Asarco violated section 57.3200 (Citation No. 3253702) at the accident site. 12 FMSHRC at 2091. The judge credited the testimony and opinions of some of the Secretary's witnesses that the slab that killed Norton was hazardous, detectable, and should have been taken down, supported, or dangered off before the accident. Id. He found that Asarco was highly negligent in failing to take the necessary precautions to protect Norton from the danger of a roof fall in his work area. Id.

The judge found that the evidence fully supported the other section 57.3200 citation (No. 3253416), because the roof conditions in the travelway were hazardous and obvious. 12 FMSHRC at 2091-92. The judge credited Erickson's testimony that there were 40 to 50 pieces of loose material in the roof and ribs along the travelway weighing from 10 to 100 pounds. Id. He also found Asarco highly negligent in failing to correct the poor ground conditions. Id.

The judge assessed penalties of \$6,000 each for the citations issued with respect to the accident area and \$200 each for the other two citations.

## II.

### Disposition of Issues

#### A. Section 57.3401 accident citation (No. 3253415)

We conclude that the judge erred as a matter of law in his determination that Asarco failed to examine and test the roof in the heading of the 2C3 stope as required by section 57.3401. That section contains two important requirements. First, areas where work is to be performed must be examined for loose ground before work is started, after blasting, and as conditions otherwise warrant during the workshift. Second, where applicable, ground conditions in work areas must also be tested.

That the area where Norton was working, the 2C3 heading, was subject to examination is not in dispute. The judge interpreted the examination requirement of the regulation to require a careful visual inspection. 12 FMSHRC at 2083, 2084. This interpretation is also not in dispute.

The Secretary does not dispute that Bales and Norton looked at the roof in the heading. See Tr. 943-44, 948-51, 1044-45, 1202-10; S. Exh. 15; A. Exh. 3. Bales testified that he examined the area when he first arrived at the 2C3 heading with Norton about 7:25 a.m., the morning of the accident, and that he found no cracks, discoloration, loose ground, or any material on the floor.

Tr. 1203-04, 1214-15, 1225-26. Richard Hubbard, an Asarco miner, confirmed that Bales examined the work area and, that he shared Bales' belief that the ground was good. Tr. 312. See also Tr. 943-44, 1045, 1304. At about 10:50 a.m., Bales visited Norton and again saw no signs of loose ground. Tr. 1205-07. Bales also looked at the ground in the area less than an hour before the accident and testified that he did not see anything wrong and did not hear any indication that the ground was "working." Tr. 1208-10. MSHA Inspector McDaniel, the first MSHA person to arrive at the accident scene, testified that he believed Norton had examined the area. Tr. 1299.

Moreover, it is undisputed that Norton scaled the roof in the area with the jumbo drill. MSHA Inspector Erickson, who issued the citation, as well as MSHA Inspectors Denton and McDaniel essentially acknowledged that the accident site had been scaled with the drill. Tr. 66, 209, 212, 428, 432, 437, 508-09, 526-27, 1299. That the area had been scaled seems to confirm that the roof had been examined.

The Secretary introduced no evidence to show that the area was not examined before Norton started working there on the day of the accident. The only evidence that the roof was not examined is (a) the fact that part of the roof fell and (b) the testimony of MSHA inspectors that they observed some areas of loose roof in the heading at the time of the accident investigation. The language of the citation makes clear that the inspectors based their determination that the roof had not been examined primarily on the fact that a roof fall had occurred, rather than on evidence that an examination had not been conducted.

The judge concluded that "[w]here loose materials in a roof are present and left uncorrected . . . , where miners work or travel, there is a prima facie indication that the roof was not properly examined within the meaning of § 57.3401." 12 FMSHRC at 2084. That conclusion is incorrect as a matter of law. Neither the presence of loose materials, nor the fact that the roof fell, by themselves, indicate that the area was not properly examined. Roof conditions in a mine are dynamic; a miner can perform a thorough and competent examination as required by the standard and determine that the roof is secure and yet, at a later time, material can become loose and fall. We agree with the judge that examinations must be "careful, informed observations with appropriate accountability." 12 FMSHRC at 2084. We disagree, however, with the judge's conclusion that a prima facie indication of violation occurs if there has been a fall of ground and loose material is subsequently discovered in the area.

The judge relied, in part, on the existence of a "belly" in the roof of the heading to support his conclusion. 12 FMSHRC at 2083. The presence of a "belly," however, does not necessarily indicate that the area had not been examined; Norton and Bales may have known that a belly was present, but determined that it was stable. Indeed, testimony from Asarco miners William Ellis and Richard Frazier, indicates that they attempted to remove a belly in the subject heading a week before the accident. After scaling the area, they concluded the area was safe. Infra at 11. Further, the fact that no action is taken to remove or support a belly does not, in itself, establish that the roof was not properly examined. A miner may observe an area of questionable

roof, test the area and erroneously conclude that it is safe. Such conduct could constitute a violation of section 57.3200, requiring that loose roof be supported or taken down, but it would not by itself constitute a violation of section 57.3401. The judge's conclusion has the effect, in cases where there has been a fall of ground, of improperly shifting to the operator the burden of proving that an examination was conducted. We hold that it is the Secretary's burden to prove that a proper examination was not conducted.

We turn to the testing requirement of the regulation. The judge found that Asarco failed to test the ground conditions in the heading because a jumbo drill was used to test the roof. The judge held that the drill was not an adequate device for testing a mine roof. 12 FMSHRC at 2084. For the reasons that follow, we reject the judge's finding that Asarco's use of the jumbo drill was not a permissible means of testing the roof.<sup>7</sup>

The standard does not specify how testing for loose ground is to be performed, nor has the Secretary described the procedure or set forth guidelines in her Program Policy Manual or other interpretative material. The Secretary has not prohibited mine operators from using jumbo drills to test for loose ground.<sup>8</sup> See Oral Arg. Tr. 23. The preamble to this safety standard emphasizes that it was drafted to be "flexible enough to accommodate the variety of situations which may arise while assuring the safety of persons working in the mines." 51 Fed. Reg. 36192-93 (October 8, 1986). Counsel for the Secretary acknowledged this fact by stating that the standard is "performance-oriented" so that it could be applied to "a lot of different situations." Oral Arg. Tr. 23.

Section 57.3401 is not a detailed standard but rather is of the type made "simple and brief in order to be broadly adaptable to myriad circumstances." See, Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981); Alabama By-Products Corp., 4 FMSHRC 2128, 2130 (December 1982). Nevertheless, such a broad standard must afford reasonable notice of what is required or proscribed. U.S. Steel Corp., 5 FMSHRC 3, 4 (January 1983). The safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); see also, Phelps Dodge v. FMSHRC, 681 F.2d 1189, 1192 (9th Cir. 1982).

Asarco asserts that it has been testing the roof at this mine with jumbo

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<sup>7</sup> Although Asarco contends that the judge expanded the scope of the testing requirement of section 57.3401 beyond that set forth in the standard, on review, Asarco does not dispute that testing was necessary in the heading on the day of the accident. Consequently, we need not decide whether the judge's conclusions as to when testing is required by the standard are correct.

<sup>8</sup> Asarco's use of the jumbo drill in testing involves "rattling the back." Under this procedure, the jumbo drill is vibrated or pounded against the roof to detect loose material and to scale it. A. Br. 9 n.2.

drills for a number of years. Asarco contends that its testing method is safe and effective and that it reasonably believed that this method complied with the requirements of the standard. When faced with a challenge to a safety standard on the grounds that it fails to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission recently summarized this test as "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." Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990). See also, Lanham Coal Co., 13 FMSHRC 1341 (September 1991). "In order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" Id., quoting Alabama By-Products Corp., 4 FMSHRC at 2129 (citations omitted).

The Secretary seems to take the position in this case that a scaling bar is the proven and effective means of testing for loose ground and, if a mine operator wishes to use another method, it does so at its own risk. The language of the regulation, however, is not so limiting. If the Secretary intended to require the exclusive use of a scaling bar to test for loose ground in all but a few limited circumstances, she could have set forth that requirement in her regulation or in interpretative materials. Absent such an express requirement, we are not convinced that a reasonably prudent person familiar with the mining industry would have recognized that testing the roof with the jumbo drill fails to comport with the testing requirements of section 57.3401. The judge, in finding that testing with a jumbo drill was inappropriate because the noise from the drill would mask the test sounds coming from the roof, relied on testimony from Supervisory MSHA Inspector Denton, MSHA ground control expert Billy Owens, and MSHA noise expert Richard Goff. Neither Denton, Owens, or Goff, however, had ever used a jumbo drill to test ground or for any other purposes. Tr. 106, 149, 182-83, 844-45, 1428, 1522-23. Denton acknowledged that he was not familiar with the jumbo drill and did not know how to test with it. Tr. 182, 183. Nor is there any indication that Denton, Owens, or Goff conducted noise tests of a jumbo drill testing for loose ground. See Tr. 182, 183, 1449, 1501, 1520, 1523. While Owens testified that investigations have found, in certain instances, that use of the jumbo drill for testing ground has not been accurate, he also conceded that testing with a scaling bar is not always accurate either. Tr. 774-75, 806-07. No objective evidence, such as test results, was presented by the Secretary as to the accuracy of either method.

Asarco presented evidence to establish the effectiveness and safety of using a jumbo drill to test the roof, which the judge did not directly address in his decision. Jack Parker, an independent expert in ground control experienced in the use of the jumbo drill, testified that using a jumbo drill to test is common, safe, and accepted throughout the mining industry. Tr. 1549, 1550-51, 1555-56, 1558-59. Patrick Garven, a representative of the largest manufacturer of underground drilling equipment, who was also qualified as an expert witness, testified that testing with a jumbo drill is a safe, common, and effective practice, and that one can distinguish between good and bad ground conditions when rattling the back based on the sound changes. Tr.

1466, 1472-74. A number of Asarco miners, including Richard Hubbard, William Ellis, Richard Frazier, Richard Abdella and Carlyle Bales, testified as to the effectiveness of using the jumbo drill to test for loose ground. Hubbard, Ellis and Frazier, witnesses proffered by the Secretary, as well as Abdella, testified that the machine would make a much different sound on solid rock than on hollow rock typifying loose ground. Tr. 279-80, 323, 357, 554-56, 977-78. Asarco's mine safety director Hendrix testified that for at least three years the jumbo drill had been used for testing ground at the Immel Mine with MSHA's knowledge. Tr. 31.

Also, MSHA inspectors testified that using the jumbo drill to test was appropriate. MSHA Inspector Vincent D'Innecenzo, who also inspected the mine after the accident, testified that rattling the back was a common industry practice for testing for loose ground, and that it was a permissible practice. Deposition Tr. 27-28. MSHA Inspector McDaniel testified that he has observed the practice of "rattling the back" for purposes of testing and considers it safe, and a common practice. Tr. 1291-93, 1345.

The judge failed to directly address Asarco's evidence that drill operators can detect loose ground by differences in vibration and by visual observations of the rock being rattled, and that testing is not solely reliant on sound. Parker testified that in addition to differences in sound frequencies, one would look for dust dribbling from the roof, and observe whether water used to suppress dust would come out of the rock at a different location than where it was squirted in, suggesting a continuous crack. Tr. 1557. Parker further testified that the drill behaves differently when going from hard to loose ground (Tr. 1557-58), and Frazier testified that, if there was bad ground, there would be dribbling or shaking in the area. Tr. 568-69. Hubbard emphasized the importance of sight when testing with the jumbo drill. Tr. 289-90.

Finally, the judge did not expressly address noise test data collected by independent noise expert James Barnes, supporting the claims by Asarco's miners that they are able to distinguish between solid and loose ground using a jumbo drill. Tr. 1631-33. Barnes testified that he was able to distinguish drummy, loose ground from solid ground by the difference in noise frequencies. Tr. 1632-33, 1640-42, 1644-45.

Expert witnesses testify to offer their scientific opinions on technical matters to the trier of fact. If the opinions of expert witnesses conflict in a proceeding, the judge must determine which opinion to credit, based on such factors as the credentials of the expert and the scientific bases for the expert's opinion. In such cases, the judge should set forth in the decision the reasons for crediting one expert's opinion over that of another. In the present case, a number of well qualified experts presented their opinions on the effectiveness of using a jumbo drill to test the roof, which the judge apparently rejected, but the judge did not set forth in his decision any reasons for rejecting their opinions. In fact, the judge rejected the opinion testimony of Jack Parker, a highly qualified roof control expert, without explanation or even any mention in the decision of his testimony.

Based on the evidence of record, we conclude that the Secretary has

failed to show that a reasonably prudent person familiar with the mining industry would have recognized that a jumbo drill could not be used effectively to test for loose ground under section 57.3401. Prior to the citation in question, Asarco was provided with no notice from the language of the regulation, from the Secretary's interpretive bulletins or other materials, or from earlier citations that the Secretary did not consider a jumbo drill to be a permissible means to test a roof.

Accordingly, we conclude that the judge erred in finding that Asarco violated section 57.3401 for failure to examine and test in the 2C3 heading.

B. Section 57.3401 stope citation (No. 3253417)

The judge held that because the inspectors found "hazardous and obvious" loose ground above the two miners sitting in an area of the 3C4 stope, there was a prima facie indication that the rib had not been examined in compliance with section 57.3401. 12 FMSHRC at 2091. The judge upheld the citation because Asarco failed to produce evidence that would contradict this prima facie indication. Id. We conclude that the judge erred as a matter of law.

Inspector Erickson, when he wrote the citation, determined that the loose ground was about fifteen feet above the two men and consisted of rocks of various sizes spread over an area about ten-feet wide. The appearance of loose ground does not by itself establish a violation of section 57.3401. The judge presumes that the presence of loose ground is sufficient to establish that the ground had not been examined, a presumption we deem erroneous. The roof and rib in the area may have been examined prior to development of the hazardous condition. Moreover, the examiners may have determined, correctly or incorrectly, that the loose ground did not require barring down.

The burden of proving a violation is on the Secretary. The inspectors did not testify that the ground had not been examined, but that two miners were sitting beneath loose material (Tr. 138-39; See S. Exh. 6); when asked whether the loose material had been examined or tested, Inspector Denton replied: "Well, they hadn't taken any action to take it down." Tr. 139. Inspector Erickson's testimony provides no additional detail. Tr. 439. The evidence falls short of that required to establish a violation.<sup>9</sup>

Accordingly, the judge erred in finding that Asarco violated section 57.3401 in the 3C4 heading.

C. The section 57.3200 accident citation (No. 3253702)

Section 57.3200 states, as pertinent, that "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area." The judge found that the slab that killed Norton was hazardous, detectable, and should have been taken down,

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<sup>9</sup> A citation for violation of section 57.3200 for hazardous ground may have been appropriate under the circumstances, but that question is not before the Commission.

supported, or endangered off before the accident. 12 FMSHRC at 2091. Asarco argues that the judge erred because the fatal ground fall was unpredictable.

The purpose of section 57.3200 is to require elimination of hazardous conditions. The fact that there was a ground fall is not by itself sufficient to sustain a violation. Rather, the Secretary is required to prove that there was a reasonably detectable hazard before the ground fall. We conclude that the Secretary failed to meet this burden and that the judge's conclusion that the hazardous ground was detectable before the accident is not supported by substantial evidence.

As we have consistently recognized, the term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, e.g., Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1137 (May 1982) quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions (e.g., Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629-30 (November 1986)), neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See e.g., Krispy Kreeme Doughnut Corp. v. NLRB, 732 F.2d 1288, 1293 (6th Cir. 1984); Midwest Stock Exchange, Inc. v. NLRB, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that in reviewing the whole record, an appellate tribunal must also consider anything that "fairly detracts" from the weight of the evidence that may be considered as supporting a challenged finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

The testimony in the record, addressing the conditions in the 2C3 heading on October 24, 1989, before the accident, indicates that there did not appear to be loose ground and that the condition of the roof was good. Carlyle Bales, Norton's foreman, was in the 2C3 heading at 7:25 a.m., 10:50 a.m., and 12:25 p.m. and saw no loose ground. Tr. 1203-04, 1205-07, 1208-10, 1214-15, 1225-27. Richard Hubbard, an Asarco miner was in the 2C3 heading at 7:25 a.m. and also testified that the ground in the area looked good. Tr. 312. Finally, Richard Abdella, another miner, was in the 2C3 heading at about 12:10 p.m. and saw no signs of loose ground. Tr. 987-88, 1000.

The testimony also indicates that in the days before the accident, the ground in the 2C3 heading was safe. About a week earlier, William Ellis and Richard Frazier, Asarco miners, noticed there was a belly in the heading and tried without success to take it down. After it had been scaled, Ellis and Frazier thought the area was safe. Tr. 318-19, 326-27, 330, 338-39, 364, 560-61, 590-91, 616. Ellis specifically testified that the belly "wasn't loose." Tr. 330. In addition, while the heading had been blasted on October 20, 1988, Hobart Tucker, who mucked the heading on the evening of October 21 and morning of October 22, testified that the ground looked good and the area was suitable for working. Tr. 378, 379-81, 389.

The evidence establishes that ground had been scaled. See, e.g., A. Exhs. 16, 26; Tr. 168, 432, 505-10, 513. Inspector Denton, who issued the citation, acknowledged that the area had probably undergone at least some scaling. Tr. 66. Denton also conceded that early drafts of MSHA's accident investigation report stated that roof had been scaled with the jumbo drill,

but that all mention of scaling or taking down loose roof was subsequently removed from the report. Tr. 209-12. Inspector Erickson also acknowledged that some scaling had evidently been done at the accident site. Tr. 428, 432, 437, 508-09, 526-27. Inspector McDaniel testified that he believed that Norton had scaled the area and that Norton probably considered the area to be safe. Tr. 1363, 1366. McDaniel specifically stated that drill marks he saw near the fall site indicated that Norton had tried to remove the belly but was unsuccessful and that Norton must have felt the area was safe. Tr. 1354-55, 1363-64, 1366. Indeed, McDaniel, who was the first MSHA official at the scene of the accident, testified that the ground fall was unpredictable. Tr. 1363, 1366, 1373.

The Secretary premises her case on the assumption that the rock that fell had been loose and could have been detected by proper testing. The judge held that Asarco's use of a jumbo drill to test the roof did not meet the requirements of section 57.3401. As we have concluded, a reasonably prudent person familiar with the mining industry would not have recognized that testing the roof with a jumbo drill did not fulfill the requirements of that section. It is not disputed that Norton used the jumbo drill to test the roof in the accident area.

The Secretary's argument for affirming the citation relies mainly on the ground fall and the conditions that were observed after the accident. As previously discussed, the Secretary, to meet her burden of proof, must show that ground conditions creating a hazard were not taken down or supported. Thus, the Secretary must first show that hazardous ground conditions existed at the time Norton was working in the area. The Secretary's witnesses who were knowledgeable of the conditions in the heading before the accident, including Hubbard, Ellis, Tucker, and Frazier, believed that the accident site roof was safe at the time they were there. The judge apparently presumed that, because there had been a roof fall and some loose roof was observed during the accident investigation, predictable hazardous ground conditions could have been detected at the time Norton was working in the area. Furthermore, to the extent the Secretary relied on Asarco's failure to roof bolt, we note that there is no roof bolting requirement for metal mines and Asarco was not charged with a failure to roof bolt. See 30 C.F.R. § 57.3360. Even though MSHA ground control expert Billy Owens, Inspector McDaniel, William Ellis, and Richard Frazier testified that the heading may have been too wide, Owens' ground control evaluation of the accident site did not mention the width of the heading as a factor. Ellis testified that the ground fall was a "freak accident", both he and Frazier testified that, when they worked in the heading, they felt it was safe, and McDaniel thought the accident was unpredictable. S. Exh. 12; Tr. 326-27, 329, 560-61, 616, 1363, 1366, 1373.

The Commission, in Amax Chemical Corp., supra, 8 FMSHRC at 1149, stated that a variety of factors should be considered in determining whether loose ground is present, including but not limited to the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, "popping" and "snapping" sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas. In evaluating the facts of this citation against the Amax

Chemical criteria, we note that the area had been examined and tested. All of the testimony concerning the condition of the heading before the accident indicates that the ground conditions were not believed to be hazardous, and scaling had been performed. There was no indication of any "popping" or "snapping" sounds. In addition, the dolomite formation in the mine was stable and the mine was not experiencing massive ground failures. 12 FMSHRC at 2076.

Accordingly, we conclude that the judge erred in finding that Asarco violated section 57.3200 for failing to take down or support ground in the 2C3 heading subsequently deemed to be hazardous.

D. Section 57.3200 travelway citation (No. 3253416)

The judge held that Asarco violated section 57.3200 because of his finding that the roof conditions in the travelway were hazardous and obvious. 12 FMSHRC 2092. Asarco argues that the judge ignored the particularity requirement of section 104(a) of the Mine Act, 30 U.S.C. § 814(a), asserting that the citation is vague and encompasses vast areas of the mine. Asarco also argues that at the hearing neither Inspector Denton nor Erickson could identify on a mine map the location of the loose ground in the travelway. Finally, Asarco argues that the roof in the travelway was safe. We find Asarco's contentions to be without merit.

Section 104(a) requires inspectors to issue citations to operators in written form describing the nature of the violation with particularity. Jim Walter Resources, Inc., 1 FMSHRC 1827, 1829 (November 1979). This requirement has two primary purposes. The first is to ensure that the operator is adequately advised of the conditions so that he can abate them. Id. The second is to give the operator fair notice of the charges. Id. The Commission held in Jim Walter that the lack of a citation's specificity does not affect its validity unless the operator is thereby prejudiced. Id. Asarco has not demonstrated any legal prejudice with respect to an inability to abate the violation or to defend against the citation.

We conclude that substantial evidence supports the judge's finding of violation. Erickson testified that while traveling to the accident site with Denton and Asarco officials, he observed 40 to 50 pieces of loose material in the roof and ribs along the travelway, each weighing from 10 to 100 pounds. Tr. 417, 419, 426. Denton also testified to the presence of loose material in the travelway between the 2C3 back stope and heading. Tr. 136-37. Erickson and Denton further testified that they pointed out the loose areas to Asarco officials as they proceeded to the accident site. Tr. 163, 419. The judge credited this testimony. 12 FMSHRC at 2092. In addition, McDaniel testified that as he was going to the scene of the accident, he saw loose ground in the travelway on pillars and ribs. Tr. 1359. The mine manager acknowledged that Denton and Erickson had pointed out loose ground generally. Tr. 1133.

Accordingly, we affirm the judge's finding that Asarco violated section 57.3200 for loose ground in the travelway leading to the 2C3 stope heading.

E. Negligence

Asarco argues that the judge erred in finding Asarco highly negligent with respect to the four violations. Because we are vacating all but one citation, our discussion is limited to negligence with respect to that violation, Citation No. 3253416.

The judge found Asarco highly negligent with respect to the section 57.3200 citation in the travelway based on Asarco's failure to take down or support loose material that was "hazardous and obvious." 12 FMSHRC at 2092. In this regard, the judge credited MSHA Inspector Erickson's testimony that there were 40 to 50 pieces of loose material in the roof and ribs along the travelway weighing from 10 to 100 pounds. Id. The judge also relied on Erickson's testimony that he saw more loose material in the travelway than he had seen at any other underground mine for "quite a period of time." Id.; Tr. 418-19. We conclude that this testimony constitutes substantial evidence supporting the judge's finding. Accordingly, we affirm the judge's finding that Asarco was highly negligent with respect to Citation No. 3253416.

F. Other Issues

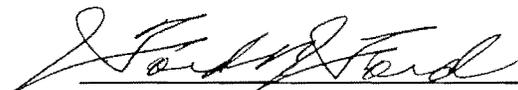
Asarco also alleges that: (1) Citation Nos. 3253415 and 3253702 (the accident citations) are impermissibly duplicative; (2) Inspector Denton was a biased witness; and (3) the judge intervened to a prejudicial degree in examining certain witnesses thereby improperly becoming an advocate for the Secretary. In view of our decision in this case, these issues are essentially moot.

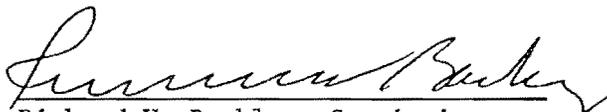
With respect to the travelway citation (No. 3253416), Denton's testimony was either undisputed or, where disputed, corroborated by other independent testimony. While Asarco's objection to the judge's examination of witnesses relates solely to the two accident citations, we note that administrative law judges have considerable leeway in conducting a hearing and in developing a complete and accurate record. See Ruhlen, Manual for Administrative Law Judges, Administrative Conference of the United States, at 35 (1974).

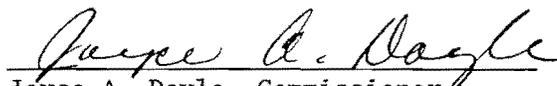
III.

Conclusion

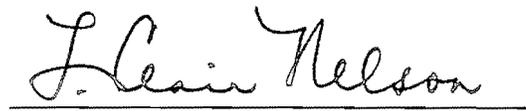
For the foregoing reasons, we reverse the judge's findings that Asarco violated section 57.3401 (Citation Nos. 3253415 and 3253417), and that Asarco violated section 57.3200 (Citation No. 3253702) in the 2C3 heading. Accordingly, we vacate citation Nos. 3253415, 3253417, and 3253702. We affirm the judge's finding that Asarco violated section 57.3200 (Citation No. 3253416) in the 2C3 travelway and his finding that Asarco was highly negligent.

  
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Ford B. Ford, Chairman

  
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Richard V. Backley, Commissioner

  
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Joyce A. Doyle, Commissioner

  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 9, 1992

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

v.

CONSOLIDATION COAL COMPANY

:  
:  
: Docket Nos. WEVA 90-3  
:  
: WEVA 90-8  
:  
: WEVA 89-234-R through  
:  
: WEVA 89-245-R  
:

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

DECISION

BY: Ford, Chairman; Backley, Doyle, 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. (the "Mine Act" or "Act") and involves the validity of 24 citations issued to Consolidation Coal Company ("Consol") alleging violations of 30 C.F.R. § 50.30-1(g)(3).<sup>1</sup> The citations allege that Consol violated the cited

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<sup>1</sup> 30 C.F.R. § 50.30 provides, in pertinent part:

§50.30. Preparation and submission of MSHA Form 7000-2--Quarterly Employment and Coal Production Report.

(a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in §50.30-1 and submit the original to the MSHA Health and Safety Analysis Center.... Each operator shall retain an operator's copy at the mine office nearest the mine for 5 years after the submission date.

\* \* \* \* \*

§50.30-1 General instructions for completing MSHA Form 7000-2.

\* \* \* \* \*

(g) Employment, Employee Hours, and Coal Production

regulation by significantly over-reporting to the Secretary of Labor's Mine Safety and Health Administration ("MSHA") the number of hours that its employees worked at its Robinson Run No. 95 Mine and its Blackstone No. 1 Mine in each quarterly report for 1986, 1987 and 1988. Commission Chief Administrative Law Judge Paul Merlin upheld each of the citations. 12 FMSHRC 167 (January 1990)(ALJ); 12 FMSHRC 1129 (May 1990)(ALJ). Consol petitioned for review of the judge's decision, asserting that the judge erred in (A) concluding that the cited regulation was validly promulgated in accordance with the Mine Act; (B) concluding that the Secretary of Labor is authorized under the Act to assess civil penalties for violations of the cited regulation; (C) finding that Consol violated the regulation; and (D) finding that the violations were the result of Consol's high negligence. We granted Consol's petition and heard oral argument. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

The citations were issued in 1989 following an MSHA audit of the records that Consol is required to maintain under 30 C.F.R. Part 50. Section 50.30 requires coal mine operators to submit information concerning employment and coal production to MSHA, on Form 7000-2, on a quarterly basis. One column of the form requires operators to report the total number of "employee-hours worked" during the quarter. From 1986 through 1988, Consol reported to MSHA the total number of hours that it estimated employees were present at its mines rather than the number of hours that employees worked. Consol obtained this estimate by adding additional time to the number of employee-hours reflected in its payroll or other time records. It added 45 minutes per employee per day for hourly employees, and 90 minutes per employee per day for salaried employees. The citations charge that Consol "significantly over reported employee hours" on Form 7000-2 by adding 45 minutes each day for hourly employees to cover "time spent on mine property before and after work

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\* \* \* \* \*

(3) Total employee-hours worked during the quarter: Show the total hours worked by all employees during the quarter covered. Include all time where the employee was actually on duty, but exclude vacation, holiday, sick leave, and all other off-duty time, even though paid for. Make certain that each overtime hour is reported as one hour, and not as the overtime pay multiple for an hour of work. The hours reported should be obtained from payroll or other time records. If actual hours are not available, they may be estimated on the basis of scheduled hours. Make certain not to include hours paid but not worked.

hours," in violation of 30 C.F.R. § 50.30-1(g)(3).

At the outset of this proceeding before the judge, Consol filed a motion to dismiss on the grounds that (1) Part 50 of the Secretary's regulations is unenforceable because it was improperly promulgated by the Secretary of the Interior; and (2) civil penalties cannot be imposed under section 110(a) of the Mine Act for the alleged violations. Consol argued that, because the regulation in question was promulgated after the Mine Act was enacted by Congress but before the Act's effective date, the regulation was invalid. In the alternative, it argued that the civil penalties assessed by the Secretary were not authorized because, under the Mine Act, penalties may be assessed only for violations of the Act and for violations of mandatory safety or health standards. In an order dated January 24, 1990, Chief Administrative Law Judge Paul Merlin denied Consol's motion. 12 FMSHRC 167 (January 1990)(ALJ). The judge held that the Secretary of the Interior was authorized to issue the reporting regulations at the time of their promulgation and that civil penalties can be imposed by the Secretary of Labor for violations of these regulations. Consol then filed a petition seeking interlocutory review of the judge's order, which was denied by the Commission on March 8, 1990.

The parties next filed with the judge "Joint Stipulations of Law and Facts" and they each filed separate motions for summary judgment. In a decision dated May 24, 1990, the Judge granted the Secretary's motion for summary judgment, upheld each of the citations and assessed civil penalties. 12 FMSHRC 1129 (May 1990)(ALJ). The judge determined that Consol violated section 50.30-1(g)(3) because MSHA has consistently required the reporting of hours worked as recorded on payroll records or other time records.

The stipulated facts are set out in full in the judge's decision. 12 FMSHRC at 1133-42. Consol requires that miners report to work prior to the beginning of their shift in order to prepare for work and requires that they remain on mine property after their shift to return equipment and supplies prior to departing. Stips. 24 & 25. Because miners are not paid for such time, it is not reflected on Consol's payroll records. Stip. 28. Consol is required by section 50.20 to report occupational injuries and accidents to MSHA. Stip. 11. Some of the injuries reported by Consol to MSHA during 1986-88 occurred before and after the miners' shifts. Stips. 20 & 21. As a consequence, Consol considered that all time that employees were on mine property was "exposure time." Stip. 23.

No accurate record is kept by Consol of the amount of pre- and post-shift time employees are on mine property. Stip. 27. Consol estimates that each hourly employee spends 45 minutes more per day on mine property than is reflected on its payroll records. Stip. 37. Consol believes that if the 45 minute estimate is added to the time shown in the payroll records, the sum reflects the number of hours each hourly employee spends at the mine site on a daily basis, i.e., the exposure hours. Stip. 38. For purposes of this proceeding, the Secretary agreed that Consol's practice of adding 45 minutes to the time shown in the payroll records "reflect[s] the actual time spent by hourly employees at [Consol's mines] on the days when they are at the mine site." Stip. 46. The parties further stipulated that payroll records reflecting time worked are not kept for salaried employees and that Consol

estimates that salaried employees spend an additional 90 minutes per day on mine property. Stips. 30 & 31. The Secretary did not cite Consol for reporting the estimated exposure hours of salaried employees. Stip. 33.

Section 50.20(a) requires mine operators to report to MSHA any accident, occupational injury or occupational illness. See Stip. 10. The Commission has interpreted section 50.20(a) to require the reporting of an occupational injury, as defined at section 50.2(e), if it occurs on mine property, whether or not such injury occurred during the miner's shift. Freeman United Coal Mining Co., 6 FMSHRC 1577, 1578-79 (July 1984); See Stip. 11. In Freeman, the Commission held that there need not be a causal nexus between the miner's work and the injury sustained. 6 FMSHRC at 1578-79. The injury in that case occurred when a miner experienced back pain while putting on his work boots in the mine's wash house about one hour before the beginning of his shift. 6 FMSHRC at 1578. The Commission affirmed the judge's finding that the operator violated section 50.20(a) by not reporting the injury to MSHA.

Prior to the Commission's decision in Freeman, Consol reported to MSHA as "hours worked" the number of employee hours set forth in its payroll records, but not pre- and post-shift exposure time. Stip. 42. Likewise, Consol did not report, under section 50.20(a), injuries that occurred to miners before and after their shifts. Id. After the Freeman decision, Consol began to report such pre- and post-shift incidents and also exposure time on mine property. Stip. 43. Consol did not inform MSHA that it had changed its method of calculating reportable hours. Stip. 45. The Secretary did not issue any policy memoranda or otherwise provide any guidance to operators regarding the effect of the Freeman decision. Stip. 44. The Secretary did not discover that Consol was including pre- and post-shift hours on its Form 7000-2 until MSHA audited Consol's records. Stip. 45.

MSHA uses the data gathered from sections 50.20 and 50.30 to calculate rates of injury occurrence ("incident rates") for each mine, operator, state, MSHA District and Subdistrict, and for the nation. Stip. 13; 30 C.F.R. § 50.1. The incident rate for a given mine, for example, is calculated by dividing the total number of occupational injuries, occupational illnesses and accidents reported in a quarter (multiplied by a constant: 200,000) by the total employee-hours worked during such quarter. 30 C.F.R. § 50.1; Gov. Exh. 1, p. 17. Incident rates are used by MSHA to analyze injury and illness trends and to allocate inspection resources. Stip. 16.

In his order of January 24, 1990, the judge determined that 30 C.F.R. Part 50 was validly promulgated by the Secretary of the Interior under the Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977)(the "Coal Act") and was properly transferred to the Secretary of Labor by the Mine Act. The Secretary of the Interior promulgated Part 50 on December 30, 1977, after the enactment date of the Mine Act, November 9, 1977, but before its effective date, March 9, 1978. The judge determined that Part 50, adopted under the Coal Act, remained in effect as a result of section 301(c)(2) of the Federal Mine Safety and Health Amendments Act of 1977,

30 U.S.C. § 961(c)(2)("Amendments Act").<sup>2</sup> 12 FMSHRC at 170. He rejected Consol's argument that the Secretary of the Interior lacked authority to issue the reporting regulations after the Mine Act was enacted, and that only regulations in effect on its enactment date were validly transferred from the Department of the Interior to the Department of Labor. 12 FMSHRC at 170-71.

The judge also rejected Consol's argument that, because Part 50 is a regulation, not a mandatory safety or health standard, penalties cannot be assessed for the alleged violations. 12 FMSHRC at 172. He held that a violation of Part 50 is also a violation of the Mine Act. 12 FMSHRC at 173. He reasoned that sections 110(a), 104(a) and 105(a) of the Mine Act, which authorize the Secretary of Labor to issue citations for violations of regulations and to notify the operator of penalty assessments for such citations, must be read in concert. Id. The judge concluded that the Secretary is authorized to assess penalties for violations of Part 50.

In his decision of May 24, 1990, the judge determined that the subject regulation requires each operator to report the total hours worked by all employees, and that for hourly employees the total hours worked for reporting purposes are the hours recorded on payroll or other similar time records. 12 FMSHRC at 1142. He determined that the Secretary has consistently interpreted the language of the regulation to require operators to obtain "hours worked" from such records and that her interpretation of the regulation is dispositive of the case. Id. He granted the Secretary's Motion for Summary Judgment and found that Consol had violated the subject regulation.

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<sup>2</sup> Section 301(c) of the Amendments Act provides in part:

(c) Unexpended appropriations; personnel; property; records; obligations; commitments; savings provisions; pending proceedings and suits

\* \* \* \* \*

(2) All orders, decisions, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges (A) which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and (B) which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, revoked, or repealed by the Secretary of Labor, the Federal Mine Safety and Health Review Commission or other authorized officials, by any court of competent jurisdiction, or by operation of law.

The judge determined, however, that the violations were non-serious and technical in nature because the method the Secretary uses to calculate incident rates produces "flawed data." 12 FMSHRC at 1144-46. He determined that the time frame for injuries that must be reported to MSHA for use in the numerator of the formula is not consistent with the time frame for hours worked that must be reported to MSHA for use in the denominator of the formula. 12 FMSHRC at 1144. The judge held that the formula of 30 C.F.R. § 50.1 produces "an inherently flawed injury incidence rate" because "the numerator and denominator [of the formula] are mismatched with the former premised upon place but the latter predicated upon time and place." Id.

The judge concluded that the violations were the result of Consol's high negligence. 12 FMSHRC at 1146. He found that Consol intentionally changed its method of reporting hours worked and took "the law into its own hands by deciding for itself what the law means and how it can best be applied." Id.

## II.

### Disposition of Issues

#### A. Whether the Regulations in 30 C.F.R. Part 50 are Enforceable.

The judge concluded that section 301(c)(2) of the Amendments Act (n. 2, supra) is a broad savings clause that carried over to the Mine Act the Part 50 regulations promulgated by the Secretary of the Interior under the Coal Act. 12 FMSHRC at 170. In relevant part, section 301(c)(2) provides that all "regulations ... which have been issued ... or allowed to become effective in the exercise of functions which are transferred under this section ... which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, revoked or repealed by the Secretary of Labor...." Section 301(a) of the Amendments Act, 30 U.S.C. § 961(a), transferred to the Secretary of Labor the enforcement functions of the Secretary of the Interior under the Coal Act and the Federal Metal and Nonmetallic Safety Act, 30 U.S.C. § 721 et seq. (1976)(repealed)(the "Metal Act"). Section 307 of the Amendments Act, 30 U.S.C. § 801 note, provides that "this Act and the amendments made by this Act ... shall take effect 120 days after the date of enactment of this Act." The Act was enacted on November 9, 1977, and became effective March 9, 1978.

Within the meaning of section 301(c)(2) of the Amendments Act, the regulation in question was "issued" and "allowed to become effective" by Interior in the exercise of its mine safety and health functions and the regulation was "in effect" on the date the Mine Act became effective. Consol<sup>3</sup> argues that the pivotal date is the Mine Act's enactment date rather than its effective date. Consol contends that passage of the Mine Act prohibited the Department of the Interior's promulgation of Part 50 because

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<sup>3</sup> The Commission permitted amicus curiae briefing by the National Coal Association ("NCA"), a mining industry trade association. Reference in this decision to arguments advanced by Consol includes the arguments of the NCA.

Congress intended to place mine safety and health rulemaking authority in the hands of the Secretary of Labor immediately upon its enactment. Consol maintains that, because Congress did not trust the Department of the Interior to protect the safety and health of miners, Congress curtailed Interior's rulemaking authority so that only those standards and regulations already in effect on the enactment date of the Mine Act would be transferred from Interior to Labor.

In making its arguments, Consol relies upon section 301(b)(1) of the Amendments Act, 30 U.S.C. § 961(b)(1).<sup>4</sup> It contends that this provision states that only regulations that were "in effect on November 9, 1977" were to be transferred to the Secretary. Consol concludes that "Interior's attempted promulgation of Part 50 (on December 30, 1977) after enactment of the Mine Act, and prior to its effective date (March 9, 1978) was an ultra vires attempt to transfer to Labor regulations that did not exist when the Mine Act was passed." Consol Br. 10.

We agree with the judge that Consol's reliance on section 301(b)(1) of the Amendments Act is misplaced. The section is ambiguous in that one phrase refers to "standards and regulations" under the Coal Act while the section's title is "Existing mandatory standards; ..." and elsewhere it refers to "mandatory standards" or "mandatory health or safety standards." Section 301(c)(2) by its express terms, clearly governs "regulations," such as the regulation at issue in this case. The judge concluded that section 301(b)(1), when read in its entirety, governs mandatory standards, not the regulation at issue. 12 FMSHRC at 169. The legislative history does not clarify section 301(b)(1). The Senate Conference Report for the Mine Act, however, discusses the "carry over" of existing safety and health standards separately from its discussion of the continuation of existing regulations, thereby providing

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<sup>4</sup> Section 301(b) of the Amendments Act provides in part:

(b) Existing mandatory standards; review by advisory committee; recommendations

(1) The mandatory standards relating to mines, issued by the Secretary of the Interior under the Federal Metal and Nonmetallic Mine Safety Act [30 U.S.C. 721 et seq.] and standards and regulations under the Federal Coal Mine Health and Safety Act of 1969 [30 U.S.C. 801 et seq.] which are in effect on November 9, 1977, shall remain in effect as mandatory health or safety standards applicable to metal and nonmetallic mines and to coal mines respectively under the Federal Mine Safety and Health Act of 1977 [30 U.S.C. 801 et seq.] until such time as the Secretary of Labor shall issue new or revised mandatory health or safety standards applicable to metal and nonmetallic mines and new or revised mandatory health or safety standards applicable to coal mines.

support for the judge's construction. S. Rep. No. 461, 95th Cong. 1st Sess. 64-65 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, 1342-43 (1977) ("Legis. Hist."); See also Sec. Br. 7, n. 5. We conclude that the more logical interpretation of section 301(b)(1) is to limit its application to mandatory standards.

The language of section 301(b)(1), moreover, does not support Consol's position that the Secretary of the Interior was required to maintain the status quo with respect to regulation during the period between enactment of the Mine Act and its effective date. Even assuming that section 301(b)(1) applies to regulations, it simply provides that standards and regulations in effect on November 9, 1977, were to remain in effect until modified by the Secretary of Labor. It does not reference standards and regulations that were not yet in effect on that date or that were modified by the Secretary of the Interior after that date.

Finally, we agree with the Secretary's argument that Consol's interpretation of the transfer provisions leads to illogical results that are at odds with the statute's underlying purposes. See, 2A Sutherland Statutory Construction, § 45.12, at 61 (Singer 5th ed. 1992 rev.). Consol's interpretation would create a four-month gap during which no agency had the authority to issue standards or regulations. Given its concern with the safety of the nation's miners, it seems highly unlikely that Congress intended to prohibit regulatory action during that period. Thus, we affirm the judge's conclusion that the regulations at Part 50 are valid and enforceable.

B. Whether Civil Penalties may be Assessed for Violations of 30 C.F.R. § 50.30-1(g)(3).

Consol argues that even if Part 50 is deemed enforceable, the Secretary is without authority to propose civil penalties for violations of Part 50 regulations because they are not mandatory health or safety standards promulgated in accordance with the procedural requirements of section 101 of the Coal Act or the Mine Act.<sup>5</sup> Consol contends that section 110(a) of the Mine Act authorizes the assessment of civil penalties only for violations of mandatory health or safety standards and violations of the Mine Act. Consol asserts that Congress, when considering the legislation that became the Mine Act, expressly rejected the civil penalty provisions contained in the Senate

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<sup>5</sup> It is undisputed that the Part 50 regulations are not mandatory safety or health standards. They were promulgated under section 508 of the Coal Act, 30 U.S.C. § 957, while mandatory standards would have been promulgated under section 101 of the Coal Act. Mandatory health and safety standards consist of the interim standards established by titles II and III of the Coal Act and standards promulgated pursuant to section 101 of the Coal Act and section 101 of the Mine Act. The interim standards were carried over to titles II and III of the Mine Act. See, e.g. section 3(1) of the Coal Act, 30 U.S.C. § 802(1) (definition of mandatory health or safety standard carried over without change in the Mine Act). See also, UMWA v. Dole, 870 F.2d 662, 668 (D.C. Cir. 1989).

and House bills as introduced. Those bills authorized the assessment of a civil penalty for a violation of the Act, safety and health standards or "any rule, order or regulation promulgated pursuant to this Act." Consol Br. 19, quoting S. 717 and H.R. 4287, as introduced.

The Secretary contends that if the Mine Act, including sections 104(a), 105(a) and 110(a), is read as a whole, civil penalties must be assessed for violations of regulations as well as safety and health standards. She contends that this interpretation is particularly apt in cases such as this where the regulation in issue, Part 50, implements a specific provision of the Mine Act, section 103(d). That section provides that operators shall keep records of "man-hours worked" and report such information "at a frequency determined by the Secretary, but at least annually." 30 U.S.C. § 813(d).

Section 110(a), if read in isolation, appears to authorize civil penalties only for violations of the Act and of mandatory safety and health standards. It is significant, however, that section 104(a) of the Mine Act authorizes MSHA inspectors to issue a citation to an operator not only for a violation of the Act, but also for a violation of a health or safety standard, rule, order, or regulation promulgated pursuant to the Act. 30 U.S.C. § 814(a). Section 105(a), 30 U.S.C. § 815(a), requires the Secretary to notify the operator of the proposed civil penalty to be assessed for the violation cited.

The legislative history of the Mine Act does not corroborate Consol's position. The Senate bill (S. 717), as introduced, provided for the assessment of a civil penalty for a "violation of a provision of this Act or a safety or health standard prescribed by or under this Act, or any rule, order, or regulation promulgated pursuant to this Act..." Legis. Hist. at 157. The original House bill (H.R. 4287) contained identical language. Legis. Hist. at 235.

When the House bill was reported by the Committee on Education and Labor, the language from section 109(a) of the Coal Act was substituted for the language quoted above but the Senate bill kept its original language. The bills were then passed by their respective houses of Congress with their civil penalty language unchanged. Thus, the Senate bill contained language specifically referencing "regulations," while the House bill did not.

The Conference Committee subsequently adopted the House bill for other reasons. The Conference Report states:

The Senate bill and the House amendment provided for a civil penalty of not more than \$10,000 for each violation of the Act or a standard promulgated thereunder. The House amendment provided that each occurrence of a violation of a standard constitute a separate offense. The Senate bill did not so provide.

The conference substitute conforms to the House amendment.

S. Rep. No. 461 at 57, Legis. Hist. at 1335. This Report indicates that the Conference Committee focused on whether each occurrence of a violation should be treated as a separate offense. Thus, it does not appear that Congress intentionally dropped the Senate's language as to regulatory violations, as claimed by Consol.

In sum, we agree with the Secretary's interpretation of the Mine Act, which seeks to harmonize sections 104(a), 105(a) and 110(a). Each part of a statute should be construed in connection with the other parts "so as to produce a harmonious whole." Sutherland, § 46.05 at 103. Such an interpretation advances the goals of the Act and maintains the importance of civil penalties as a deterrence. Further, nothing in the Act or its legislative history indicates that Congress rejected civil penalties for regulatory violations.

Finally, we agree that Part 50 implements the responsibilities of the Secretary set forth in section 103 of the Act. These regulations constitute implementation of section 103 pursuant to rulemaking authority under section 508 of the Mine Act, 30 U.S.C. § 957. Accordingly, we affirm the judge's conclusion that a civil penalty may be assessed for a violation of section 50.30-1(g)(3).

#### C. Violation of the Regulation

Consol argues that the judge's decision upholding the Secretary's interpretation of 30 C.F.R. § 50.30-1(g)(3) ignores the plain language of the regulation and fundamental rules of statutory construction. Consol notes that "the regulation clearly differentiates between on-duty (on mine property) time and off-duty (off mine property) time," and that off-duty time is to be excluded from the calculation of the number of employee hours worked. Consol Br. 26. It asserts that the examples of off-duty work listed in the regulation ("vacation, holiday, sick leave and all other off-duty time") occur off mine property. From this it reasons that off-duty time equates with time spent off mine property and that on-duty time equates with time spent on mine property. Consol maintains that the judge's interpretation of the term "hours worked" to equate with hours paid while on mine property has no support in the language of the regulation. It contends that the time spent by miners, before and after shift, performing miscellaneous tasks, such as picking up and returning equipment and supplies, is to be included in hours worked under the regulation, even though employees are not compensated for such time, because they are exposed to the hazards of mining during that time. It points out that MSHA considers on-duty, remunerated time to include time when no labor is being performed, such as meal breaks, because employees are "on duty" at the work site. Consol argues that it is inconsistent to exclude time when work is being performed while including paid work breaks.

Consol also points to the fact that under section 50.1, incident rates are to be calculated using the "hours of employee exposure" rather than the hours of remunerated work. The reporting of hours worked requires the reporting of those hours "that are consistent with the possible occurrence of reportable incidents used to calculate the intended accurate incidence rate." Consol Br. 28. Consol maintains that it cannot be penalized for logically

interpreting Part 50 in a manner that is consistent with the express terms of section 50.30-1(g)(3).

Consol also argues that, because its payroll records do not accurately reflect time worked, it is authorized under the regulation to estimate the total number of hours worked. The parties stipulated that Consol's estimate as reported to MSHA "reflect the actual time spent by hourly employees [at its mines]." Stip. 46. Consol contends that it was justified in reporting these estimated hours since actual hours were not available from its "payroll or other time records."

We disagree with Consol's view that the language of the regulation is plain and we conclude that the Secretary's interpretation is reasonable. Section 50.30 (n. 1 supra) requires mine operators to complete MSHA Form 7000-2 in accordance with the instructions found in section 50.30-1, and to submit the completed form to MSHA. Section 50.30-1(g)(3) requires operators to show the "total hours worked by all employees during the quarter covered." "[H]ours worked" is not defined here or in section 50.2. The regulation further instructs operators to "[i]nclude all time where the employee was actually on duty..." The term "on duty" is likewise not defined. The regulation provides that "hours reported should be obtained from payroll or other time records" but indicates that these figures may require modification to exclude "vacation, holiday, sick leave, and all other off-duty time, even though paid for." Overtime hours are to be reported as straight time rather than as a multiple. Thus, although the language of the regulation is not plain, it would appear that an operator is required to use its payroll or other time records to calculate gross employee hours worked; to subtract any time included in this calculation that represents time not worked, such as sick leave, and any multiple hours used to calculate overtime pay; and to report the resulting figures to MSHA. This reported figure would include all time reflected in the payroll records "where the employee was actually on duty."

Payroll or other time records for hourly employees typically represent all hours worked, and the regulation instructs operators to use such records as a starting point for the calculation required. The regulation does not instruct operators to add to those figures any unpaid hours worked that are not included in the payroll or other time records. The only modifications authorized are for the purpose of deleting hours paid and not worked rather than for adding hours worked and not paid. We discern no legal justification for reading into this regulation the right of an operator to include all time that miners are on mine property.

The only provision of the regulation that provides an exception from the use of payroll or other time records states that "[i]f actual hours are not available, they may be estimated on the basis of scheduled hours." 30 C.F.R. § 50.30-1(g)(3). MSHA has consistently interpreted this sentence to authorize mine operators to submit estimated hours as hours worked only if payroll or

other time records do not reflect actual hours worked.<sup>6</sup> Stip. 39; Sec. Br. 17. This exception cannot be reasonably read to allow an operator to augment the hours worked as reflected in the payroll records with additional unpaid hours, during which employees are on mine property.

MSHA's interpretation of the Part 50 regulations was further clarified in informational guidelines. Although these guidelines are not binding on MSHA or the Commission, they do provide "an accurate guide to current MSHA policies and practices." Coal Employment Project v. Dole, 889 F.2d 1127, 1130 n. 5 (D.C. Cir. 1989). The guideline in effect between March 1978 and December 1986 paraphrased the regulation and stressed that hours paid but not worked were not to be reported. Gov. Exh. 6, p. 16. When the guideline was revised in December 1986, it included a new sentence indicating that operators are "not [to] include time spent on mine property outside of regularly scheduled shifts, i.e., bathhouse, parking lot, etc." Gov. Exh. 1, p. 15; Stip. 41. We agree with the judge that this added language did not signal a change in MSHA's interpretation of the regulation. The added language made it explicit that operators are to submit figures for employee hours worked based upon their payroll records rather than on information or estimates that reflect the time employees are present at the mine.

Consol focuses on the term "hours worked" and contends that, because its employees "work" before and after each shift, the time spent performing such "work" should fall within the concept of "hours worked." Consol asserts that it is inconsistent for the Secretary to exclude such unremunerated time worked while including time that miners are paid while not working, such as paid meal breaks. We do not dispute the logic behind Consol's argument that miners perform "work" before and after their regular shifts and agree that this time could or even should have been incorporated by the Secretary into the concept of "hours worked." The Secretary, however, chose not to include these unpaid hours in the description of "hours worked" in the regulation or guidelines.

Consol also argues that the incident rates calculated by the Secretary under the Mine Act should be comparable to incident rates calculated by the Secretary for employers covered by the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ("OSHAct"). It asserts that MSHA's Part 50 regulations should be interpreted in pari materia with the Secretary's requirements under the OSHAct, which do not require that reportable time equate with compensated time. While we agree with Consol that, as a matter of policy, the incident rates calculated by the Secretary for the mining industry should be comparable with the incident rates of other industries, the Mine Act does not explicitly require that the method of calculating incident rates under the Mine Act be consistent with that used under the OSHAct. As a consequence, Consol's assertion that, as a matter of law, the Secretary's Part 50 regulations must be interpreted consistently with the reporting requirements under the OSHAct is rejected.

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<sup>6</sup> In contrast, MSHA allows the reporting of estimated hours of work for salaried employees totalling 9 1/2 hours per day at Consol's mines. Stips. 32 & 33.

Finally, Consol argues that "a regulation cannot be applied in a manner that fails to inform a reasonably prudent person of the conduct required." Consol Br. 36-37, quoting Garden Creek Pocahontas Co., 11 FMSHRC 2148, 2152 (November 1989). Consol maintains that the Secretary's guidelines interpreting Part 50 are internally inconsistent and have changed significantly since the regulation was adopted. In fact, Consol had actual notice of the Secretary's December 1986 interpretation of the regulation to the effect that mine operators should "not include time spent on mine property outside of regularly scheduled shifts, i.e., bathhouse, parking lot, etc." Gov. Exh. 1, p. 15; Stip. 41. The revised guideline containing this specific language was issued two and one half years before the contested citations were issued. We conclude that Consol was given fair notice of the requirements of the regulation.

Based on the above, we affirm the judge's finding that Consol violated section 50.30-1(g)(3). Notwithstanding the preceding determinations, however, we also agree with the judge that the incident rates calculated by MSHA are flawed because the injury and accident information that mine operators are required to submit does not correlate with the data that mine operators must report for employee hours worked.<sup>7</sup> See 12 FMSHRC 1144-46. As stated above, the injury and accident information gathered by MSHA from section 50.20 and the employee hours worked information gathered by MSHA from section 50.30 are used by MSHA to calculate rates of injury occurrence pursuant to section 50.1. Under section 50.1 incident rates are to be calculated by dividing the number of accidents and injuries by the number of employee exposure hours. The Secretary, however, calculates incident rates by dividing the number of accidents and injuries during total exposure hours by the number of employee hours worked. The mismatch of numerator and denominator yields distorted incident rates. The Secretary argues that, since all mine operators are required to report only actual paid hours worked, any skewing, if it occurs, would be similar across operators. Sec. Br. 21. This assumption, however, is not correct. Employees at some mines may perform pre- and post- shift tasks for varying periods of time before and after the start of their paid shifts, and employees at other mines may work longer shifts and perform such tasks during their paid shifts. The reported incident rates of these operators may not be comparable.

Another source of lack of comparability in reported incident rates across operators arises from inconsistent treatment of salaried employees. MSHA admits that it allows Consol to include an additional 90 minutes of exposure time for salaried employees, but has not disseminated its acceptance of this allowance to other operators similarly situated. Oral Arg. Tr. 29-30. This policy may seriously skew the data since counsel for Consol indicated that at large mines as much as 30% of the work force may be categorized as salaried employees. Oral Arg. Tr. 44-45.

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<sup>7</sup> The citations charged Consol with nonserious, non-S&S violations. In upholding the citations, the judge concluded that the violations were "nonserious and technical in nature" because, as applied by MSHA, the incident rate formula produces flawed data. 12 FMSHRC at 1146. The Secretary did not appeal this finding.

Nevertheless, because section 50.30-1(g)(3) requires mine operators to report to MSHA the number of employee hours worked as recorded in the operator's payroll or other time records, we conclude, as did Judge Merlin, that Consol violated the regulation. Prior to the Commission's decision in Freeman United Coal Mining Co., 6 FMSHRC 1577 (July 1984), Consol reported as hours worked the number of paid hours that miners worked as reflected in its payroll records. Stip. 42. Consol was not free to reinterpret the reporting regulation merely because it believed that the incident rates calculated by MSHA were flawed, because of the Commission's decision in Freeman or because of its belief that MSHA's use of the data is misguided. As noted by the Secretary, Consol's method is also flawed in that it dilutes Consol's incident rate as compared to other operators. Sec. Br. 19-21. If each operator could report to MSHA whatever data it believed would lead to the most accurate incident rate at its own mines, operator reports would not be comparable and the incident rates calculated by the Secretary would be inaccurate. Finally, it is not clear from the record in this case whether the flaw caused by MSHA's use of mismatched data resulted in significantly skewed incident rates for Consol because few injuries at Consol's mines occurred before or after the miners' regular shifts. See Sec. Br. 20-21 n. 13.

We conclude that any flaws in MSHA's calculations of incident rates do not excuse Consol's violation of the regulation. Incident rates provide a general picture of the safety record of a mine operator. The assertion that MSHA's method of calculating incident rates is less than perfect or that there may be better methods does not excuse mine operators from complying with the data submission requirements of Part 50. The Commission's task is not to determine the best method of calculating incident rates, but to determine whether the Secretary's interpretation of the reporting regulation is reasonable and whether the operator was given fair notice of its requirements. See e.g., K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291-92 (1988); Lanham Coal Co., 13 FMSHRC 1341, 1343-44 (September 1991).<sup>8</sup>

D. Whether Consol was highly negligent

We conclude that substantial evidence supports the judge's finding that Consol's "negligence was high." 12 FMSHRC at 1146. The express language of section 50.30-1(g)(3) is ambiguous and, in general, the reporting requirements of the regulation should be harmonized with the other sections in Part 50 to effectuate the Mine Act's goal of promoting the safety and health of miners. Cf. Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir.

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<sup>8</sup> At the time of oral argument, the Secretary had issued an advance notice of proposed rulemaking to amend her Part 50 regulations. 53 Fed. Reg. 45,878 (November 14, 1988). Consol moved the Commission, on May 8, 1992, to take judicial notice of the Secretary's announcement that she had withdrawn Part 50 from her regulatory agenda. See 57 Fed. Reg. 16, 983 (April 27, 1992). The Secretary has not filed an opposition to this motion. We hereby grant Consol's motion. See Fed. R. App. P. 28(j). We find the Secretary's action in removing Part 50 from her regulatory agenda disturbing in light of our conclusions that injury incident rates are distorted and subject to inconsistencies as between operators.

1984)(citation omitted).

Nevertheless, as the judge concluded, "after the Freeman decision the operator intentionally changed its reporting of hours worked under § 50.30-1(g)(3)." 12 FMSHRC at 1146. As the judge explained:

Whatever difficulties may be presented by the Secretary's interpretation of the Act and regulations, no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied.

Id.

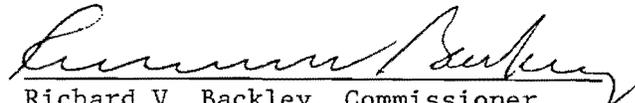
We conclude that the judge's decision is supported by substantial evidence. Accordingly, we affirm his finding that Consol's negligence was high.

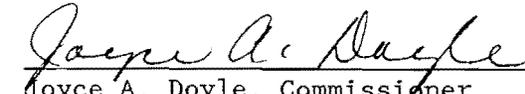
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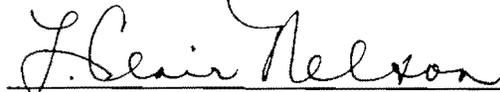
Conclusion

For the foregoing reasons, we affirm the judge's finding that Consol violated 30 C.F.R. § 50.30-1(g)(3) in each instance cited, and also affirm the judge's finding of high negligence.

  
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Ford B. Ford, Chairman

  
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Richard V. Backley, Commissioner

  
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Joyce A. Doyle, Commissioner

  
\_\_\_\_\_  
L. Clair Nelson, Commissioner

Commissioner Holen, concurring:

I fully agree with this decision. I add my concern that the goal of improving mine safety can be unnecessarily compromised by the use of inaccurate data as a basis for allocating inspection resources, calculating national mine safety statistics, and making regulatory policy.

  
\_\_\_\_\_  
Arlene Holen, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
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June 16, 1992

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. WEVA 91-73  
 :  
UNITED STATES STEEL MINING COMPANY :

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

DECISION

BY THE COMMISSION:

At issue in this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"), is whether United States Steel Mining Company, Inc. ("U.S. Steel") violated 30 C.F.R. § 77.200, because its thermal coal dryer was losing fluidizing air current.<sup>1</sup> Commission Administrative Law Judge George Koutras found that U.S. Steel did not violate section 77.200, because the Secretary of Labor failed to establish that there was a hazard presented to miners. 13 FMSHRC 1465 (September 1991)(ALJ). The Commission granted the Secretary's Petition for Discretionary Review. For the reasons set forth below, we affirm the judge's decision.

I.

Factual Background and Procedural History

U.S. Steel operates the Pinnacle Preparation Plant located in Pineville, West Virginia. The plant's thermal coal dryer, a structure six stories high, dries fine coal by fluidization.<sup>2</sup> Fluidizing air current is created by two

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<sup>1</sup> 30 C.F.R. § 77.200 requires:

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

<sup>2</sup> "Fluidization" is defined in the Department of Interior's A Dictionary of Mining, Mineral, and Related Terms ("DMMRT") as "[a] roasting process in which finely divided solid materials are kept in suspension by a rising current of air (or other gas). This produces a fluidized bed which provides an ideal condition

fans. One fan, located at the top of the dryer, pulls up the air current. This fan is 8 to 10 feet in diameter and is driven at 1200 revolutions per minute ("rpm") by an 800 to 1000 horsepower motor. The second fan, at the bottom of the dryer, pushes up the air current. This fan is 3.5 feet in diameter and is driven at 1700 rpm by a 300 to 400 horsepower motor. The air current allows fine coal to float across the drying bed where it is superheated to remove its moisture. It is carried upward as it dries and then settles on a conveyor belt.

On September 10, 1990, Mine Safety and Health Administration ("MSHA") Inspector Michael T. Dickerson conducted a regular inspection of the preparation plant. During his inspection of the thermal coal dryer at the feed end of the dryer bed, he saw hot coal embers and float coal dust and felt a current of fluidizing air coming through a fracture in the concrete floor, at about one-third of the thermal dryer's height. The length of the fracture was variously described as 3.5 feet and 8 to 10 feet and had been intentionally created at an earlier time in order to weld a seam on the dryer wall. Tr. 144, 171, 173. The inspector also observed a weld seam crack 3 to 4 inches long in the metal lining of the dryer bed.

Dickerson issued a section 104(a) citation for violation of section 77.200, alleging that the concrete floor at the feed end of the thermal dryer had deteriorated. The citation also alleged that there was leakage allowing live embers and small amounts of float coal dust to escape and allowing loss of small amounts of fluidizing air current. Dickerson designated the violation as significant and substantial.

Dickerson indicated before the judge, however, that the deteriorated concrete floor was not out of repair under the cited standard. Tr. 150, 153, 155, 160. Dickerson testified that the deteriorated floor played no part in the violation, since the purpose of the floor was not to enclose the fluidizing air from the dryer bed. Tr. 153, 155, 160. Rather, in Dickerson's view, the violation was caused by the split in the metal lining of the dryer. Tr. 153, 160. Dickerson testified that the violation pertained to the loss of the fluidized air current within the dryer, not to the hot embers and coal dust that floated out into the air since U.S. Steel's maintenance outside the dryer would ensure that any combustible material would not accumulate. Tr. 145, 146-47, 156, 159, 162. In sum, Dickerson believed that, if left unabated, the loss of the fluidizing air current could cause the coal dust inside to settle, become hot and ignite. He believed that this would pose a hazard of fire or explosion of the coal in suspension and expose the dryer attendant to serious injury. Tr. 137-38, 151, 156-57.

In his decision, Judge Koutras found that, although the primary purpose of section 77.200 was to assure the physical and structural integrity of surface coal preparation structures, the language of the standard was broad enough to cover a damaged and unrepaired dryer bed enclosure lining. 13 FMSHRC at 1472. He also concluded that the dryer bed enclosure was not

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for gas-solid reaction because each solid particle is in constant motion and in contact with the moving gas stream on all sides." DMMRT at 447.

maintained in good repair. Id.

Judge Koutras found, however, that in order to establish a violation of section 77.200, the disrepair or condition of the cited equipment must present a hazard to miners. 13 FMSHRC at 1473. Based on the evidence of the case, he could not, however, conclude that the Secretary established that the leaking dryer bed enclosure lining presented such a hazard. Id. He noted that Dickerson had conceded that the escaping coal dust and coal embers did not pose a hazardous condition outside the dryer. Id. He further noted that, while Dickerson was primarily concerned with the loss of fluidizing air current inside the dryer, there was only a small amount of fluidizing air current coming through the cracked dryer lining and there was no evidence that air flow inside the dryer was restricted. Id. Accordingly, he concluded that U.S. Steel did not violate the regulation. Id.

## II.

### Disposition of Issues

On review, the Secretary argues that the judge erred in finding that U.S. Steel did not violate section 77.200. The Secretary first argues that, for a finding of violation, the judge required a showing of an actual hazard of a significant and substantial nature: "-- in essence the judge would require a finding of a 'significant and substantial' violation in order to make out a violation." PDR at 5. The Secretary also argues that the judge erred in not finding a hazard of a significant and substantial nature, based on the inspector's testimony.

Contrary to the Secretary's assertions, the judge did not equate a violation of section 77.200 to a showing of a hazard of a significant and substantial nature. The judge required only "that the disrepair or condition of the cited equipment [present] a hazard to miners." 13 FMSHRC at 1473. The judge did not, by requiring a showing of a hazard, require a showing of a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature, the prerequisite to a significant and substantial violation under Cement Division, National Gypsum Co. 3 FMSHRC 822, 825 (April 1981) and Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Accordingly, we reject the Secretary's argument that the judge essentially required a showing of an actual hazard of a significant and substantial nature as a prerequisite to a finding of violation of section 77.200.

In addressing the Secretary's second argument, that the judge erred in not finding that the alleged hazard was significant and substantial based on the inspector's testimony, we find that the judge did not err. Substantial evidence supports the judge's finding that the weld seam crack in the dryer bed enclosure presented no hazard to miners. 13 FMSHRC at 1473. As the Commission has consistently recognized, the term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." See, e.g., Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1137 (May 1982) quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

The judge noted Inspector Dickerson's concession that there were no hazards presented outside the dryer. 13 FMSHRC at 1473. The Secretary on review acknowledges that it was the loss of fluidizing air current inside the dryer unit that posed the potential hazard, not the material leaking out of the dryer. See PDR at 6 n.4; S. Br. at 2 n.1, 10-12. The judge further found that the alleged hazard inside the dryer related to restricted air flow that could result from loss of fluidizing air current. 13 FMSHRC at 1473. However, the judge found that there was no evidence of restricted air flow. Id.

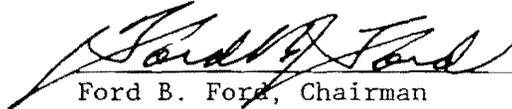
Although U.S. Steel foreman David Walters testified that he observed a very small, gentle flow of air escaping through a 3 to 4 inch long hairline split in the metal lining, he stated that "it would take a large hole to short circuit [the effect of the] two fans." Tr. 167, 169, 170. Walters testified that a four-inch hairline crack would not short circuit the airflow and, in view of the volume of fluidizing air current produced by the two large fans, the effect of the split on the air current across the bed was insignificant. Tr. 169-70. Walters testified that there was no hazard of an accident or injury to anyone. Tr. 172.

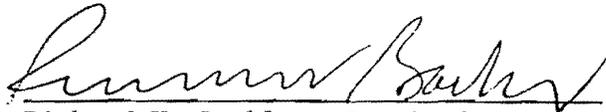
Inspector Dickerson's testimony that the alleged hazard was significant and substantial in nature is not compelling. Dickerson, who was not qualified as an expert witness on thermal coal dryers and claimed no specialized experience or qualifications relating to them, stated that there was a reasonable likelihood that a fire or explosion would occur as a result of the loss of fluidizing air if it were unabated. See Tr. 133-35, 138. However, he did not explain how the small amount of fluidized air seepage involved in this instance would result in restricted air flow in the dryer and create a hazard, nor did he testify that the crack was likely to widen, creating greater seepage and resulting in restricted air flow. See Tr. 138, 151, 154, 159. Although Dickerson testified that dryer explosions were not an unusual occurrence, there was no evidence presented that such explosions occurred in connection with three to four inch seam leaks. See Tr. 138. Dickerson conceded that the small amount of escaping fluidizing air would pose a hazard only if it restricted air flow within the dryer. Tr. 159. As noted above, the judge found no evidence of restricted air flow. 13 FMSHRC at 1473.

In short, the inspector's testimony did not prove that any hazard existed. Thus, we hold that the judge did not err in concluding that a violation was not established.

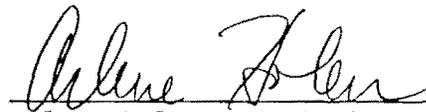
III.  
Conclusion

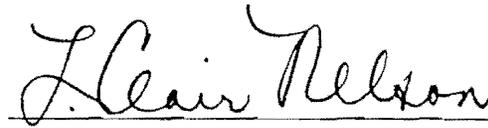
Accordingly, the judge's decision is affirmed.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

Disbribution

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 25, 1992

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. WEVA 90-141  
 :  
SOUTHERN OHIO COAL COMPANY :

BEFORE: Ford, Chairman; Backley, 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"). The issue is whether Commission Administrative Law Judge James A. Broderick erred in finding that Southern Ohio Coal Co. ("SOCCO") violated 30 C.F.R. § 75.1725(c), a mandatory safety standard applicable to underground coal mines. The standard provides: "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." Following an evidentiary hearing, Judge Broderick found that SOCCO had violated the standard because all affected miners working around a conveyor belt had not been informed that the belt, which previously had been locked-out, was going to be started. 12 FMSHRC 2503 (November 1990)(ALJ). For the reasons set forth below, we reverse the judge's decision.

I.

Factual and Procedural Background

SOCCO operates the Martinka No. 1 Mine, an underground coal mine located in Marion County, West Virginia. On May 5, 1989, an eight miner crew was extending an underground conveyor belt. The "belt move" in this instance involved extending the tailpiece of the conveyor belt one block (100 feet) toward the coal face in the north main section of the mine. The process involved, in part, tying-off the existing belt, moving the tail piece forward, adding additional belt, adding belt rails, and adding rollers. Before work began, Foreman Bill Laird and miner Sam Guido locked-out and tagged the belt

at the main power source. The crew<sup>1</sup> then added and spliced the belt and installed some of the top structure of the belt. The crew had not finished installing the bottom structure.

In order to more easily install the bottom rollers, approximately 30 feet of slack needed to be removed from the belt. Laird and one of the miners, Mike Bowman, left the area of the tailpiece to go to the headgate, approximately 5000 feet away, in order to activate the take-up device, which is used to tighten or add tension to the belt. Another miner, John Giordano, travelled to an area 200 or 300 feet outby the tailpiece, to the Jabco, a switch controlling power to the belt.

Laird pulled the take-up device to remove the slack. When Laird discovered that the take-up device would not remove enough slack to adequately tension the belt, he called Foreman John Gowers, who was located at the tail, told him that the belt was going to be started, and asked him to make sure that everything was clear. Gowers called him back and stated that everything was clear. Tr. II 18-19.<sup>2</sup> Gowers then told Dempsey McHenry to have Giordano turn on the Jabco. McHenry walked outby to Giordano and relayed Gowers' instructions, and Giordano turned on the Jabco. Gowers assumed that the other miners had overheard his conversation with McHenry. Tr. I 32; G-Exh. 2, p. 6. However, according to their testimony, crew members Guido, DeRosa and Renick knew Laird was going to pull the take-up device, but they did not know that Laird was going to start the belt.<sup>3</sup> Renick depo. at 25-26; Tr. I 92, 97, 127.

Laird testified that before the belt was started, he "bumped" the belt at least twice. Tr. I 51-53; G-Exh. 2, p. 2.<sup>4</sup> On his way back from the Jabco to the feeder, McHenry observed that the belt was "jumping up and down," at a location where "come-alongs" were still attached to the belt.<sup>5</sup> The come-alongs were attached to the top of the belt at locations described as anywhere from 40 to 200 feet from the tailpiece. Tr. I 131; Giordano depo. at 16; Renick depo. at 12; McHenry depo. at 16. McHenry then walked back to the

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<sup>1</sup> The remainder of the crew consisted of Foreman John Gowers and miners Lou DeRosa, Dempsey McHenry, Frank Renick, Mike Bowman, and John Giordano.

<sup>2</sup> The transcript of the evidentiary hearing is set forth in two volumes. Reference to the first volume is depicted as "Tr. I," while reference to the second is "Tr. II."

<sup>3</sup> Laird testified, however, that before he went to the headgate, he told Guido that he would probably have to run the belt in order to take up the slack. Tr. II 9.

<sup>4</sup> Bumping the belt involves jogging the belt, by turning it on and quickly turning it off.

<sup>5</sup> A "come-along" is a mechanical, hand-operated winch that latches and pulls wire rope and was used by the crew to hold up the belt so that belt structure and rollers could be installed.

Jabco and turned off the belt so that the come-alongs could be removed. Tr. I 130; McHenry depo. at 20, 26-27; 12 FMSHRC at 2504. After the power to the belt was turned off, Laird again locked-out and tagged the power box because he knew that the crew still had to install bottom structure. Tr. II 23-24, 28.

Guido testified at the hearing that he had been sitting on the belt, unhooking a come-along that was three to five feet away from him. He further stated that the belt started as he was getting off, causing him to be thrown from the belt and injuring his knee. Tr. I 106, 108-10.<sup>6</sup> He testified that he did not see the belt bump or feel it move at all. Tr. I 93. He also stated that there was no lighting except for cap lamps and that no one saw his injury.

On August 8, 1989, three months after this incident, James Young, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), went to the mine for an inspection and received a written request from union representatives to investigate the incident. Inspector Young interviewed Dewey Ice, as well as crew members Laird, Gowers, DeRosa, McHenry, and Renick. Inspector Young did not interview Guido because he had not yet returned to work.

Based upon his investigation, Inspector Young concluded that the belt had been started while still being worked on by miners who had not been informed that it was going to be started. Tr. I 17. Accordingly, he issued a section 104(a) citation alleging a significant and substantial ("S&S") violation of section 75.1725(c) stating:

Based on information obtained during an accident investigation, the safe work procedure involving tagging and locking out machinery, when workers are exposed to moving parts, was not in place. Communication between the head drive and the tail piece was neglected to the point that, the drive was unlocked and the belt started without notifying the employees working on the belt at the tail that the belt flight was going to be started. Six to Eight employees were working in the area, four employees involved were not informed that the belt was to be started....

Citation No. 3118169.

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<sup>6</sup> Crew member Lou DeRosa testified that Guido told him that he was leaning over to get his gloves from the belt when it started, and this information had also been reported by Dewey Ice, SOCCO's accident prevention officer, on SOCCO's accident report form after a conversation between Ice and DeRosa. Tr. I 142; Tr. II 30-31; G-Exh. 4. In addition, other witnesses testified that they had not seen the come-along next to Guido, but only saw come-alongs approximately 40 to 200 feet outby the tailpiece. Tr. I 136; Giordano depo. at 16; Renick depo. at 10-12.

Inspector Young testified that he believed that SOCCO violated section 75.1725(c) because:

when you have people working at one area on this belt line and you have people working down 5,000 feet away, [and that] is where the power is disconnected or tagged out or locked out or whatever, if you don't tell these people up here that you're going to start that belt, ... the part about being locked and tagged out means absolutely nothing.

Tr. I 25. He stated that men working 5,000 feet away from the area of the "visible disconnect" would know that it is safe to work on equipment only if they were told so, and that he had no problem with running the belt to take out the slack as long as there was proper communication and the crew was in a safe position. Tr. I 59, 69.

The citation was terminated by Inspector Young when SOCCO planned "a safety talk at their meeting [in which] they were going to go over with the foremen about starting up procedures and this type of thing." Tr. I 59-60. In addition, the action to terminate is described on the citation form as, "[a]ll parties involved in the investigation, agreed upon the importance of proper communication between work sites, and the review of accidents at this mine site." Citation No. 3118169.

Following an evidentiary hearing, the judge found that SOCCO had violated section 75.1725(c) and that the violation was S&S. In reaching his finding of violation, the judge first determined that the activities involved in extending a belt constitute "maintenance" within the meaning of section 75.1725(c). 12 FMSHRC at 2505. The judge also stated:

The evidence ... is clear that neither Guido nor DeRosa were informed that foreman Laird was going to start the belt. Although motion of the belt is necessary to make adjustments, it obviously cannot safely be accomplished while the belt is being worked on. All the affected miners must be informed if a belt which has been locked out is going to be started up. This was not done here. I conclude that a violation of 30 C.F.R. § 75.1725(c) has been established.

12 FMSHRC at 2506.

The judge then found that "[m]aking repairs or adjustments on a belt while the belt is moving is a serious violation," and that the violation was properly designated as being S&S. Id. The judge assessed a civil penalty of \$300 against SOCCO, rather than the \$276 penalty proposed by the Secretary. 12 FMSHRC at 2507. The Commission subsequently granted SOCCO's petition for discretionary review, in which SOCCO challenged only the judge's finding of violation, and we heard oral argument. On review, SOCCO notes preliminarily that there must be repair or maintenance being performed for there to be a

violation; that, in any event, the standard has no notice requirement; and finally, if a notice requirement can be read into the standard, SOCCO's practice of "bumping" the belt satisfied the requirement. PDR at 2-3.

II.  
Disposition of Issues

Under section 75.1725(c), power to machinery must remain off until repairs and maintenance are completed, unless power is necessary to make an adjustment. Not all tasks are covered by the standard; it applies only where repairs or maintenance are being performed. Here, it is undisputed that the crew was engaged in a belt move at the time the belt was started, and that the belt move had not been completed. Tr. I 24, 98; Tr. II 24, 28.

When determining whether SOCCO violated section 75.1725(c), the judge preliminarily considered whether "maintenance" was being performed while power was turned on to the belt.<sup>7</sup> The judge concluded that the work involved in extending the belt constituted maintenance within the meaning of the standard. 12 FMSHRC at 2505. In his finding of fact IV, the judge described the progress made in the belt move process and the work still to be completed. 12 FMSHRC at 2504. The judge found that "the action in extending the belt described in finding of fact IV constitutes maintenance on machinery as that term is used in [section] 75.1725(c)." 12 FMSHRC at 2505. The judge also found that extending the belt system involves "adding and adjusting activities which constitute maintenance." 12 FMSHRC at 2506.

On review, the Secretary focuses on Guido's and DeRosa's activities when the belt started and states that, at the time that power to the belt was turned on, Guido was working on the belt and DeRosa was working in close proximity to the belt. S. Br. at 7. In response, SOCCO argues that there is no basis for an allegation that maintenance work was being performed while the belt was in operation. Soc. Rep. Br. at 7.

We agree with the judge that the preliminary question is whether the belt move constitutes maintenance within the meaning of the standard. The judge first noted that the term "maintenance" is defined in the dictionary as "[t]he act of continuing, carrying on, preserving or retaining something . . . [t]he work of keeping something in proper condition." 12 FMSHRC at 2506 (citation omitted). He then turned to a thesaurus which listed as synonyms for maintenance: "1. preservation, upkeep, annual upkeep, keeping up; 2. continuance, continuity, extension, prolongation; perpetuation, persistence, perseveration, repetition." Id. (citation omitted). From this, the judge concluded that the belt move constituted maintenance because extending it involved "adding and adjusting activities." Id.

We find that the judge's literal application of the word "extension" is

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<sup>7</sup> Neither party contends that "repairs" were involved in this case and the evidence is undisputed that the crew was not engaged in making repairs when power was returned to the belt. Tr. I 62-64. The judge's decision involves only the issue of "maintenance."

out of context with the essence of the term maintenance. That essence, as the dictionary indicated, is that maintenance means "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . . . [p]roper care, repair, and keeping in good order . . . . [t]he upkeep, or preserving the condition of property to be operated." See Webster's Third New International Dictionary, Unabridged 1362 (1971); A Dictionary of Mining, Mineral, and Related Terms 675 (1968); and Black's Law Dictionary 859 (5th ed. 1979).

The record reveals that the belt move was not designed to prevent the belt from lapsing from its existing condition or to keep the belt in good repair but, rather, to increase its usefulness to SOCCO. Inspector Young acknowledged that no work was performed on May 7, 1989, to keep the belt in the same condition that it was in the day before, that no "deteriorating condition" was being "upgrad[ed]," and that the belt would run without adding additional length to it. Tr. I 64. Inspector Young explained that the belt haulage system runs coal to the tailpiece and, as the face advances, the tail piece would be "farther than the haulage would allow," if the belt were not also advanced.<sup>8</sup> Tr. I 20.

By adding new structure to extend the belt, SOCCO's miners were not engaged in the upkeep, preservation or maintenance of the existing belt. The evidence reveals that the belt move did not preserve the ability of the existing belt to convey material. The belt was not in need of upkeep. Instead, the belt move was an improvement of the belt system, extending it and shortening the distance between the belt's feeder and the working face. Accordingly, we reverse the judge's holding that the belt move engaged in by SOCCO constituted maintenance within the meaning of the standard.

Even if we were to assume for the sake of argument that the belt move constituted maintenance, we would reverse the judge's decision because his holding regarding warning requirements for conveyor belt start-ups is erroneous as a matter of law. While we share the judge's concern that adequate warning be given before a conveyor belt is started in order to assure the safety of miners, we find no indication that section 75.1725(c) requires such warning.

The Commission has consistently recognized that a safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Lanham Coal Co., Inc., 13 FMSHRC 1341, 1343 (September 1991)(citations omitted). The Commission further explained that:

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably

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<sup>8</sup> Typically, a shuttle car or ram car hauls coal from the working face to a "feeder," which is located at the tail of the belt. The coal is dumped onto the feeder, which feeds coal onto the tail of the conveyor belt. Tr. I 74.

prudent person test. The Commission recently summarized this test as "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."

Id. (citations omitted).

Section 75.1725(c) does not give a reasonably prudent person notice that it prohibits the cited conduct. The plain language of section 75.1725(c) expressly sets forth requirements for blocking and turning off power to machinery, but does not set forth any requirements regarding communication to miners before power is returned. Indeed, Inspector Young testified that the section "doesn't read that you must tell somebody [that the belt] is going to start." Tr. I 59. Instead, he explained that "the general law is to make sure that when people are working on [a belt], it's not going to start." Id. We conclude that a reasonably prudent person would not have known that the standard requires that miners be alerted before power is returned to machinery in underground coal mines.<sup>9</sup>

It is significant that the Secretary has set forth in 30 C.F.R. Parts 56, 57 and 77 specific requirements for providing adequate warning before conveyor belts are started for every type of mine except underground coal mines. See 30 C.F.R. §§ 56.14201, 57.14201, 77.1607(bb).<sup>10</sup> While Parts 56, 57 and 77 also provide blocking and locking out requirements for other types of mines similar or identical to those set forth in section 75.1725(c), the Secretary does not rely upon those standards to provide warnings applicable to

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<sup>9</sup> Even if we were to assume that the standard requires such warning, a reasonably prudent person might not have known that bumping the belt, apparently a common practice in underground coal mines, is not considered an adequate warning by the Secretary. In fact, Inspector Young considered bumping a belt to be a warning, and stated that a belt is normally bumped to alert miners that it might be started. Tr. I 52.

<sup>10</sup> For example, 30 C.F.R. § 56.14201, entitled "Conveyor start-up warnings," provides:

(a) When the entire length of a conveyor is visible from the starting switch, the conveyor operator shall visually check to make certain that all persons are in the clear before starting the conveyor.

(b) When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 seconds after the warning is given, the conveyor shall be started or a second warning shall be given.

starting conveyor belts. See 30 C.F.R. §§ 56.14105, 57.14105, 77.404(c). The specific start-up warnings required by the standards for other types of mines cannot be read into the general language of section 75.1725(c), applicable to underground coal mines. To do so, as urged by the Secretary, would not meet the test set forth in Lanham Coal Co., Inc., 13 FMSHRC at 1343, nor serve the interests of safety. As the court stated in Dravo Corp. v. OSHRC, 613 F.2d 1227, 1232 (3rd Cir. 1980):

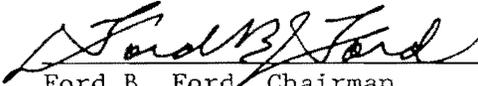
To strain the plain and natural meaning of words for the purpose of alleviating a perceived safety hazard is to delay the day when the ... safety and health regulations will be written in clear and concise language so that employers will be better able to understand and observe them.

Id., quoting Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649-50 (5th Cir. 1976).

For the reasons discussed above, we conclude that the judge erred, in finding that the belt move in which SOCCO was engaged constituted maintenance within the meaning of section 75.1725(c), and in finding that the standard requires warning to affected miners before a previously locked-out belt is started.

III.  
Conclusion

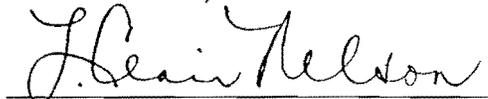
For the reasons set forth above, we reverse the judge's decision and vacate the citation.

  
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Ford B. Ford, Chairman

  
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Richard V. Backley, Commissioner

  
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Joyce A. Doyle, Commissioner

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1992

IN RE: CONTESTS OF RESPIRABLE :  
DUST SAMPLE ALTERATION : MASTER DOCKET NO. 91-1  
CITATIONS :

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

## DECISION

BY: The Commission

In this consolidated civil penalty and review proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1988)(Mine Act), the Commission, on November 13, 1991, granted petitions for interlocutory review filed by the Secretary of Labor ("Secretary") and operators represented by the law firm of Jackson & Kelly ("contestants"). The proceeding before the administrative law judge arises from a dispute between the Secretary and approximately 500 operators alleged to have altered respirable dust samples. On April 4, 1991, the Mine Safety and Health Administration (MSHA) issued approximately 4,700 citations charging such alterations. The operators contested the validity of the citations. The judge issued a prehearing order which, *inter alia*, required the Secretary to compile a list of documents in her possession that may be relevant, including an itemized list of documents the Secretary claims to be privileged or otherwise nondiscoverable. In response thereto, the Secretary produced a Generic and Privileged Document List (Document List) which, in its amended form (September 25, 1991), contains a listing and description of 449 documents, including 67 documents the Secretary claims are privileged.

After receiving a series of discovery related motions from the parties, the judge issued three orders,<sup>1</sup> which required the Secretary to produce eight documents notwithstanding her claims of privilege and upheld the Secretary's privilege claims as to 52 documents. The Secretary filed a motion seeking the judge's certification of this case for Commission interlocutory review. The judge denied the motion. On October 21, 1991, the Secretary filed the instant petition for interlocutory review insofar as she is ordered to produce six of the eight documents.

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<sup>1</sup> The pertinent orders of the judge are dated: September 13, 1991, 13 FMSHRC 1573 (Order 1); September 27, 1991, 13 FMSHRC 1611 (Order 2); and October 7, 1991, 13 FMSHRC 1750 (Order 3).

Thereafter, contestants filed a petition seeking interlocutory review of the same three orders, asserting that the judge erred in upholding the Secretary's privilege claims as to 52 documents.

On November 13, 1991, the Commission granted both petitions for interlocutory review.

### I. Secretary's Petition

The Secretary challenges the judge's rulings on two grounds: (1) that he erred in rejecting the Secretary's claim of deliberative process privilege, and, (2) that he erred in failing to rule on her claim of work product privilege.

#### A. Deliberative Process Privilege

In Order 1, the judge set forth a brief general explanation and description of the deliberative process privilege. The judge then specifically evaluated documents claimed by the Secretary to be within the deliberative process privilege, including each of the five documents presently claimed to be privileged (Nos. 3, 365, 366, 367, and 401). The judge determined that each of the five documents was privileged as part of the deliberative process of the agency.

In Order 2, the judge ordered the Secretary to disclose a number of privileged documents including the five in issue. In reaching his conclusion, the judge stated:

Documents for which claims of 'executive privilege' or attorney work product privilege are upheld may nevertheless be ordered produced if necessary to the opposite party's case. In such a case, I must consider whether 'need for access to the documents, or any part of the documents, for purposes of this litigation must be overridden by some higher requirement of confidentiality.' (citations omitted.)

Order 2 at 4.

The judge also cited the Commission's decision in the case of Secretary of Labor/Logan v. Bright Coal Company, Inc., 6 FMSHRC 2520 (1984), noting that in considering whether documents protected by the "informer's privilege" should be ordered disclosed, the Commission placed the burden on the party seeking disclosure, requiring a showing that the information sought be essential to a fair determination of the case; that consideration should be given to whether the Secretary is in sole control of the material sought, and whether the party seeking disclosure has other avenues available to it to obtain the material.

In applying the foregoing, the judge concluded as to each of the five documents that "the material sought is, for the most part, in the sole

possession of the Secretary, and the operators do not have other means of obtaining it or its equivalent." Id. at 4, 5.

The judge also set out four guidelines by which he would determine whether "to order disclosure of privileged documents." Id. at 5. Only guideline three is pertinent here:

Other documents for which the claim of executive privilege was upheld will be ordered disclosed to the extent that they are factual and deal with matters which are completed rather than those still pending.

The judge then considered each document separately, applying the aforementioned guideline and concluded as to Document 3 (and others not in issue):

These documents were held privileged as part of the deliberative process. However, they appear to be factual in nature although in draft form. They are exclusively in the Secretary's control, and are clearly relevant and important, indeed are close to the core issue of this case. Since the final report has been prepared, these documents relate to a completed matter. I hold that their disclosure is essential to a fair determination of this case and this overrides the Secretary's interest in confidentiality. Id.

Documents 365, 366, 367

These documents do contain deliberations and opinions, but they precede the Report on sample filter abnormalities (Document No. 2), and therefore are related to a completed rather than a pending matter. Id.

Document 401

This is a draft of study PHTC prepared prior to the report identified as Document No. 1. For the reasons given in my discussion of Documents 365, 366 and 367, this document will be ordered disclosed. Id.

Accordingly, the five documents in issue were ordered disclosed. The Secretary filed a motion seeking reconsideration of Order 2. The Secretary also submitted the subject documents for in camera inspection.

The judge granted the motion for reconsideration, reviewed the documents in camera and issued Order 3, wherein he again ordered the disclosure of the five documents in issue.

The Secretary disputes the judge's determination to compel disclosure on

two grounds.

1. that the judge misapplied the law when he ordered disclosure of all documents that relate to a completed matter, erroneously assuming that the deliberative process privilege expires once the reports were completed.

2. that the judge erred in not requiring contestants to make a specific factual showing demonstrating that disclosure of the documents is essential to their defense. She asserts that in fact no such need exists because the operators have been provided with the final reports; they will have an opportunity to depose the Secretary's experts regarding the basis for their conclusions; and they will have the opportunity to cross-examine the experts at trial.

Contestants assert that the documents played no role in the development of agency policy, rules or regulations and that therefore the deliberative process privilege does not apply to the documents in issue. Contestants also argue that even if privileged, once incorporated by reference into the relevant report, the communications lose the privilege and are subject to discovery.

Contestants urge that the judge was correct in balancing the needs of the parties and concluding that contestants' need overcame the Secretary's interests. The documents related to fundamental issues in the case -- how the government defines an abnormal white center (AWC) and how the government determines whether to cite an operator for an AWC. As such, they claim disclosure is essential to contestants' defense. Contestants also urge that the Secretary's argument that contestants' need has not been demonstrated fails to recognize that the judge has made an in camera inspection and "was able to see for himself the obvious materiality and relevance of these documents to the primary issues in the case and to determine that these documents were necessary to the development of contestants' defense." Response Br. at 20.

1. Disposition of Issues

Inasmuch as application of the deliberative process privilege is an issue of first impression for the Commission, a brief historical perspective may be noted.

In setting forth the reasoning supporting his dissent in Nixon v. Sirica, 487 F.2d 700 (1973), Circuit Court of Appeals Judge Wilkey, inter alia, traced the origins of the privilege of confidentiality, or executive privilege, terms which refer to what is presently described as the government's deliberative process privilege:

The oldest source of Executive Branch privilege, the common sense-common law privilege of confidentiality, existed long before the Constitution of 1789, and might be deemed an inherent power of any government ... Historically, apart from and prior to the Constitution, the privilege against disclosure to the

public ... arises from the undisputed privilege that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves privately and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.

Id. at 763, 764.

The Freedom of Information of Act, 5 U.S.C. § 552 (1970) ("FOIA") represents the codification of "this age old, common sense-common law privilege." Id. at 765. The FOIA was enacted "to assure the American public that necessary access to Governmental information, and to prohibit the abuse of so-called 'Executive privilege'" Id. at 766. However, the FOIA contains categories of documents or information that are exempt from disclosure, which represents a Congressional determination that "if the material sought falls within one of these seven exemptions, the public interest in maintaining confidentiality outweighs the public interest in the right to know Governmental affairs." Id. at 766.

In construing the pertinent FOIA Exemption 5<sup>2</sup>, the Supreme Court stated:

That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear (citations omitted) ... The cases uniformly rest the privilege on the policy of protecting the 'decision making process of government agencies' (citation omitted), and focus on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' (citations omitted).

NLRB v. Sears Roebuck & Co., 421 U.S. 132, 150 (1975).

The Court went on to endorse the Senate Report (citation omitted) in concluding that "'frank discussion of legal or policy matters' in writing

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<sup>2</sup> 5 U.S.C. § 552 reads in part:

"(a) Each agency shall make available to the public information as follows: ..."

"(b) This section does not apply to matters that are ..."

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

might be inhibited if the discussions were made public; and that the 'decisions' and 'policies formulated' would be the poorer as a result." Id. See also Kaiser Aluminum & Chemical Corp. v. U.S., 157 F. Supp. 939, 946 (1958).

The breadth of the privilege is described by the court in Jordan v. U.S. Dept. of Justice, 591 F.2d 753 (D.C. Cir. 1978):

This privilege protects the 'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated' (citations omitted). The privilege attaches to inter-and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy.

Id. at 772.

The test for a proper claim to the privilege was described:

the document must be 'pre-decisional.' The privilege protects only communications between subordinates and supervisors that are actually antecedent to the adoption of an agency policy.... The communication must be 'deliberative,' that is, it must actually be related to the process by which policies are formulated.

Id. at 774.

Contrasted against this construction, contestants argue that the documents in issue, drafts and comments regarding drafts of reports, are outside of the zone of the privilege, although at the same time they concede that the reports, i.e., the two documents that evolved from the disputed documents, "may arguably have been the subject of deliberation by the agency." Response Brief at 16.

It is difficult to embrace the proposed parsing of conduct advocated by contestants. The description of the documents offered by the Secretary, and the conclusions drawn by the judge after his in camera review of the documents, seem to confirm that the documents were deliberative and fall within the zone of the privilege. In concluding that contestants' need for the documents outweighs the Secretary's interest in keeping them confidential, the judge reasoned that fairness to the contestants "demands that they be apprised not only of the final report, but also the deliberations, Government suggestions, changes and revisions that led to the final report." Order 3 at 3.

In National Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114 (9th Cir. 1988), the court was presented with a similar attempt by a plaintiff

to narrow the zone of communication that might qualify under Exemption 5 of the FOIA. Plaintiff argued that "'to qualify under Exemption 5, the documents must not only be predecisional and deliberative, but [must] also contain non-binding and advisory recommendations regarding law or policy: opinions or recommendations regarding facts or consequences of facts [are] not ... exempt.'" Id. at 1117. The court rejected this attempt to parse the privilege beyond the bright lines set by the Supreme Court. Citing E.P.A. Agency v. Mink, 410 U.S. 73 (1973), the court noted that the Supreme Court "has recognized a distinction only between 'materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on others.'" Id. at 1118.

Thus, contestants' assertions that the disputed documents "are not part of the decision making process" but merely "part of the factual predicate for the decision to issue citations" should be rejected. Response Brief at 16. Accordingly, we reject contestants' argument that the disputed documents fall outside the zone of the privilege, and affirm the judge's conclusion that the documents are deliberative.

a. Did the judge err in ruling that documents relating to completed matters falls outside the privilege?

As previously described, in his second Order, the judge set out an additional guideline for determining the applicability of the deliberative process privilege to documents, based on their factual content and their dealing with completed rather than pending matters. Order 2 at 5. The judge supplied no authority for this guideline.

We interpret the guideline to include two independent bases on which disclosure would be ordered: (1) if the documents were factual; or (2) if the documents related to completed matters. The judge's ruling regarding documents 365, 366, 367 demonstrates this construction. In applying the guideline, the judge found the documents to contain "deliberations and opinions," not facts. However, they were ordered disclosed because they were related to a completed, rather than a pending matter.

Factual documents are not at issue here. The case law is clear: purely factual material that does not expose an agency's decision making process does not come within the ambit of the privilege. Exxon v. Doe, 585 F. Supp. 690, 698 (D.C. 1983).

In an apparent attempt to support the judge's conclusion regarding completed matters, contestants cite Sears, 421 U.S. 132:

[I]f an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be

withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.

Id. at 161.

Many courts, in applying the Sears holding, have construed the court's limitation narrowly:

If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process.... But such disclosure of the internal workings of the agency is exactly what the law forbids (citations omitted).

Lead Industries Association Inc., v. OSHA et al., 610 F.2d 70, 86 (2nd Cir. 1979).

We conclude that the disputed guideline adopted and relied upon by the judge in Order 2 restricts the applicability of the deliberative process privilege more than was contemplated by the Supreme Court. Accordingly, we conclude that the guideline is legally unsupported. The judge incorrectly concluded that documents dealing with completed matters automatically fall outside the privilege. Furthermore, there is no finding by the judge that the disputed documents have been expressly incorporated into the final report.

b. What is the effect of the judge's error?

Although in Order 2 the judge applied the wrong standard by relying upon the above-referenced guideline in ruling that disclosure was required because the documents "deal with matters which are completed rather than those still pending," we conclude that this error was harmless.

After the issuance of Order 2, the Secretary filed a motion for reconsideration, wherein, inter alia, she challenged the judge's guideline. The Secretary cited several cases supporting her contention that the privilege for predecisional agency deliberation continues to exist notwithstanding the fact that the documents relate to a matter that has been completed. Motion at 3-4.

The judge granted the motion, and for the first time viewed the disputed documents in camera. He then issued Order 3. Although the judge did not refer to the Secretary's challenge to his guideline, he did not repeat the disputed guideline in his order, nor did he indicate any reliance upon it. In Order 3, the judge provided a precise, detailed basis for his determination. The judge again concluded that the documents are within the scope of the privilege but, he determined that, when balanced between the Secretary's need for confidentiality and the contestants' need for a fair defense, the Secretary's need must give way. In viewing the judge's reasoning on this issue, we conclude that he ultimately supported his order to disclose, not on the disputed guideline of Order 2 but, rather, by properly applying the balancing test adopted by the Commission in Bright, supra. Specifically, in the case at bar, the judge found that:

Contestants have asserted that the documents in question directly relate to the central issue of this case, that they are exclusively in the possession of the Government, and that they consist of largely factual material. The Secretary has not denied the first two assertions.

The litigation before the Commission involves the Government's charge that the mine operators tampered with respirable coal mine dust samples. This contention is based in part on the study and report prepared by West Virginia University. I conclude that fairness to the operators (and in the Commission's interest in fairly deciding these cases) demands that they be apprised not only of the final report, but also of the deliberations, Government suggestions, changes and revisions that led to the final report. I do not believe that the disclosure of the documents will compromise government policy deliberations. The operators' need for the documents outweighs the Secretary's interest in keeping them confidential.

Order 3 at 1-3.

The Secretary further argues that contestants should have been required to make a specific showing demonstrating that disclosure is essential to their defense. This point is effectively moot. The judge has viewed the disputed documents and has concluded that they are essential to contestants' defense.

Accordingly, we conclude that the judge properly acted within his discretion,<sup>3</sup> and therefore we affirm his order requiring disclosure of the documents, notwithstanding the Secretary's assertion of its deliberative process privilege.

B. Work Product Privilege

The Secretary has sought interlocutory review of the judge's orders requiring production of six documents (Nos. 3, 365, 366, 367, 401 and 424) on grounds that the documents are protected from disclosure by the work product privilege.<sup>4</sup>

As previously noted, the judge issued three orders relevant to this proceeding. Order 1 contains no indication that the judge considered whether the documents in issue fell within the work product privilege. After setting forth relevant case law regarding each of the privileges asserted by the

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<sup>3</sup> See Part II B, slip op. at 17, regarding generally the judge's discretion and the Commission's standard of review.

<sup>4</sup> In her brief to the Commission the Secretary concedes that she inadvertently failed to assert the work product privilege as to Document No. 3. Brief at 4.

Secretary, the judge individually referenced and evaluated a large number of documents, including those in issue. As to each of the documents individually evaluated, the judge provided a brief description, and a ruling regarding the asserted privilege(s). Notwithstanding the Secretary's assertion of the work product privilege as to the documents in issue, Order 1 contains no comment or ruling on the work product privilege. In that order, however, the judge concluded that each of the six documents was protected from disclosure by virtue of the deliberative process privilege.

Order 2 contains the judge's reversal of his previous decision regarding the application of the deliberative process privilege as to the six documents in issue. However, once again he did not rule on the work product privilege.

Order 3 contains the judge's reconsideration and affirmance of his ruling in Order 2 to compel disclosure of the documents previously determined to be protected by the deliberative process privilege. Again, there is no comment or ruling regarding the Secretary's asserted work product privilege.

The Secretary argues that the judge's failure to rule on her claim of work product privilege is "an abuse of discretion and grounds for a Commission order in the nature of mandamus directing the ALJ to decide the Secretary's claims." Brief at 16. The Secretary also sets forth an extensive analysis of the merits of the claimed privilege.

Contestants argue that the Secretary waived her right to assert the work product privilege. They argue that the Secretary failed to raise the work product privilege issue in her motion for reconsideration filed after the judge issued Order 2 compelling disclosure of the documents.

Contestants argue that, when viewed as a whole, the judge's three orders effectively constitute a ruling on all the privileges but "if the judge decided that the other claimed privileges did not apply to protect the document from production, he simply did not note the application of that privilege." Response Brief at 29.

Contestants further argue that the analysis made by the judge regarding the deliberative process privilege was the same analysis required for the work product privilege and that therefore his failure to expressly deal with the work product privilege was harmless. *Id.* at 25.

Finally, contestants also argue that the privilege does not apply to the documents in issue.

1. Did the judge fail to rule on the Secretary's asserted claim of work product privilege?

Not only did the judge fail to expressly rule on the work product privilege in his three orders, but contrary to the arguments of contestants, he did not effectively rule on that privilege. The judge's description of the documents and his consequential findings and conclusions deal with the deliberative process privilege. The judge's analysis lacks discussion specifically pertaining to the work product privilege and fails to apply the

guideline he set forth regarding the work product privilege:

Documents for which the claim of work product privilege was upheld will be ordered disclosed to the extent they are factual and do not include mental impression, conclusions, opinions or legal theories.

Order 2 at 5. The judge's orders did not discuss whether the documents contained legal theories or mental impressions -- elements that are clearly unique to the work product privilege.

Contestants, however, would have the Commission conclude that, since the deliberative process privilege and the work product privilege contain overlapping elements, and since the analysis regarding contestants' need for the documents is essentially the same as that underlying consideration of the deliberative process privilege, we should view the judge's disposition regarding the deliberative process privilege as dispositive of the work product privilege. To do so however, would ignore the consideration that because the work product privilege exists for unique reasons, a different result might obtain. Consequently, a separate analysis is required.

In Secretary of Labor v. Asarco, Inc., 12 FMSHRC 2548 (1990) the Commission recently ruled in a similar situation, wherein the Secretary urged multiple privileges for a particular document, and the judge failed to rule on all of the asserted privileges. The Commission was invited by the Secretary in that case, to draw an inference from the judge's failure to directly rule on a particular privilege. The Commission resisted then, as it does now:

The Secretary maintains that the judge's failure to rule indicates that he determined that the subject statements should not be provided. We cannot make this assumption on the existing record, and remand this issue to the judge for his reconsideration in accordance with this decision and Bright.

12 FMSHRC at 2557.

Accordingly, we conclude that the judge did not expressly rule on the work product privilege and that the judge's analysis of the deliberative process privilege cannot be construed to dispose of the work product privilege issue.

2. Did the Secretary waive her right to the privilege?

Contestants properly note that, after issuance of Order 2, wherein the judge ordered disclosure of the documents based upon his rejection of the Secretary's deliberative process privilege claim, the Secretary filed a motion for reconsideration that did not mention the judge's failure to address the asserted work product privilege.

To evaluate the effect of this action by the Secretary, it is important to view the motion in context. The judge's initial response (Order 1) to the

Secretary's privilege assertions was positive. Although the Secretary had advanced multiple bases for nondisclosure, the judge, relying upon only one of those bases, granted the Secretary the ruling she sought. Thus the documents in issue were protected from disclosure by virtue of the judge's conclusion that the deliberative process privilege obtained.

In Order 2, the judge reversed himself and concluded that, although the documents were privileged as deliberative, that privilege must fall away if the documents related to a completed matter. The judge did not rule on the work product privilege. The Secretary promptly responded with a motion for reconsideration. She challenged the basis of the judge's ruling regarding the deliberative process privilege and submitted the documents for an in camera inspection. The motion contained no mention of the work product privilege, nor is there any indication that the Secretary intended to abandon her earlier asserted claim of work product privilege. Indeed, it would have been premature to seek reconsideration of a ruling that had not yet been rendered. Accordingly, we find contestants' waiver argument to be unpersuasive.

Also unpersuasive is contestants' attempt to draw support from the Commission's ruling in Wilmot Mining Co., 9 FMSHRC 684 (1987). In that civil penalty proceeding the judge directed the parties to explore settlement. Notwithstanding a proposed settlement agreeable to the parties, the judge conducted a hearing and offered no explanation for his apparent rejection of the settlement offer. Wilmot argued to the Commission that the settlement offer was improperly rejected. The Commission noted that:

Wilmot apparently never objected to the judge's procedure in going forward with the hearing. It did not object at the hearing or argue this point to him in its post-hearing brief. Failure to object in a timely manner to an alleged procedural error ordinarily waives the right to complain of the error on appeal....

Id. at 686.

In the instant case, the Secretary has acted timely. She has been ordered to disclose documents for which she has claimed several privileges but the judge has ordered disclosure without ruling on one of the privileges asserted. The Secretary is under no obligation, under the Commission's rules, to re-assert the claim of privilege before seeking interlocutory review of the judge's failure to rule on the claim.

Accordingly, we conclude that the judge failed to rule on the Secretary's claim of work product privilege and we therefore remand this matter to the judge.

## II. Contestants' Petition

Contestants seek interlocutory review of the same three orders of the judge insofar as they uphold the Secretary's claim of privilege as to fifty-two documents.<sup>5</sup>

Contestants rest their challenge on four grounds: (1) the Secretary's assertion of the privileges was improperly invoked and should not have been allowed; (2) the judge failed to require the Secretary to furnish sufficient factual material in support of her claimed privileges; (3) the judge failed to properly apply the claimed privileges to the documents in issue; (4) the judge's orders prevent meaningful review because they lack sufficient factual detail and analysis.

### A. Issues

#### 1. Was the Secretary's assertion of the privileges properly invoked?

The Secretary's assertion of various privileges is contained in the Document List dated June 21, 1991.<sup>6</sup> The descriptions of the documents and the bases for the claimed privileges contained therein are further augmented in the Secretary's opposition to motion to compel discovery,<sup>7</sup> and in two affidavits dated August 30, 1991.<sup>8</sup>

The affidavits were filed in response to the judge's order to the Secretary (August 22, 1991) requiring that she reply to contestants' contention "that privileges must be formally asserted by the agency head after personal consideration of the documents for which privilege is claimed." Order 1 at 1-2.

The first affidavit, from the Deputy Assistant Secretary for Mine Safety and Health of the Department of Labor, states that he is authorized to act on behalf of the agency in enforcement matters and that he has reviewed the documents for purposes of determining whether to assert a governmental privilege. The affiant then formally asserts four specific privileges (deliberative, investigative, attorney-client, and work product) to

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<sup>5</sup> Although contestants reference fifty-one documents, the Secretary states she assumes contestants inadvertently omitted one additional document, placing fifty-two documents in issue. See Response Brief at 8, fn. 8.

<sup>6</sup> A copy of the amended list dated September 25, 1991 has been furnished to the Commission. See Appendix to Secretary's Response Brief, Exhibit 1.

<sup>7</sup> Id., Exhibit 2.

<sup>8</sup> Id., Exhibit 3.

specifically enumerated documents, setting forth the bases for each claim of privilege. The affiant also determines not to assert a privilege as to certain documents.<sup>9</sup>

The second affidavit is from a Supervisory Industrial Hygienist for MSHA authorized by the agency to serve "as an agent of more than one federal grand jury investigating allegations of the alteration of the weight of coal dust samples ... in accordance with Rule 6(e) of the Federal Rules of Criminal Procedure."<sup>10</sup>

In ruling on the Secretary's assertion of the privileges in Order 1, the judge traced the relevant case law, including Commission precedent and concluded:

the claim of executive privilege invoked here by a high level official of the Department of Labor who has direct responsibility for the matters involved after personal consideration of the documents, is sufficient formal claim of privilege when coupled with the Secretary's offer to submit the documents (except those for which grand jury immunity is claimed) for in camera inspection.

Order 1 at 5.

Contestants argue that the invocation of the claim of privilege must be made by the Secretary of Labor or by a high ranking subordinate who has been formally delegated the task, and who has been furnished with guidelines on the use of the privilege. Because Secretary Lynn Martin has not herself invoked the privilege, nor formally delegated that task, contestants argue that the judge erred in accepting "a substitute procedure that does not meet the requirements of the law." Brief at 17.

The Secretary argues that she properly invoked the claims of privilege and, in doing so through the use of two affidavits, exceeded the requirements under Commission precedent.

#### Disposition

The analysis of the judge demonstrates that he properly recognized and understood the basis for the requirement that executive privilege be invoked by "a responsible government official" and not merely by trial counsel. Order 1 at 5. He recognized that privilege claims should be narrowly construed and not lightly claimed. Case law seems to reflect a concern that the claim of government privilege not be left merely to trial counsel, whose judgment might

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<sup>9</sup> Id. at A-105.

<sup>10</sup> Id. at A-106.

be "affected by their interest in the outcome of the case."<sup>11</sup> In this case, a high ranking official of the agency formally invoked the privilege and, contrary to contestants' assertion, did not "merely restate Secretary's Counsel's privilege assertions."<sup>12</sup> Brief at 15. The affidavit of the Deputy Assistant Secretary contains a listing of documents that he determined were not privileged. As such, the underlying rationale for formal invocation of the privilege is essentially satisfied.

The judge entertained contestants' argument and concluded that the quality of the invocation in this case was sufficient to afford contestants the protection required. In doing so, the judge also relied upon the Commission's holding in Bright, 6 FMSHRC 2520, which essentially recognized that, although authority exists requiring a formal claim of privilege by the department head in order to invoke the informant's privilege, most cases do not address whether the privilege was formally raised. The judge concluded that "to require that she (the Secretary) personally consider all the documents in these cases and invoke privileges such as are claimed in this administrative proceeding is ... neither practical nor necessary." Order 1 at 5. We agree, and therefore affirm the judge's ruling.

#### Administrative Law Judge's Dispositions as to Contestants' Issues 2, 3, and 4

After receiving and reviewing the Secretary's document list and the two affidavits described above, the judge, in Order 1, referenced appropriate procedural law and case law regarding discovery and privilege in general, and then set forth the pertinent case law and the principles derived therefrom regarding each of the specific privileges claimed by the Secretary. The judge then ruled on the asserted claims of privilege, referring to each document separately. As a result 50 documents were protected from disclosure, i.e., privileged, four documents were ordered disclosed, and 14 documents were ordered to be produced for an in camera inspection.<sup>13</sup>

In Order 2, the judge completed his in camera inspection of the 14 documents ordered to be submitted to him and also inspected in camera, two additional documents submitted by the Secretary with her motion to reconsider the order to disclose. Additionally, the judge reconsidered his previous ruling granting claimed privileges with respect to 11 documents. To those documents the judge applied a series of guidelines by which he re-evaluated whether production was necessary, notwithstanding the existence of a

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<sup>11</sup> Pierson v. U.S., 428 F. Supp. 384, 395 (1977); See also Thill Securities Corp. v. New York Stock Exchange, 57 F.R.D. 133, 138 (E.D. Wisc. 1972).

<sup>12</sup> Additionally, as contestants themselves have shown this is a high profile litigation in which Secretary of Labor Lynn Martin has been personally involved. See Brief Exhibit B at 8; Brief Exhibit A at 19-20; PIR at 12-13.

<sup>13</sup> Parts of one document were ordered to be produced and the remainder presented for in camera inspection.

privilege. This process resulted in 49 documents being protected from disclosure, i.e., privileged, and 18 documents being ordered disclosed.<sup>14</sup>

In Order 3, the judge issued orders in response to contestants' motion to compel and the Secretary's motion for reconsideration. The judge also accepted for in camera review nine additional documents tendered by the Secretary. This process resulted in three documents being protected from disclosure, i.e., privileged, and eight documents being ordered disclosed.

In all, the judge examined, in camera, 25 of the 67 documents claimed to be privileged.

2. Did the judge fail to require sufficient factual material in support of the Secretary's claimed privilege?

Contestants argue that the Secretary has not been required to furnish sufficient factual data to support her assertion of privilege; that a detailed description of each document, along with a detailed justification for the claim of privilege is required; that the Secretary "must be required to submit a 'Vaughn' index in order for the judge to determine whether the documents are ... privileged."<sup>15</sup> Brief at 12.

The Secretary argues that the judge has been presented with more than a sufficient basis for his rulings on privilege. She rejects contestants' demand for a Vaughn index arguing that courts have required such an indexing in FOIA cases where the court is confronted with masses of documents, "unrelated to any specific claims, with which the court is unfamiliar." Response brief at 32. By contrast, the judge in the instant case is intimately familiar with the litigation and able to place the documents in issue in proper context. The Secretary claims the requirement to create such an index would yield no new information to contestants. Moreover, because the Secretary has offered to provide the documents to the judge for in camera inspection, any question he may have regarding the application of a privilege can easily be resolved. Id. at 34.

3. Did the judge fail to properly apply the claimed privileges to the documents the Secretary has refused to disclose?

Contestants broadly challenge all conclusions of privilege made by the judge, claiming in general that he did not properly apply the tests required to sustain each privilege. Contestants separately describe the scope of each of the five privileges at issue and assert particular errors of the judge.

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<sup>14</sup> Portions of two of the documents were excepted from the disclosure order.

<sup>15</sup> In Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), a case brought pursuant to the FOIA, the court ordered that the agency furnish an index containing an itemization of the documents with a correlated indication of its asserted justification for each claimed privilege.

In defending the judge's ruling, the Secretary separately analyzes the scope of each privilege and responds to each of the asserted charges of judicial error.

4. Did the judge's orders prevent meaningful review because assertedly they lack sufficient factual detail and analysis?

Contestants charge that the judge failed to sufficiently explain the bases for his rulings, thereby precluding meaningful review and running afoul of Commission precedent that the judge must "clearly articulate the basis for his conclusion" set forth in Asarco, 12 FMSHRC 2548, Brief at 6-7.

The Secretary defends the adequacy of the judge's orders by tracing each order and describing the manner by which the judge evaluated, analyzed, and explained his rulings as to each individual document. The Secretary contends that the judge complied with Commission Procedural Rule 55(d), 29 C.F.R. § 2700.55(d) (infra).

B. Disposition of Issues

Contestants' issues 2, 3, and 4 address the discretion to be accorded the judge in discovery proceedings. The Commission's standard of review is determined by our procedural rules and relevant court precedent.

Discovery before the Commission is regulated by Commission Procedural Rule 55, 29 C.F.R. 2700.55.<sup>16</sup> The scope of discovery permitted is specified in Rule 55(c):

Parties may obtain discovery of any relevant matter not privileged, that is admissible evidence or appears reasonably calculated to lead to the discovery of admissible evidence.<sup>17</sup>

In reviewing a judge's rulings under the above-cited rule, the Commission described its standard of review as follows:

[T]he Commission cannot merely substitute its judgment for that of the administrative law judge ... The Commission is required however, to determine whether the judge correctly interpreted the law or abused his

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<sup>16</sup> Rule 1(b), 29 C.F.R. 2700.1(b) also pertains: "On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission or any Judge shall be guided so far as practicable by any pertinent provision of the Federal Rules of Civil Procedure as appropriate."

<sup>17</sup> The documents in issue are apparently relevant inasmuch as the Secretary listed the documents in the Generic and Privileged Document List in response to the judge's order to include all relevant documents. Furthermore the Secretary has not argued to the contrary.

discretion and whether substantial evidence supports his factual findings.

12 FMSHRC at 2555 (citations omitted). That case was one in which the Commission was reviewing the discovery rulings of the judge after entry of a final order of dismissal based on the Secretary's refusal to comply with the judge's order to produce documents claimed to be privileged.

In similar cases (after entry of a final order), courts have recognized "the broad discretion the discovery rules vest in the trial court"<sup>18</sup> and have expressed a standard of review that is even more limited:

A district court has very wide discretion in handling pretrial discovery and we are most unlikely to fault its judgment unless, in the totality of the circumstances, its rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case.

Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1979)(citations omitted). Indeed our Commission Procedural Rule 55(d) also grants broad discretion to the judge:

Discovery limited by Judge. Upon application by a party or by the person from whom discovery is sought or upon his own motion, a judge may, for good cause shown, make any order limiting discovery to prevent undue delay or to protect a party or person from annoyance, oppression, or undue burden or expense.

(Emphasis supplied).

Thus, when analyzing the manner, content, and effect of a judge's discovery rulings, the judge, by rule, is authorized to exercise wide discretion in discovery matters, and the Commission by precedent is disinclined to substitute its judgment for that of the judge unless error or abuse of discretion has occurred.

Further support for the application of this standard of review, or one that accords the judge even wider discretion, is drawn from the fact that the Commission is not reviewing a final order of the judge. Notwithstanding the rule that discovery orders are usually not appealable,<sup>19</sup> we have accepted contestants' (and the Secretary's) representations that the matters raised in

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<sup>18</sup> 8C. Wright & A. Miller, Federal Practice and Procedure § 2006 at 35.

<sup>19</sup> See 8C Wright & A. Miller, Federal Practice and Procedure § 2006 at 29 (1970); 9 Moore's Federal Practice § 110.13[2] at 132 (2d ed. 1991). However, our decision to grant the petitions is grounded in the recognition that this is an unprecedented litigation of enormous impact and concern to all parties that raises complex procedural and substantive issues of first impression.

the petitions involve controlling questions of law, the review of which "may materially advance the final disposition of the proceedings."<sup>20</sup> In determining whether to grant review of pretrial discovery orders on an interlocutory basis, courts have recognized and erected a high threshold of review.

[I]n the absence of a certification ... or of a showing of 'persistent disregard of the Rules of Civil Procedure' (citation omitted), or of 'a manifest abuse of discretion' (citation omitted), on the part of the district court, no jurisdictional basis exists for interlocutory review of pretrial discovery orders of the type here presented.<sup>21</sup>

Xerox Corp. v. SCM Corp., 534 F.2d 1031, (2nd Cir. 1976). Accordingly, in this case, the discretion accorded the judge under the Commission's procedural rules is broadly construed.

Did the judge rely upon sufficient factual material in ruling on the privilege? (Issue 2)

This is a matter that is squarely within the discretion of the judge and will not be disturbed unless a clear abuse of discretion is demonstrated. On the facts presented in this case, contestants have failed to demonstrate judicial abuse.

After reviewing the Secretary's document list and the two affidavits invoking the privilege claims, and after applying the appropriate legal principles, the judge agreed to protect 50 of the 67 documents claimed to be privileged. As to the protected documents he stated, "I conclude that her [the Secretary] description of these documents, while somewhat cryptic and lacking in detail, is sufficient for me to determine that the documents fit the privilege asserted." Order 1 at 9. He then proceeded, item by item, to rule on each document in this group. At the same time, apparently concluding that he was provided an insufficient amount of information supporting certain claims of privilege, the judge ordered the production of 14 documents for his in camera inspection. He also rejected four claims of privilege. Id. at 16-17. As previously noted, before the issuance of his third order, the judge had actually inspected 25 of the 67 documents claimed to be privileged. Thus it is clear that when the judge determined more was needed to support a privilege claim he acted, ordering production of the documents for his in camera inspection, and the Secretary complied.

Indeed, the record demonstrates that the Secretary has consistently offered to make the documents available for in camera inspection, "in the

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<sup>20</sup> See Commission Procedural Rule 74, 29 C.F.R. 2700.74(a).

<sup>21</sup> The contestants did not request nor did the judge issue a certification for interlocutory review. The Secretary however did file a motion seeking certification. The judge denied the motion.

event that the Judge is unable from the document description provided by the Secretary to determine the validity of the privilege asserted, the Secretary agrees with Kentucky Carbon that an in camera inspection of any such privileged document is appropriate."<sup>22</sup>

Thus, availability of access to the disputed documents and the sound reasons contained in the Secretary's response brief,<sup>23</sup> provide strong support for a rejection of contestants' demand for a so-called "Vaughn index." In Vaughn, 484 F.2d 820, the circuit court was reviewing the district court's summary judgment in favor of the Civil Service Commission, which had denied a FOIA request claiming that certain exemptions to disclosure obtained. Noting that the Supreme Court, in the seminal FOIA case, Mink, 410 U.S. 73 "made it clear that it was not always necessary for a court to conduct an in camera examination" (Vaughn supra, at 824, fn. 16), the Vaughn court proceeded to put its gloss on the approach to be taken by trial courts in determining whether documents fit within FOIA exemptions. However, the indexing required by the court was based upon an entirely different type of litigation than the case at bar. In Vaughn, a law professor, engaged in research on the Civil Service Commission, sought disclosure of reports, running into "many hundreds of pages" which were not related to any litigation or claim the professor had with the Commission. The court observed:

This lack of knowledge by the party seeing (sic) disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible.

Id. at 824-825.

Thus, the circumstances underlying the court's determination are unique to FOIA litigation and not present in the case at bar. The "dispute resolution" typically employed is an in camera inspection. "Where the ALJ had questions about particular documents he reviewed them, resulting in inspection of approximately a quarter of the documents ruled privileged." Response Brief at 34.

Accordingly, we conclude that the judge's reliance upon the record information was well within his discretion and that contestants have failed to demonstrate any abuse, or any reason why the judge should have compelled a "Vaughn index." We also note that the record discloses the existence of no

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<sup>22</sup> Secretary's opposition to motion to compel discovery, August 9, 1991 at 1. Except, the Secretary refused to furnish document 406 which she maintained was prohibited from disclosure under Rule 6(e), Fed. R. Crim. P.

<sup>23</sup> Id. at 9-11, 31-35.

motion or any other attempt by contestants, subsequent to the issuance of the judge's orders, to cause the judge to require more information or receive additional documents for an in camera inspection.<sup>24</sup>

Did the judge properly apply the privileges? (Issue 3)

The judge has set forth an accurate description of the legal elements underlying each of the privileges.<sup>25</sup> While contestants' complaint is that the Secretary provided, and the judge relied upon, too little information to support the asserted privileges, contestants also support their challenge by listing specific documents and coupling them with specific alleged errors. The Secretary's defense generally provides sufficient basis for sustaining the judge.<sup>26</sup> In other instances the charges of contestants are not well founded.<sup>27</sup>

Deliberative process privilege. In their challenge, contestants assert that six of the 11 documents protected pursuant to this privilege refer to communications occurring after a policy had been settled upon, and therefore fail to meet the first prong of the test, that documents be "pre-decisional." The Secretary's rebuttal indicates that four of the documents relate to the issuance of civil citations and were pre-decisional with respect to that decision. Response Brief at 22. As to the remaining two documents, they "discuss options for how to improve MSHA's dust sampling program in the future, and remain pre-decisional because these policy decisions have not yet

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<sup>24</sup> Contestants' July 21, 1991 motion to compel discovery contains an alternative request for in camera inspection.

<sup>25</sup> With the exception of the guideline imposed regarding the deliberative process privilege that was the focus of the Secretary's challenge in her petition for interlocutory review.

<sup>26</sup> Except as noted by the Secretary, document no. 17 "held to be protected by the attorney-client privilege, should have been protected instead as work product, which the Secretary also claimed." Response Brief at 25, fn 19.

<sup>27</sup> With respect to their challenge to document no. 203, contestants note that the judge protected the document notwithstanding the Secretary's failure to assert the privilege on the "Secretary's repository list." Brief at 19, fn 14. However, in her October 4, 1991, motion for reconsideration, the Secretary expressly asserted three privileges, including the deliberative process privilege.

In support of their challenge to the work product privilege contestants assert that "many of the documents held to fall within this privilege, were not generated by the Secretary's counsel and, in fact, were undated with unknown authors." Brief at 26. Contestants support the statement with reference to 13 particular documents. Examination of the record discloses that of the 13 referenced documents, six were both undated and unsigned and of those, three were prepared for the U.S. Attorney's criminal investigation and the remaining three were computer printouts. Of the seven documents that were dated, three were both dated and signed.

been made." Id. at 22-23. The Secretary also indicates that a third deliberative process occurred relating to matters to be referred for criminal action.

Contestants charge that eight of the 11 documents failed to meet the second prong of the deliberative process privilege test, i.e., they were not "deliberative." The Secretary defends, stating all 11 documents "contain opinions, recommendations, discussion points, options and other deliberative materials." Id. at 23. She indicates that some of the documents were prepared by the Assistant Secretary for the Secretary; some were in draft form and others were handwritten notes. She notes that the judge has inspected four of the documents in issue.

Investigative process privilege. Although contestants argue that too little information was given to and received from the judge, the Secretary defends the judge's rulings, averring that 17 of the 19 documents so protected relate to ongoing criminal investigations and that the two remaining documents relate to a separate civil investigation.<sup>28</sup> As such, the judge apparently concluded that disclosure of the documents "would interfere with those enforcement proceedings."<sup>29</sup>

Attorney-client privilege. Again, all documents so protected are challenged en masse, with the complaint essentially being that the "judge decided this issue based solely upon whether the author and recipient of a particular document were in an attorney-client relationship" and that the judge "failed to consider the extent to which a waiver of any claim ... has occurred." Brief at 23-24. The Secretary states that all the documents except one "deal primarily with highly sensitive criminal matters." Response Brief at 25. She also explains that two separate attorney-client relationships exist, one between the Department of Justice (the attorney) and the Department of Labor (the client), concerning criminal matters; and the second between the Office of the Solicitor (attorney) and the Office of the Secretary and MSHA (the clients), and that all the documents so protected resulted from one of these relationships.

Regarding the allegation that the privileges may have been waived, the Secretary states "Contestants never argued to the ALJ that the Secretary waived any privilege, and, in fact, they still cite nothing in the record to support such a claim." Id. at 31.

Work product privilege. The judge protected 20 documents under this privilege. Contestants' challenge is essentially that too little information was provided to the judge who then ruled in a summary fashion making it impossible to determine if he properly applied the principles regarding the privilege. Brief at 25. The Secretary claims all 20 documents "were created

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<sup>28</sup> Three of the documents protected under the investigative process privilege (Nos. 154, 161, 375) were not so claimed by the Secretary, however they were inspected in camera by the judge.

<sup>29</sup> See Order 1 at 6.

in connection with the tampering allegations and dealt specifically with potential or actual criminal or civil litigation." Response Brief at 17. She observes that contestants did not challenge the basic fact that the documents were prepared "'in anticipation of litigation or for trial' by government attorneys or their agents within MSHA." Id. Two of the documents are the work product of the Department of Justice, relating to criminal matters. Six of the documents were prepared by attorneys in the Office of the Solicitor. All contain "opinions, legal theories, and/or discussions of future litigation plans and strategies." Id. at 18. The remaining 12 documents "were all prepared by MSHA employees in connection with the AWC criminal investigation." Id. Nine of the 12 were "'prepared at the direction of, and for the assistance of, the U.S. Attorney'" while the remaining three also relate to the criminal investigation. Id. at 18-19.

Each of the judge's orders details the legal elements required in balancing the interests of the parties following the determination that the qualified privileges, i.e., deliberative process, investigative process, or work product, were properly invoked and obtain. In those instances the judge applied the test set forth in the Commission's Bright decision. Order 1 at 8-9; Order 2 at 4-5; Order 3 at 1-3. The judge also properly recognized that the attorney-client privilege is an absolute privilege, which does not require a balancing analysis after a determination that the privilege is properly claimed.

After reviewing of the record,<sup>30</sup> including the judge's orders, the affidavits, the document list and the elaborations offered by the Secretary<sup>31</sup> we conclude that contestants have failed to establish judicial error or abuse of discretion with respect to the application of the four privileges. Accordingly, we affirm the judge's rulings on these matters.

Rule 6(e) of the Federal Rules of Criminal Procedure. Contestants' allege that the Secretary has failed to prove that the information in two folders (Nos. 11 & 12) of document 406 "is truly before a grand jury and that the disclosure of the information is prohibited by Rule 6(e)." Brief at 29. Contestants properly note that the judge has not protected these documents under this provision of the rules, but make this challenge because the Secretary has invoked the protection under this rule. Contestants also challenge the application of the rule since the documents are not within the possession of the grand jury. Id.

The Secretary responds that the documents claimed to be protected from disclosure under this rule are secret grand jury materials in the possession of MSHA's Robert Thaxton, an authorized grand jury agent, and that disclosure of the documents is absolutely prohibited under the rule. Moreover, the Secretary, citing Federal Rule of Criminal Procedure 6(e)(3)(D), states that

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<sup>30</sup> The documents in issue were not contained in the record before us and the Commission did not view any documents in camera.

<sup>31</sup> See Secretary's 8/9/91 opposition to motion to compel discovery and Secretary's 10/4/91 motion for reconsideration.

the prohibition against disclosure extends to the Commission and its judges because the rule authorizes the filing of a petition for disclosure only before a district court where the grand jury convened. Id. at 27.

Although the judge has not ruled on this matter, the Secretary continues to assert this basis for protection because the documents are presently protected only by the qualified work product privilege. Id. at 26. The judge declined to rule on this issue because he determined that the subject documents were privileged on other grounds. Order 1 at 8.

We conclude however, that the Secretary is entitled to a ruling on the issue and therefore remand the matter to the judge for such purpose.

Did the judge provide sufficient factual detail and analysis? (Issue 4)

The contestants originally argued that the orders fail to contain "findings of fact, conclusions of law and the reasons or basis for them." PIR at 3. The Secretary countered that those requirements refer only to final dispositions, and not to discovery orders. See 29 C.F.R. 2700.65(a). As noted above, Rule 55(d) pertains. As measured against that standard, contestants' challenge fails to establish any abuse of discretion. The judge carefully referenced the applicable case law, evaluated the documents item by item, applied the law and rendered his rulings. He examined 12 of the 52 documents in issue. Consequently, contestants' have failed to establish that the judge abused his discretion. Accordingly, we affirm the judge's rulings.

### III. Conclusion

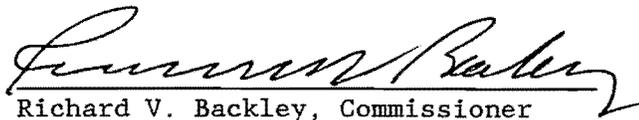
For the foregoing reasons, we hereby dissolve our order of November 13, 1991 staying the judge's order to produce certain documents, and we affirm the judge's order requiring the production of certain documents claimed to be protected by the deliberative process privilege. We also remand to the judge for his analysis and ruling on those documents claimed by the Secretary to be protected by the work product privilege.<sup>32</sup>

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<sup>32</sup> The related issue raised by the Secretary in her motion to supplement the record with expert witness list (January 30, 1992) is not before the Commission, and consideration of it would be premature since the judge has not ruled on the work product privilege issue. Therefore the motion is denied.

Further, we reject contestants' assertions of error; affirm the judge's rulings;<sup>33</sup> and expressly provide that our decision is without prejudice to contestants' right to file before the judge a motion for in camera inspection of any particular document. We also direct the judge to rule on the Secretary's assertion of Rule 6(e) of the Federal Rules of Criminal Procedure as a basis for nondisclosure.

  
\_\_\_\_\_  
Ford B. Ford, Chairman

  
\_\_\_\_\_  
Richard V. Backley, Commissioner

  
\_\_\_\_\_  
Joyce A. Doyle, Commissioner

  
\_\_\_\_\_  
Arlene Holen, Commissioner

  
\_\_\_\_\_  
L. Clair Nelson, Commissioner

---

<sup>33</sup> Except as provided in fn. 26 supra.

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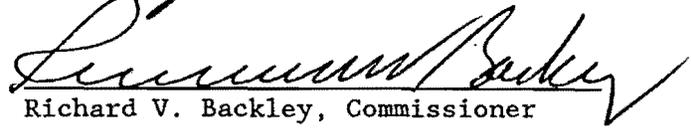
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Administrative Law Judge James A. Broderick  
Federal Mine Safety & Health Review Commission  
5203 Leesburg Pike, Suite 1000  
Falls Church, VA 22041



Accordingly, we vacate the judge's default order and remand this matter for further proceedings.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
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

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

JUN 5 1992

|                        |   |                           |
|------------------------|---|---------------------------|
| SECRETARY OF LABOR,    | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : |                           |
| ADMINISTRATION (MSHA), | : | Docket No. PENN 91-1320   |
| Petitioner             | : | A. C. No. 36-02105-03521  |
| v.                     | : |                           |
|                        | : | Docket No. PENN 92-140    |
| R & N COAL COMPANY,    | : | A. C. No. 36-02105-03523  |
| Respondent             | : |                           |
|                        | : | Split Vein Breaker Mine   |

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

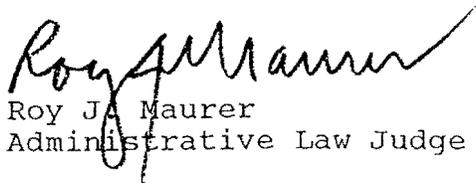
These cases are before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Petitioner has filed a motion to approve a negotiated settlement between the parties and to dismiss these cases. In light of the respondent's dire financial situation, the Secretary has proposed a 90 percent reduction in penalty with respect to each violation and further proposed that payment of the penalties be made in 6 monthly installments.

R & N Coal Company at this point has no employees with its only source of income being rental income of \$3250 per month.

I have considered the Secretary's representations and the financial data submitted and I conclude that the proffered settlement is consistent with the criteria in section 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement IS GRANTED and respondent shall pay a total penalty of \$4350. The first payment of \$725 is due within 90 days of this order and five additional payments of \$725 are to be made no more than 30 days from the previous one until payment is made in full. Upon payment in full, these cases ARE DISMISSED.

  
 Roy J. Maurer  
 Administrative Law Judge

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Frank L. Tamulonis, Jr., Esq., Zimmerman, Lieberman & Derenzo, 111 East Market Street, P. O. Box 238, Pottsville, PA 17901 (Certified Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

JUN 9 1992

|                              |   |                           |
|------------------------------|---|---------------------------|
| SECRETARY OF LABOR,          | ) | PENALTY PROCEEDING(S)     |
| MINE SAFETY AND HEALTH       | ) |                           |
| ADMINISTRATION               | ) | Master Docket No. 91-1    |
| Petitioner                   | ) | Docket No. KENT 91-1028   |
| v.                           | ) | A. C. No. 15-16376-03515D |
|                              | ) |                           |
| CAPRICORN COAL COMPANY, INC. | ) | Mine No. 3                |
| Respondent                   | ) |                           |

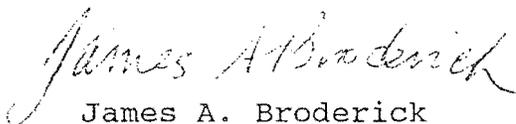
DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On June 2, 1992, the Secretary filed a motion to approve a settlement between the parties in the above case. The case includes one alleged violation of 30 C.F.R. Section 70.209(b), which was originally assessed at \$1,200. The Secretary continues to assert that the violation resulted from a deliberate act, which is denied by the mine operator. The degree of negligence is disputed, and the parties agree to the reduction in the total penalties from \$1,200 to \$960.

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

Accordingly, the settlement motion is APPROVED. The operator is ordered to pay within 30 days of the date of this order the sum of \$960 for the violation charged in this proceeding.



James A. Broderick  
Administrative Law Judge

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Michael J. Schmitt, Esq., Wells, Porter, Schmitt and Walker, 327 Main Street, P. O. Box 1179, Paintsville, KY 41240-5179

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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JUN 17 1992

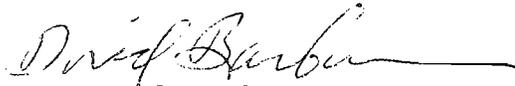
RAYMOND D SHEETS, : DISCRIMINATING PROCEEDING  
Complainant :  
v. : Docket No. VA 92-5-D  
Koch Carbon, Inc., :  
Respondent : NORT CD 91-09  
:

DISMISSAL OF PROCEEDING

Before: Judge Barbour

On April 20, 1992, counsel for Respondent advised me by letter of a telephone conversation with Complainant in which Complainant stated that he wished to "drop" this case. Counsel enclosed a letter dated April 9, 1992, from Complainant to me (but sent to counsel) stating: "I, Raymond David Sheets, wish to drop my case against Koch Carbon with no further actions to be taken." Subsequently, I issued an order to the parties to show cause within 10 days why this matter should not be dismissed with prejudice. Neither party has responded to the order.

ACCORDINGLY, there being no reason given why this case should be continued on the docket, the Complainant's request is granted and this matter is DISMISSED with prejudice.



David Barbour  
Administrative Law Judge

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Louis K. Obdyke, IV, Esq., Associate General Counsel, Koch Industries, Inc., P. O. Box 2256, 4111 E. 37th Street, North, Wichita, KS 67201 (Certified Mail)

/epy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

(303) 844-5266 / FTS 564-5266

JUN 17 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 91-149-M  
Petitioner : A.C. No. 39-00180-05511  
: :  
v. : P Q 1643  
: :  
HILLS MATERIALS COMPANY, :  
Respondent :

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Edward C. Carpenter, Esq., COSTELLO, PORTER, HILL,  
HEISTERKAMP & BUSHNELL, Rapid City, South Dakota,  
for Respondent.

Before: Judge Lasher

Upon motion for approval of a proposed settlement of the  
five violations involved after hearing, and the same appearing  
proper, the settlement is **APPROVED**.

Upon evaluation of the evidence in the record, the parties  
agree that two of the Citations involved should be modified and  
the penalties therefor reduced. Respondent agrees to the Peti-  
tioner's proposed penalties for the three remaining Citations.  
The terms of the settlement are reflected in the order below.  
The penalties agreed to by the parties are here **ASSESSED**.

ORDER

1. Citations numbered 3629578 and 3635122 are **MODIFIED**  
to delete the "Significant and Substantial" designations thereon  
and are otherwise **AFFIRMED**.

2. Respondent, if it has not previously done so, is  
**ORDERED TO PAY** to the Secretary of Labor within 40 days from  
the date hereof the sum of \$817 (\$20 each for Citations numbered  
3629578 and 3635122 and \$259 each for Citations numbered 3629575,  
3629577, and 3629579).

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

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Mr. Jim Johnson, Industrial Relations Manager, HILLS MATERIALS COMPANY, P.O. Box 2320, Rapid City, SD 57709 (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 17 1992

|                           |   |                           |
|---------------------------|---|---------------------------|
| SECRETARY OF LABOR,       | : | CIVIL PENALTY PROCEEDING  |
| MINE SAFETY AND HEALTH    | : |                           |
| ADMINISTRATION (MSHA),    | : | Master Docket No. 91-1    |
| Petitioner                | : | Docket No. VA 91-571      |
|                           | : | A. C. No. 44-04704-03533D |
| v.                        | : |                           |
|                           | : | No. 7 Mine                |
| DORIS COAL COMPANY, INC., | : |                           |
| Respondent                | : |                           |

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On June 10, 1992, the Secretary filed a motion to approve a settlement between the parties in the above case. The case includes thirteen alleged violations of 30 C.F.R. § 70.209(b), which were originally assessed at \$1,100 apiece. The Secretary continues to assert that the violations resulted from a deliberate act, which is denied by the mine operator. The degree of negligence is disputed, and the parties agree to the reduction in the total penalties from \$14,300 to \$12,155.

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

Accordingly, the settlement motion is APPROVED. The operator is ordered to pay within 30 days of the date of this order the sum of \$12,155 for the violations charged in this proceeding.

  
James A. Broderick  
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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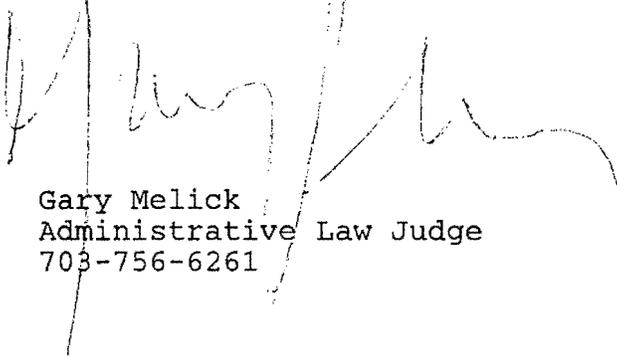
JUN 17 1992

ROY FARMER ON BEHALF OF : COMPENSATION PROCEEDING  
OTHER MINERS, :  
Complainant : Docket No. VA 92-59-C  
v. :  
ISLAND CREEK COAL COMPANY, : VP-3 Mine  
Respondent :

ORDER OF DISMISSAL

Before: Judge Melick

Complainants request approval to withdraw their complaint in the captioned case based upon a settlement of the underlying dispute. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed.



Gary Melick  
Administrative Law Judge  
703-756-6261

Distribution:

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Mary Lu Jordan, Esq., United Mine Workers of America, 900 15th Street, N.W. Washington, D.C. 20005

/vmy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 18 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. SE 90-117-M  
v. : A. C. No. 54-00001-05503 BOY  
: Ponce Cement or  
MAR-LAND INDUSTRIAL CONTRACTOR, : Ponce Cement Plant  
INCORPORATED, :  
Respondent :

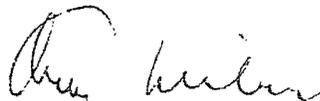
DECISION ON REMAND

Before: Judge Weisberger

On May 27, 1992, the Commission issued a decision in this matter to me "...for reassessment of a civil penalty in light of the considerations set forth above". (Mar-Land Industrial Contractor, Inc., SE 90-117-M, 14 FMSHRC, \_\_\_ slip op., May 27, 1992).

In its decision, the Commission reversed my finding of high negligence (13 FMSHRC 333 (1991)), and concluded, with regard to the negligence of Mar-Land as follows: "we consider the degree of negligence with respect to the violation in issue to be ordinary". (Mar-Land, supra, slip op., at 6). In light of this consideration, and considering the remaining statutory factors as stipulated to be by the parties, I conclude that a penalty of \$1,000 is appropriate for the violation at issue.

It is ORDERED that within 30 days of this decision, Respondent pay \$1,000 as a civil penalty for the violation of 30 C.F.R. § 56.15005.



Avram Weisberger  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 22 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 90-429  
Petitioner : A. C. No. 15-16685-03510  
: :  
v. : Docket No. KENT 90-430  
: A. C. No. 15-16685-03511  
RAMBLIN COAL COMPANY, INC., :  
Respondent : No. 8 Mine

DECISION

Appearances: Joseph B. Lockett, Esq., Nashville,  
TN, for Petitioner;  
Billy Shelton, Esq., Pikeville, KY,  
for Respondent.

Before: Judge Fauver

These cases were brought by the Secretary seeking civil penalties for alleged violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. By Order of July 1, 1991, KENT 90-430 was stayed, and in KENT 90-429, Citations 3367128, 3510164, and 3510419 were settled, and Citation No. 3509948 was stayed. An evidentiary hearing was held as to the remaining citations.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the following Findings of Fact and warrants the following Conclusions of Law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. Respondent employs about 20 employees at its Mine No. 8, which produces 125,000 to 150,000 tons of coal per year for sales or use substantially affecting interstate commerce. The coal seam in Mine No. 8 is 32 to 36 inches high.

Citation No. 3368936

3. Citation No. 3368936 was issued on November 28, 1989, by Inspector Thomas Charles for a violation of 30 C.F.R.

§ 75.402. The evidence sustains the charge. Rock dust had not been applied as required to the following areas in the 002-0 section: the No. 1 entry starting 40 feet outby the face and extending for 170 feet; the last row of open crosscuts across the section; and the No. 2 entry starting at the outby corner of the last open crosscut and extending outby for 80 feet. The areas in question were very black. Two spot band samples were taken by Inspector Charles, and they support the citation. Inspector Randy Wellman accompanied Inspector Charles and confirmed his findings.

4. Respondent should have observed and corrected this condition before the inspection, and was therefore negligent. Electrical equipment on the section provided an ignition source, and it was reasonably likely that an explosion or fire could occur, killing or seriously injuring 13 persons on the section.

5. A penalty of \$168 is appropriate, considering the criteria for a civil penalty in § 110(i) of the Act.

Citation No. 3367127

6. Citation No. 3367127 was issued on January 26, 1990, by Inspector James Frazier for a violation of 30 C.F.R. § 75.601-1. The evidence sustains the charge. The trip setting for the number 6 cable supplying power from the power center to the Lee Norse roof bolting machine was improperly set. The cable should be set no higher than 300 amperes, but was set on 450. This created a danger of fire or smoke inhalation in the event of a short circuit or over-current. The power was on this piece of equipment when the violation was observed by Inspector Frazier.

7. The violation was obvious and an electrician employed by Respondent was in the area. Respondent was therefore negligent. It was reasonably likely that a fire might occur, causing serious injuries.

8. A penalty of \$54 is appropriate.

Citation No. 3510451

9. Citation No. 3510451 was issued on February 21, 1990, by Inspector Sam Harris for a violation of 30 C.F.R. § 75.601-1. The evidence sustains the charge. The trip setting for the cable connecting the section power center breaker to the mobile coal drill was not set properly. A number 6 cable was being used, and the setting for this cable should be set no higher than 300 amps. It was set at 550 amps. The power was on this piece of equipment when the violation was observed.

10. The violation was obvious and should have been corrected before the inspection. Respondent was therefore

negligent. It was reasonably likely that the cable might catch on fire if it were subjected to more current than it was designed to withstand. This could result in severe burns.

11. A penalty of \$54 is appropriate.

Citation No. 3510452

12. Citation No. 3510452 was issued on February 21, 1990, by Inspector Harris for a violation of 30 C.F.R. § 75.512. The evidence sustains the charge. The trailing cable (about 220 volts) on the Lee Norse roof bolter was not maintained in a safe condition. The cable had a damaged place exposing about one inch of the underlying power conductors. The metal part of the conductor was exposed. This cable is ordinarily handled by hand by the roof bolter helper, who keeps it out of the way of the roof bolter and other equipment in the mine.

13. The violation was obvious and should have been corrected before the inspection. Respondent was therefore negligent. It was reasonably likely that the roof bolter helper might touch the bare conductor and suffer a fatal electrical shock.

14. A penalty of \$98 is appropriate.

Citation No. 3510194

15. Citation No. 3510194 was issued on March 6, 1990, by Inspector Harris for a violation of 30 C.F.R. § 77.1605(k). The evidence sustains the charge. The guard along the outer bank of the elevated roadway to the mine was not sufficient to prevent a vehicle from leaving the roadway. An adequate guard had been installed originally, but the roadway was built up by adding ballast until the guard was beneath the surface. Further, in an area where posts had been installed the earth had slipped or eroded until there was no berm or guard for about 200 feet. The total length of roadway affected was 800 to 1,000 feet.

16. The road was frequently traveled and the condition was obvious and dangerous. Respondent was therefore negligent. Coal trucks, supply vehicles, and miners driving to and from work regularly used the roadway. It was reasonably likely that one of these vehicles might travel off the roadway, causing fatal injuries to the driver. A fall of 80 to 100 feet to the bottom of the hollow would result.

17. A penalty of \$136 is appropriate.

Citation No. 3510199

18. Citation No. 3510199 was issued on March 6, 1990, by Inspector Harris for a violation of 30 C.F.R. § 75.1722(a). The evidence sustains the charge. Inspector Harris observed the Joy cutting machine being trammed from one working place to another with no guard on the cutter chain. The coal in this mine is 32 to 36 inches. The machine operator had poor visibility because of the height of the coal and the size of the machine.

19. Respondent should have observed and corrected this condition and was therefore negligent. The machine was set to travel about 60 feet to another working place. With 15 people in the mine, it was reasonably likely that a miner might come into contact with the cutting chain, causing serious injuries.

20. A penalty of \$112 is appropriate.

Citation No. 3509741

21. Citation No. 3509741 was issued on March 28, 1990, by Inspector James Frazier for a violation of 30 C.F.R. § 77.513.

22. The evidence sustains this charge. A dry wooden platform or insulated mat had not been provided for the number two charger, which was used to charge scoop batteries. The charger (480 volts) was on the mine surface and was fully exposed to the weather.

23. Respondent should have observed and corrected this condition, and was therefore negligent. It was reasonably likely that someone might receive a fatal electrical shock. The charger was used several times a day to plug or unplug batteries for charging.

24. A penalty of \$112 is appropriate.

Citation No. 3510420

25. Citation No. 3510420 was issued on March 28, 1990, by Inspector James Frazier for a violation of 30 C.F.R. § 77.513. The evidence sustains the charge. A dry wooden platform or insulated mat had not been provided for the number one charger, which was used to charge scoop batteries. The charger (480 volts) was on the mine surface and was fully exposed to the weather.

26. Respondent should have observed and corrected this condition, and was therefore negligent. It was reasonably likely that someone might receive a fatal electrical shock. The charger was used several times a day to plug or unplug batteries for charging.

27. A penalty of \$112 is appropriate.

Citation No. 3509742

28. Citation No. 3509742 was issued on March 28, 1990, by Inspector Frazier for a violation of 30 C.F.R. § 75.503. The evidence sustains the charge. A scoop used in and inby the last open crosscut was not maintained in a permissible condition. There was an opening in excess of .005 inches in the main panel board; a rear headlight had no set screw in the lens and the headlight was not secured to the frame; there was no set screw in a packing gland nut; and the headlight on the right front of the scoop had no set screw in the packing gland nut. These problems created a danger of fire or explosion through ignition of coal dust.

29. Respondent should have observed and corrected this condition, and was therefore negligent. It was reasonably likely that a spark might ignite the coal dust in the air, causing an explosion or fire with serious injuries. Ten persons worked on the section.

30. A penalty of \$157 is appropriate.

Citation No. 3510415

31. Citation No. 3510415 was issued on March 28, 1990, by Inspector James Frazier for a violation of 30 C.F.R. § 77.208(d). The evidence sustains the charge. Two compressed gas cylinders were placed beside the parts building and were not secured in a safe manner. There was a great deal of scrap metal in this area, which was frequently traveled by persons obtaining parts from the building or just going about ordinary surface duties.

32. Respondent should have observed and corrected this condition, and was therefore negligent. It was reasonably likely that the cylinders might fall or be knocked over, causing an explosion or causing the cylinder to become a missile if the cylinder were punctured.

33. A penalty of \$112 is appropriate.

Citation No. 3509946

34. Citation No. 3509946 was issued on April 10, 1990, by Inspector Sam Harris for a violation of 30 C.F.R. § 75.305. The evidence sustains the charge. The last recorded date in the record book entitled "Examination of Emergency Escapeways and Facilities; Smokers Articles; Fire Doors" was April 2, 1990. This examination is required to be made and recorded at intervals not to exceed seven days. The mine produces coal five days a week.

35. Respondent was aware of the need to record the examinations. Negligence was moderate. It was unlikely that the violation would result in any injury. It was not significant and substantial.

36. A penalty of \$112 is appropriate.

Citation No. 3509947

37. Citation No. 3509947 was issued on April 10, 1990, by Inspector Sam Harris for a violation of 30 C.F.R. § 75.300. The last recorded date in the record book entitled "Daily and Monthly Examination of Ventilation Equipment" was April 3, 1990. This examination is required to be made and recorded on a daily basis. The mine produces coal five days a week.

38. Respondent was aware of the need to record the examinations. Negligence was moderate. It was unlikely that the violation would result in any injury. It was not significant and substantial.

39. A penalty of \$112 is appropriate.

Citation No. 3510198

40. Citation No. 3510198 was issued on March 6, 1990, by Inspector Sam Harris for a violation of 30 C.F.R. § 75.301-4(a). The evidence sustains the charge. Inspector Harris attempted to take an air reading in the No. 7 active working entry and found no perceptible movement of air. An anemometer was used to take the air reading, and the blades of the instrument did not turn. The problem was caused by a line brattice, which did not reach the floor and did not adequately direct the flow of air to the face.

41. It was obvious that the line brattice did not reach the floor of the mine, and that the flow of air would therefore be short-circuited. Respondent was therefore negligent. It was reasonably likely that the two persons working in the entry could sustain serious injuries or disease as a result of this condition.

42. A penalty of \$119 is appropriate.

Citation No. 3510200

43. Citation No. 3510200 was issued on March 6, 1990, by Inspector Harris for a violation of 30 C.F.R. § 75.208. The evidence sustains the charge. An area of unsupported roof, about 10 feet long and 20 feet wide, was present in the No. 3 entry working place where coal had been loaded out. There was no visible warning device nor a barricade to prevent travel into the

area of unsupported roof. Inspector Harris testified that the roof appeared to be fragile shale, susceptible to sloughing and falling. The height of the coal was about 36 inches.

44. Respondent should have observed and corrected this condition and was therefore negligent. It was reasonably likely that someone would enter the area and be struck by falling roof, sustaining fatal or severe injuries.

45. A penalty of \$112 is appropriate.

Citation No. 3509801

46. Citation No. 3509801 was issued on March 28, 1990, by Inspector Sam Harris for a violation of 30 C.F.R. § 75.400. The evidence sustains the charge. Accumulations of coal, coal dust, and float coal dust mixed with oil were present on a scoop used to load and haul coal in the face area. The accumulations covered much of the area of the scoop, including electrical components of the machine. This presented a danger of fire should the machine overheat or if some electrical problem occurred.

47. This condition was readily visible. Respondent was therefore negligent. It was reasonably likely that a fire might be started or propagated because of the accumulations, causing serious injuries.

48. A penalty of \$85 is appropriate.

Citation No. 3509802

49. Citation No. 3509802 was issued on March 28, 1990, by Inspector Sam Harris for a violation of 30 C.F.R. § 75.503. The evidence sustains the charge. A scoop used to load and haul coal in the face area was not in a permissible condition. There was an opening in excess of four thousandths of an inch between the panel board cover and the supply compartment. The lens in the right headlight was displaced, and there was no set screw in the packing gland nut. The same headlight was not secure due to loosening of the set screws. There was an opening in excess of four thousandths of an inch between the main compartment and its cover. Finally, the parking brake on the scoop would not hold the machine stationary.

50. These conditions presented a number of dangers. The primary danger was caused by the openings between the covers of the electrical compartments which could cause a spark to escape, igniting coal dust and causing a fire or explosion. An ignition was reasonably likely to occur, with 13 persons on the section exposed to danger of serious injuries.

51. A penalty of \$157 is appropriate.

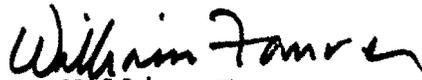
ORDER

1. Respondent shall pay the above penalties of \$1,812 within 30 days of the date of this Decision.

2. The civil penalties in the settlements approved on the record, if not previously paid, shall be paid by Respondent within 30 days of this Decision.

3. The STAYS in Docket Nos. KENT 429 and 430 are LIFTED, and all citations charging excessive history violations are DISMISSED.

4. This Decision and Order and the settlement approved on the record constitute a final disposition of all issues in these proceedings.



William Fauver  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 22 1992

VP-5 MINING COMPANY, : CONTEST PROCEEDINGS  
Contestant :  
v. : Docket No. VA 92-112-R  
: Order No. 3800172  
SECRETARY OF LABOR, : Docket No. VA 92-113-R  
MINE SAFETY AND HEALTH : Order No. 3800173  
ADMINISTRATION (MSHA), :  
Respondent : Docket No. VA 92-114-R  
: Order No. 3800174  
: Docket No. VA 92-115-R  
: Citation No. 3800175  
: VP-5 Mine

DECISION

Appearances: Timothy M. Biddle, Esq. and Thomas A. Stock,  
Esq., Crowell and Moring, Washington, D.C.,  
for Contestant;  
Robert Wilson, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Respondent

Before: Judge Melick

These contest proceedings were filed by the VP-5 Mining Company (VP-5) pursuant to sections 105(d) and 107(e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge two citations and two "imminent danger" withdrawal orders issued by the Secretary of Labor at the VP-5 Mine on March 25 and 26, 1992.

The VP-5 Mine is a shaft coal mine located in southwestern Virginia employing 348 miners and annually producing about 1.37 million tons by both longwall and continuous miner methods. The north side of the mine where longwall panels have been extracted is known as the East Gob. The East Gob is a large (4,600 foot by 6,000 foot) inaccessible area remaining from seven mined-out longwall panels and is surrounded by bleeder entries on the north and west, by the

9th Development Panel on the east (the site of an extant longwall mining operation), and by barriers separating it from the main intake air courses on the south (See Joint Exhibit No. 1).

Methane is liberated during the mining process and continues to be liberated from the gob area. If the ventilating system is properly functioning, methane liberated at the longwall face is diluted and carried out of the mine by ventilating air currents. Methane not removed by such ventilation is ordinarily pulled into the gob by a pressure differential between the longwall face area and the gob. The methane moves from an area of relatively high pressure (the longwall face) to an area of lower pressure (the gob) Methane liberated from fallen roof in the gob flows out of the gob by air drawn through the gob and into adjacent bleeder connectors and bleeder entries which in turn, direct the methane to the main return air course. Under the Secretary's regulations, at the point where the bleeder entries intersect a main return, the methane concentration must be no more than 2.0 percent. See 30 C.F.R. § 75.316-2(h). Additional methane is drawn off the gob through vertical ventilation holes drilled into the gob from the surface.

MSHA Inspector Carl Duty appeared at the VP-5 Mine on March 25, 1992, to perform a spot inspection required under section 103(i) of the Act at mines liberating large amounts of methane. He proceeded to the bleeder entries surrounding the East Gob entering at the 1 North Main entries and traveled across the northern portion of the East Gob through one of the bleeder entries checking roof conditions and, using a Riken detector, taking methane readings. These readings were all below 3.0 percent methane. He also obtained methane readings in each of 32 bleeder connectors across the north side of the gob. In three of these connectors he detected methane concentrations of 4.2 percent, 4.1 percent and 4.0 percent respectively. Laboratory analysis of a bottle sample then taken at the No. 1 connector of the No. 6 Development also showed 4.13 percent methane along with .16 percent carbon dioxide, 20.1 percent oxygen and .107 percent ethane.

When Inspector Duty found 4.2 percent methane in the No. 1 connector of 6 Development he issued a section 107(a) imminent danger withdrawal order directing that longwall operations be halted until further notice. Although the longwall had already been shut down by the operator, Duty

was unaware of this at the time he issued this order. Duty also issued a section 104(a) citation alleging that the VP-5 Mine had failed to comply with its Ventilation Plan in violation of 30 C.F.R. § 75.316. The inspector maintains that VP-5 was not controlling methane levels in the East Gob as required by Paragraph 10 of the Ventilation Plan. The order was terminated later the same day when methane levels in the bleeder connectors were reduced to below 3 percent.

The following day, March 26, 1992, Inspector Duty returned to the same area of the mine and obtained methane readings in the same bleeder connectors. Again he issued a section 107(a) Order and section 104(a) citation. He found 4.75 percent and 4.8 percent methane at the Nos. 1 and 2 entries, respectively, at the 4 Development and 5.2 percent methane at the 6 Development. The inspector's methane readings on both dates are undisputed.

The citations at bar, Nos. 3800173 and 3800175, issued March 25, 1992 and March 26, 1992, respectively, charge violations of the VP-5 Ventilation Plan under the standard at 30 C.F.R. § 75.316 and allege as follows:

The bleeder system was not functioning properly in that the methane content at the bleeder connectors from No. 2 Development through No. 6 Development ranged from 4.0 percentum at No. 2 Development to 4.2 percentum at No. 6 Development. This is a significant increase in the amount of methane that is normally observed in these areas indicating that the methane content in these areas are [sic] not being controlled. (Citation No. 3800173)

The bleeder system was not functioning properly in that 4.5 to 5.2 percentum of methane was present in the bleeder connectors from No. 2 Development to No. 6 Development. The approved ventilation plan was not being complied with in that permanent type stoppings were being erected in the bleeder connectors at the top of No. 2 through No. 7 Developments that prevents the gob areas from being ventilated as approved by the MSHA District Manager. (Citation No. 3800175)

In particular the Secretary maintains that in each case VP-5 violated paragraph 10 of its Ventilation System and Methane and Dust Control Plan, and, more specifically, the following language of that plan:

The bleeder entries, bleeder systems, or equivalent means will be used in all active pillaring areas to ventilate the mine areas from which the pillars have been wholly or partially extracted so as to control the methane content in such areas.

(Exhibit G - 12; Tr. 67-68, 115).

The Secretary maintains, in addition, that under Citation No. 3800175, VP-5 also violated the provisions of subsection (a) of paragraph 10 of the Ventilation Plan. Those provisions read as follows:

Bleeder entries will be defined as special air courses developed and maintained as part of the mine ventilation system and designed to continuously move air-methane mixtures from the gob, away from active workings, and deliver such mixtures to the mine return air courses. Bleeder entries will be connected to those areas from which pillars have been wholly or partially extracted at strategic locations in such a way to control air flow through such gob area, to induce drainage of gob gas from all portions of such gob areas, and to minimize the hazard from expansion of gob gases due to atmospheric change.

Paragraph 10 of the Ventilation Plan requires in essence that the methane content of the gob must be controlled by the bleeder system or equivalent means. As noted by VP-5 however neither the Secretary's regulations nor the VP-5 Ventilation Plan specifically define what is meant by "control" of the methane content. The Secretary's regulations state only that bleeder entries are "designed to continuously move air-methane mixtures into the gob, away from active workings, and deliver such mixtures to the mine return air courses." See 30 C.F.R. § 75.316-2(e)(1). As further noted by VP-5 there is no regulation or provision of the subject Ventilation Plan which mandates any particular concentration of methane as indicative of "control." VP-5 argues that evidence of such control is implicit in the requirements under 30 C.F.R. § 75.316-2(h) that air exiting bleeder entries must contain no more than 2.0 percent methane where it enters a return air course. There is no dispute in this case that VP-5 was, indeed, maintaining its bleeder air at 2.0 percent or less at the relevant checkpoint when Inspector Duty issued his citations. VP-5 argues that since this is the only indicia of control mentioned in the Ventilation Plan, that should be the end of the matter.

It is established law that once a ventilation plan is approved and adopted, its provisions are enforceable at the mine as mandatory safety standards. Zeigler v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), Carbon County Coal Co.,

6 FMSHRC 1123 (1984), Carbon County Coal Co., 7 FMSHRC 1367 (1985), Jim Walter Resources, Inc., 9 FMSHRC 903 (1987). In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. In plan violation cases the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition or practice violates the provision. Jim Walter Resources, Inc., *supra*, at p. 907. Where the plan provisions are ambiguous the Secretary may establish the meaning intended by the parties by presenting credible extrinsic evidence, for example, as to the history and purpose of the provision and evidence of prior consistent enforcement. See Penn Allegh Coal Co., 3 FMSHRC 2767 (1981).

The term "control" as used in Paragraph 10 of the Ventilation Plan is ambiguous and may indeed be subject to different interpretations. The issue here is whether the undisputed methane concentrations found in these cases constitute a lack of such "control." It is not clear whether there has been prior consistent enforcement by MSHA of its present interpretation of these provisions. The Secretary failed to produce evidence of any similar prior citations and noted only that Inspector Duty had testified that in the preceding month he had issued an imminent danger withdrawal order under similar circumstances. Mine Manager Eddie Ball testified on the other hand that there had never been prior enforcement action by MSHA comparable to the charges made herein. The latter testimony is, however, not sufficiently detailed from which it may reasonably be inferred that MSHA inspectors had indeed observed essentially the same conditions in the past and decided not to cite those conditions. The evidence is therefore insufficient in this case from which any inference may be drawn either that there has been prior consistent enforcement of the construction now taken by the Secretary or that there has been prior consistent non-enforcement.

In any event I find that the policy and practices followed at the VP-5 Mine may also demonstrate what the parties intended by the term "control." See Penn Allegh Coal Co., *supra*. VP-5 policy regarding methane in the connecting entries was described by Mine Manager Eddie Ball at hearing as follows:

Well, my orders to all three shifts at the coal mine I'm at and at the previous coal mine, "At 4 percent [methane] you stopped the longwall. If it goes to 4.5, or you find 4.5, you stay right there where you find it, you monitor it, if it continues to rise, go withdraw your people. If it is not something you can see that's an immediate area that you can immediately do something about, then you withdraw your people."  
(Tr. 271-272, See also Tr. 252, 257, 274 and 275.)

Within this framework I conclude that when methane levels reach 4 percent in the bleeder connectors there has been recognition in VP-5 company policy and practice that the methane in the gob is not adequately controlled. This policy and practice is entirely consistent with the Secretary's view that such levels of methane in the bleeder connectors under the facts of these cases constitute a violation of those Ventilation Plan provisions requiring the methane level in the gob to be controlled. This evidence therefore establishes the meaning intended by the parties and, considering the undisputed methane levels found in these cases, I conclude that there were indeed violations of paragraph 10 of the Ventilation Plan as charged on March 25 and March 26, 1992. In light of the above findings there is no need to also determine whether there was a violation in Citation No. 3800175 under the Secretary's alternate theory. It appears in any event that this alternate theory was withdrawn at hearing (Tr. 125-127).

The violations were also "significant and substantial" for the same reasons that the underlying conditions also constituted "imminent dangers." Mathies Coal Co., 6 FMSHRC 1 (1984). See discussion, infra. See also National Gypsum Company, 3 FMSHRC 822 at p. 828.

Withdrawal Orders No. 3800172 and 3800174, issued pursuant to section 107(a) of the Act, charge on March 25 and March 26, 1992, respectively, as follows:

The bleeder system was not functioning properly in that the methane content at the bleeder connectors from No. 2 Development through No. 6 Development ranged from 4.0 percentum at No. 2 Development to 4.2 percentum at No. 6 Development. This is a significant increase in the amount of methane that is normally observed in those connectors indicating that the methane content in these areas are [sic] notbeing controlled (75.316). (Order No. 3800172).

The bleeder system was not functioning properly in that 4.5 to 5.2 percentum of methane was present in the bleeder connectors from No. 2 Development to No. 6 Development. Permanent type stopping were [sic] being erected in the bleeder connectors that prevent the air from being coursed through the gob area as approved by ventilation plan for this mine. Order No. 3800174).

Inspector Duty also noted in Order No. 3800172 that the "Area or Equipment" was the development off 2 East Mains Face Area and in Order No. 3800174 that the "Area or Equipment" was the "Entire Mine".

Section 107(a) of the Act provides, in part, as follows:

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 the operator of such mine to cause all persons except those referred to in section 104(c), 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 exists.

Section 3(j) of the Act defines "imminent danger" as the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. This definition was not changed from the definition contained in the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (Amended 1977) ("Coal Act"). The Senate Report for the Coal Act states that an imminent danger is present when "the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceeding or notice." S. Rep. No. 411, 91st Cong., 1st Sess. 89 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess. Part I, Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 215 (1975) (quotes Coal Act Legislative History). It further states that the "seriousness of the situation demands such immediate action" because "delays, even of a few minutes, may be critical or disastrous." See Utah Power and Light Company, 13 FMSHRC 1617 (1991).

In Rochester and Pittsburgh Coal Company v. Secretary, 11 FMSHRC 2159 (1989), the Commission set forth the analytical framework for determining the validity of imminent danger withdrawal orders issued under section 107(a) of the Act. The Commission indicated that it is first appropriate for the judge to determine whether the Secretary has met her burden of proving that an "imminent danger" existed at the time the order was issued. The Commission also suggested, however, that even if an imminent danger had not then existed, the findings and decision of the inspector in issuing a section 107(a) order should nevertheless be upheld "unless there is evidence that he has abused his discretion or authority." Rochester and Pittsburgh, supra, at p. 2164 quoting Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25 at p. 31 (7th Cir. 1975).

In evaluating whether an imminent danger existed in these cases it is important to consider the three ingredients necessary for a methane ignition or explosion, i.e. fuel, adequate oxygen and an ignition source. The record in this case is undisputed that methane at concentrations of 5 to 15 percent and, in the presence of ethane, even less than 5 percent, can provide the fuel for an ignition or explosion. It is further undisputed that methane concentrations in three of the bleeder connectors on March 25 were 4.2 percent, 4.1 percent and 4.0 percent. Bottle samples taken that date also demonstrate the presence of 4.13 percent methane and .107 percent ethane.

These methane concentrations also represented an increase over readings in the 3 to 3.5 percent range obtained by Inspector Duty during biweekly inspections in the previous three months. It was Duty's expert opinion that his readings on March 25 were "abnormally high" and with this increase the system was "overloaded." He further opined that the methane was not being removed and could increase in a matter of moments to the explosive range. These findings are consistent with the VP-5 policy and practice to close down longwall operations when methane in the bleeder connectors reaches 4 percent. See discussion, supra.

It is undisputed that at least 12 percent oxygen is also necessary for a methane ignition. It is further undisputed that bottle samples indicated that on March 25, 1992, there was 20.1 percent oxygen present in the 6 Development No. 1 Connector. Finally, according to the undisputed testimony of the Secretary's expert on mine ignitions and explosions, Cleat Stephans, ignitions can be triggered from frictional heat from rocks sliding against one another during a roof fall. Moreover, roof falls are expected to occur within, and on the fringes of, the gob. While there is additional record evidence of other ignition sources disputed by VP-5, this undisputed source, i.e., frictional heat, is clearly sufficient in itself to complete the equation for an imminent danger.

In regard to one of these disputed ignition sources, the inspector testified that he was concerned, in issuing the orders, that the building methane would back up into the longwall face where he believed other ignition sources existed. While it turned out that on March 25 the longwall had already been shut down, the operator was under no binding restraint preventing it from restarting the longwall absent Inspector Duty's order. The operator's policy of shutting down the longwall when methane concentrations at the bleeder connectors reach 4 percent is also consistent with Inspector Duty's concerns that these methane concentrations indicated that the ventilation system was "overloaded" and that methane would back up into an operating longwall

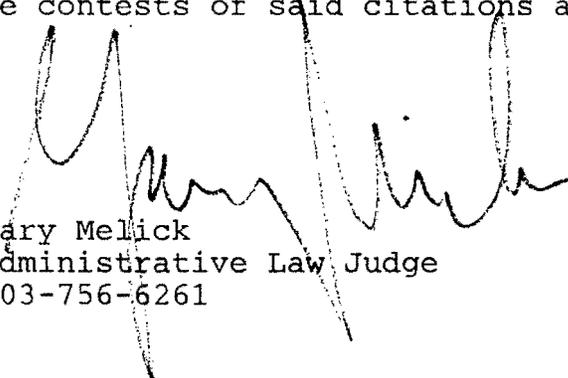
face with its recognized potential ignition sources. In any event, I find that even within the framework of the undisputed evidence, there was clearly an imminent danger as charged in Order No. 3800172.

Additional conditions existed at the time Order No. 3800174 was issued that provide even further support for the Inspector's finding therein of an imminent danger. In his March 26 order the inspector noted that methane was present in the bleeder connectors at a 4.5 to 5.2 percent concentration. Bottle samples also confirmed the presence of 4.48 percent methane with .113 percent ethane. While Contestant does not dispute the existence of 5.2 percent methane at this time it claims that this reading was obtained after the order was already issued. The record however does not support this claim. It is apparent from the testimony of Inspector Duty and the face of the order itself, that while he believed he already had sufficient evidence based on his methane readings at the No. 4 Development to issue an imminent danger order, the order itself was not issued until he had also obtained a 5.2 percent methane reading at the No. 6 Development No. 1 Connector (Government Exhibit No. 15; Tr. 77-78). In addition, Duty noted that a crew of miners had been working in the area with, among other things, metal hammers and axes. While those miners were having lunch at the time he issued his order it is reasonable to expect that they would have resumed working with these metal tools -- a high potential ignition source -- in the very near future. See Utah Power and Light Company, 13 FMSHRC 1617 at p. 1622 (1991).

While Contestant also mildly protests in a footnote to its brief that Inspector Duty presented no evidence that there was at this time sufficient oxygen for methane ignition, a bottle sample taken during his March 26 inspection showed the presence of 18.89 percent oxygen at the "bleeder connector No. 2 Entry of 4 Development" (Government Exhibit No. 14). The clear potential source for ignition or explosion from miners working with metal tools in the presence of sufficient oxygen and explosive levels of methane, without question, constitute an imminent danger. Order No. 3800174 must accordingly also be upheld.

ORDER

Citation Nos. 3800173 and 3800175 and Order Nos. 3800172 and 3800174 are AFFIRMED and the contests of said citations and orders are DISMISSED.



Gary Melick  
Administrative Law Judge  
703-756-6261

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/lh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**JUN 23 1992**

|                        |   |                          |
|------------------------|---|--------------------------|
| SECRETARY OF LABOR,    | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : |                          |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 91-640-M |
| Petitioner             | : | A. C. No. 45-03180-05506 |
|                        | : |                          |
| v.                     | : | Black River Site         |
| STONEWAY CONCRETE,     | : |                          |
| Respondent             | : |                          |

**ORDER OF DISMISSAL**

**Before: Judge Merlin**

On March 6, 1992, an order to show cause was issued directing the operator to file an answer to the penalty proposal. On March 20, 1992, the operator filed a letter stating that a settlement had been reached in this case on November 15, 1991. The operator also enclosed a copy of a letter dated November 15, 1991, addressed to the Seattle Solicitor confirming the settlement agreement and a copy of a check for \$131.50 the settlement amount. On April 13, 1992, an order was issued accepting the operator's March 20 letter as a response to the March 6 show cause order and directing the Solicitor to file the settlement motion or show cause why the case should not be dismissed. The file contains the return receipt showing that the Solicitor received a copy of the April 13 order on April 15, 1992. The Solicitor has failed to respond to the April 13 order.

This Solicitor routinely fails to respond to show cause orders, orders to submit information and other orders issued by the Chief Administrative Law Judge. In virtually all his cases, it has been necessary to repeatedly remind him of orders which require him to take action. As I have stated on prior occasions, the Office of the Chief Administrative Law Judge is simply too busy to keep calling and writing this Seattle Solicitor. In any event, these reminders are of no effect. The Solicitor's failure to respond here is at one with his constant and continual disregard of duly issued orders. In this the Seattle Solicitor stands alone because all other Solicitors comply with Commission orders. His persistent dereliction of duty, of which this case is but one example, cannot be countenanced.

Only the Commission can approve a settlement of a penalty that has been contested under section 105(a) of the Mine Act. 30 § 820(k). In light of the Solicitor's failure to respond to the show cause order dated April 13, 1992, this penalty petition must be dismissed.

Accordingly, it is ORDERED that the this case be DISMISSED.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin  
Chief Administrative Law Judge

Distribution:

Ernest Scott, Esq., Office of the Solicitor, U. S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101 (Certified Mail)

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 23 1992

|                        |   |                          |
|------------------------|---|--------------------------|
| SECRETARY OF LABOR,    | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : |                          |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 91-444-M |
| Petitioner             | : | A. C. No. 45-03180-05505 |
|                        | : |                          |
| v.                     | : | Black River Quarry       |
| STONEWAY CONCRETE,     | : |                          |
| Respondent             | : |                          |

ORDER OF DISMISSAL

Before: Judge Merlin

On May 22, 1991, the operator's request for a hearing was received by this Commission for docketing.

On November 13, 1991, my law clerk telephoned the Seattle Solicitor reminding him to file the penalty petition which he promised to do, but did not. On March 6, 1992, the Commission's Docket Office again telephoned the Solicitor but he did nothing. Finally, on April 9, 1992, an order was issued directing the Solicitor to show cause why this case should not be dismissed for failure to file a penalty proposal. The file contains the return receipt card showing that the Solicitor received a copy of this order on April 14, 1992. The Solicitor has failed to respond. This case is now over a year old and the Commission has heard nothing from the Solicitor.

The Seattle Solicitor in this case routinely fails to respond to show cause orders, orders to submit information and other orders issued by the Chief Administrative Law Judge. It has been necessary to repeatedly remind him of orders which require him to take action. But even these reminders are of no effect. As I have stated on prior occasions, the Office of the Chief Administrative Law Judge is simply too busy to keep calling and writing this Seattle Solicitor. In his constant and continual disregard of duly issued orders, this Solicitor stands alone. His persistent dereliction of duty cannot be countenanced.

In light of the foregoing, it is ORDERED that this case be DISMISSED.



Paul Merlin  
Chief Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

JUN 23 1992

|                        |   |                          |
|------------------------|---|--------------------------|
| SECRETARY OF LABOR,    | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : |                          |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 91-5-M   |
| Petitioner             | : | A. C. No. 10-01658-05505 |
|                        | : |                          |
| v.                     | : | Plant #1                 |
| DEATLEY COMPANY,       | : |                          |
| Respondent             | : |                          |

**ORDER OF DISMISSAL**

**Before: Judge Merlin**

On October 1, 1990, the operator's request for a hearing was received by this Commission for docketing.

On January 24, 1992, the Commission's Docket Office telephoned the Seattle Solicitor reminding him to file the penalty petition which he said he would do, but did not. On March 6, 1992, the Commission's Docket Office again telephoned the Solicitor but he did nothing. Finally, on April 29, 1992, an order was issued directing the Solicitor to show cause why this case should not be dismissed for failure to file a penalty proposal. The file contains the return receipt card showing that the Solicitor received a copy of this order on May 4, 1992. The Solicitor has failed to respond. This case is well over a year old and the Commission has heard nothing from the Solicitor.

The Seattle Solicitor in this case routinely fails to respond to show cause orders, orders to submit information and other orders issued by the Chief Administrative Law Judge. It has been necessary to repeatedly remind him of orders which require him to take action. But even these reminders are of no effect. As I have stated on prior occasions, the Office of the Chief Administrative Law Judge is simply too busy to keep calling and writing this Seattle Solicitor. In his constant and continual disregard of duly issued orders, this Solicitor stands alone. His persistent dereliction of duty cannot be countenanced.

In light of the foregoing, it is **ORDERED** that this case be **DISMISSED**.



Paul Merlin  
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 23 1992

|                              |   |                           |
|------------------------------|---|---------------------------|
| SECRETARY OF LABOR,          | : | CIVIL PENALTY PROCEEDING  |
| MINE SAFETY AND HEALTH       | : |                           |
| ADMINISTRATION (MSHA),       | : | Docket No. WEST 91-515-M  |
| Petitioner                   | : | A. C. No. 35-00490-05509  |
|                              | : |                           |
| v.                           | : | Stukel Mt. Crusher & Wash |
| KLAMATH PACIFIC CORPORATION, | : | Plant                     |
| Respondent                   | : |                           |

ORDER OF DISMISSAL

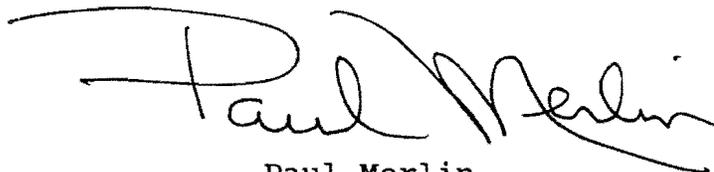
Before: Judge Merlin

This case is before me pursuant to the Commission's remand dated April 21, 1992.

On April 22, 1992, I issued an order instructing the parties to confer about possible settlement and directing the Seattle Solicitor to advise me within 21 days as to the results of these discussions. The Solicitor did not respond. Therefore, on May 18, 1992, an order was issue directing the Solicitor to advise whether the case could be settled or show cause why it should not be dismissed. The file contains the return receipt card showing that the Solicitor received the show cause order on May 21, 1992. Once again, the Solicitor has failed to respond.

The Seattle Solicitor in this case routinely fails to respond to show cause orders, orders to submit information and other orders issued by the Chief Administrative Law Judge. It has been necessary to repeatedly remind him of orders which require him to take action. But even these reminders are of no effect. As I have stated on prior occasions, the Office of the Chief Administrative Law Judge is simply too busy to keep calling and writing this Seattle Solicitor. In his constant and continual disregard of duly issued orders, this Solicitor stands alone. His persistent dereliction of duty cannot be countenanced.

In light of the foregoing, it is ORDERED that the penalty petition in this case be DISMISSED.



Paul Merlin  
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 23 1992

|                        |   |                          |
|------------------------|---|--------------------------|
| SECRETARY OF LABOR,    | ) | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | ) |                          |
| ADMINISTRATION (MSHA), | ) | Master Docket No. 91-1   |
| Petitioner             | ) | Docket No. WEVA 91-1659  |
| v.                     | ) | A.C. No. 46-06850-03549D |
|                        | ) |                          |
| DARBET, INCORPORATED,  | ) | Mine No. 1               |
| Respondent             | ) |                          |

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On June 2, 1992, the Secretary filed a motion to approve a settlement between the parties in the above case. The case includes three alleged violations of 30 C.F.R. § 70.209(b), which was originally assessed at \$1,000. The Secretary continues to assert that the violation resulted from a deliberate act, which is denied by the mine operator. The degree of negligence is disputed, and the parties agree to the reduction in the total penalties from \$3,000 to \$2,400.

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

Accordingly, the settlement motion is APPROVED. The operator is ordered to pay within 30 days of the date of this order the sum of \$2,400 for the violation charged in this proceeding.

  
James A. Broderick  
Administrative Law Judge

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Darwin Rowe, Darbet, Incorporated, Post Office Box 27, Iaeger, WV 24844 (Certified Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

JUN 24 1992

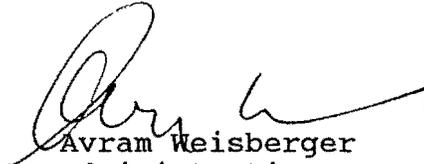
MARVIN DAVID WARREN, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 91-1036-D  
: MSHA Case No. MADI CD 91-01  
WEBSTER COUNTY COAL CORPORATION, :  
Respondent : Retiki Mine

**ORDER OF DISMISSAL**

Before: Judge Weisberger

On June 22, 1992, Complainant filed a Motion to Withdraw Complaint indicating that he has resolved his differences with Webster County Coal Corporation.

Accordingly, the Motion is Granted. This case is ordered dismissed with prejudice.

  
Avram Weisberger  
Administrative Law Judge

Distribution:

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Susan E. Chetlin, Esq., Webster County Coal Corporation, 2525  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

(303) 844-5266 / FTS 564-5266

JUN 26 1992

MANSEL JOHN SAFFELL, : DISCRIMINATION PROCEEDING  
Complainant :  
 :  
v. : Docket No. WEST 90-174-DM  
 :  
 : WE MD 90-07  
NATIONAL CEMENT COMPANY, :  
Respondent :

DECISION

Appearances: James E. Millar, Esq., Bakersfield, California,  
for Complainant;  
C. Gregory Ruffenach, Esq., SMITH, HEENAN & ALTHEN,  
Washington, D.C.,  
for Respondent.

Before: Judge Morris

This case involves a discrimination complaint filed by Mansel John Saffell against Respondent National Cement Company of California (hereafter "NCC"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").

The applicable portion of the Mine Act, Section 105(c)(1), in its pertinent portion provides as follows:

Discrimination of interference prohibited; complaint; investigation; determination; hearing

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 ...  
30 U.S.C. § 815(c)(1).

### Applicable Case Law

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2); that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom.; Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1982). The operator may rebut the prima facie 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 miners' unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1982); 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, 397-413 (1983) where the Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (Nov. 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp. 709 F.2d 86 (D.C. Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

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

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

### Procedural History

On January 22, 1992, a limited hearing took place in Ontario, California. The purpose of the hearing was to determine whether the protected activities alleged in the complaint were investigated by the Secretary of Labor as required by the Act.

As a result of the evidence received at the hearing, the Judge, on January 31, 1992, issued an order ruling that Complainant had complied with the Act and the Commission ruling in Hatfield v. Colquest Energy, Inc., 13 FMSHRC 544 (April 1991).

Subsequently, after notice to the parties, a hearing on the merits was held in Bakersfield, California, on March 31, 1992. Both parties filed post-trial briefs.

### Background

MANSEL JOHN SAFFELL began working at the Lebec, California, plant in 1980. At that time, the plant was owned by General Portland. The plant was later purchased by LaFarge and then by NCC. The plant produces cement powder. (Tr. 54).

Mr. Saffell was hired by General Portland as a production foreman. He continued to work in that capacity both for LaFarge and for NCC. In general, his job involved the supervision of work crews engaged in the production of cement. He conducted inspections, and was responsible for reporting malfunctions and safety conditions at the plant. (Tr. 54, 55).

Prior to his employment with General Portland, Mr. Saffell had worked for Penn-Dixie, also a cement production company, for eight or nine years. He had received specialized safety training relating to the cement industry and was awarded an MSHA instructor's training certificate. This certificate empowered him to train other employees in how to give safety demonstrations and conduct safety seminars, etc. (Tr. 56, 57).

While the plant was owned by General Portland, Mr. Saffell was directly involved in maintaining safety, serving as Chairman of the communications safety committee for two or three years. He continued in this capacity when LaFarge bought the plant.

After NCC purchased the plant in 1987 or 1988, Mr. Saffell noticed a decline in the emphasis on monthly executive safety council meetings, which involved both hourly and salaried employees. The safety council wrote up safe work procedures and discussed various safety items, including potentially unsafe conditions and remedies. Safety awards were given for no-lost-time accidents, no doctor-reported incidents, etc. (Tr. 57, 59).

All of these safety functions ceased when NCC took over. In fact, Mr. Saffell received a grievance from an hourly employee complaining about the company's failure to hold monthly safety meetings. (Tr. 58-60; Ex. C-4).

After NCC took over, Mr. Saffell noted a gradual neglect in maintaining the plant in a safe condition. NCC stopped the previous practice of assigning an electrician to work the 3 p.m. to 11 p.m. and the 11 p.m. to 7 a.m. shifts. For some reason, NCC wanted a lot of lights turned off at night. In particular, the lighting situation began to deteriorate to the point where it became extremely dangerous to work at the plant at night. (Tr. 60).

In May of 1989, Mr. Saffell suffered an industrial injury while digging in a clinker discharge tunnel at night. (Tr. 61; Ex. C-5). The lights in the tunnel had not been maintained and did not work. After Mr. Saffell cleared the discharge tunnel, a hot clinker fell on the ground. Because of the lack of lighting, he could not see that he was standing on the hot clinker, which burned his feet. (Tr. 61, 62).

Mr. Saffell tried to get NCC to repair the safety defects at the plant by submitting written requests for maintenance work, known as Job Request Tickets ("JRTs") and work orders. (Tr. 62). (Copies of various undated JRTs and work orders are in evidence as Complainant's Exhibit 6). However, he found that some of the necessary work was not being done all the time. (Tr. 67, 68, 101).

#### Protected Activity

Mr. Saffell attempted to solve the lighting problems at NCC. The JRTs and work orders were assigned to an electrician. The problems that required planning were turned in to Jess Kemple of the electrical department. (Tr. 67). The work was not done all of the time. (Tr. 67-68).

On July 12, 1989, a daily planning meeting (about 6:25 a.m. to 7 a.m.) took place. Present were Byron McMichael (plant manager), Bill Russell (chief electrician), Jim Kemple (electrical

foreman), George Watson (maintenance planner), Carl Hawkins (repair foreman), John Simms (maintenance planner), Phil Messer (production manager), Wally Bingham (repair foreman), and Chuck Luesada (labor foreman). (Tr. 68-69).

Mr. Saffell asked Jim Kemple if the work orders were going to be done. He didn't answer. Mr. Saffell then said that if the company wasn't going to repair the poor lighting around the plant he (Saffell) would get an outside agency, namely MSHA to repair them. (Tr. 69-70).

The next day at a similar meeting, the same men were present. Mr. Saffell brought up the work orders and Mr. Kemple said they were not going to be taken care of. (Tr. 70). Mr. Saffell said if they were not going to be taken care of, he would make a report to MSHA. (Tr. 71).

Mr. McMichael and Mr. Messer made no comment on the subject. (Tr. 71). There was no reaction from anyone in the room. (Tr. 72).

The following day there was another meeting and when Mr. Kemple said the conditions would not be corrected, Mr. Saffell went to his office and called Bill Willson (Supervisor of MSHA, San Bernardino Office). (Tr. 72) Mr. Saffell also filed a written complaint with MSHA. The written complaint dated July 15, 1989, addressed the "lighting situation." The complaint generally recites Mr. Saffell's testimony. (Ex. C-1).

Concerning the discussion of the lighting conditions Mr. McMichael described Mr. Saffell as being hostile and volatile to Mr. Kemple. In addition, Mr. Saffell was dealing with Mr. Kemple without the latter's boss being present. (Tr. 14, 136). In any event, Mr. McMichael talked to Mr. Russell (Mr. Kemple's boss). Mr. Russell showed Mr. McMichael what they were working on and he was satisfied. (Tr. 136). Mr. McMichael felt this was the wrong area to address Mr. Saffell's comments. He felt Mr. Saffell should have seen him and the electrical manager so they could talk privately in detail. (Tr. 136-138).

It is clear that under the Mine Act, Mr. Saffell had a statutory right to voice his concern about safety matters and to make safety complaints to MSHA.

In addition, on October 16, 1989, Mr. Saffell also wrote to Mr. McMichael, the NCC plant manager, complaining about his assignments as relief foreman. Since this letter refers to Mr. Saffell's prior complaints about inadequate lights, I consider it also to be a protected activity. The letter (Ex. 12) is also part of the Commission file. It reads, in part, as follows:

At this particular time I am assigned to Ron Gibson's shift while he is filling in for Jim Young. Why? If I'm the Relief Foreman, then I'm the Relief Foreman. Why do I get the "junk shift" and not the "gravy." When I was the Relief Foreman the last time, I filled in for Jim Young, and so did Doshier when he worked Relief so I know it's not because of past practice. I accepted this situation at first, but I kept wondering why. Am I going to be assigned to just the shifts that Gibson doesn't want, or what? I never gave it any thought until a couple of the salaried people made the comment that this is revenge for complaining about the lights. They were joking when they said it, but it got me to thinking.

### Direct Evidence of Discrimination

As a threshold matter, it is apparent that the record fails to disclose any direct evidence of discrimination as to Mr. Saffell's protected activity. However, direct evidence is seldom seen. Accordingly, it is appropriate to consider any circumstantial indicia that might be involved in the case.

### Knowledge of Protected Activity

NCC admits it knew of Mr. Saffell's safety complaints. The plant manager, Mr. McMichael, was present at the planning meeting when Mr. Saffell confronted Mr. Kemple. (Tr. 168-176).

### Hostility to Protected Activity

There was some hostility shown by the electrical manager to Mr. Saffell, but NCC's management showed no hostility whatsoever to him. The statements by Mr. Saffell were treated matter-of-factly. (Tr. 72, 85-86, 114, 117). Compare Hicks v. Cobra Mining, Inc., et al., 12 FMSHRC 563, 568 (Wersberger, J.).

The failure of management to manifest hostility, displeasure, or anger appears to confirm Mr. McMichael's testimony that NCC treats complaints to federal agencies as an exercise of important statutory rights and does not discriminate against employees who exercise such rights. (Tr. 150-151).

### Coincidence in Time

On October 16, 1989, Mr. Saffell wrote to Mr. McMichael. The letter principally complains about job assignments to Mr. Saffell as a relief foreman. However, the lighting conditions were mentioned and I consider the letter to be a protected activity. Such activity and the protected activity in July 1989 bear little coincidence in time to adverse action in December 1989. In Larry Cody v. Texas Sand and Gravel Company, 13 FMSHRC 606, 668 (1992), it was held that adverse action was not motivated by a two-week-old safety complaint. See also Ernie L. Bruno v. Cyprus Plateau Mining Corporation, 10 FMSHRC 1049, 1055 (1988).

### Disparate Treatment

Mr. Saffell asserts he was subject to disparate treatment when he left work. Specifically, he claims other employees have missed work for extended periods without permission and have not been subject to adverse action. (Tr. 93, 94). In support of the disparate treatment claim, Mr. Saffell introduced into evidence the employment information concerning three hourly employees, namely Robinson, Abbott, and Dunlop. (Ex. C-11, C-12).

However, employment actions relating to hourly employees Robinson, Abbott, and Dunlop are regulated by terms of the collective bargaining agreement. (Tr. 132-134, 150). These rules do not apply to management level employees such as Mr. Saffell. (Tr. 134, 140). In any event, the employment file of Mr. Dunlop received in evidence indicates the employee was discharged for his attendance-related problems. Further, the Abbott personnel file, also received in evidence, involved alleged racial slurs against a Ms. Gloria Robinson. Like Mr. Dunlop's, Ms. Robinson's employment is governed by the terms of the collective bargaining agreement. In any event, Ms. Robinson returned to work the following day with a reasonable explanation for having left work.

The circumstantial evidence frequently relied upon fails to establish an inference of discriminatory conduct by NCC.

### Events Involving Job Assignments

After making his complaint to MSHA, Mr. Saffell noticed certain changes in his job assignments that he attributed to the fact that he had made the complaint. Mr. Saffell was working as a relief foreman when he noticed the changes.

As Mr. Saffell explained, the advantage of the relief foreman's job is that when you are not filling in for someone from production, which involves night and swing shifts, you normally work a Monday to Friday schedule, with weekends off. When Phil Messer offered Mr. Saffell the relief foreman's position, these advantages were pointed out to him. When he had previously served as a relief foreman, he worked a Monday to Friday schedule when he was not filling in for someone. (Tr. 74-77).

The first example he gave of adverse changes in his job assignment as relief foreman concerned the procedure for covering a shift when a foreman called in sick. The normal procedure was for the foreman on the preceding shift to work an extra four hours and the foreman on the following shift to report in four hours early, thus covering the eight-hour shift of the absent foreman. After Mr. Saffell complained to MSHA, the company required him to report for work to cover the missing shift. He testified this was "not the standard procedure at all." (Tr. 76, 77).

A further example of adverse job changes concerned working holidays. Normally, a relief foreman had holidays off, absent special circumstances, if he was not filling in for someone on vacation. After Mr. Saffell complained to MSHA, the company required him to work on a holiday and gave another employee, who should have worked the holiday, the day off. As Mr. Saffell testified, "this just wasn't the norm." (Tr. 77-78).

An additional example concerned the company's failure to assign Mr. Saffell to cover the vacation of the foreman assigned to the primary quarry. When Mr. Saffell had worked as relief foreman several years before, he had been assigned to the quarry to cover that foreman's vacation. After he complained to MSHA, instead of being assigned to the quarry, where he would have worked ten-hour days, Monday through Thursday, he was assigned to the primary crusher, which involved, among other things, working swing and graveyard shifts. The company gave the more desirable quarry assignment to the primary crusher foreman. As Mr. Saffell explained, no special expertise was required for him to fill in at the quarry. (Tr. 78, 79, 187).

As plant manager, Mr. McMichael would be in a better position than Mr. Saffell to know why assignments were made.

Mr. McMichael testified that in the fall of 1989 he moved production foreman Ron Gibson up to the quarry to cover for vacationing Jim Young.

This transfer was made, on the recommendation of Gar Summy, because Mr. Gibson had more quarry experience. At the time, Gar Summy was a quality control quarry raw materials manager. Mr. Saffell had no quarry experience and Mr. Gibson would be better suited to supervise the quarry crew. A relief foreman would not automatically move to fill in for a quarry foreman. (Tr. 145, 146).

The last example concerned Mr. Saffell's permanent assignment to the dust dump. Normally, when a relief foreman was not covering for another foreman on vacation, for example, he would help out with assignments in the maintenance department. After Mr. Saffell complained to MSHA, he was permanently assigned, when not covering a vacation, to spend his eight-hour shift watering the dust in the dust dump. (Tr. 79, 80).

To Mr. Saffell's knowledge, no one had ever been permanently assigned to spend his entire shift watering the dust. He testified it took about an hour out of a regular shift to water the dust. (Tr. 80, 186). As the company's witness, Mr. Gibson stated "it doesn't take eight hours to water the dust down. You set the sprinkler, you can go off for two or three hours, do your other routine job checks that you normally do and come back." Mr. Gibson had never been ordered to stay at the dust dump for eight hours. He agreed that the dust dump assignment is not sought after. (Tr. 129, 130).

After complaining to MSHA, Mr. Saffell was forced to spend all day at the dump and, as he stated, "I was to move the hose all the time, keep it going, keep it moving all the time. By the time I would get it set up in one place, they wanted it to run for 15-20 minutes and then moved to another one, and then moved to another one. This wasn't just for that one day, this was when I was not covering a shift." (Tr. 186). After a time of dragging the hose, Mr. Saffell hooked up a device on his personal pick-up so he could move the hose around without having to drag it. (Tr. 80).

Mr. McMichael, who would know why assignments are made, indicated the assignment to the dust dump was due to increased environmental awareness at the time. (Tr. 148-149).

On October 16, 1989, Mr. Saffell wrote a letter to Mr. McMichael describing the manner in which the company was discriminating against him in job assignments. (Tr. 84; Ex. C-7). Mr. McMichael claims to have directed one or two other company employees to respond to Mr. Saffell's letter, but he admitted he did not know if they had done so. Mr. Saffell never received any response from the company to his complaints about such discrimination. (Tr. 85, 177, 186).

Mr. Saffell also noticed several other changes at work following his complaint to MSHA. His authority began to be questioned, especially within the electrical department. He was told they didn't work for him. His instructions to the electricians were ignored and the electrical foreman, Mr. Kemple, did nothing about it. (Tr. 80, 81). Mr. Saffell gave an example involving his attempt to call out an electrician to come to the plant. He tried to reach the employee three times by phone, without success. The electrician claimed Mr. Saffell had not called him. Mr. Saffell believed the company had a monitoring device hooked to the phone line that would prove he had made the calls. (Mr. McMichael refused to check the phone log and refused to back Mr. Saffell's authority in the dispute.

At the hearing, Mr. McMichael did not doubt that Mr. Saffell made the telephone call but he stated the phone monitor was not hooked up. (Tr. 81, 138).

According to Mr. McMichael, the telephone call incident involved one of several occasions when he was less than satisfied with Mr. Saffell's performance as a management employee. When this incident arose, Mr. Saffell was very hostile, violent, and abrasive. A meeting was held to discuss the problem. (Tr. 81, 138). Present at the meeting were Mr. McMichael, Mr. Russell (electrical supervisor manager), Mr. Kemple (electrical supervisor), and Tony Burn (instrument man). Mr. McMichael felt the meeting should have been handled in a pleasant, formal, and professional environment. Instead, Mr. Saffell became very hostile, ran out of the room saying, "You haven't heard the end of this." Mr. McMichael stated he wouldn't accept such behavior from his children. (Tr. 139).

### Discussion

Under different circumstances, the described adverse job assignments might be considered the evidence of discriminatory intent. However, Mr. Saffell was a relief foreman. It is uncontroverted that he was to fill in "for vacation and/or extended absences." The very nature of his job as relief foreman indicates Mr. Saffell could have anticipated many changes in his work assignments. As he stated in his letter dated January 10, 1991 (Ex. 17), as relief foreman he covered for the following people:

| <u>Foreman</u>             | <u>Assignment</u>           | <u>Scheduled Shift</u>                  |
|----------------------------|-----------------------------|---|
| Chuck Luesada              | Finish Silo/Yard<br>Foreman | 7 a.m. - 3 p.m.<br>Monday - Friday      |
| Jim Young                  | Quarry/Primary<br>Foreman   | 7 a.m. - 5:30 p.m.<br>Monday - Thursday |
| All Maintenance<br>Foreman | Maintenance                 | 7 a.m. - 3 p.m.<br>Monday - Friday      |
| All Production<br>Foreman  | Production                  | Various Shifts                          |
| Ray McPherson              | Garage Foreman              | 7 a.m. - 3 p.m.<br>Monday - Friday      |

In sum, I credit Mr. McMichael's testimony that there was nothing unusual nor abnormal about Mr. Saffell's jobs. (Tr. 149).

Further, I credit Ron Gibson, the NCC production foreman and a relief foreman himself, who indicated it is the company's discretion as to what the relief foreman does.

Mr. Saffell further described the company's attitude after he complained to MSHA, "It was like I was there but I didn't really exist." The company's treatment of Mr. Saffell finally forced him to seek the help of Dr. Kellewan. (Tr. 84, 86; Ex. C-8). Dr. Kellewan diagnosed Mr. Saffell as suffering from stress due to the events at work.

## Further Discussion and Findings

The evidence of job assignments fails to establish any discriminatory intent by NCC after Mr. Saffell filed his MSHA complaint.

As a threshold matter, NCC did not unilaterally appoint Mr. Saffell to the relief foreman job. Rather, Phil Messer offered him the position. (Tr. 77).

A portion of the evidence concerns what Mr. Saffell considers to be adverse job assignments while he was serving as the relief foreman. It is true that different jobs were assigned. However, the very nature of the relief foreman's job is to cover for many foremen who may be on vacation. (See Ex. 17 for list of individuals for whom the relief foreman could substitute.) As Mr. Saffell himself stated: "When you work the relief job, when you are not assigned as vacation relief, you work Monday to Friday, weekends and holidays off, unless special circumstances." (Tr. 77). "I covered the vacations and the production, and I covered them in the other areas." (Tr. 78). There were two other relief foremen and "we were more or less assigned daily to whatever come up that needed to be taken care of." (Tr. 78, 79).

In sum, no credible evidence supports the view that NCC discriminated against Mr. Saffell in job assignments when he was the relief foreman.

### Events of December 27, 1989

Things finally came to a head on December 27, 1989. Mr. Saffell had been away from work for several days due to the illness and death of his wife's mother. On December 27, he was ordered to attend a meeting with Mr. McMichael and another company employee, Phil Messer. Mr. Saffell recounted what happened at the meeting as follows:

I sat down and Phil made the comment, "I am sorry to hear about your mother-in-law--my mother in-law had passed away--I am sorry to hear about your mother-in-law, you should have gotten in touch with me directly." I said, "Phil, I tried about 12 different times to get a hold of you." And Byron jumped in and said, "Bullshit, you know where we are all the time, you could have gotten a hold of us at any given time." I didn't know what the hell was coming off. I took my radio

and I put it on Phil's desk. I said, "Byron, I just went through this with Tony Burk and you are calling me a liar, and I can't ..." I said, "Byron, I have been seeing a doctor because of the stress over filing this Goddamn grievance." I said he told me if I can't handle it, that I should walk away from it now. I was in no condition to stay around the plant. His attitude was just--I couldn't deal with it. It was the final straw.

I left the office and then I went back and I told him at that time, I says he told me I would have to walk away from it if I could. I said, "I've got to walk away from it." I said, "I've got to take sick leave, take official sick leave," and I walked out the door and then I came back in and told him once again. I said, "I am taking official sick leave," and I told him I was going to send a letter to Mr. Unmacht, and I made the comment that I was also going to talk to the Bakersfield, California, reporters who had been asking me to comment on different things going on up there. And I left the plant.

I also told him, prior to leaving, that I was going on official sick leave, and that I would provide the documentation as soon as I could, and I left. (Tr. 87, 88)

Mr. McMichael's version of the meeting is as follows:

A. We sat down in Mr. Messer's office and Mr. Saffell came in and Phil Messer shared his condolences with Mr. Saffell about his mother-in-law, and then I started my list of things that I wanted to talk with Mr. Saffell about, and he became just violent. Threw his radio down and says I don't have to listen to this any more. He says I will give you a doctor's statement that says I can leave work whenever I want to. I thought he was going to get mad, walk out the door, cool off and come back and we are going to talk some more about this, and I waited in the control room for almost an hour. And then I asked some of the guys, I said where did he go? They said he left the plant. I said, really? I didn't believe it.

By way of collateral evidence: When Mr. Saffell left the plant, he believed he was mentally distraught. He didn't call NCC the next morning because he hadn't gathered his information. (Tr. 107, 108).

Mr. McMichael reviewed his notes and Mr. Messer's notes for a couple of days after December 27. He expected Mr. Saffell to come up the next morning with documentation from a medical doctor showing he had been treated and was given permission to take off work whenever he felt stressed. When he didn't show up in a couple or three days, Mr. McMichael decided Mr. Saffell was sincere about resigning. Mr. McMichael made his termination decision around December 31, 1989. (Tr. 183).

On January 2, 1990, Mr. Saffell learned that NCC said he no longer worked there. He had not been contacted by the company nor had he been in touch with them after going on sick leave. (Tr. 91).

Mr. Saffell had never seen a form for sick leave and NCC never offered him an opportunity to return to work. (Tr. 92, 97).

Mr. McMichael felt that Mr. Saffell's actions were insubordinate. Further, he believed Mr. Saffell had intended to resign. John Turner also told NCC that Mr. Saffell intended to resign at the end of the year. (Tr. 141).

In a number of instances, Mr. McMichael was less than satisfied with Mr. Saffell as a management employee. These include the meeting where Mr. Saffell became hostile with electrician Kemple. (Tr. 136). Also, the meeting with the instrument people where Mr. Saffell became hostile, violent, and abrasive. (Tr. 18, 139). In addition, Mr. McMichael had been told Mr. Saffell left the plant on December 12, 1989. This was when he abandoned his post. (Tr. 141). Further, he reported he would be off for his mother-in-law's funeral. (Tr. 141). This report was made to the control operator but Mr. Saffell could have called Mr. McMichael directly. (Tr. 142).

#### DISCUSSION

On the facts, it appears NCC took adverse action against Mr. Saffell when it refused to reinstate him. However, I conclude such adverse action was not motivated, in whole or in part, by Mr. Saffell's protected activity. Assuming that NCC's actions were motivated in part by Mr. Saffell's protected activities, NCC established by a clear preponderance of the evidence, that it was

also motivated by business reasons and Complainant's unprotected activities, and that it would have taken the adverse actions in any event.

For the foregoing reasons, I enter the following:

ORDER

Complainant failed to establish discrimination under the Mine Act on the part of Respondent and, accordingly, these proceedings are **DISMISSED**.

  
John J. Morris  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

JUN 29 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 92-78-M  
Petitioner : A.C. No. 41-02852-05517  
 :  
v. :  
 : Tin Top Sand and Gravel Plant  
TEXAS INDUSTRIES, INCORPORATED, :  
Respondent : .....

DECISION

Appearances: Olivia Tanyel Harrison, Esq. and Jack Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; Bob Williams, Texas Industries, Incorporated, Weatherford, Texas, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq., the "Act," charging Texas Industries, Incorporated (Texas Industries) with six violations of mandatory standards. The general issue before me is whether Texas Industries violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed.

Citation No. 3895580 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.12025 and charges as follows:

The spray bar water pump 480 VAC and its switch gear were not effectively grounded in that a grounding conductor had not been provided from the main service near the transformers to the electrical switch gear about 300 feet away.

The cited standard provides in relevant part that "[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection."

Texas Industries does not dispute that the violation existed as charged but maintains that it was neither "significant or substantial" nor of serious gravity. Melvin Robertson, an MSHA mine inspector/electrical with extensive electrical experience, testified that indeed there was no grounding medium for the branch circuit to the 35 horsepower starter pump as charged. According to Inspector Robertson, the National Electrical Code, which is also used and followed by the Texas Industries' electrical engineer, provides the relevant industry standards. These standards were not being followed with respect to the cited branch circuit. Moreover, Robertson noted that the National Electrical Code specifically provides that "the earth shall not be used as the sole equipment grounding conductor" and therefore the peg ground utilized at the pump site was clearly inadequate. Inspector Robertson opined, based upon the existing conditions, that there was a reasonable likelihood for ground faults to occur resulting in electrical shock or fire. He also noted that the voltage was sufficient to cause electrocution.

On behalf of Texas Industries, Charles Cleaveland, the Tin Top Plant Manager at the time the citations were issued, disagreed with Inspector Robertson's opinion regarding the severity of the hazards. At the same time, however, Cleaveland readily acknowledged and qualified his statement by conceding that he did not have electrical expertise. Under the circumstances I can give Mr. Cleaveland's lay opinion but little weight. On the other hand, the expert testimony of Inspector Robertson is persuasive regarding the severity of the hazard and I have no difficulty in concluding based on that testimony that the hazard was both "significant and substantial" and serious. See Mathies Coal Co, 6 FMSHRC 1 (1984), U.S. Steel Mining Co, 7 FMSHRC 1125 (1985). There is a dearth of evidence on the issue of negligence and considering the remaining criteria under Section 110(i) of the Act, I find that a civil penalty of \$100 is appropriate.

The remaining five citations charge violations of the standard at 30 C.F.R. § 56.141079(a) and each charges, in essence, that a flange type bushing or seal keeper on the ends of a rotating shaft were exposed and not guarded. These were all located in areas along walkways where an employee would, according to the inspector, likely get a hand, finger, or clothing caught in pinchpoints or suffer injuries from the rotating bolts protruding from the moving machine part. The specific charges in the citations are set forth in the appendix attached hereto.

The cited standard, 30 C.F.R. 56.14107(a), reads as follows:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys,

flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

Texas Industries does not dispute the existence of the cited violations, but maintains that they were neither "significant and substantial" nor serious. According to MSHA Inspector Robertson, the factual situations involved in Citation Nos. 3895911, 3895912, and 3895914, were essentially the same. Each involved an unguarded rotating shaft with bolts protruding from the rotating shaft and a gap of approximately one-half inch that was unguarded and would permit a hand or finger to be inserted causing broken bones, lacerations, and mangled hands and/or fingers. Robertson concluded that the hazard was "significant and substantial" and serious because of the close proximity of these unguarded moving machine parts to walkways at a height of approximately 30 to 40 inches above the walkway and in areas in which an employee might reach as for a handrail. He observed that employees were greasing at the time the citations were issued and that there were grease fittings in close proximity to the moving machine parts. He testified that in most cases the grease fittings are directly behind the flange and noted that greasing does in fact occur at these locations while the plant is in operation.

With respect to Citation Nos. 3895915 and 3895975, Inspector Robertson observed that the cited unprotected gaps exposing the moving machine parts were larger than those previously cited and therefore would permit an employee's clothing to become entangled by the moving parts. He concluded that these hazards were less severe than where the hand or fingers could become mangled.

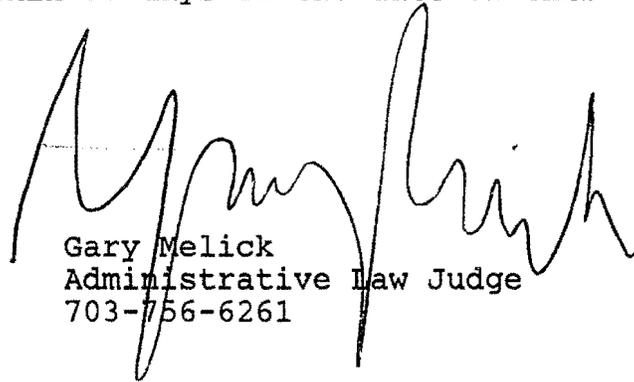
Plant Manager Charles Cleaveland testified on the other hand that these citations did not present a major safety hazard. He based his conclusion upon the fact that the plant had been in operation since 1975, had been inspected many times by 10 or 11 different inspectors and that this was the first time these conditions had been cited. In addition, he noted that the cited areas have work platforms with handrails. It was therefore his opinion that it was unlikely for employees to use the flanges as handrails. He further testified that serious injury findings in these cases was inconsistent with findings in another citation (Citation No. 3895913) which the same Inspector found not to be "significant and substantial."

In rebuttal Inspector Robertson observed that the conditions found in Citation No. 3895913 were distinguishable in that a bar provided partial protection to employees and would have hindered employees from exposure to the hazardous moving machine part. Inspector Robertson also testified that in 1988 he had specifically informed previous Plant Manager Fuller of the hazardous nature of the exposed flanges and advised him to provide guards for those exposed flanges.

Under the circumstances I find that the Secretary has met her burden of proving that the violations were indeed "significant and substantial" and serious. In light of the inspector's testimony regarding previous warnings to management to guard the cited conditions in 1988, it is also clear that the operator is chargeable with negligence. Considering all of the criteria under § 110(i) of the Act, I find that the Secretary's proposed penalties are indeed appropriate.

ORDER

Texas Industries, Incorporated, is hereby directed to pay civil penalties of \$456 within 30 days of the date of this decision.



Gary Melick  
Administrative Law Judge  
703-756-6261

Distribution:

Olivia Tanyel Harrison, Esq. and Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Charles Cleaveland, Texas Industries, Incorporated, 5211 New Tin Top Road, Weatherford, TX 76087 (Certified Mail)

/lh

## APPENDIX

Citation No. 3895911:

A flange type bushing or seal keeper was mounted on the end of the No. 128 belt conveyor drive gear box drive shaft rotating within an approximately one half inch of the belt drive guard. The flange is about 40 inches up from the walkway where an employee would likely get hand or finger into pinch point.

Citation No. 3895912:

A flange type bushing or seal keeper was mounted on the end of the No. 127 belt conveyor gear case drive shaft. The belt heads on the rotating flange came very close to the drive guard approximately one half inch and was located about 40 inches up from the walkway where an employee would travel to service the area.

Citation No. 3895914:

A guard was not provided for the rotating flange on the drive shaft of No. 123 belt conveyor gear case shaft. The flange rotates very near the drive gear (belt heads about 1/2 inch from guard) causing a pinch point about 40 inches up from the access way that an employee would likely get finger caught in.

Citation No. 3895915:

A guard was not provided over the rotating flange on the end of the gear case shaft of No. 120 belt conveyor. Bolt heads on the key way area on the flange could catch clothes of employees. This flange is located just under where an employee would check oil in gear case or near where he would grease pillow block bearing. An employee was observed greasing in Plant during shift.

Citation No. 3895975:

A flange type bushing or seal keeper was mounted on the end of the No. 122 belt conveyor gear case drive shaft. The bolt heads on the rotating flange came very close to the drive guard where an employee would likely get a finger caught in the pinch point or catch clothes.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 29 1992

SECRETARY OF LABOR, ) CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH )  
ADMINISTRATION (MSHA) ) Docket No. KENT 91-1417  
Petitioner ) A.C. No. 15-02705-03726  
v. ) Camp No. 2 Mine  
PEABODY COAL COMPANY )  
Respondent )

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor,  
United States Department of Labor, Nashville,  
Tennessee, for Petitioner;  
David R. Joest, Esq., Peabody Coal Company,  
Henderson, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq., the "Act," charging the Peabody Coal Company (Peabody) under Section 104(d)(1) Citation No. 3551466, with one violation of the mine operator's ventilation plan.<sup>1</sup>

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<sup>1</sup> Section 104(d)(1) of the Act provides in part as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such 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 and health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under the Act.

It is established law that once a ventilation plan is approved and adopted, its provisions are enforceable at the mine as mandatory safety standards. Zeigler v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), Carbon County Coal Co., 6 FMSHRC 1123 (1984), Carbon County Coal Co., 7 FMSHRC 1367 (1985), Jim Walter Resources, Inc., 9 FMSHRC 903 (1987). The general issue before me is whether Peabody violated the ventilation plan as charged, whether the violation was "significant and substantial" and/or the result of "unwarrantable failure," and what, if any, civil penalty should be assessed.

Citation No. 3551466, charges as follows:

The No. 2 monitoring borehole drilled from the surface penetrating through the No. 11 Coal Seam into the No. 9 Coal Seam for the purpose of monitoring the No. 8 and No. 9 seals in the No. 9 Coal Seam, was not properly identified on the mine map for the No. 11 coal seam and as the result of was mined into destroying the borehole.

It is undisputed that the alleged violation is based upon provisions of a petition for modification which had been granted and had become part of the mine operator's approved ventilation plan. In essence, those provisions required that "the 5 east and 6 east seals shall be monitored from a borehole identified on the mine map as Hole No. 2."<sup>2</sup> Peabody does not dispute that the violation occurred as charged but maintains that the violation was neither "significant and substantial" nor caused by its "unwarrantable failure" to comply with the applicable law.

The essential facts are not in dispute. Mining operations at the Camp No. 2 Mine are conducted in two seams, the No. 11 seam (upper) and the No. 9 seam (lower). Pursuant to an order granting a petition for modification of the application of a mandatory safety standard, Peabody had been monitoring air quality outside certain seals of abandoned areas in the lower seam by sampling through boreholes drilled from the surface. On March 7, 1991, a mining unit in the No. 1 section of the upper seam mined through one of these methane monitoring boreholes, the No. 2 borehole. There seems to be no dispute that this occurred because the mine map in use in March 1991 erroneously showed the No. 2 borehole as if it were a core sample drillhole rather than a monitoring borehole. Core drillholes are plugged after they are drilled and are normally mined through. The No. 2 borehole should have been clearly marked on the mine map so that it would not be mined through, however, due to negligence in the

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<sup>2</sup> The apparent contradiction between the language in the citation that the No. 2 monitoring borehole monitored the No. 8 and No. 9 seals and the statement in the ventilation plan that the No. 2 borehole monitored the 5 and 6 East seals was explained at hearing by MSHA Inspector Smith (See Tr. 31-32).

preparation of the map in the mine engineering office it was not. It is not disputed that the area in the upper seam through which the No. 2 borehole passed was not originally projected to be mined so that marking the No. 2 borehole as a borehole would not have been critical at the time. When the plans changed and projections for mining that area were added to the map, someone neglected to mark the No. 2 borehole as it should have been marked.

In evaluating whether a violation is "significant and substantial" the Commission in Mathies Coal Company, 6 FMSHRC 1 (1984), explained 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 Co., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation. Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 1007 (1987).

The third element of the formula requires that the Secretary establish "a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573 (1984); Monterey Coal Co., 7 FMSHRC 996 (1985). The time frame for determining if a reasonable

likelihood exists includes the time that a violative condition existed or would have existed if normal mining operations continued. Rushton Mining Co., 11 FMSHRC 1432 (1989).

MSHA Inspector Ted Smith found the violation in this case to have been "significant and substantial." He testified that the roof conditions in the area of the seals was bad and had not been physically examined for two years. He further noted that the area behind the seals historically accumulates high levels of methane, between 30 and 50 percent, and oxygen is depleted in those areas. He opined that such methane could migrate into the cavities and cracks of the No. 9 and No. 11 seam and into the borehole either through a roof fall or cracked seal. According to Smith, if the methane should escape into these areas, which were ventilated by the old south fan, the level of methane could very well be diluted to the explosive 5 to 15 percent range. In addition, according to Smith, if the continuous miner should strike the lining of the borehole or limestone it could cause an ignition. He further opined that the ignition could travel back down into the No. 9 seam causing a violent explosion and injuring miners working in both the No. 9 and No. 11 seams.

Peabody argues on the other hand that the violation was not "significant and substantial" because the inspector's scenario required at least three discrete steps: (1) a failure of the seals monitored by the No. 2 monitoring borehole, (2) explosive concentrations of methane in the No. 9 seam workings, and (3) sufficient quantities of methane travelling from the No. 9 seam to the No. 11 seam to cause an explosion. Peabody argues that the ten previous months of daily monitoring at the borehole reflects either no methane or occasional negligible amounts of methane at the borehole and, similarly, only negligible amounts of methane found at the old south exhaust fan for several weeks after the incident at issue. Peabody also argues that it is unlikely that sufficient quantities of methane would travel from the No. 9 seam to the No. 11 seam to cause an explosion since the pipe was only one and a quarter inches in diameter and a pump had to be used to extract samples at the surface.

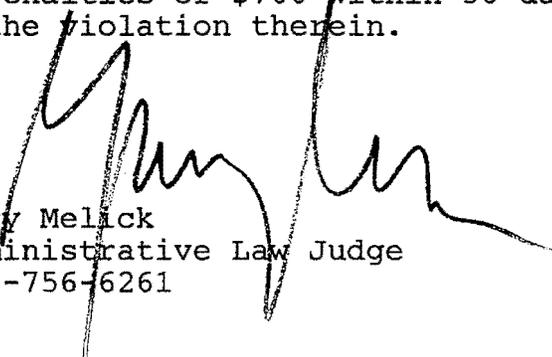
While it is true that the targeted hazard in this case would require the coincidence of several events, I nevertheless find that the Secretary has proven through the credible testimony of her expert witness that there was a discrete safety hazard contributed to by the underlying violation and that there was a reasonable likelihood that the hazard would result in serious injuries or death. Accordingly, the instant violation meets the stated criteria to be "significant and substantial." For the same reasons the violation was also of high gravity.

I do not however find that the Secretary has sustained her burden of proving that the violation was caused by Peabody's "unwarrantable failure" to comply with the standard. Unwarrantable failure has been defined by the Commission as aggravated

conduct constituting more than ordinary negligence. See Emery Mining Corporation, 9 FMSHRC 1997 (1987), Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987). In this case it is clear that the instant violation was the direct result of the inattention of the mine engineering office in preparing the mine map. This inattention constitutes negligence but not of a particularly aggravated nature. In addition it is noted that the persons performing and supervising the actual mining did not know the location of the No. 2 borehole or did not realize that it was a borehole as a result of the negligent preparation of the mine map. Absent more I cannot find that these circumstances constitute more than simple negligence. Accordingly, and considering all the facts under section 110(i) of the Act, I find that a reduction in the proposed civil penalty to \$700 is appropriate.

ORDER

Citation No. 3551466 is modified to a citation issued under § 104(a) of the Act and is AFFIRMED as modified. Peabody Coal Company is directed to pay civil penalties of \$700 within 30 days of the date of this decision for the violation therein.



Gary Melick  
Administrative Law Judge  
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 29 1992

RICHARD ALLEN PLASTER, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. VA 91-449-D  
FALCON COAL CORPORATION, :  
Respondent : NORT CD 91-02  
: Mine No. 1

DECISION

Appearances: E. Gay Leonard, Esq., Copeland, Molinary & Bieger,  
Abingdon, Virginia, for Complainant;  
Thomas R. Scott, Jr., Esq., Street, Street, Street,  
Scott & Bowman, Grundy, Virginia, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a discrimination complaint filed by the complainant, Richard Allen Plaster, against the respondent, Falcon Coal Corporation (Falcon), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Mr. Plaster filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA). His complaint alleged:

On January 27, 1991 (sic), I was section electrician at Falcon Coal Corporation. My battery light went out at the beginning of the shift (at approximately 3 p.m.). I made a couple of attempts to have one brought to me by Mr. Hackney and after he declined to do so and after talking to the section foreman, I removed myself from what I considered a hazardous working condition (no light) and removed myself from the mine to obtain another light. While I was obtaining another light, a verbal confrontation occurred between Rick Hackney and myself because I had removed myself from what I felt like was a hazardous condition.

During the verbal confrontation with Mr. Hackney, I was discharged by him. Mr. Hackney just slapped his hands and said, "You're gone." I then requested him to have a Federal inspector come to the mine site and I received no response from him.

Following an investigation of his complaint, it was found by MSHA to lack merit because a violation of section 105(c) had not occurred. Mr. Plaster then filed his complaint with this Commission.

Pursuant to notice, a hearing was conducted in Abingdon, Virginia, on February 13, 1992. Subsequently, both parties filed post-hearing briefs and/or proposed findings and conclusions, which I have considered along with the entire record of proceedings in this case in making the following decision.

The complainant originally alleged that he was illegally discharged from his job with Falcon on January 28, 1991, when he was fired after leaving his work place to come outside the mine to get a cap light. Complainant also now alleges that he had several prior confrontations with Falcon management because of unrelated safety violations in the mine and he believes that his discharge on January 28, 1991, was motivated at least in part by these previous safety complaints. Respondent, on the other hand, insists that Plaster was quite properly discharged from his job solely for insubordination—the admitted use of abusive language directed towards his supervisor during a work-related discussion with that supervisor.

#### DISCUSSION

Plaster began his employment at Falcon as an electrician/mechanic on December 4, 1990. He was fired on January 28, 1991.

In the intervening 2-month time period, Plaster now claims to have had several confrontations with the mine foreman, Ricky Hackney. Hackney was, like Plaster, also a certified electrician, and the subject of these "confrontations" purportedly was electrical hazards that Plaster was finding in the mine. Hackney, however, flatly denies that there were ever any confrontations or discussions with Plaster about any unsafe electrical conditions. I do believe Plaster found and repaired several unsafe electrical conditions during his short tenure at this mine, but I do not find credible his allegations that he had any trouble with Hackney because of it. I note that there is no mention made of this in his complaint to MSHA filed January 30, 1991. My considered opinion after reading this entire record again is that whatever happened to cause Plaster to be discharged on January 28, 1991, played out on that day. Hackney had no pre-existing agenda to get rid of Plaster. Therefore, I will turn now to the important events of January 28, 1991, in some detail.

When Plaster went into the mine on January 28, 1991, his cap light was apparently operating normally. However, in a short time, it began to go dim even though he claims to have charged it for 11 hours preceding that shift.

Plaster also claims that the only other prior incident involving his cap light was resolved virtually without incident before he went underground. This testimony differs considerably from that of his section foreman, Allen Perkins and mine foreman Hackney. They both recall numerous occasions during his 2-month employment that Plaster had problems with his light. The resolution of this discrepancy in the testimony is probably not too important except perhaps as it bears on the frustration level of Perkins and/or Hackney if it is true that this was a frequently recurring situation.

At any event, shortly after arriving at the section on January 28, Plaster called Hackney on the surface and told him about the problem with his light. Hackney told Plaster that he would get him a new light as soon as possible. Plaster also went to his section foreman, Perkins, and told him that his light was going out and that he had already called Hackney and that Hackney was going to send him one in. Perkins told Plaster to go back to the feeder area, where another miner was stationed who had a light, and stay there until Hackney called and said that he was coming in with his light; then he (Perkins) would send somebody to the end of the track to get it.

When the replacement light was not forthcoming, Plaster called outside to Hackney a second time, telling him that his light had now gone completely out and asking him again to send in a light as well as a part needed for repair of a shuttle car. Hackney again told Plaster that he still could not deliver the light because he was alone outside. Federal regulations and Virginia state law require that a responsible person be on duty at all times outside the mine in case of an emergency. Therefore, Hackney was waiting for Jerry Shortridge to arrive at the mine office so he could take the light to Plaster. Hackney seemingly was unaware of it, but Shortridge arrived in the office area in time to hear Hackney tell someone [probably Plaster] on the telephone that "[t]here is nobody out here but me. I have no way of getting you one." (Tr. 259).

After the second telephone conversation with Hackney, Plaster requested that his foreman allow him to go out and get his own light. Perkins told him to go ahead. Plaster's subsequent unlit trip to the surface was undertaken in at least as hazardous a condition and probably more so than the situation he was in at the feeder. He went out of the mine with neither a cap light nor an operable light on the mantrip. He himself admits it was hazardous to come out that way but states that "it was either that or stay in there the entire shift without a battery light." It seems to me that a third option, i.e., waiting for someone else to either bring one in, or getting someone else who had a light to come out would have been preferable. But, in any event, he did successfully make it outside without incident.

After arriving on the surface, he went to the supply shed and was in the process of obtaining a light when he encountered Hackney. Hackney asked "[W]hat in the hell are you doing?" or words to that effect. He was angry that Plaster had come out of the mine. Plaster replied, according to Shortridge, who overheard this exchange, and essentially corroborates Hackney's version, with words to the effect that he was getting a light. Hackney responded by berating Plaster: "No, you didn't have to come outside to get a light. You could have gotten someone else to have gotten a light." Additionally, Plaster testified that he added on: "Your job is up there [indicating inside on the section]. If you stay here, you will stay on the section where your job is at." Plaster then said: "You'll have to take that up with Perkins." Intimating I suppose that Perkins had ordered him to go outside and get his own light. Perkins denies this, but he did allow him to go as opposed to ordering him to go. Anyway, Hackney replied: "I will, but right now you're standing in front of me and I'm taking it up with you." At this point, Plaster was now angry about being brought up short by Hackney. According to Shortridge, he is now talking louder than Hackney, who is also angry. Plaster replies with: "Fuck you, I ain't staying in there without no light." (Plaster's version) or "Fuck you, you can't tell me what to do." (Hackney's version). After some more disputed conversation which could more properly be called angry argument, Plaster tells Hackney "fuck you" twice more, at least according to Hackney and Shortridge. At the third repetition of this offensive phraseology, Hackney fired Plaster on the spot. Two days later Plaster filed the complaint at bar.

The general principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that 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 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette

test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Of particular importance in this case is the second part of the complainant's burden of proof. He must make an initial showing that his discharge was motivated at least in some part by his protected activity. If he fails to establish a causal connection between his protected activity, and the adverse action taken against him, he has failed to prove an essential element of his case and his complaint is subject to dismissal.

If going outside to get his own light was protected activity, and arguably it was, the adverse action must still be proven to have been taken as a result of that protected activity in order to be found discriminatory under the Mine Act.

It seems clear to me from the record in this case that going outside to get the light wasn't what got him fired. Hackney wasn't real happy to see him out there by any means, but had he just gotten the light and kept his mouth shut, I'm convinced he wouldn't have gotten fired. It was solely the insubordinate and abusive language that got him fired and that is not protected activity. Plaster himself testified that Hackney told him just minutes or even seconds before he was fired: "If you stay here, you will stay on the section where your job is at." (Tr. 58). This statement is attributed to Hackney by Plaster before he uttered his insubordinate response. At that point in time he still had a job. And it is my impression that had he said nothing further or simply said "OK, I've got the light, I'm going back in now," that would have been the end of it. He would not have been fired. He wasn't in fact fired until after he said an angry "fuck you" to Hackney either once or three times, depending on whose version of the argument you believe. But, no matter how many times it was, it is undisputed that only after that exchange was he fired. That appears to me to be a justifiable firing that was the immediate and direct result of his insubordinate language.

Complainant attempts to justify his outburst by showing that virtually all the miners, including Hackney himself, use this type of language with each other on a daily basis, and I accept that as true. However, all the witnesses who testified in this case, save the complainant, also very clearly stated that this type of language is not directed at one's supervisor during a serious business discussion, and if it was, they would expect repercussions.

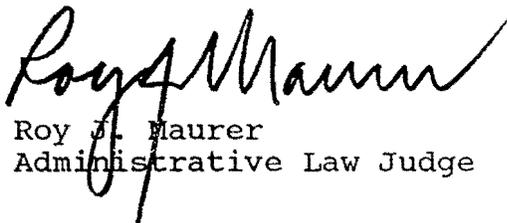
Perhaps as an illustration of that principle, after Plaster had departed, Hackney purportedly remarked to Shortridge: "Nobody is going to stand and cuss me like that." (Tr. 269).

In summary, complainant has most definitely not shown by a preponderance of the reliable and probative evidence that his discharge was motivated in any part by protected activity. He has therefore failed to meet his burden of proof in this regard.

I concur with the respondent that insubordination, i.e., this type of verbal abuse by an employee directed towards his supervisor, need not be tolerated by any company, and is certainly not protected activity under section 105(c) of the Mine Act.

ORDER

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

  
Roy J. Maurer  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

(303) 844-5266 / FTS 564-5266

JUN 30 1992

|                         |   |                          |
|-------------------------|---|--------------------------|
| SECRETARY OF LABOR,     | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH  | : |                          |
| ADMINISTRATION (MSHA),  | : | Docket No. WEST 91-168   |
| Petitioner              | : | A.C. No. 05-00301-03764  |
|                         | : |                          |
| v.                      | : |                          |
|                         | : | Dutch Creek Mine         |
| MID-CONTINENT RESOURCES | : |                          |
| INCORPORATED,           | : |                          |
| Respondent              | : |                          |

DECISION APPROVING PARTIAL SETTLEMENT

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

Before: Judge Morris

This is a civil penalty proceeding initiated by Petitioner against Respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (the "Act"). The civil penalties sought here are for the violation of mandatory regulations promulgated pursuant to the Act.

A hearing in this case and related cases commenced in Glenwood Springs, Colorado on April 15, 1992. The parties reached a partial amicable settlement and subsequently filed a written Joint Motion to Approve Settlement.

Respondent further filed a suggestion of bankruptcy.

The Citations, the original assessments, and the proposed dispositions are as follows:

| <u>Citation/<br/>Order No.</u> | <u>Proposed Penalty</u> | <u>Amended<br/>Proposed Penalty</u> |
|--------------------------------|-------------------------|-------------------------------------|
| 3580363                        | \$1,000.00              | \$ 600.00                           |
| 3580351                        | \$1,100.00              | 660.00                              |
| 3410391                        | \$1,100.00              | 660.00                              |
| 3411019                        | \$1,600.00              | <u>960.00</u>                       |
|                                | TOTAL                   | \$2,880.00                          |

In support of their motion, the parties submitted information relating to the statutory criteria for assessing civil penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. Citation Nos. 3580363, 3580351, 3410391, and 3411019 and the amended proposed penalties are **AFFIRMED**.

2. Respondent filed a case under Chapter 11 of the Bankruptcy Code and is operating its bankruptcy estate as a debtor-in-possession. Accordingly, upon approval of the United States Bankruptcy Court in Case No. 91-11658 PAC, it is **ORDERED** that civil penalties be assessed against the Respondent in the amount of \$2,880.00 and Petitioner is authorized to assert such assessment as a claim in Respondent's Bankruptcy case.

3. The undersigned Judge retains jurisdiction of this case and related cases not otherwise disposed of by the settlement herein. (Order No. 3410800 was the subject matter of contest and evidentiary hearings conducted April 15 and 16 and June 16 and 17, 1992).

  
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  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

JUN 4 1992

IN RE: CONTESTS OF RESPIRABLE ) MASTER DOCKET NO. 91-1  
DUST SAMPLE ALTERATION )  
CITATIONS )  
)

**ORDER GRANTING IN PART AND DENYING  
IN PART MOTION TO COMPEL FURTHER RESPONSES**

On April 20, 1992, Contestants represented by the law firm Jackson & Kelly (Contestants) filed a motion to compel further responses by the Secretary of Labor (Secretary) to Contestants' discovery requests. The motion was supported by a memorandum. At my request, the Secretary filed with me copies of the Secretary's responses to the first and second sets of discovery. She requested that she be permitted to file a response to the Contestants' motion by May 22, 1992. I later orally extended the time without objection by Contestants to May 29, 1992. However, the Secretary has not filed a response to the motion.

Contestants' motion is based in part on the fact that on March 19, 1992, the Department of Labor, Office of Inspector General (OIG) withdrew the claim of privilege previously asserted with respect to discovery requests involving dust samples taken by MSHA inspectors. In addition, Contestants seek an order compelling further responses to certain interrogatories as to which, they assert, the Secretary has made inadequate responses.

**INVESTIGATIVE PRIVILEGE-OIG**

Interrogatory 12, First Set, asks the Secretary to identify all inspector dust samples taken from Consolidation Coal Company (Consol) during the period 1988 to date, including the name of the inspector who took the sample. The Secretary's objection that disclosing the identity of the inspectors is protected by the OIG investigative privilege was sustained in my order issued December 30, 1991. After the OIG withdrew its claim of privilege, the Secretary on April 23, 1992, disclosed the identity of the inspectors submitting samples exhibiting AWC characteristics during the period in question. I conclude that this is an adequate response to the interrogatory. My order of December 30, 1991, held that the request for information as to all inspector samples during the period was overly broad.

Interrogatory 13, First Set, also seeks the identity of the inspectors and other persons having contact with or

responsibility for samples examined for AWC. My order of December 30, 1991, upheld the Secretary's objection to identifying the inspectors and upheld the objection to the remaining part of the interrogatory as being overly broad and unduly burdensome since it was not limited in time. On April 23, 1992, the Secretary disclosed the identity of MSHA inspectors and field offices involved in processing samples found to have AWC. I conclude that this is an adequate response to the interrogatory.

Interrogatory 14, First Set, also asks among other things for the identity of inspectors who took samples from Consol during the period 1988 to date which were found to have AWC. The Secretary's amended response discloses the identity of the inspectors and other information withheld because of OIG privilege claims. I conclude that this is an adequate response to the interrogatory.

Request for Production 3, First Set, asks for all documents relating to any investigation from 1988 to date of the subject of this proceeding. My order of December 30, 1991, upheld the Secretary's objection that the request was overly broad and unduly burdensome. Contestants' motion states that it is unclear whether the Secretary relied on the OIG investigative privilege in withholding any requested documents. The Secretary replied that she did not withhold any document sought in this request for production in reliance on the OIG privilege. I conclude that the Secretary has adequately responded to the request.

Document 445 includes dust data cards concerning samples taken by MSHA inspectors from August 1989 to June 1991. The Secretary asserted the OIG investigative privilege. On May 30, 1992, the Secretary sent copies of Document 445 and available MSHA inspector sample custody sheets to Contestants. I assume that this responds to Contestants' request for production of Document 445.

#### **INADEQUATE RESPONSE**

Interrogatory 3, Second Set, asks the Secretary to describe all procedures to examine inspector or other MSHA generated samples for AWC. The Secretary responded by referring to the protocols in Repository Documents 13 and 177, and the depositions of Thaxton and Raymond. Contestants' motion argues that the Secretary has not identified the procedures used to ensure that all MSHA samples were, in fact, examined for AWC. I conclude that the Secretary's response is adequate. She was not asked for information as to procedures to assure that all MSHA inspector samples were examined, but only for the procedures actually followed in examining MSHA samples for AWC. The response - referring to the documents describing the protocols - is an adequate response.

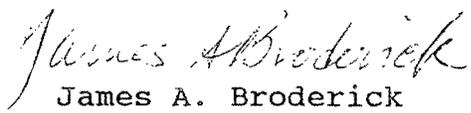
Interrogatory 7, Second Set, asks the Secretary to distinguish each of Contestants' cited filters from the experimental filters produced in the West Virginia University study and the Pittsburgh Health Technology Center study. The Secretary's response is that the cited filters differ from the experimental filters in that the former show evidence that the filter media were intentionally altered. This answer is not responsive. The interrogatory is obviously asking the Secretary for the physical distinctions, if any, between the two sets of filters. I will order her to further respond.

Interrogatory 14, Second Set, asks the Secretary to state and identify all facts, documents, physical evidence, and individuals whose testimony will support the Secretary's negative response to requests for admissions, and to summarize the expected testimony of prospective witnesses and content of documents which support the Secretary's responses. The Secretary's response to the interrogatory states that her denials are self-explanatory and are supported by the deposition testimony of MSHA officials and employees, the exchange of expert reports, the deposition of experts, and the Secretary's response to Interrogatory 6. She also objects to being requested to identify witnesses at this time. I conclude that the Secretary has adequately responded to this extremely broad interrogatory.

**ORDER**

Accordingly, the motion to compel further responses to discovery requests is GRANTED with respect to Document 445. The Secretary is ORDERED to place Document 445 in the Document Repository. The motion is GRANTED with respect to Interrogatory 7, Second Set, and the Secretary is ORDERED to further respond to that interrogatory.

The motion to compel further responses is DENIED with respect to Interrogatories 12, 13, and 14, First Set, Request for Production 3, First Set, and Interrogatories 3 and 14, Second Set.

  
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

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

(303) 844-5266 / FTS 564-5266

June 5, 1992

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : CIVIL PENALTY PROCEEDING  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. WEST 92-100  
 : A.C. No. 05-02820-03605 A  
 :  
v. : Golden Eagle Mine  
 :  
DONALD L. GIACOMO, employed :  
by WYOMING FUEL COMPANY, :  
Respondent :

ORDER GRANTING MOTION TO COMPEL

Pending herein is Respondent's motion to compel Petitioner to disclose the names of witnesses who will testify in the pending case. Petitioner, relying on Commission Rule 59, 29 C.R.F. § 2700.59 <sup>1</sup>, declines to produce the requested information.

At the Judge's direction, Petitioner produced for an In Camera inspection the portion of her file she desires to protect with the informant privilege. The material submitted may contain the names of informant witnesses and their testimony.

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<sup>1</sup> The cited Commission Rule reads as follows:

**§ 2700.59 Name of miner witnesses and informants.**

A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness. A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.

## DISCUSSION

The controlling case law is the Commission decision in Secretary of Labor v. ex rel. George Roy Logan v. Bright Coal Co., Inc., and Jack Collins, 6 FMSHRC 2520 (1984).

In Logan the Commission stated it was appropriate for the Judge to conduct a balancing test to determine whether the Respondent's need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest. Logan, 6 FMSHRC at 2526.

## Findings of Fact

1. This case is a civil penalty proceeding brought by the Secretary of Labor against Donald L. Giacomo ("Giacomo") under Section 110(c) of the Mine Act.

2. Citation 3240616 charges Giacomo violated 30 C.F.R. § 75.1725A.<sup>2</sup>

---

<sup>2</sup> § 75.1725 Machinery and equipment; operation and maintenance.

(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.

3. Citation 3240616<sup>3</sup> alleges Giacomo violated Section 102(d)(1) of paragraph 5 of the Act.

4. Petitioner, in her original petition for assessment of a civil penalty, alleged in part as follows:

5. Evidence developed during MSHA's investigation of the circumstances surrounding the issuance of the Section 104(d)(1) Order indicates that Respondent kept the machine in production by placing a miner in the operator's compartment of the continuous-mining machine.

5. On June 1, 1992, Petitioner amended paragraph 5 of the original petition to read as follows:

---

<sup>3</sup> Citation No. 3240616 reads as follows:

Persons were required by management to operate equipment that was not maintained in safe operating condition, in that, based on statements received from both labor and management, the Joy Continuous Miner in MMU 010-0 headgate was being operated on the 5-11-90 a.m. shift by the following methods:

The remote control would not function to raise the miner head while mining coal. A man was placed in the cab to operate this function while the miner was being operated by remote control. This practice was dangerous due to two persons subject to being on opposite sides of the operating machine and accidental error. Also dangerous due to the fact that neither person had complete control at all times. Both the shift foreman and safety manager were present and had instructed the crew to proceed by this method. This is unwarrantable action (MSHA Citation No. 32406160, at Section 1(8) "Condition or Practice").

5. Evidence developed during MSHA's investigation of the circumstances surrounding the issuance of Order No. 3240616 on May 14, 1990, indicates that Respondent knew the continuous mining machine was being operated manually by a miner from within the cab and by a miner operating the remote controls, and knowingly allowed or condoned hazardous operation of the machine in this manner.

6. The assertion of informant's privilege has been formally raised by the Secretary of Labor.

7. The In Camera inspection reveals statements were made concerning the operation of the continuous miner. Accordingly, the statements are relevant in these proceedings.

8. The informants may not assist Respondent's defense but the applicability of the informant's privilege does not raise or fall upon the substance of a person's communication with the government officials concerning a violation of law. (Logan, 6 FMSHRC at 2525).

9. In discovery in this case, Petitioner asked Respondent the following question and Respondent replied under oath as noted:

2. State the name, job title, current business address, employer, and current telephone numbers for each person you believe to have knowledge of the facts concerning the violation alleged in Order No. 3240616.

ANSWER: I do not know what violation is alleged in Citation Order No. 3240616. I was not allowed to attend hearings regarding Citation Order No. 3240616, and my attorney was forcibly removed from a hearing in which said Citation was presumably litigated and evidence regarding the Citation was to be heard. When I attended a Safety and Health Conference during which evidence of the alleged violation was supposed to have been presented, I advised that a decision has already been made that a violation had occurred and I would only be allowed to present a statement in mitigation. The Secretary of Labor has refused to provide me with the names

of witnesses who could explain what I am accused of doing. Therefore, all I can do is read the Citation and try to guess how a violation is supposed to have occurred and what unnamed witnesses might speculate about what I did or did not do, thus resulting in the knowing authorization, ordering or carrying out of a violation of mandatory safety standards. The Citation alleges that the violation occurred on May 11, 1990, when I was working as a foreman helping to remove the Longwall from the southwest Longwall section two of Wyoming Fuel Company's Golden Eagle Mine. Persons whom I believe to have been working on that date are: Bob Mattis, David Fagneta, Dan Renner, Keith Mantelli, Jack Feltzger, Jr., David Wakefield, Ed Shannon, John A. Garcia, James Sterns, Felix Martinez, Jim Paravecchio, Wayne Schoupe, Bob Vigil, and Sam Henry. I do not know the current job titles, current business addresses, employers, or current telephone numbers for the above-listed individuals. We are not currently employed by the same employer and do not work in the same mine.

In answering Petitioner's Interrogatories, Giacomo stated under oath that he does not work for Wyoming Fuel Company nor does he presume to speak for Wyoming Fuel Company.

11. The information sought here is not available from other sources since only Petitioner knows the names of the witnesses she intends to call. As a result, Respondent has no other avenues available to discover such witnesses.

12. Disclosure is essential to a fair determination of the issues since Giacomo will have an opportunity to depose Petitioner's witnesses and prepare his defense.

#### Further Findings and Discussion

Petitioner admits Giacomo is not an employer or a coal mine operator. Further, it is admitted he does not work at the same mine with any individuals who might be called by the Petitioner as witnesses. (Petitioner's response, page 3; filed May 4, 1992). Nevertheless, Petitioner claims Giacomo is an "agent" within Commission Rule 59.

It is true that Petitioner must prove Giacomo was an agent of the mine operator to establish a violation of Section 110(c). However, the foregoing admitted facts establish that Giacomo is not an agent of an operator within the meaning of Rule 59.

Petitioner further asserts a possibility of retaliation exists against miners who might testify.

I disagree. Giacomo is not a mine operator and does not work at the same mine as any individuals who might be called as witnesses. (Petitioner's Response, page 2, filed May 4, 1992). Merely working in the same geographic area as the Golden Eagle Mine is insufficient to establish the possibility of retaliation.

Petitioner further states Respondent knows the "universe of all persons who may have information regarding this case" and the requested information is "available from sources other than the government."

Contrary to Petitioner's position, a review of the In Camera material reveals two potential witness informants who are not listed by Giacomo as persons having knowledge of the facts concerning the violation alleged. (See para. 9, supra, where Giacomo lists persons having knowledge of the facts).

In sum, it is the Judge's view that the factual situation presented here involved "extraordinary circumstances" within the meaning of Commission Rule 59. Further, Respondent's need for the information is greater than the Secretary's need to maintain the privilege in order to protect the public interest.

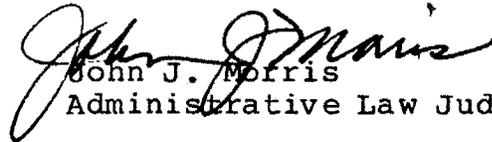
Accordingly, I enter the following:

#### ORDER

1. Respondent's motion to compel is **GRANTED**.
2. Within 15 days, Petitioner is **ORDERED** to disclose the names of the individuals she intends to call as witnesses in this case.
3. The material submitted to the Judge for an In Camera inspection is hereby **SEALED**. The following notation shall appear on the sealed envelope:

DOCUMENTS HEREIN WERE SEALED ON JUNE 4, 1992,  
BY ORDER OF THE PRESIDING JUDGE. A COPY OF  
THIS ORDER WAS ATTACHED TO THE ENVELOPE SEALING  
SAID DOCUMENTS.

4. The Judge has also signed the sealed envelope beneath  
the foregoing notation.

  
John J. Morris  
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 12 1992

IN RE: CONTESTS OF RESPIRABLE ) MASTER DOCKET NO. 91-1  
DUST SAMPLE ALTERATION )  
CITATIONS )  
)  
) CONTEST PROCEEDINGS  
)  
UTAH POWER & LIGHT COMPANY, ) Docket Nos. WEST 91-357-R  
MINING DIVISION, ) through WEST 91-361-R  
Contestant )  
v. ) Citation Nos. 9860864  
) through 9860868  
SECRETARY OF LABOR, )  
MINE SAFETY AND HEALTH ) Cottonwood Mine  
ADMINISTRATION (MSHA), )  
Respondent ) Docket Nos. WEST 91-362-R  
) through WEST 91-364-R  
)  
) Citation Nos. 9860819  
) through 9860821  
)  
) Docket Nos. WEST 91-467-R  
) through WEST 91-468-R  
)  
) Citation Nos. 9862937  
) through 9862938  
)  
) Docket No. WEST 92-31-R  
)  
) Citation No. 9862981  
)  
) Deer Creek Mine  
)  
SECRETARY OF LABOR, ) CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH )  
ADMINISTRATION (MSHA), ) Docket No. WEST 91-482  
Petitioner ) A.C. No. 42-00121-03744D  
v. )  
) Docket No. WEST 92-116  
ENERGY WEST MINING COMPANY, ) A.C. No. 42-00121-03754D  
Respondent )  
) Deer Creek Mine  
)  
) Docket No. WEST 91-483  
) A.C. No. 42-01944-03590D  
)  
) Cottonwood Mine

BENTLEY COAL COMPANY,  
Contestant  
v.

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

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

BENTLEY COAL COMPANY,  
Respondent

KENTUCKY PRINCE COAL COMPANY,  
Contestant  
v.

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

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

KENTUCKY PRINCE COAL COMPANY,  
Respondent

)  
) CONTEST PROCEEDINGS  
)  
) Docket No. WEVA 91-783-R  
) Citation No. 9862628  
)  
) Long Run Deep Mine No. 1  
)  
)  
) CIVIL PENALTY PROCEEDING  
)  
) Docket No. WEVA 92-316  
) A.C. No. 46-07609-03518D  
)  
) Long Run Deep Mine No. 1  
)  
)  
) CONTEST PROCEEDINGS  
)  
) Docket Nos. KENT 91-309-R  
) through KENT 91-310-R  
)  
) Citation Nos. 9858895  
) through 9858896  
)  
) Kentucky Prince Unit  
) Train Loadout  
)  
) Docket No. KENT 91-311-R  
) Citation No. 9858714  
)  
) Jeff Tipple Mine  
)  
) Docket No. KENT 91-312-R  
) Citation No. 9859438  
)  
) Grae No. 2 Mine  
)  
) CIVIL PENALTY PROCEEDINGS  
)  
) Docket No. KENT 91-1166  
) A.C. No. 15-05151-03513D  
)  
) Jeff Tipple Mine  
)  
) Docket No. KENT 91-1167  
) A.C. No. 15-11719-03518D  
)  
)  
) Kentucky Prince Unit  
) Train Loadout

)  
) Docket No. KENT 91-1168  
) A.C. No. 15-16349-03526D  
)  
) Grae No. 2 Mine

ORDER DENYING MOTIONS TO VACATE CITATIONS

On May 4, 1992, Contestant Utah Power & Light, Mining Division (now known as Energy West Mining Company) <sup>1/</sup> (Energy West) filed a motion for an order vacating the 11 citations issued by the Secretary of Labor (Secretary) to Contestant on April 4, 1991, June 7, 1991, and September 11, 1991. Each citation alleged a violation of 30 C.F.R. § 70.209(b) because the respirable dust sample submitted by Contestant had been altered by removing a portion of the dust from the sample. As grounds for the motion Contestant states that the Secretary failed to issue the citations with the "reasonable promptness" required by section 104(a) of the Mine Act. The motion was accompanied by a memorandum in support of the motion and an appendix including affidavits, MSHA documents, copies of correspondence, and excerpts of deposition testimony. On May 19, 1992, the Secretary filed a statement in opposition to the motion with an appendix including affidavits and excerpts of deposition testimony.

On May 22, 1992, Contestants Bentley Coal Company (Bentley) and Kentucky Prince Coal Company (Kentucky Prince) filed a motion for an order vacating the five citations issued to Bentley and Kentucky Prince on April 4, 1991, alleging violations of 30 C.F.R. §§ 70.209(b) or 71.209(b). The motion was accompanied by a memorandum and an appendix including an affidavit, MSHA documents, and discovery responses. On June 8, 1992, the Secretary filed a response to the motion:

Docket No. WEST 92-31-R, Citation No. 9862981

Citation No. 9862981 was issued September 11, 1991. The Notice of Contest was filed by Utah Power & Light Company, Mining Division on October 9, 1991. The Secretary filed her answer on October 18, 1991. On November 4, 1991, Chief Judge Paul Merlin issued an order staying proceedings in this docket until the first decision is rendered in Master Docket No. 91-1.

Docket No. WEST 92-31-R is not part of the Master Docket and has not been assigned to me. For these reasons, this order will

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<sup>1/</sup> The contested citations were issued to Utah Power & Light Company, Mining Division. The related civil penalty petitions were issued under Contestant's current name, Energy West Mining Company.

not consider the motion to vacate insofar as it relates to Docket No. WEST 92-31-R and Citation No. 9862981.

### Motion for Summary Decision

The facts and legal principles applicable to these motions are similar to those involved in the motion to vacate citations filed by Southern Ohio Coal Company (SOCCO) and Windsor Coal Company (Windsor). On May 22, 1992, I issued an order denying the motions to vacate filed in those proceedings. As in the SOCCO and Windsor order, the motions to vacate citations here are treated as motions for summary decision under Commission Rule 64(b). Resolving ambiguities in the Secretary's favor, the motions may be granted only if the entire record shows that there is no genuine issue as to any material fact, and movants are entitled to summary decision as a matter of law.

### Facts

The samples which resulted in the citations contested by Energy West were taken between September 14, 1989, and March 26, 1991. All but two of the citations were issued April 4, 1991. For the two samples taken March 25 and 26, 1991, the citations were issued June 7, 1991. Robert Thaxton, MSHA's Supervisory Industrial Hygienist and an authorized representative of the Secretary made the determination in the case of each sample that it showed an abnormal white center which established tampering. Thaxton received the first eight cited samples involved in these proceedings between September 27, 1989, and June 25, 1990. The samples taken March 25 and 26, 1991, were received by Thaxton on April 17, 1991.

The samples which resulted in the citations contested by Bentley and Kentucky Prince were taken between August 24, 1989, and July 26, 1990. The citations were all issued April 4, 1991. The samples were received by Thaxton between September 14, 1989, and August 20, 1990.

With respect to the samples taken before November 1990, I found in the SOCCO/Windsor order that the Secretary's belief that the samples showed violations did not come about before November 1990. The same findings apply here. Thus, for the purpose of ruling on the motions, the delay between the time the Secretary believed that violations occurred and the issuance of the citations was approximately 4 months. With respect to the samples from Energy West taken in March 1991, the delay was approximately 2 months (April 17 to June 7, 1991). I find that there is no genuine issue as to these material facts.

### Reasonable Promptness

In my SOCCO/Windsor order, I concluded that the Secretary established adequate justification for her 4-month delay in issuing the contested citations, namely her wish to avoid premature disclosure of a pending criminal investigation. The same consideration applies to the motions filed by Energy West, Bentley, and Kentucky Prince with respect to the citations issued on April 4, 1991. For those citations, I conclude that the Secretary has established adequate justification for the delay in their issuance, namely the government's interest in avoiding disclosure of a pending criminal investigation.

No such interest existed with regard to the two citations issued June 7, 1991. The only reason the Secretary has advanced for the delay in issuing them is her decision to issue citations in groups after sufficient numbers of violative samples were collected, which occurred every 2 to 3 months. I am not persuaded that the Secretary needed 2 to 3 months after she determined that a violation occurred to administratively accomplish the issuance of a citation. Therefore, I conclude that the Secretary has failed to establish an adequate justification for her 2-month delay in issuing these contested citations.

For all of the citations, I must determine whether the delay was prejudicial to the Contestants. See Old Dominion Power Co., 6 FMSHRC 1886 at 1894 (1984), rev'd on other grounds sub nom., Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985); Emery Mining Corp. v. Secretary, 10 FMSHRC 1337 at 1354 (ALJ) (1988). Energy West has not asserted that the 2-month delay in issuing the citations on June 7, 1991, prejudiced its ability to defend itself. With respect to all the citations issued to Energy West, it advanced the same arguments advanced by SOCCO and Windsor. As in the SOCCO/Windsor order, I conclude that prejudice has not been established.

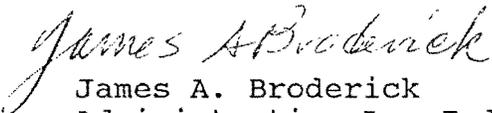
Contestants Bentley and Kentucky Prince state that mining operations in the subject mines have ceased "and many--if not all--of the witnesses on whom Contestants would have relied are no longer available." The Bentley employees were terminated or transferred "in 1991" and the mine has been closed and reclaimed. The Secretary's response includes an affidavit that the mine was not abandoned until August, 1991. It further points out that the cited samples were taken by an independent contractor, and not by Bentley employees. Contestants state that operations ended at two of the Kentucky Prince mines in 1991 and most of the employees were terminated or transferred. In April 1992, Kentucky Prince was sold to a third party, and most of the employees involved in the dust sampling no longer work for Kentucky Prince.

Contestants' affidavit does not specify the dates when mining operations at Bentley and Kentucky Prince ceased, only that it occurred in 1991. Because it is not clear whether it occurred during the period from November 1990 to April 1991, the ambiguity must be resolved in the Secretary's favor, i.e., that it occurred after April 4, 1991. Hence, prejudice has not been shown. The facts that coal extraction ceased at Kentucky Prince in January 1992, and that the mines were sold to a third party in April 1992 are not relevant to the question of prejudice since these events occurred after the citations were issued and, therefore, after the delay complained of.

Based on the above considerations and the considerations in the SOCCO/Windsor order, I conclude that Contestants have not shown that the delays in issuing the contested citations were prejudicial to their ability to defend themselves in these proceedings, and consequently, they are not entitled to summary decision as a matter of law.

ORDER

Accordingly, the motions to vacate citations filed on behalf of Utah Power & Light/Energy West, Bentley, and Kentucky Prince are DENIED.

  
James A. Broderick  
Administrative Law Judge

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All others regular mail

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|   |   |                           |
|---|---|---------------------------|
| WEBSTER COUNTY COAL CORP.,<br>Contestant  | ) | Docket Nos. KENT 91-364-R |
| v.  | ) | through KENT 91-378-R     |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Respondent | ) | Citation Nos. 9858517     |
|   | ) | through 9858531           |
|   | ) | Retiki Mine               |
|   | ) | Docket Nos. KENT 91-379-R |
|   | ) | through KENT 91-439 R     |
|   | ) | Citation Nos. 9858575     |
|   | ) | through 9858635           |
|   | ) | Dotiki Mine               |
| WHITE COUNTY COAL CORP.,<br>Contestant  | ) | Docket Nos. LAKE 91-435-R |
| v.  | ) | through LAKE 91-438 R     |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Respondent | ) | Citation Nos. 9858487     |
|   | ) | through 9858490           |
|   | ) | Pattiki Mine              |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | ) | CIVIL PENALTY PROCEEDINGS |
| v.  | ) | Docket No. YORK 91-44     |
| METTIKI COAL CORP.,<br>Respondent   | ) | A.C. No. 18-00621-03753D  |
|   | ) | Mettiki Mine              |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | ) | Docket No. VA 91-558      |
| v.  | ) | A.C. No. 44-03236-03514D  |
| PERMAC, INC.,<br>Respondent   | ) | Prep Plant No. 1          |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | ) | Docket No. VA 91-559      |
| v.  | ) | A.C. No. 44-03010-03528D  |
|   | ) | Woodman Luke Prep Plant   |

|   |                  |   |
|---|------------------|---|
| RACE FORK COAL CORPORATION,<br>Respondent   | )<br>)<br>)      |   |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | )<br>)<br>)<br>) | Docket No. KENT 91-1056<br>A.C. No. 15-08413-03614D |
| v.  | )<br>)           | Pontiki No. 1 Mine                                  |
| PONTIKI COAL CORP.,<br>Respondent   | )<br>)<br>)      |   |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | )<br>)<br>)<br>) | Docket No. KENT 92-102<br>A.C. No. 15-00672-03625D  |
| v.  | )<br>)           | Retiki Mine   |
| WEBSTER COUNTY COAL CORP.,<br>Respondent  | )<br>)<br>)<br>) | Docket Nos. KENT 91-1039<br>through KENT 91-1042    |
|   | )<br>)<br>)<br>) | A.C. No. 15-02132-03641D<br>through 15-02132-03644D |
|   | )<br>)           | Dotiki Mine   |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | )<br>)<br>)<br>) | Docket No. LAKE 91-713<br>A.C. No. 11-02662-03613D  |
| v.  | )<br>)           | Pattiki Mine  |
| WHITE COUNTY COAL CORP.,<br>Respondent  | )<br>)<br>)      |   |

ORDER DENYING MOTION  
TO VACATE CITATIONS

On May 26, 1992, the above named Contestants filed a motion to vacate the 87 citations issued to them by the Secretary of Labor on April 4, 1991. The citations alleged a violation of 30 C.F.R. § 70.209(b) or § 71.209(b) because the respirable dust samples submitted by Contestants had been altered by removing a portion of dust from the sample. As grounds for the motion Contestants state that the Secretary failed to issue the citations with the "reasonable promptness" required by section 104(a) of the Mine Act. The motion was accompanied by a memorandum in its support and a 57 page appendix which included affidavits, MSHA documents, and the

Secretary's response to discovery requests. The Secretary filed a response to the motion on June 8, 1992.

### Motion for Summary Decision

The facts and legal principles applicable to this motion are similar to those involved in the motion to vacate citations filed by Southern Ohio Coal Company (SOCCO) and Windsor Coal Company (Windsor) which was denied by an order issued May 22, 1992. As in the SOCCO/Windsor order, the motion to vacate citations here is treated as a motion for summary decision under Commission Rule 64(b). It may be granted only if the entire record shows that there is no genuine issue as to any material fact and movants are entitled to summary decision as a matter of law.

### Facts

The respirable dust samples which resulted in the 87 contested citations were taken between August 15, 1989, and February 25, 1991. Robert Thaxton made the determination in the case of each sample that it showed an abnormal white center which established tampering. Thaxton received the samples between August 31, 1989, and March 11, 1991.

In November 1989, Howard Stone, Webster County Coal Safety Director, mailed the dust samples for the Dotiki Mine to MSHA. MSHA notified him of the results for all but one unit. When he asked MSHA about the omission, he was told that he had not submitted the correct number of samples. He therefore submitted a replacement sample. However, when the citations were issued on April 4, 1991, he noted that the sample for the allegedly missing unit was cited as exhibiting an abnormal white center.

In early 1991, Alan Smith, Safety Director at Mettiki Coal Corporation, asked MSHA whether Mettiki had submitted any samples containing AWCs and he received a negative reply. However, Mettiki was issued two citations on April 4, 1991, for samples taken in February 1990, which had been reviewed by Thaxton in March 1990.

Two potential witnesses for Contestants have died: the sole employee in the Safety Departments of Permac and Race Fork, who died in September 1991, and an employee of Webster County who was sampled in a designated occupation and who died in March 1991. Another potential witness of Webster County retired in December 1991. I find that there is no genuine issue as to these material facts.

Reasonable Promptness

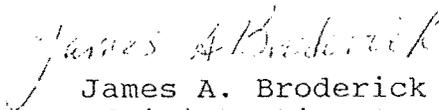
In my SOCCO/Windsor order, I concluded that the Secretary established adequate justification for her 4-month delay in issuing the citations, namely, her wish to avoid premature disclosure of a pending criminal investigation. The same consideration applies to the motions before me now. I conclude that the Secretary has established adequate justification for the delay in their issuance: the government's interest in avoiding disclosure of a pending criminal investigation. The same interest justifies the Secretary's concealment and disclaimer regarding the existence of AWCs in response to Contestants' inquiries.

Contestants have advanced the same arguments concerning prejudice as were advanced by SOCCO and Windsor, with the additional argument that two potential witnesses (one for Permac and Race Fork, and one for Webster County) have died and clearly are not available to testify. Although Elbert Asbury of Permac and Race Fork died almost 6 months after the citations were issued, during which time his testimony could have been preserved, and the testimony of Marvin Forbes (who died prior to the issuance of the citations) would be of dubious relevance (Forbes apparently was a sampled miner), it is hard to argue that their unavailability has not limited Contestants' capacity to defend themselves in these proceedings. The question is whether the limitation is so prejudicial that fairness requires that the citations be vacated. As I previously noted, since Asbury's death occurred after the citations were issued, his testimony could have been preserved. With respect to Forbes' death, Contestants' have not shown what Forbes' potential testimony might have been, or that he was indeed the subject of a cited sample. Therefore, I conclude that the Secretary's delay did not result in prejudice to Contestants, and that the proceedings can be fairly determined on their merits.

Based on the above considerations and the considerations in the SOCCO/Windsor order, I conclude that Contestants have not shown that the delay in issuing the contested citations was prejudicial to their ability to defend themselves in these proceedings, and consequently, they are not entitled to summary decision as a matter of law.

ORDER

Accordingly, the motion to vacate citations filed on behalf of Contestants Mettiki, Permac, Race Fork, Pontiki, Webster County, and White County are DENIED.

  
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 24 1992**

IN RE: CONTESTS OF RESPIRABLE DUST : Master Docket No. 91-1  
SAMPLE ALTERATION CITATIONS :

## ORDER GRANTING MOTION TO CONDUCT DEPOSITIONS OF NON-EXPERT WITNESSES OUT OF TIME

On June 3, 1992, Contestants represented by Jackson & Kelly and included in Docket No. KENT 91-265-R et al. (Contestants) filed a motion for an order allowing them to conduct joint depositions of non-expert witnesses T. A. Bassett, Jr., and Raymond J. Carroll out of time. On June 10, 1992, Contestants filed an amended motion seeking an order allowing them to conduct joint depositions of non-expert witnesses Carter Elliott, I. A. Bassett, Jr., and Raymond Carroll. The amended motion was served by mail on counsel for the Inspector General, U.S. Department of Labor (OIG) on June 8, 1992. Contestants also seek a subpoena duces tecum compelling Inspector General Julian W. De La Rosa to produce all documents in his possession concerning MSHA Internal Investigation No. 890014, OIG Case No. 30-0801-0036 relating to the investigation of alleged tampering with coal dust cassette samples.

The three named proposed witnesses are stated to be in the OIG and to have been involved in the investigation of alleged tampering of coal dust samples taken by MSHA inspectors.

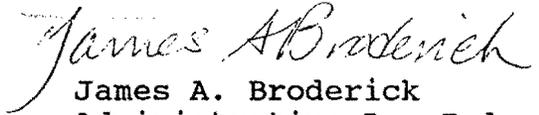
On October 29, 1991, I issued an order granting the OIG leave to enter a special appearance to oppose the motions of certain Contestants to compel testimony of Robert Thaxton. On March 16, 1992, the OIG withdrew its opposition to Contestants' motion to compel testimony of Thaxton. Action on the motion to compel was stayed by order issued November 20, 1991. The OIG withdrew its opposition because its investigation was closed on or before February 27, 1992, after it found no evidence of criminal wrongdoing or official misconduct on the part of MSHA inspectors who submitted coal dust samples displaying abnormal white centers.

The instant motion states that on March 13, 1992, counsel for the Secretary informed the Court and Contestants' counsel that the OIG completed its investigation and also informed the court and counsel that the Secretary is no longer asserting investigative privilege with respect to the OIG investigation. This was subsequent to January 31, 1992, the deadline for joint non-expert witness depositions in the Discovery Plan. The

Secretary has not responded to the motion.

I conclude that Contestants have shown good cause for conducting the depositions out of time. Therefore the motion is GRANTED, and subpoenas are issued herewith in accordance with Contestants amended request for subpoenas.

This order gives Contestants the right to conduct depositions of the three named OIG employees, and to require the Inspector General to respond to the subpoena duces tecum. It does not, of course, preclude the Secretary from asserting any applicable claim of privilege with respect to any question asked at the depositions or any documents sought to be examined and produced.

  
James A. Broderick  
Administrative Law Judge

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JUN 30 1992

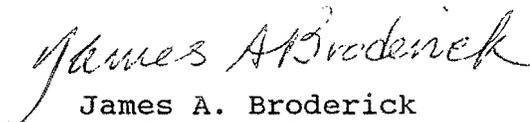
IN RE: CONTESTS OF RESPIRABLE ) Master Docket No. 91-1  
DUST SAMPLE ALTERATION )  
CITATIONS )

ORDER

The Commission remanded this matter to me by its decision issued June 29, 1992, for a ruling on the Secretary's claim of attorney work product privilege to support her refusal to disclose documents 3, 365, 366, 367, 401 and 424. The Commission also directed me to rule on whether Rule 6(e) of the Federal Rules of Criminal Procedure bars disclosure of folders 11 and 12 of document 406. 14 FMSHRC \_\_\_\_\_ (1992).

To assist me in carrying out the terms of the remand, I direct the Secretary to resubmit documents 3, 365, 366, 367, 401 and 424 to me on or before July 10, 1992, for inspection in camera. Contestants may on or before the same date file a motion for in camera inspection of any other document concerning which the Secretary's claim of privilege was upheld. I also direct the Secretary to respond to my letter of June 18, 1992, concerning the present status of any grand jury investigation.

Finally, I direct that the parties file on or before July 15, 1992, memoranda in support of their respective positions on the Secretary's work product privilege claim, and on the applicability of Rule 6(e) of the Federal Rules of Criminal Procedure.

  
James A. Broderick  
Administrative Law Judge