JUNE 1996

COMMISSION DECISIONS


| | | | | |
|---|---|---|---|---|
| 06-05-96 | Sec. Labor on behalf of James Johnson and UMWA v. Jim Walter Resources, Inc. | SE | 93-127-D | Pg. 841 |
| 06-19-96 | Blue Bayou Sand & Gravel, Inc. | CENT | 93-238-M | Pg. 853 |
| 06-20-96 | United States Steel Mining Co. | WEVA | 92-783 | Pg. 862 |
| 06-20-96 | Mechanicsville Concrete Inc. | VA | 93-145-M | Pg. 877 |


ADMINISTRATIVE LAW JUDGE DECISIONS


| | | | | |
|---|---|---|---|---|
| 06-03-96 | Energy West Mining Company | WEST | 93-169 | Pg. 887 |
| 06-03-96 | UMWA Local 1058 v. Consolidation Coal | WEVA | 95-262-C | Pg. 890 |
| 06-07-96 | Leo Journagan Construction Co. | CENT | 95-265-M | Pg. 892 |
| 06-10-96 | De Atley Company, Inc. | WEST | 95-512-M | Pg. 904 |
| 06-14-96 | Jim Walter Resources, Inc. | SE | 95-459 | Pg. 906 |
| 06-17-96 | Linda S. Sparks v. Old Ben Coal Co. | LAKE | 95-378-D | Pg. 913 |
| 06-17-96 | Cogema Mining Incorporated | WEST | 94-661-M | Pg. 919 |
| 06-18-96 | Barrick Bullfrog Incorporated | WEST | 94-251-M | Pg. 933 |
| 06-19-96 | Higman Sand and Gravel, Inc. | CENT | 95-261-M | Pg. 951 |
| 06-20-96 | Sec. Labor on behalf of Irineo G. Beltran v. Terrazas, Incorporated | CENT | 96-72-DM | Pg. 970 |
| 06-20-96 | S & M Construction Incorporated | WEST | 96-3 | Pg. 1018 |
| 06-21-96 | Sec. Labor on behalf of Andy Howard, Jr. v. Bruce Young & Yogo, Inc. | KENT | 96-96-D | Pg. 1054 |
| 06-21-96 | Sec. Labor on behalf of Carroll Johnson v. Jim Walter Resources | SE | 93-182-D | Pg. 1057 |
| 06-25-96 | Blue Bayou Sand and Gravel | CENT | 93-238-M | Pg. 1059 |
| 06-26-96 | Northern Illinois Service Company | LAKE | 95-229-M | Pg. 1061 |
| 06-26-96 | Donald S. Wallace v. Barrick Goldstrike Mines, Inc. | WEST | 95-282-DM | Pg. 1072 |
| 06-28-96 | William F. Metz v. Wimpey Minerals, etc. | PENN | 95-479-DM | Pg. 1087 |
| 06-28-96 | Sec. Labor on behalf of Arthur R. Olmstead v. Knife River Coal Mining | WEST | 96-130-D | Pg. 1103 |


ADMINISTRATIVE LAW JUDGE ORDERS


| | | | | |
|---|---|---|---|---|
| 06-03-96 | Southern Minerals, Inc., et al. | WEVA | 92-15-R | Pg. 1119 |
| 06-04-96 | Basin Resources Incorporated | WEST | 95-254 | Pg. 1125 |
| 06-06-96 | Consolidation Coal Company | WEVA | 93-146-B | Pg. 1131 |

## JUNE 1996

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

Clyde Perry v. Phelps Dodge Morenci, Docket No. WEST 96-64-DM. (Judge Amchan, May 14, 1996)

Secretary of Labor v. Cannelton Industries, Inc., et al, Docket No. WEVA 94-381. (Judge Hodgdon, April 29, 1996)

Secretary of Labor v. Cyprus Cumberland Resources Corp., Docket No. PENN 95-75. (Judge Feldman, May 7, 1996)

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

Secretary of Labor, MSHA v. Energy West Mining Company, Docket No. WEST 93-169. (Judge Manning, June 3, 1996)

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. KENT 93-318-R, etc. (Judge Amchan, May 15, 1996)

*Secretary of Labor, MSHA v. Thunder Basin Coal Company, Docket No. WEST 94-239-R was dismissed based on Thunder Basin's motion to withdraw.

# COMMISSION DECISIONS

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 5, 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAMES JOHNSON | : | |
| and | : | |
| UNITED MINE WORKERS OF AMERICA | : | Docket No. SE 93-127-D |
| v. | : | |
| JIM WALTER RESOURCES, INC. | : | |

BEFORE: Holen, Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge William Fauver found that Jim Walter Resources, Inc. ("JWR") violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c),[2] when it disciplined James Johnson because he refused to remove

---

[1] Chairman Jordan has recused herself in this matter. Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), we have designated ourselves a panel of three Commissioners to exercise the powers of the Commission.

[2] Section 105(c)(1) provides in part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or

a longwall shearer and install roof support. 15 FMSHRC 2367 (November 1993) (ALJ). For the reasons set forth below, we affirm the finding of discrimination and vacate and reassess the civil penalty.

I.

Factual and Procedural Background

JWR operates the No. 7 mine, an underground coal mine in Brookwood, Alabama. On March 13, 1992, Johnson, a member of the owl shift crew for the No. 1 longwall, was assigned to move an unproductive longwall shearer from the face through Crosscut A and down the No. 3 entry. 15 FMSHRC at 2367-68. The longwall had most recently advanced past Crosscut A, which connected the Nos. 3 and 4 entries. G. Ex. 4. The Department of Labor's Mine Safety and Health Administration ("MSHA") considered "Crosscut A-type" crosscuts to be gob and subject to roof falls because of the substantial pressures exerted by the advancement of the longwall. 15 FMSHRC at 2373-74. MSHA had a policy prohibiting travel through such crosscuts until additional roof support had been installed in accordance with an approved supplemental roof control plan. *Id.* MSHA communicated that policy to union safety committeemen in quarterly safety meetings. *Id.* at 2374; Tr. 19-20.

The normal route for removing the longwall or other large equipment was through Crosscut B. 15 FMSHRC at 2374. The supplemental roof control plan approved by MSHA required installation of additional roof support before longwall machinery was moved through Crosscut B. *Id.*; Tr. 60-61, 94. Moving the longwall shearer through Crosscut A required maneuvering the equipment around a 90 degree turn. Tr. 25. On March 13, however, JWR chose to move the shearer through Crosscut A, notwithstanding the additional difficulty, because the entry to Crosscut B was dangered off. 15 FMSHRC at 2374. As a consequence, cribs installed in Crosscut A during the normal course of mining were removed to allow sufficient space for moving the shearer. *Id.* at 2374-75; Tr. 58-59.

When Johnson arrived at Crosscut A, he overheard Tommy Boyd, a United Mine Workers of America ("UMWA") safety committeeman, ask Danny Watts, the evening supervisor, if there was a plan to correct roof conditions in Crosscut A before miners traveled through the area. 15 FMSHRC at 2368; Tr. 63-64, 84-85. Johnson observed that roof had fallen

---

> otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this [Act] including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

30 U.S.C. § 815(c)(1).

on the stageloader in the No. 4 entry, roof bolts were missing near the stageloader, there was a brow, a crack near the intersection of Crosscut A and the No. 3 entry, there were no timbers, and two cribs had been removed. 15 FMSHRC at 2368; Tr. 68, 85-86; G. Ex. 4. After observing the roof conditions, Johnson stepped under the No. 1 longwall shield. Tr. 85.[3]

Watts told Boyd that if he had a problem he should call Larry Vines, the longwall manager. 15 FMSHRC at 2368. Boyd replied that, if he called anyone, it would be MSHA. *Id.* Watts then asked the owl shift longwall crew members what they were going to do. Tr. 89. When no one replied, he ordered them to shovel the beltline in the No. 4 entry. *Id.* The miners traveled to the beltline and began shoveling. 15 FMSHRC at 2369; Tr. 90.

Alvin McMeans, the face boss for the No. 1 longwall, called Johnson from the beltline to Crosscut B. 15 FMSHRC at 2369; Tr. 90. McMeans asked Johnson why he thought Crosscut A was unsafe. 15 FMSHRC at 2369; Tr. 66, 90-91. Johnson replied that cribs had been taken down, roof bolts were missing, the area was gob, and that MSHA had previously cited miners for traveling through such crosscuts. 15 FMSHRC at 2369-70. McMeans asked Johnson, "If I asked you to work in the area, what would you say?" *Id.* at 2375; Tr. 67. Johnson replied that he would be afraid to work in the area and that he would have to "withdraw under [his] individual safety rights."[4] 15 FMSHRC at 2370, 2375. McMeans instructed Johnson to resume shoveling. Tr. 92.

After McMeans questioned each member of the longwall crew, he met with Paul Phillips, the mine manager, and discussed conditions in Crosscut A. 15 FMSHRC at 2370. Phillips then met with Safety Committeeman Boyd at the intersection of Crosscut B and the No. 3 entry and asked Boyd to accompany him to the area the miners thought was unsafe. *Id.*; Tr. 147-48. Boyd

---

[3] The condition of the roof in Crosscut A gave rise to a separate action. On March 13, 1992, as a result of an inspection made pursuant to section 103(g) of the Mine Act, 30 U.S.C. § 813(g), JWR received a citation alleging a violation of 30 C.F.R. § 75.202(a) (1995). 15 FMSHRC at 2372. JWR contested the citation and the matter proceeded to hearing before Judge Fauver. Finding that the roof conditions in Crosscut A were hazardous and required additional support, the judge affirmed the citation. 15 FMSHRC 432, 434 (March 1993) (ALJ). JWR filed a petition for review of the judge's decision, which the Commission denied. Accordingly, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). The record of that proceeding before the judge was incorporated by reference into the record of this proceeding. 15 FMSHRC at 2372. The transcript of that hearing is referred to as "Roof Tr."

[4] Section (i) of the labor agreement in force at the mine, entitled "Preservation of Individual Safety Rights," provides in part: "No Employee will be required to work under conditions he has reasonable grounds to believe to be abnormally or immediately dangerous to himself . . . ." R. Ex. 1, at 1.

stated that he would travel through the No. 4 entry but not the No. 3 entry. 15 FMSHRC at 2370; Tr. 148. Entry No. 3 had been dangered off the previous day because some timbers were missing. 15 FMSHRC at 2368; Tr. 88-89. Phillips explained that they could not travel through the No. 4 entry because the head gate drive had been "shoved against the rib," roof bolts were missing, and there was no travelway. 15 FMSHRC at 2370; Tr. 148. Approximately 75 feet of the No. 4 entry had been dangered off. 15 FMSHRC at 2373.

The other crew members then joined Boyd and Phillips. Tr. 149. Phillips told the miners they would build cribs, set timbers in two different locations, and hang curtains from the inby pillar in Crosscut A to the No. 1 longwall shield. 15 FMSHRC at 2371; Tr. 149-50. Boyd stated that they did not have a plan to do that work. 15 FMSHRC at 2371. Phillips instructed McMeans to bring the miners to the No. 4 beltline to shovel and then to bring each miner to meet with him individually. Tr. 151-52.

Johnson testified that Phillips asked him, "If I asked how to make that place safe, what are you going to do?" and that he had replied, "How do you make gob safe?" 15 FMSHRC at 2371, 2375; Tr. 92. Phillips told Johnson to go to work and "make the area safe." 15 FMSHRC at 2375; Tr. 173. When Johnson refused, Phillips ordered him to get on a bus to go to another area to work. 15 FMSHRC at 2375-76; Tr. 155.

On the following day, Johnson was charged with insubordinate conduct and given notice of a five-day suspension with intent to discharge. 15 FMSHRC at 2372. After a meeting between management and union representatives, that action was modified to a two-day suspension. *Id.* Johnson filed a discrimination complaint with MSHA and the Secretary filed the present complaint on Johnson's behalf, pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C.

§ 815(c)(2).[5] The Secretary proposed that a civil penalty be assessed against JWR in the range of $2,000 to $2,500. The UMWA intervened in support of the Secretary's position.

The judge found that Johnson's work refusal constituted protected activity under section 105(c) of the Mine Act. 15 FMSHRC at 2376. He concluded that Johnson had a reasonable and good faith belief that Crosscut A was unsafe, that an MSHA-approved supplemental roof control plan was required to make the area safe, and that Johnson had given reasonable and sufficient notice of his safety concerns to management. *Id.* The judge concluded that JWR had taken adverse action against Johnson by giving him a five-day notice of suspension with intent to discharge, suspending him for two days, and twice isolating and interrogating him, and that such action amounted to discrimination in violation of the Act. *Id.* at 2376-77. The judge assessed a civil penalty of $5,000, noting that JWR had "a substantial history of violations of § 105(c) of the Act," accumulating $5,286 in delinquent civil penalties in the 24-month period preceding the instant violation. *Id.* at 2378.

The Commission granted JWR's petition for discretionary review, which challenged the judge's finding that Johnson had engaged in a protected work refusal and the judge's civil penalty assessment. The Commission subsequently heard oral argument.

---

[5] Section 105(c)(2) provides in part:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . alleging such discrimination or interference and propose an order granting appropriate relief.

30 U.S.C. § 815(c)(2)

II.

Disposition

A. Protected Work Refusal

A miner alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it is also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The Mine Act grants miners the right to complain of a safety or health danger but does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have inferred a right to refuse to work in the face of a perceived danger. *See Secretary on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 519-21 (March 1984), *aff'd*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (August 1990) (citations omitted). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 812. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.*; *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette*, 3 FMSHRC at 807-12; *Secretary on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. This requirement's purpose is to "remove from the Act's protection work refusals involving frauds or other forms of deception." *Id.*

JWR claims the judge erred in finding that Johnson had engaged in a protected work refusal. JWR Br. at 5. JWR contends the judge mischaracterized Johnson's work refusal as his refusal to move the shearer rather than his refusal to install roof support. *Id.* at 7, 10. It asserts that Johnson's refusal to install roof support was unreasonable and unprotected because hazards are inherent to mining and he was adequately qualified to perform the work. *Id.* at 7-10. JWR argues that, even if the refusal were protected, it lost that status when management took action to determine the nature of the hazards and to direct miners who routinely installed roof support to

correct them. *Id.* at 5. The Secretary claims the work of installing roof support was connected to removing the shearer and that the judge analyzed whether Johnson's refusal to enter Crosscut A to install roof support was protected. S. Br. at 9 n.4. He also contends that substantial evidence supports the judge's determinations that Johnson had a reasonable, good faith belief that Crosscut A was unsafe to work in, that Johnson adequately communicated that belief, and that JWR did not adequately address Johnson's safety concerns.[6] *Id.* at 10-18.

We conclude substantial evidence supports the judge's determination that Johnson's work refusal was protected. Preliminarily, the judge did not fail to recognize the work refusal at issue was Johnson's refusal to install roof support. In finding that the work refusal was protected, the judge (quoting Phillips' order to Johnson to make the area safe by installing roof support) stated, "Johnson, on reasonable, good faith grounds, believed Crosscut A was unsafe to work in, and that an MSHA-approved plan was needed 'to make it safe.'" 15 FMSHRC at 2376. The judge also considered evidence relevant to Johnson's refusal to install roof support, noting that Johnson was not a roof control expert, did not know exactly how to make the area safe, and had reasonable grounds to rely on his safety committeeman's opinion that a plan was needed. *Id.*

Moreover, substantial evidence supports the judge's determination that Johnson's refusal to install roof support was based on a reasonable and good faith belief that Crosscut A was unsafe and that an approved plan was necessary to make it safe. Johnson testified that, although he installed roof support in normal conditions, he considered the conditions in Crosscut A to be dangerous and abnormal, and that he did not know how to support the roof safely or "whether [management] knew how to support the top." Tr. 95-96, 106-08, 118, 121-22. Johnson heard the roof popping and "taking weight." Roof Tr. 71. He observed that roof bolts were missing, roof had fallen and cribs had been removed. Tr. 85-86. He could see there was a crack as well as a brow in the roof and that there were no timbers. *Id.* On many occasions, Johnson had witnessed roof falls in other forward crosscuts, sometimes extending to the No. 1 longwall shield. Roof Tr. 76. Johnson knew that MSHA considered a forward crosscut to be gob and had cited miners who had traveled through such an area. 15 FMSHRC at 2373; Tr. 66-67, 91. Johnson's concerns were confirmed and shared by his safety committeeman, who believed that an approved

[6] The UMWA did not file a brief before the Commission.

supplemental roof control plan was necessary before work could proceed in the area.[7] 15 FMSHRC at 2373; Tr. 84-85, 151.

Johnson was not a roof control expert. 15 FMSHRC at 2376; Tr. 136-37. In addition, he had reason to doubt whether management knew how to support the roof, given the unusual circumstances of moving a large piece of equipment through an area of gob and the conflicting opinions of his immediate supervisor, who believed the area was safe enough to work in, and Phillips, who believed that additional support was necessary. 15 FMSHRC at 2374-75; Tr. 69-70, 146-47.

Furthermore, substantial evidence supports the judge's determination that Johnson adequately communicated his safety concerns to JWR. 15 FMSHRC at 2376. When Foreman McMeans asked Johnson why he believed the area was unsafe, he replied that the crosscut was in the gob, cribs had been removed, roof bolts were missing, and he knew that MSHA had cited miners for traveling through a forward crosscut. Tr. 65-67, 85, 91. Johnson told Phillips that he did not know how to make the area safe. 15 FMSHRC at 2375; Tr. 92.

Once a determination is made that a miner expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; *see also Bush*, 5 FMSHRC at 997-99; *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (February 1988), *aff'd*, 866 F.2d 431 (6th Cir. 1989); *Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460, 2463-64 (December 1993). A miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate his fears or ensure safety. *Bush*, 5 FMSHRC at 998-99.

Substantial evidence supports the judge's determination that JWR failed to adequately address Johnson's reasonable safety concerns. As the judge found, in response to Johnson's statement that he did know how to make the area safe, Phillips "did not give Johnson specific

---

[7] JWR argues that the judge erred in finding that Johnson had reasonably relied on Boyd's opinion that a plan was necessary because Johnson testified that he did not have a personal opinion on whether a plan was required. JWR Br. at 9-10. Substantial evidence supports the judge's determination. Under the labor agreement in force at the mine, when an employee and management disagree on whether a condition is hazardous, at least one safety committeeman is required to review the condition. R. Ex. 1, Art. III, Sec. (i), ¶ (2). If the safety committeeman agrees with management that hazardous conditions do not exist, the miner is required to perform the work. *Id.* If the safety committeeman and management disagree and the matter involves an issue of federal mandatory health or safety regulations, the appropriate federal agency is contacted to settle the dispute. *Id.* at ¶ 3. Thus, in resolving disputes involving allegedly hazardous conditions, miners were required to defer to the opinions of their safety committeemen.

orders as to how the roof should be supported." 15 FMSHRC at 2375. Rather, Phillips only stated, "I am telling you to go and make the place safe." Tr. 153-54, 173. Phillips had a prior discussion with Johnson and other crew members regarding installation of additional support in Crosscut A. 15 FMSHRC at 2371. No supplemental written plan for supporting the area, however, had been prepared by JWR's engineers. *Id.* at 2373; Tr. 160-61, 177-78, 180-81. Moreover, that discussion did not address Johnson's concern that miners had previously been cited for traveling through a forward crosscut and that a plan approved by MSHA was necessary to make the area safe. Nor did JWR make an effort to contact MSHA to determine whether an approved plan was necessary. 15 FMSHRC at 2376-77; Tr. 187-88.

In sum, substantial evidence supports the judge's determination that Johnson's work refusal was protected and that JWR discriminated against Johnson in violation of section 105(c) of the Act.

B. Assessment of Civil Penalty

JWR argues that the judge erred in assessing a civil penalty of $5,000. JWR Br. at 10. It contends the judge failed to set forth sufficient findings supporting his conclusion that JWR had a "substantial history" of violations of section 105(c) and that, in any event, he should have only considered past violations of section 105(c) involving similar factual circumstances. *Id.* JWR also asserts the judge erred in basing the assessment on his finding that, in the preceding 24-month period, JWR had accumulated $5,286 in delinquent penalties. *Id.* at 11. JWR submits there is no evidence of delinquent penalties in the record and that it is aware of no such penalties. *Id.* The Secretary argues the judge properly considered JWR's complete history of violations, including previous violations of section 105(c), but acknowledges that he did not allege that JWR had delinquent penalties. S. Br. at 22-26 & n.17.

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). The Commission has cautioned, however, that the exercise of such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Id., citing Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984). Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . ." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). The judge must make findings of fact on the criteria that "not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg Stone,* 5 FMSHRC at 292-93.

We conclude that JWR received adequate notice of the judge's consideration of its history of previous violations as well as his basis for doing so and that we have been provided with a sufficient foundation for review. Although the judge did not specifically indicate which

violations of section 105(c) he relied upon, the record contains a complete 24-month citation history, submitted in response to the judge's request, as well as a list of section 105(c) cases that were brought to the judge's attention in the parties' post-hearing briefs and correspondence. Tr. 210; S. Post-Hrg Br. at 14-15; G. Ex. 6; JWR Post-Hrg Br. at 23-24 & Attach. JWR-3; letters dated September 2 and 7, 1993.

Furthermore, the judge did not abuse his discretion by considering JWR's entire violation history, rather than limiting his consideration to only those violations of section 105(c) involving similar factual circumstances. Section 110(i) provides in part that in assessing civil penalties, "the Commission shall consider the operator's history of previous violations . . . ." 30 U.S.C. § 820(i). As the Commission held in *Secretary on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 557 (April 1996), the language of section 110(i) does not limit the judge's consideration of an operator's history of violations to factually similar violations. The Commission has explained that "'section 110(i) requires the judge to consider the operator's general history of previous violations as a separate component when assessing a civil penalty. Past violations of *all* safety and health standards are considered for this component.'" *Id.*, *quoting Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (August 1992) (emphasis added). Thus, the judge did not err in his consideration of JWR's history of previous violations.

The judge abused his discretion, however, in basing the assessment, in part, upon JWR's alleged delinquency in the payment of penalties. An operator's delinquency in payment of penalties is not one of the criteria set forth in section 110(i) of the Mine Act for consideration in the assessment of penalties. Accordingly, we vacate the civil penalty assessed by the judge. *See Dolese Bros. Co.*, 16 FMSHRC 689, 695 (April 1994); *Turner Bros. Inc.*, 6 FMSHRC 805, 806 (April 1984).

In the circumstances of this case and in the interest of judicial economy, we reassess the penalty. *See, e.g., Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1465-67 (August 1982); *Westmoreland*, 8 FMSHRC at 492-93. JWR did not dispute the judge's findings on the other statutory penalty criteria. Based upon those findings and upon our holdings, including that consideration of an alleged delinquency in the payment of penalties is incorrect, we conclude that a civil penalty of $2,500 is warranted.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that JWR discriminated against Johnson in violation of section 105(c) of the Mine Act, vacate the civil penalty, and order JWR to pay a penalty of $2,500.

Arlene Holen, Commissioner

James C. Riley, Commissioner

Marc Lincoln Marks, Commissioner

Distribution

David M. Smith, Esq.
Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue North
2400 AmSouth/Harbert Plaza
Birmingham, AL 35203

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Barry Woodbry, Esq.
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

R. Stanley Morrow, Esq.
Jim Walter Resources, Inc.
P.O. Box 133
Brookwood, AL 35444

Administrative Law Judge Arthur Amchan
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 19, 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. CENT 93-238-M |
| BLUE BAYOU SAND AND GRAVEL, INC. | : | |

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves a citation alleging a significant and substantial ("S&S") violation of 30 C.F.R. § 56.14101(a) (1995)[2] and a withdrawal order, issued under section 107(a)[3] of the Mine Act, 30 U.S.C. 817(a), alleging that

---

[1] Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition.

[2] Section 56.14101(a) provides in part:

> *Minimum requirements.* (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. . . .
>
> (3) All braking systems installed on the equipment shall be maintained in functional condition.

[3] Section 107(a) of the Mine Act provides in part:

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

defective brakes on a haulage truck created an imminent danger. Administrative Law Judge Avram Weisberger concluded that the operator violated the standard but that the violation was not S&S and did not present an imminent danger. 16 FMSHRC 1059, 1064-67 (May 1994) (ALJ). For the reasons that follow, we reverse and remand.

I.

Factual and Procedural Background

Blue Bayou Sand and Gravel, Inc. ("Blue Bayou") operates an open-pit sand and gravel mine in Arkansas. 16 FMSHRC at 1059; Tr. 12. On April 28, 1993, Larry Slycord, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), and his supervisor, Billy Ritchey, conducted a regular inspection of the mine. 16 FMSHRC at 1060; Tr. 10. Inspector Slycord observed a loaded 22-ton Euclid haulage truck traveling out of the pit and motioned to the driver, William Jewell, to stop the truck. 16 FMSHRC at 1062-63; Tr. 135. Slycord informed Jewell that he wanted to test the service and parking brakes. 16 FMSHRC at 1063. Jewell replied that the brakes did not work and that he used the transmission to hold the truck. *Id.*

Inspector Slycord directed Jewell to drive to a nearly level area and motioned to him to stop the truck. *Id.* Slycord and Ritchey heard an exhaust of air as if brakes had been applied but observed that the truck continued to roll without hesitation, eventually coming to a stop. *Id.* at 1063, 1066. The truck was tested again with the same result. *Id.* at 1063. Inspector Slycord issued Citation/Order No. 4116491 alleging an imminent danger and an S&S violation of section 56.14101(a). *Id.* at 1064, 1066; Tr. 181. Slycord and Ritchey directed Jewell to park the truck, permitting him first to unload it into a nearby hopper in preparation for the brake repair. 16 FMSHRC at 1065; Tr. 181-82. Subsequently, Inspector Slycord modified the citation by changing the likelihood of injury designation from "reasonably likely" to "highly likely." Tr. 143-44; Gov't Ex. 1 at 2, 3. Blue Bayou contested the citation and order.

Following an evidentiary hearing, the judge concluded that Blue Bayou had violated section 56.14101(a) but that the violation was not S&S. 16 FMSHRC at 1066-67. The judge explained that, although the violation contributed to the hazard of the truck hitting and injuring a person, the reasonable likelihood of injury had not been established. *Id.* at 1066. The judge also determined that the record failed to establish such an event was imminent. *Id.* at 1064-65. He

---

> 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 exist.

emphasized that the inspector, after becoming aware of the defective brakes, permitted the truck to be driven down a grade to unload. *Id.* at 1065. Accordingly, the judge dismissed the withdrawal order, modified the citation, and assessed a civil penalty of $50, based in part on his findings of low gravity and low negligence. *Id.* at 1067, 1069.

The Commission granted the Secretary's petition for discretionary review, which challenged the judge's S&S and imminent danger determinations.

II.

Disposition[4]

A. Significant and Substantial

The Secretary claims substantial evidence does not support the judge's determination that the violation was not S&S. PDR at 1. He asserts the judge erred in finding that a reasonable likelihood of injury had not been established because there was evidence the truck could roll into the hopper and fall down a 20- to 30-foot-high bank; truck drivers have been killed at other mines because trucks without brakes have gone over bump blocks and into hoppers; people working along the road would be endangered by the truck; and mobile equipment accidents cause more fatalities than any other hazard in the mining industry. *Id.* at 11-14. Blue Bayou contends the judge correctly determined the violation was not S&S because the truck had operated in the cited condition for many months; bump blocks and mounds of dirt added a degree of safety to operation of the truck; the truck normally operated at speeds of only 3 or 4 miles per hour; and it had no history of accidents. Blue Bayou Br. at 18-19.

The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*,

---

[4] Blue Bayou requests that the Commission review the judge's finding of violation for the instant citation as well as for two other citations involving the defective brakes. Blue Bayou Br. at 2, 15-17, 19-20. The Mine Act and the Commission's procedural rules provide that the Commission's scope of review is limited to issues raised in the petition for discretionary review. 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(f) (1995); *see, e.g., Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1429 & n.7 (D.C. Cir. 1989). Blue Bayou raised its challenge to the judge's decision in its response brief, filed after the deadline for filing a petition had passed. *See* 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). Accordingly, we address only the S&S and imminent danger issues raised by the Secretary.

3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

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

*Id.* at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

The first and second elements of the *Mathies* criteria have been established. 16 FMSHRC at 1066. The issue on review is whether the judge erred in concluding the Secretary failed to establish the reasonable likelihood of an injury-producing event.

The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) ("*R&P*"), *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, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

In concluding the Secretary failed to establish the third *Mathies* element, the judge determined there was a mound of dirt at the track hoe[5] and a bump block at the hopper, the truck normally traveled at a speed of under 10 m.p.h., and there were no steep grades or significant traffic on the road. 16 FMSHRC at 1066-67.

---

[5] A track hoe loads dirt from the pit into the truck. Tr. 15.

The overwhelming weight of the evidence, however, detracts from the judge's conclusion. Inspector Slycord observed the loaded truck operating without brakes at a pit work site with grades as high as 10%. Tr. 16, 110, 117. To dump its load into the hopper, the truck was driven in reverse down a 40-foot-long road with a 3- to 4-foot decline to the hopper area. Tr. 110, 117. Both Slycord and Ritchey testified that, if the transmission had failed, the driver would have no means of stopping the truck. Tr. 121, 184. Slycord testified that, if the driver had to swerve to avoid a person or obstruction, the truck could have plunged into the hopper and down a 20- to 30-foot-high bank into the plant area, fatally or seriously injuring the driver. Tr. 118-21, 127. Slycord testified that the plant operator who stands in the area beside the hopper, construction workers working beside the road, and other drivers would also have been endangered. Tr. 22, 111-12, 114-16, 118, 127-28. On the day of the inspection, another haulage truck was using the road and there were three other vehicles that could use or cross the road. Tr. 111, 127. We consider these particular facts surrounding the violation against the backdrop of Inspector Ritchey's testimony that mobile equipment accidents are the leading cause of fatalities in the mining industry.[6] Tr. 186.

The evidence relied upon by the judge is insubstantial compared to the body of record evidence and does not establish that an accident would not be reasonably likely to occur. Although there was a bump block at the hopper, it may not have been sufficient to stop the truck from falling into the hopper. Ritchey testified that fatalities have occurred at other mines when trucks with malfunctioning brakes have rolled over bump blocks and into hoppers. Tr. 185-86. Ritchey also testified that, even if the 22-ton truck was going slowly, it could "drive right over" a pickup truck, crushing its driver. *Id.* Blue Bayou's assertions, that the company had no history of accidents and that the truck had been operated in the cited condition for many months without incident, are not dispositive of a finding that the third *Mathies* element has not been established. *See Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043, 2046 (October 1994). Accordingly, we reverse the judge's determination that the Secretary failed to establish the third *Mathies* element. *See id.* at 2045-47.

---

[6] Commissioner Holen notes that, under the Commission's precedent, Inspector Ritchey's testimony to the effect that mobile equipment accidents are the leading cause of fatalities in the mining industry is irrelevant. The Commission has long held that an S&S determination is based on the particular facts surrounding the violation. *E.g., Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (April 1995); *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1122 (July 1992). In *Lion Mining Co.*, the Secretary argued that the judge erred, when determining whether a roof control violation was S&S, in failing to consider that roof falls are the leading cause of fatalities in mines. 18 FMSHRC ___, slip op. at 3, No. PENN 94-71-R (May 23, 1996). The Commission unanimously rejected the Secretary's argument and explained, "The Commission has held that an S&S determination must be based on the particular facts surrounding the violation, including the nature of the mine." *Id.* at 5, *citing Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

Although the judge did not expressly consider the fourth *Mathies* element, the evidence is undisputed that an injury resulting from the truck's involvement in an accident would be serious in nature. Inspector Slycord testified that, in the event of an accident, the truck driver could have experienced broken bones, head injury, or death, the plant operator could have been crushed to death, and another driver using the haul road could have been killed. Tr. 126-28.

Viewing the record as a whole, we find that substantial evidence does not support the judge's conclusion that Blue Bayou's violation of section 56.14101(a) was not reasonably likely to result in an injury. Accordingly, we reverse the judge's determination that the violation was not S&S.

B. Imminent Danger

The Secretary argues that the judge erred in vacating the imminent danger order and in failing to address evidence establishing an imminent danger. PDR at 6-10. He also claims the judge committed legal error when, relying on the inspector's permitting the truck to be unloaded, he found that danger was not imminent. *Id.* at 10-11. Blue Bayou responds, in essence, that the judge correctly determined the record does not support a finding of imminent danger. Blue Bayou Br. at 17-19. It also emphasizes that Inspector Slycord initially designated the likelihood of injury on the order as "reasonably likely" and only changed it to "highly likely" to justify the withdrawal order. *Id.* at 18.

Section 3(j) of the Mine Act defines an 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." 30 U.S.C. § 802(j). Adopting the reasoning of the U.S. Courts of Appeals, the Commission has "refused to limit the concept of imminent danger to hazards that pose an immediate danger." *R&P*, 11 FMSHRC at 2163, *citing Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App.*, 504 F.2d 741 (7th Cir. 1974). *See also VP-5 Mining Co.*, 15 FMSHRC 1531, 1535 (August 1993); *Island Creek Coal Co.*, 15 FMSHRC 339, 345 (March 1993). Rather, the Commission has stated that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *R&P*, 11 FMSHRC at 2163, *quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974) (emphasis omitted). The Commission has explained that "[t]o support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (October 1991) ("*UP&L*").

In reviewing an inspector's finding of an imminent danger, the Commission must support the inspector's finding "unless there is evidence that he has abused his discretion or authority." *R&P*, 11 FMSHRC at 2164, *quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25, 31 (7th Cir. 1975) (emphasis omitted). An inspector abuses his discretion, making a

decision that is not in accordance with law, if he orders the immediate withdrawal of miners in circumstances where there is not an imminent threat to safety. *UP&L*, 13 FMSHRC at 1622-23. An inspector is granted wide discretion because he must act quickly to remove miners from a situation he believes is hazardous. *Island Creek*, 15 FMSHRC at 346-47.

We conclude that the judge erred in determining that an imminent danger did not exist because the inspector allowed the truck to be unloaded before the brakes were repaired. The judge found the inspector's action inconsistent with enforcement of an imminent danger order. Record evidence indicates the truck was unloaded with caution to facilitate repair of the brakes. Tr. 181-82. As the Commission stated in *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (August 1992), although some "imminently dangerous conditions may require abatement that poses a degree of unavoidable risk to miners[, t]he fact that such actions are necessary to abate a condition . . . does not mean that the condition does not pose an imminent danger."

Further, although the judge articulated the proper standard for imminent danger, he failed to apply it. The judge did not examine whether the inspector abused his discretion by issuing the withdrawal order. The inspector made a reasonable investigation of the surrounding facts. *See Island Creek*, 15 FMSHRC at 346. The record reveals that Inspector Slycord observed the 22-ton truck operating without brakes at a pit work site with grades up to 10%, being driven in reverse on a decline to the hopper. Tr. 16, 110, 117. The inspector also testified there was a 20- to 30-foot drop from the bank where the hopper is located to the plant area below. Tr. 120-22. Slycord noted that, in addition to the truck driver, people in other vehicles were using or could use the road, a plant operator was working at the hopper, and construction workers were beside the road. Tr. 22, 111-12, 114-16, 118, 127-28. The inspector articulated his concern that these people would have been endangered in the event the driver could not control the truck, e.g., if the driver had to swerve suddenly, or if the transmission had failed, leaving no way to stop the truck. Tr. 118-23, 127. The bump block at the hopper may not have prevented the cited truck from rolling into the hopper. Tr. 121-23, 184-85. In addition, the truck was dangerous even at slow speed and could cause a fatality in the event of collision. Tr. 185-86.

The subsequent modification of the citation from "reasonably likely" to cause injury to "highly likely" does not diminish evidence that it was the inspector's belief at the time he issued the order that an imminent danger existed. Inspector Slycord explained that he modified the citation to correct a mistake. Tr. 144.

It was reasonable for the inspector, in evaluating the particular circumstances at issue in this case, to conclude that an imminent danger existed. The evidence does not allow any other conclusion than that the inspector did not abuse his discretion in issuing the imminent danger order. Accordingly, we reverse the judge's determination.

III.

Conclusion

For the foregoing reasons, we reverse the judge's S&S and imminent danger determinations. We remand for reassessment of the civil penalty consistent with this decision.[7] *See, e.g., Gatliff Coal Co., Inc.*, 14 FMSHRC 1982, 1989 (December 1992).

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

[7] We note that, in his penalty assessment, the judge found low gravity and low negligence based on evidence that work necessary to repair to the brakes was minor. 16 FMSHRC 1067. We caution the judge against relying upon such evidence on remand. *Cf. Southern Ohio Coal Company*, 13 FMSHRC 912, 919 (June 1991) (operator's failure to make minor repairs was aggravated conduct).

Distribution

Avram Weisberger, A.L.J.
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Susan E. Long, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 516
Arlington, VA 22203

David J. Potter, Esq.
901 North State Line Avenue
Texarkana, TX 75501-5268

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 20, 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. WEVA 92-783 |
| UNITED STATES STEEL MINING COMPANY, INC. | : | |

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners[1]

## DECISION

BY: Jordan, Chairman; Holen and Riley, Commissioners

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), is before the Commission for the third time and raises the question of whether a violation by United States Steel Mining Company ("U.S. Steel") of a trolley wire transportation safeguard issued under 30 C.F.R. § 75.1403[2] was significant and substantial ("S&S").[3] In the decision now before us, Administrative Law Judge William Fauver concluded that the violation was S&S. 16 FMSHRC 1189 (May 1994) (ALJ). The Commission granted U.S. Steel's petition for discretionary review, which challenges the judge's S&S determination. For the reasons that follow, we affirm the judge's decision.

---

[1] Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition.

[2] Section 75.1403, entitled "Other safeguards," provides:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

[3] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."

I.

Factual and Procedural Background

The facts of this case are fully set forth in the Commission's first decision in this matter, 15 FMSHRC 2445 (December 1993), and are summarized here. *Id.* at 2445-46. On May 23, 1989, James Bowman, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued U.S. Steel a safeguard notice at its Gary No. 50 Mine, an underground coal mine in Wyoming County, West Virginia. *Id.* The notice required that, to prevent de-energizing of track equipment, all trolley wire be installed without excessive kinks, bends, and twists. *Id.* at 2446. It also required that the trolley wire be installed within a gauge where anti-swing devices could be used on all equipment. *Id.* On February 4, 1992, MSHA Inspector Gerald Cook[4] inspected the 5K track entry in a track-mounted jeep. *Id.* The trolley pole disengaged and caused the jeep to lose power 15 times. *Id.* Cook determined that the causes of the trolley pole disconnections were kinks in the wire and a wide gauge between the track and wire. *Id.* Inspector Cook issued U.S. Steel a citation for violation of the safeguard and designated the violation S&S. *Id.;* Gov't Ex. 1. U.S. Steel contested the violation and proposed civil penalty. 15 FMSHRC at 2446.

The judge rejected U.S. Steel's contention that the safeguard was invalid and found that the cited conditions violated the safeguard. 15 FMSHRC 452, 457 (March 1993) (ALJ). In concluding that the violation was S&S, the judge stated that the test was "whether the violation presents a substantial *possibility* of resulting in injury or disease . . . ." *Id.* at 456 (emphasis in original). The Commission granted U.S. Steel's petition for discretionary review, which challenged the judge's determinations that the safeguard was valid and that the violation was S&S.

The Commission affirmed the judge's ruling that the safeguard was valid and that U.S. Steel violated it. 15 FMSHRC at 2447-48. The Commission concluded, however, that the judge erred in his S&S analysis by applying a "substantial possibility" test. *Id.* at 2448. The Commission remanded the case for proper application of the third element of the S&S test set forth in *Mathies Coal Co.,* 6 FMSHRC 1, 3-4 (January 1984), whether there was a *reasonable likelihood* that the hazard contributed to would result in an injury. 15 FMSHRC at 2448 (emphasis added).

On remand, the judge determined that "reasonable likelihood," as used in the third element of the *Mathies* test, does not mean proof that an injury was "more probable than not."

---

[4] Inspector Gerald Cook is incorrectly identified in the transcript and by the judge as Earl Cook. *Compare* Tr. 51-52; 15 FMSHRC 452, 453 (March 1993) (ALJ); PDR at 2 (erroneous references to Earl Cook) *with* Gov't Ex. 1 (citation signed by Gerald Cook); S. Br. at 3 n.2 (noting erroneous references). Earl Cook was the U.S. Steel official to whom Inspector Bowman issued the notice to provide safeguard. Tr. 22; Gov't Ex. 3.

16 FMSHRC 829, 831-32 (April 1994) (ALJ). He certified this ruling for review by the Commission. *Id.* at 832-33. The Commission denied review and directed the judge to issue a final disposition pursuant to its remand instructions. 16 FMSHRC 1043, 1044 (May 1994).

In the decision on review, the judge rejected U.S. Steel's view that "reasonable likelihood" means "more probable than not." 16 FMSHRC at 1190. He concluded that an S&S violation is not to be defined "in terms of a percentage of probability." *Id.* at 1190-91(citation omitted). The judge concluded that violation of the safeguard was S&S, concluding that the reliable evidence supported Inspector Cook's testimony that, taken as a whole, the hazards presented by the violation made it reasonably likely that serious injuries would result. *Id.* at 1193.

II.

Disposition

U.S. Steel argues that, to satisfy the third *Mathies* element, the Secretary must prove that it was "more probable . . . than not" that the hazard contributed to by the violation will result in an injury. PDR at 5. U.S. Steel also argues that substantial evidence does not support the judge's S&S determination. *Id.* In its view, the disconnection of a pole from the trolley wire does not contribute to a "discrete safety hazard,"[5] and it was not reasonably likely that the cited condition could result in an injury. *Id.* at 5-6.

The Secretary argues that the judge applied the "reasonable likelihood" element of *Mathies* and properly concluded the violation was S&S. S. Br. at 6-12. He emphasizes that the Commission has never held that "reasonable likelihood" requires a showing that it is "more probable than not" that injury or illness will occur. *Id.* at 7. He contends that such a construction is inconsistent with the Mine Act, its legislative history, and Commission case law. *Id.* at 7-12. The Secretary also argues that substantial evidence supports the judge's determination that the violation was S&S. *Id.* at 12-13.

Under the Commission's test, a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3

---

[5] U.S. Steel thus also argues that the violation is not S&S because the Secretary failed to prove the second element of the *Mathies* test, i.e., whether there was a safety hazard contributed to by the violation. Review of the second *Mathies* element, however, is not before the Commission. U.S. Steel did not raise the second *Mathies* element in its first petition for review in this matter and the Commission remanded the proceeding to the judge only for proper application of the third element, 15 FMSHRC at 2448. The judge's jurisdiction was therefore limited to that issue. *See Ronny Boswell v. National Cement Co.*, 15 FMSHRC 935, 937 (June 1993).

FMSHRC 822, 825-26 (April 1981). In *Mathies*, 6 FMSHRC at 3-4, the Commission further explained:

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

*See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985). The Secretary bears the burden of proving that a violation is S&S. *See, e.g., Peabody Coal Co.*, 17 FMSHRC 26, 28 (January 1995), *citing Union Oil Co. of Cal.*, 11 FMSHRC 289, 298-99 (March 1989).

A. Whether the Judge's S&S Analysis Was Erroneous

We agree with the judge that the third element of the *Mathies* test does not require the Secretary to prove it was "more probable than not" an injury would result. *See* 16 FMSHRC at 1190-93. The legislative history of the Mine Act indicates Congress did not intend that the most serious threat to miner health and safety, an imminent danger, be defined in terms of "a percentage of probability." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (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*, at 626 (1978). We do not find error in the judge's conclusion that, because an S&S violation under the Mine Act is less serious than an imminent danger, it is also not to be defined in terms of percentage of probability. 16 FMSHRC at 1191. Furthermore, Commission precedent has not equated "reasonable likelihood" with probability greater than 50 percent. A "more probable than not" standard would require the Secretary, in order to prove a violation is S&S, to prove it is likelier than not that the hazard at issue will result in a reasonably serious injury. We reject such a requirement.

U.S. Steel relies on a judge's decision in *Texasgulf, Inc.*, 9 FMSHRC 748, 759-61, 763 (April 1987) (ALJ), to the effect that "reasonably likely" must be regarded as synonymous with "probable." PDR at 5. Although the Commission affirmed the judges's determination that the violation was not S&S, it did not endorse the judge's probability analysis. *Texasgulf, Inc.*, 10 FMSHRC 498, 500-04 (April 1988). The Commission specifically declined to revisit the S&S test, as set forth in *Nat'l Gypsum* and *Mathies*. *Id.* at 500 n.4.

Accordingly, we conclude that the judge did not err when he found that the term "reasonable likelihood" does not mean "more probable than not." 16 FMSHRC at 1193.

B. Whether Substantial Evidence Supports the Judge's S&S Conclusion

We conclude substantial evidence supports the judge's determination that the violation was S&S.[6] Inspector Cook cited 15 hazardous locations. Gov't Ex. 1. The area in which the violation occurred was lower in height than other areas of the mine and was uneven, with grades and swags, increasing the likelihood of injuries resulting from a disconnected trolley pole. 16 FMSHRC at 1193. When a trolley pole disengages, the vehicle is deenergized, resulting in an immediate loss of lights, communication, and electrically powered brakes. *Id.* Much of U.S. Steel's equipment has electrically powered brakes. Tr. 15. Although the operator represents that its vehicles have a hydraulic brake backup system (PDR at 5), Inspector Cook testified that he had never seen a jeep with hydraulic brakes stop after the trolley pole disengaged. Tr. 102-03. Inspector Bowman similarly testified that he had issued many citations for failing hydraulic braking systems. Tr. 122. Further, a vehicle that lost its lights at a dip in the track would not be seen by drivers of other vehicles. 16 FMSHRC at 1193. A vehicle without communication would be unable to report its location to the dispatcher or request assistance. *See* Tr. 127; PDR at 5.

In addition, disengaged trolley poles can dislodge or strike rocks in the roof. 16 FMSHRC at 1193. The rocks may strike miners or cause sparks that could ignite methane. *Id. See also* Tr. 15, 58-59, 102. Inspector Bowman testified that this mine liberated approximately two million cubic feet of methane in a 24-hour period. Tr. 16. Moreover, the record indicates that disconnected trolley poles, even with anti-swing devices, are capable of causing injury, including breaking an arm, if a miner reaches out for the pole. Tr. 112, 119; *see also* Tr. 15.

We are unpersuaded by U.S. Steel's argument that an injury-producing event is not reasonably likely because the vehicle is deenergized for only 15 to 20 seconds until the operator replaces the pole. PDR at 5; Tr. 125. Taken together, the loss of brakes, lights, and

---

[6] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *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, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB,* 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB,* 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

communication for even 15 to 20 seconds support the judge's conclusion that an injury was reasonably likely to occur. We reject U.S. Steel's argument that the violation was not S&S because Cook completed his journey through the mine without taking action to eliminate the hazard. PDR at 6. Immediate abatement of a violation is only required when the condition observed results in a withdrawal order. Citations, on the other hand, even those designated S&S, "fix a reasonable time for the abatement of the violation." 30 U.S.C. § 814(a). We also reject U.S. Steel's contention that the Secretary failed to prove the violation was S&S because he offered no evidence that anyone has ever been injured by a pole equipped with an anti-swing device disengaging from a trolley wire. PDR at 6. The fact that injury has been avoided in the past or in connection with a particular violation may be "fortunate, but not determinative." *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (February 1986).

III.

Conclusion

The judge did not err in applying the "reasonable likelihood" test set forth in the third element of *Mathies*, and substantial evidence in the record supports the judge's conclusion that the violation was S&S. Accordingly, we affirm the judge's determination that U.S. Steel's violation was S&S.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

James C. Riley, Commissioner

Commissioner Marks, concurring in result:

My colleagues have concluded that the violation in issue was "significant and substantial," ("S&S"). I agree and concur in that result. However, I vigorously disagree with the majority's refusal to consider the core issue, i.e., that there is a compelling need to provide a clear, unambiguous interpretation of the statutory term "significant and substantial."

In reaching their conclusion, the majority has applied the so-called "*Mathies* test," which is an amplification of the *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822 (April 1981) decision, wherein the Commission enunciated its interpretation of S&S. After careful consideration of this matter I have concluded that the Commission majority in both *Nat'l Gypsum* and *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984) erred, and that the time for re-examination of this vital issue is long overdue.

The procedural history of this *U.S. Steel* case is, in many ways, illustrative and indicative of the chronic enforcement and adjudicative quagmire that has been spawned since the ill conceived *Nat'l Gypsum* decision was issued. The violation in this case was issued on February 4, 1992. Since that time, the case has been before the judge and the Commission three times! In each instance the issue related to the third element of the *Mathies* test which requires the Secretary to prove that "a reasonable likelihood that the hazard contributed to will result in an injury." *Mathies,* 6 FMSHRC at 3-4.

Because that phrase is manifestly ambiguous, and because U.S. Steel argued for a different interpretation, the judge attempted to set forth a clarifying interpretation of both the statutory language and the Commission's decisions by posing "a practical and realistic question [,] whether the violation presents a substantial *possibility* of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is *more probable than not* that injury or disease will result." 15 FMSHRC 452, 456 (March 1993) (ALJ) (emphasis in original) (citations omitted). U.S. Steel objected and filed a petition for discretionary review, which was granted. The Secretary, however, considered the judge's formulation to be an attempt "to use more familiar language that reflected the Commission's practical application of the test." S. Br. at 18.

Clinging to the shopworn status quo, and apparently without revisiting the merits of the underlying problem, i.e., that the third *Mathies* element is seriously deficient, the Commission responded by concluding that the judge erred, and by instructing him to apply the "reasonable likelihood" *Mathies* standard. 15 FMSHRC 2445, 2448 (December 1993).

On remand the judge determined that the parties continued to be sharply divided in their interpretations of the third *Mathies* element and that "[T]he Commission has not resolved this issue." 16 FMSHRC 829, 830 (April 1994) (ALJ). He went further:

> The parties' conflict is understandable because the term 'reasonable likelihood' may convey different meanings. To U.S. Steel, the word 'likelihood' governs, and the term 'reasonable likelihood' means 'more probable than not.' To

the Secretary, the word 'reasonable' modifies 'likelihood' to mean a *reasonable potential,* not 'more probable than not.'

*Id.* The judge then proceeded to analyze that issue and concluded that "the term 'reasonable likelihood' as used in the *Mathies* test does not mean 'more probable than not.'" *Id.* at 832. Recognizing the importance of that ruling, the judge then took the unusual step of certifying his ruling to the Commission for interlocutory review. *Id.* at 832-33.

Regrettably, the Commission declined yet another opportunity to consider this important issue. The Commission refused to grant the review,[1] and directed the judge "to issue a final disposition, on the existing record, pursuant to the Commission's previous remand instructions." 16 FMSHRC 1043, 1044 (May 1994).

On remand, the judge quickly complied, reiterating his previous conclusions rejecting the "more probable than not" formulation urged by U.S. Steel and also concluding that the record supported the issuing inspector's conclusion that "the hazards presented by this violation made it reasonably likely that serious injuries would result." 16 FMSHRC 1189, 1193 (May 1994) (ALJ).

Once again U.S. Steel sought discretionary review seeking a ruling clarifying the meaning of the Commission's third *Mathies* element. U.S. Steel's arguments squarely raise the issue: *what does reasonable likelihood mean?* They urge a "more probable than not" meaning. PDR at 4-5. The Secretary defends the judge's rejection of the U.S. Steel argument. S. Br. at 6-7. Thus, the Commission is again presented with the opportunity to better explain, and more clearly interpret, the statutory term of "significant and substantial." Unfortunately, my colleagues have opted not to confront the obvious, which is, that the words used in the third *Mathies* element are not serving our nation's miners, the regulated, or the regulators very well. The majority has chosen to narrowly dispose of the controversy in this case and to pass on this opportunity to provide clear direction to all potential litigants as well as to the Commission's judges who have grappled with this issue since the Commission issued its two decisions.

Accordingly, I find it necessary to disassociate myself from such a resolution. In the past year-and-one-half, the Commission has reviewed several cases that raised the very same question:

---

[1] Although the Secretary opposed interlocutory review on procedural grounds, he explicitly stated that he "agrees with the judge that the legal issue presented is an important one." S. Opp'n at 3.

*what does reasonable likelihood mean?* Moreover, since *Mathies* issuance in 1984, approximately 47 Commission decisions involving S&S have been issued.[2] Of those 47 decisions, over 93% of the cases related to the **third** *Mathies* element. It must be emphasized that this high level of litigation has resulted, ***not from confusion regarding the meaning of the statutory terms***, but from the confusion created by the ***Commission's own terms*** which purport to set forth a framework for the uniform enforcement and adjudication of S&S violations. Notwithstanding the foregoing, in the twelve years that have passed since the issuance of *Mathies,* the Commission has responded by merely clutching to the same ineffective words. That "strategy" has failed. As such, I believe the reasonable and appropriate Commission response to this compelling indication of widespread confusion and uncertainty, is to end the pretense that no problem exists -- confront the problem and find language that interprets S&S in a clear, unambiguous way.

To that end I continue to believe that the wisest course of action would have been to defer decision in this case, and to have invited the litigants, as well as industry and union intervenors to fully brief and orally argue this vital issue with a view toward crafting a clear interpretation of S&S. Unfortunately, my colleagues did not support that approach. However, because the parties in this action continue to dispute the meaning of the third *Mathies* element, I render my present view on this issue. Notwithstanding the following, however, I remain ready and willing to consider the differing views of the aforementioned parties because I believe the S&S analysis can only benefit from such varied input.

As I indicted above, I have concluded that the Commission's present interpretation of the statutory term "significant and substantial" is wrong. My conclusion is based on several factors, not the least of which is the Mine Act itself and the compelling legislative history. Also of great assistance is the incisive and prescient dissent of Commissioner A.E. Lawson in the *Nat'l Gypsum* case.

Everyone agrees that the Act does not define the term "significant and substantial." Nor does the Act contain language that sets limitations on the breadth of the violations that are to be considered S&S, beyond the fact that Congress expressly stated that S&S violations do **not** include conditions that have been determined by the Secretary to constitute an imminent danger. 30 U.S.C. § 814(d)(1). Also of significance is the fact that the Act does not contain the disputed language found in the Commission's third and forth *Mathies* test, that requires the Secretary to prove that the violation in issue poses a **reasonable likelihood of serious injury.** That is a burden that the Congress expressly rejected!

Absent a determination that the meaning of S&S is clear on its face, a determination I am unwilling to make, the primary basis for determining Congressional intent includes an examination of the legislative history. In this case the evidence of that intent is clear and

---

[2] Additionally, the number of S&S related petitions for discretionary review filed during this time period, but denied, is unknown because no record of denied petitions is maintained.

convincing. The S&S language in the Mine Act was taken directly from section 104(c)(1) of the predecessor Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), which had been the subject of important litigation before the Department of the Interior's Board of Mine Operations Appeals ("Board"). That litigation was expressly discussed in the Senate Committee Report accompanying the Mine Act. Thus, the intended meaning of S&S in the Mine Act is readily available and precisely set forth:

> The Interior Board of Mine Operations Appeals has until recently taken an unnecessarily and improperly strict view of the 'gravity test' and has required that the violation be so serious so as to very closely approach a situation of 'imminent danger.' *Eastern Associated Coal Corporation,* 3 IBMA 331 (1974).
>
> The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the 'significant and substantial' language in *Alabama By-Products Corp.*, 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1). The Board there held that 'an inspector need not find a risk of serious bodily harm, let alone death' in order to issue a notice under Section 104(c)(1). The Board's holding in *Alabama by-Products Corporation* is consistent with the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard which poses a danger to miners as long as they are not of a purely technical nature. The Committee assumes, however, that when 'technical' violations do pose a health or safety danger to miners, and are the result of an 'unwarranted failure' the unwarranted failure notice will be issued.

S. Rep. No.181, 95th Cong., 1st Sess. 31 (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,* at 619 (1978) ("*Legis. Hist.*").

In the referenced, overruled *Eastern Associated Coal* case, the Board had concluded that violations designated S&S had to pose a "probable risk of serious bodily harm or death." 3 IBMA at 334. Subsequently, the Board reversed itself and concluded that the S&S terms:

> when applied with due regard to their literal meanings, appear to bar issuance of notices under section 104(c)(1) in two categories of violations, namely, violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of *any* injury which has only a remote or speculative chance of coming to fruition. A corollary of this proposition is that a notice of violation may be issued under section 104(c)(1) without regard for the seriousness or gravity of the injury likely to result from the hazard posed by the violation, that is, an inspector need not find a risk of serious bodily harm, let alone of death.

*Alabama By-Products*, 7 IBMA at 94. As indicated, that holding was cited with approval in the Senate Committee Report. *Legis. Hist.* at 619. The *Alabama By-Products* decision also

contained a separate opinion by Administrative Judge Howard J. Schellenberg, Jr. wherein he concurred in result by expressly joining his colleagues in concluding that the Board's prior interpretation of section 104(c), as stated in *Eastern Associated Coal,* "was in error." 7 IBMA at 97. He then indicated "I would have preferred to adopt as a guideline, . . . that the pertinent phrase be interpreted to mean, 'a reasonable risk of danger to the safety or health of the miners.'" *Id.* His comment is important, because it draws a bright line on what *Alabama By-Products* did **not** hold!

Thus, in citing with approval the Board's *Alabama By-Products* holding, the task of determining Congressional intent regarding the meaning of S&S became rather straightforward. It clearly did **not** mean, as urged by Judge Schellenberg, "a reasonable risk of danger to the safety or health of the miners." 7 IBMA at 97. Yet that is essentially the formulation ultimately adopted by the majority in *Nat'l Gypsum*!

Apart from the Commission's failure or refusal to follow clear legislative direction, the *Nat'l Gypsum* interpretation of S&S is based on misguided concerns that were, and continue to be, unfounded. The majority expressed its serious concern that maintaining the *Alabama By-Products* interpretation of S&S, as urged by the Secretary, would result in almost all violations being charged as S&S. *Nat'l Gypsum*, 3 FMSHRC at 825. Commissioner Lawson dashed that concern by citing oral argument concessions that indicated that only 62% of all coal mine violations cited prior to consideration of the *Nat'l Gypsum* case were characterized as S&S. *Id.* at 835 (Lawson, A., dissenting). During that time period the *Alabama By-Products* S&S rule of construction was in effect!

The *Nat'l Gypsum* majority also expressed grave concern that by maintaining the *Alabama By-Products* S&S construction, future enforcement under section 104(e) of the Mine Act, 30 U.S.C. §814(e), would result in "continual shutdown" of the mines. *Id.* at 826-27. Commissioner Lawson exposed the hollowness of that concern by quoting the Secretary's position regarding the "pattern" violation authority under section 104(e):

> The Secretary hasn't issued a notice yet. The Secretary hasn't issued a withdrawal order based on a notice of pattern yet. We haven't got a case that presents that yet and I don't believe the Commission should engage in this unwarranted speculation that the *National Gypsum* invites you to do, that we will not be able to effectively administer the Act if this definition of significant and substantial is adopted.

*Id.* at 837 (Lawson, A., dissenting) (citations omitted). Those words were uttered approximately 16 years ago. However, they are no less accurate today, as I am unaware of any section 104(e) enforcement, and certainly have not seen any cases seeking review of a section 104(e) violation. But more to the point, is Commissioner Lawson's reaction to the majority's unfounded apprehension that an adverse effect upon section 104(e) enforcement would result from a continuation of the *Alabama By-Products* interpretation of S&S:

> What this demonstrates about the enforcement of section 104(e) of the Act may well raise one's eyebrows, but it can hardly be maintained, given this record, that any operator has reason to fear a 104(e) based closure of its mine. The adoption of all-encompassing rules to be applied to cases not yet--perhaps never--to be before us is both judicially premature and the unwise rendering of a judgment in a vacuum, before any experience or factual context exists within which to make such a decision. We should not promulgate rules for deciding non-existent cases which are not now and may never be before us.

*Id.* at 838 (Lawson, A., dissenting).

Indeed, 15 years after those words were written, they continue to have vitality. That demonstration of solid judgment and impressive 20/20 forward vision, is only surpassed by Commissioner Lawson's caution to the majority regarding the effects of their newly minted interpretation of S&S:

> As a foundation for meaningful analysis, I can discern no improvement which will result from this alteration of the existing procedure, and no benefit accruing to either the inspector, the miner, or the mine operator. Unless the production of litigation is our goal, I confess that I can ascertain no purpose to this redefinition.

*Id.* at 839-40 (Lawson, A., dissenting).

I am in total agreement with that insightful statement! The Commission's *Nat'l Gypsum/ Mathies* interpretation of S&S has neither clarified nor facilitated a uniform application of S&S. To the contrary, the present ambiguity only serves to fuel a constant stream of unnecessary litigation that results in a diminished level of Congressionally mandated protection to our nation's miners and puts an unacceptable financial strain on operators and the government. The recently decided *Power Operating Co.*, 18 FMSHRC 303 (March 1996), presents a vivid demonstration.

In that case, the Secretary cited Power Operating Company ("Power") for a violation of 30 C.F.R. § 77.1710(a) (1995)[3] and charged S&S. 18 FMSHRC at 304. The Department of Labor's Mine Safety and Health Administration ("MSHA") inspector observed a miner steam cleaning a rock truck with a device (steam jenny) that delivers water under high pressure. *Id.* The miner was not wearing goggles, and his face was splattered with black material that the inspector believed to be dirt and grease. *Id.* Power did not dispute the foregoing, but challenged

---

[3] Section 77.1710(a) states:

> Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.

the S&S charge. *Id.* The judge concluded that the violation was not S&S. 16 FMSHRC 591, 607 (March 1994) (ALJ). Although he determined that an injury to the eye was reasonably likely to occur, he concluded that "the record does not establish[ ] any evidence regarding the level of severity of an injury occasioned by contact of the materials with an eye. *Id.* The Secretary appealed and the Commission ruled that the judge erred in failing to conclude that the injury to the eye was reasonably likely to be serious. 18 FMSHRC at 306. The Commission majority (myself included) relied upon testimony of the inspector, that had not been considered by the judge, which set forth the inspector's opinion as to the seriousness of the likely injury. *Id.* at 306-07. Although I had no difficulty concluding that the facts of that case clearly established a S&S violation, I do not believe that Congress ever intended or expected that inspectors, judges or Commissioners possess medical skills and knowledge sufficient to make such fine distinctions as to the specific degree of injury. However, because of the ambiguity of the third and forth *Mathies* elements, Power was able to persuade one judge and one Commissioner that such is the burden of the Secretary.[4] In my opinion that issue should never have been litigated -- it was not even a close call. However, because the existing interpretation of S&S provides room for the fly-specking myopia noted below, operators have effectively been encouraged to do so.

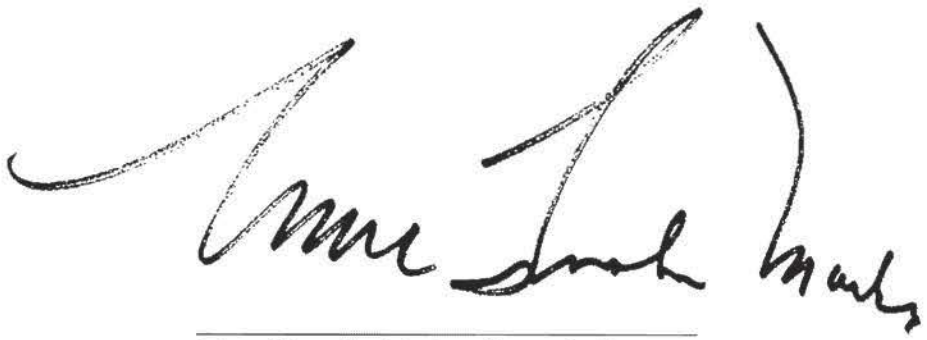
---

[4] That all eye injuries are not *ipso facto* serious is evidenced by the Secretary's own regulations for the reporting of accidents, injuries, and illnesses set forth at 30 C.F.R., Part 50. Sections 50.20-3(a)(5)(i)&(ii) set forth the criteria for differentiating, for purposes of eye injuries, between first aid and medical treatment. First aid encompasses irrigation of the eye, removal of foreign material not imbedded in the eye, and the use of non-prescription eye medications. 30 C.F.R. § 50.20-3(a)(5)(i). Medical treatment encompasses removal of imbedded foreign objects, use of prescription medications, and other professional treatment. 30 C.F.R. § 50.20-3 (a)(5)(ii). First aid is characterized as 'one-time treatment, and any follow-up visit for observational purposes, of a *minor* injury' (emphasis added). 30 C.F.R. §50.2(g). It appears that the potential injury here could well fall into the category of eye injury characterized by the Secretary as *minor* (one requiring only first aid) and which need not even be reported to MSHA on its Mine Accident, Injury, and Illness Report Form 7000-1. 30 C.F.R. §§ 50.2, 50.20. Thus, I disagree with my colleagues that the only possible conclusion is that forcibly propelled 'dirt, grease or hot water striking the eye is reasonably likely to cause reasonably serious trauma.' Slip op. at 4.

*Power Operating*, 18 FMSHRC at 308 (Doyle, J., dissenting).

Interestingly, this precise problem was also anticipated by Commissioner Lawson.[5]

Enough is enough! Fairness dictates that we in the Commission better serve the interests of miners, mine operators and the Secretary of Labor. Therefore, I conclude that the interpretation of S&S, as understood and applied prior to the *Nat'l Gypsum* decision, should be restored. It was a faithful implementation of clear Congressional intent.[6]



Marc Lincoln Marks, Commissioner

---

[5] The majority's tampering will add to the statute words of limitation which will require every mine inspector to make judgments, not only as to the 'likelihood' of the effects of the hazard, and the 'reasonable[ness]' of that 'likelihood' but will as well demand medical predictions to be made as to whether a hazard will result in an injury or illness of a 'reasonably serious' nature. *Must the inspector henceforth determine, not only whether the roof is safe or unsafe, but whether the unconscious miner who is the victim of a roof fall has suffered 'merely' a concussion, or a fractured skull?* Would only the hazard in the latter case, under the majority's rationale, be one which is significant and substantial?

*Nat'l Gypsum*, 3 FMSHRC at 833 (Lawson, A., dissenting) (emphasis supplied).

[6] Notwithstanding this present conclusion, I restate that I remain open to revisit this issue after it has been thoroughly briefed and argued.

Distribution

Billy M. Tennant, Esq.
U.S. Steel Mining Company
600 Grant Street, Room 1580
Pittsburgh, PA 16219

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge William Fauver
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 20, 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. VA 93-145-M |
| MECHANICSVILLE CONCRETE, INC.<br>t/a MATERIALS DELIVERY | : | |

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners[1]

## DECISION

BY: Jordan, Chairman; Holen and Riley, Commissioners

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raises the issues of whether a judge on his own initiative can designate a violation of a mandatory safety standard to be significant and substantial ("S&S")[2] and whether the judge's penalty assessment for the violation was proper. Administrative Law Judge Arthur Amchan concluded that a violation by Mechanicsville Concrete, Inc. t/a Materials Delivery ("Mechanicsville") of 30 C.F.R. § 56.14100(b) (1995)[3] was S&S, although the Secretary's citation had not contained that allegation, and assessed a penalty of $200. 16 FMSHRC 1444, 1449-52 (July 1994) (ALJ). The Commission directed review *sua*

---

[1] Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition.

[2] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."

[3] Section 56.14100(b) provides:

> Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

*sponte* of the judge's S&S determination (*see* section 113(d)(2)(B) of the Act, 30 U.S.C. § 823(d)(2)(B))[4] and granted Mechanicsville's petition for discretionary review only to the extent it requested review of the penalty. For the reasons that follow, we reverse the judge's S&S determination and affirm his penalty assessment.

I.

Factual and Procedural Background

Mechanicsville owns and operates the Branchville pit, a sand and gravel mining operation in Southampton County, Virginia. 16 FMSHRC at 1445. On May 10, 1993, Charles Rines, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of equipment at the mine, including a front-end loader. *Id.* at 1449-50. The vehicle, which could lift and transport more than three tons of material per bucketful, was used to mine sand and gravel, move raw material to the preparation plant for processing, and load processed materials into customers' trucks. Tr. I 84-85, 93, 97-98.[5]

Inspector Rines observed that the windshield wiper and blade were missing from the vehicle. 16 FMSHRC at 1450. Accordingly, he issued a citation, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of section 56.14100(b). 16 FMSHRC at 1450; Gov't Ex. 7. Inspector Rines did not allege the violation was S&S. *Id.*

The judge found that Mechanicsville violated the regulation by failing to have a windshield wiper arm and blade on the front-end loader. 16 FMSHRC 1451. In addition, the judge determined that the violation was S&S, concluding that he had the authority under section 105(d) of the Mine Act, 30 U.S.C. § 815(d), to "find an 'S&S' violation *sua sponte* . . . ." 16 FMSHRC at 1452. The Secretary had proposed a civil penalty of $50; the judge assessed a civil penalty of $200 for the violation. *Id.*

---

[4] Section 113(d)(2)(B) provides in relevant part:

> [A]fter the issuance of a decision of an administrative law judge, the Commission may in its discretion . . . order the case before it for review . . . . The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved.

[5] The hearing was conducted on March 22 and 23, 1994. "Tr. I" refers to the March 22 hearing transcript; "Tr. II" refers to the March 23 hearing transcript.

II.

Disposition

The Secretary asserts that the judge did not have authority to find a violation S&S where the citation issued by the Secretary did not allege an S&S violation. S. Br. at 3-8. He argues that his enforcement responsibility and authority under the Mine Act are exclusive and that the judge's action was, in effect, an attempt to review the Secretary's enforcement decision. *Id.* at 5-7. The Secretary argues that the judge assessed an appropriate penalty. *Id.* at 9-10.

Mechanicsville does not take a position on the judge's authority to find a violation S&S where the Secretary has declined to do so. Mechanicsville contends, however, that the judge improperly enhanced the penalty. M. Br. at 4. It submits that the judge erred in denying its motion to strike certain evidence of prior violations. *Id.*

A. Whether the Judge Had Authority to Find the Violation S&S

We agree with the Secretary that the judge erred in determining on his own initiative that the violation was S&S. The Mine Act confers enforcement authority upon the Secretary. *Thunder Basin Coal Co. v. Reich*, 127 L. Ed. 2d 29, 36, 40 (1994). Under section 103(a) of the Act, 30 U.S.C. § 813(a), the Secretary's representatives are required to make frequent inspections of mines and to investigate whether operators are in compliance with the requirements of the Act. Section 104(a) delegates to the Secretary authority to issue citations for violations of the Act or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to the Act. Sections 104(d)(1) and 104(e), 30 U.S.C. § 814(d)(1) and (e), expressly provide that the Secretary possesses authority to designate a violation S&S. *See Consolidation Coal Co.*, 6 FMSHRC 189, 191-92 (February 1984) (inspector's S&S findings under section 104(d)(1)). The Commission adjudicates disputes under the Mine Act (*see* sections 105 and 113, 30 U.S.C. §§ 815 and 823); the Commission has no enforcement responsibility under the Act. *See Thunder Basin*, 127 L. Ed. 2d. at 36. The Commission does not have authority to inspect mines, investigate violations, or issue citations. The Commission has concluded that its administrative law judges are not authorized representatives of the Secretary and do not have authority to charge an operator with violations of section 104 of the Mine Act. *Mettiki Coal Corp.*, 13 FMSHRC 760, 764 (May 1991).

The Supreme Court has held that an administrative agency has virtually unreviewable discretion in making decisions not to take particular enforcement action relating to its statutory or regulatory authority. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); *see Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986). The Commission has recognized that the Secretary's discretion to vacate citations is unreviewable. *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (October 1993). We perceive no material difference between the Secretary's discretion on the one hand to vacate a citation and his discretion on the other hand not to issue a citation in the first instance or not to designate a citation as S&S. In making his

*sua sponte* determination, the judge essentially made a prosecutorial decision to designate the citation as S&S in the first instance--an exercise of enforcement authority reserved for the Secretary--along with an adjudicatory determination to affirm that designation. In so doing, the judge, contrary to the Mine Act's statutory scheme, usurped the Secretary's role of enforcing the Mine Act.

The judge claimed authority to designate Mechanicsville's violation S&S based on section 105(d) of the Mine Act, which gives the Commission authority to affirm, modify, or vacate a citation.[6] The Commission has held that section 105(d) permits a judge to modify a citation or order so long as the essential allegations necessary to sustain the modified enforcement action are contained in the original citation or order. *Consolidation Coal Co.*, 4 FMSHRC 1791, 1793-94 (October 1982). The Commission emphasized that the judge did not add new findings to create a 104(d)(1) citation. *Id.* at 1796. By contrast, the Commission has overturned a judge's modification of an imminent danger withdrawal order issued under section 107(a) of the Mine Act, 30 U.S.C. § 817(a), to a failure to abate withdrawal order issued under section 104(b) of the Act, 30 U.S.C. § 814(b). *Mettiki*, 13 FMSHRC at 764-65. The Commission reasoned that the modification was not appropriate because the judge added new findings to create a section 104(b) order. *Id.* at 765. The Commission emphasized that findings necessary to establish an imminent danger order were different from findings required to establish a section 104(b) order. *Id.* Here, the judge similarly erred by adding a new finding and conclusion, i.e., that the violation posed a hazard to employees that was reasonably likely to result in a reasonably serious injury[7] and was therefore S&S. 16 FMSHRC at 1450-52.

---

[6] Section 105(d) states, as pertinent:

> [T]he Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 [U.S.C.], but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.

[7] Our dissenting colleague relies on the fact that, in responding to statement 10.B. on the citation form, "Injury or Illness could reasonably be expected to be," the inspector checked the box indicating "Fatal." Slip op. at 7-8. Commissioner Marks fails to acknowledge that, in responding to statement 10.A., "Injury or Illness . . . (is)," the inspector checked the box indicating "Unlikely." In order to establish the third element of an S&S determination, *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), requires "a reasonable likelihood that the hazard contributed to will result in an injury."

B. Whether the Judge Erred in His Penalty Assessment

In contested civil penalty cases, the Mine Act requires that the Commission make an independent penalty assessment based on the statutory criteria of section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). The Commission has explained that "[t]he determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." 5 FMSHRC at 294 (citation omitted).

In reviewing a judge's penalty assessment, the Commission must determine whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria.[8] While "a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . ." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

The judge found that Mechanicsville's history of violations warranted assessment of a substantial penalty. 16 FMSHRC at 1452. Mechanicsville claims the judge erred in basing his penalty assessment in part on violations set forth in Gov't Exs. 9 through 12. M. Br. at 4. Mechanicsville asserts that these exhibits should have been stricken, pursuant to its motion made at hearing, because they were not produced by the Secretary pursuant to Mechanicsville's discovery requests. *Id.*

We conclude that the judge did not err in refusing to strike the exhibits. The citations therein were relevant to the issue of the operator's history of violations. Section 110(i) sets forth the operator's history of previous violations as a factor to be considered in assessing a civil penalty. As the judge correctly noted, all but one of the citations were listed in the Secretary's prehearing report, which indicated they might be introduced. Tr. II 13-14, 16-17; S. Resp. to

---

[8] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *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, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Notice of Hr'g at 5. There was no showing of prejudice. *See Materials Delivery*, 15 FMSHRC 2467, 2469 (December 1993) (ALJ) (three citations in the exhibits had previously been litigated). 15 FMSHRC at 2469; Tr. II 17. Moreover, Mechanicsville, which was represented by counsel, asked the judge to strike the exhibits only after they had been admitted into evidence without objection. Gov't Ex. 9 (Tr. I 118); Gov't Ex. 10 (Tr. I 129); Gov't Ex. 11 (Tr. I 132); Gov't Ex. 12 (Tr. I 138-39). Failure to object to an offer of evidence when the offer is made waives on appeal any argument against its admission. 1 John W. Strong et al., *McCormick on Evidence* § 52, at 200 (4th ed. 1992); *see In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1864 (November 1995), *appeal docketed*, No. 95-1619 (D.C. Cir. Dec. 28, 1995).

Mechanicsville does not dispute the judge's other penalty criteria findings, including high negligence and high gravity. 16 FMSHRC at 1452. Accordingly, we conclude that the assessed penalty was within the judge's discretion and is supported by substantial evidence.

III.

Conclusion

For the foregoing reasons, we conclude that the judge lacked authority to find, *sua sponte*, that Mechanicsville's violation was S&S and we reverse the judge's conclusion that the violation was S&S. We affirm the judge's assessment of a $200 civil penalty.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

James C. Riley, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

The majority has determined that the judge does not have the authority to conclude that a violation is significant and substantial when the Secretary has failed to formally make such a charge. I disagree and dissent on this issue.

In reaching their conclusion, the majority stresses that the Act gives the Commission no enforcement responsibility and that the Commission has no authority to investigate or inspect mines, issue citations, or charge operators with section 104 violations. Slip op. at 3. I don't disagree generally with that statement. However, I find those observations irrelevant to the analysis.

My colleagues veer off the rails by concluding that the judge's action in this case was essentially "a prosecutorial decision to designate the citation as S&S in the first instance--an exercise of enforcement authority reserved for the Secretary . . ." and that in doing so he "usurped the Secretary's role of enforcing the Mine Act." Slip op. at 3-4. They go further, concluding that the judge "erred by adding a new finding and conclusion, i.e., that the violation posed a hazard to employees that was reasonably likely to result in a reasonably serious injury and was therefore S&S." Slip op. at 4. They are wrong.

As long recognized by the Commission, and as apparently understood today by the majority, the Commission's holding in *Consolidation Coal Co.*, 4 FMSHRC 1791 (October 1982), reflected a recognition that section 105(d) of the Act authorizes the judge to modify citations "so long as the essential allegations necessary to sustain the modified enforcement action are contained in the original citation or order." Slip op. at 4. For reasons explained below, I conclude that is precisely what occurred in this case, i.e., the judge's ruling is based on allegations contained in the original citation. Therefore, I find that the judge acted within his authority and in accordance with his duty as an administrative law judge when he concluded that the subject violation was S&S.

The violation in issue was one of five separate violations charged by the Secretary on May 10, 1993, and ultimately sustained by the judge. All five violations related to the highly dangerous condition of the cited front-end loader. In addition to the citation on review, which was issued because the sole windshield wiper arm and blade was missing, the loader was also cited for: a broken windshield and right side glass; an inoperable parking brake; an inoperable horn; and an inoperable back-up alarm. In all citations, *except* the windshield arm/blade citation, the inspector checked the S&S box on the citation form. The inspector testified that he **did not check the S&S** box on the windshield arm/blade citation **because it was not raining** at the time of his inspection. *See* Tr. I 105-06, 166.

The majority's conclusion on this issue is totally reliant upon the fact that the inspector checked "no" next to the S&S box on Citation No. 4085282. Gov't Ex. 7 (statement 10.C.). However, the majority fails to recognize that, on the *same citation*, in response to statement

10.B., "Injury or Illness could reasonably be expected to be," a check appears in the box indicating "FATAL." Gov't Ex. 7 (statement 10.B.) (emphasis supplied). Thus, in this case, the Secretary came before the judge **charging** that the violation *could reasonably be expected to be a fatality*. At the hearing before the judge, this charge was supported by unrefuted testimony from the inspector that rain and early morning dew on the windshield causes a "distorted view of everything in front of you." Tr. I 104-05.[1] Moreover, the inspector testified that the loader *is* operated in the early morning and when it is raining. *Id.* at 105. Significantly, on cross-examination the inspector refused to agree that there was no likelihood of an accident resulting from the violation. *Id.* at 204-06.[2] Thus, the record before the judge included: the Secretary's **charge** that the violation could result in an *injury reasonably expected to be fatal*; the testimony of the inspector, refusing to agree on cross-examination, that there was no likelihood of an accident; and most importantly, the inspector's testimony that he would have checked the box designating the violation S&S if it had been raining at the time of citation. Given the foregoing, I conclude that the judge had both a duty and obligation to rectify what was a misapprehension of law by the inspector.[3]

---

[1] The inspector's testimony on cross-examination further establishes the dangerous condition of the loader at the time of citation:

> The windshield was broken in several places. That affected the vision of the operator that was operating that piece of equipment. It was spider-webbed in front of it. You got an illusion whenever you would look through this broken glass.

Tr. I 170.

[2] In a purported defense of the dangerous condition of the loader, the operator's counsel callously challenged whether a miner would actually be killed by the loader because the ground was sandy, not hard asphalt, and because the loader was two feet above the ground. Tr. I 165-66, 207-09, 223.

[3] The Commission case law is well settled. In evaluating whether a violation is S&S it is necessary to consider the violation in the context of "continued normal mining operations." *U.S. Steel Mining Co.,* 6 FMSHRC 1573, 1574 (July 1984); *see also Monterey Coal Co.,* 7 FMSHRC 996, 1001-02 (July 1985). "The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued." *Rushton Mining Co.,* 11 FMSHRC 1432, 1435 (August 1989), *citing Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986), and *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (August 1985). Here, the testimony established that the loader was used in rainy conditions. Tr. I 105.

The administrative law judge has the duty to determine whether the evidence of record supports the Secretary's charge. But for his belief that the absence of rain at the time of citation restricted him from formally charging S&S, the Secretary's inspector and principal witness clearly indicated that he believed the violation was S&S. The judge's authority is not limited to either *agreeing* with the levels of gravity charged by the Secretary or determining that the Secretary's charges of gravity should be *diminished*. The judge also has both the duty and authority to determine, in view of the record, that the gravity of the charges made by the Secretary should be *increased*. The Secretary clearly supports this view.

> To the extent that the judge determines that the evidence presented at the hearing indicates that the gravity of a particular violation is higher than that initially determined by the Secretary, the judge can properly consider this evidence in evaluating the gravity of the violation for purposes of assessing an appropriate civil penalty.

S. Br. at 9.

That is precisely what the judge did in this case. The record clearly indicates that the Secretary believed the gravity of the violation to be S&S but for his inspector's misapprehension of the breadth of the law.

The majority also intimates that no basis for the S&S conclusion exists in this case. *See* Slip op. at 4 (different findings required). I disagree. In this case the evidence in the record is adequate to determine that all *Mathies* elements were satisfied. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). Moreover, as the Secretary acknowledges, "the penalty criterion of gravity encompasses the same factors or evidence evaluated in determining whether a violation is significant and substantial." S. Br. at 10 n.7, *citing Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (September 1987).

For the foregoing reasons, I dissent and would affirm the judge's conclusion of S&S.

Marc Lincoln Marks, Commissioner

Distribution

Robert A. Blackwood, III, Esq.
3054-A Berkmar Drive
Charlottesville, VA 22901

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge Arthur Amchan
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

# ADMINISTRATIVE LAW JUDGE DECISIONS

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

JUN 3 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEST 93-169<br>A.C. No. 42-01994-03614 |
| v. | : | |
| ENERGY WEST MINING COMPANY, Respondent | : | Cottonwood Mine |

**DECISION AFTER REMAND**

Before: Judge Manning

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act") following a remand from the Commission. 18 FMSHRC 565 (April 1996). In its decision, the Commission affirmed the determination of former Commission Administrative Law Judge John J. Morris that an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") did not abuse his discretion in issuing a failure to abate order of withdrawal under section 104(b) of the Mine Act. The Commission vacated Judge Morris's penalty assessment, however, and remanded the case for reconsideration of that issue. Id. at 571.

The citation involved in this case states that respirable dust samples taken by Energy West Mining Company ("Energy West") showed an average concentration of 2.2 milligrams of respirable dust per cubic meter of air, in violation of 30 C.F.R. § 70.100 (a). The health standard requires that the average concentration be maintained at or below 2.0 milligrams. Energy West conceded that it violated section 70.100(a) as alleged in the citation but disputed that the violation was significant and substantial ("S&S") and challenged the failure to abate order issued by the MSHA inspector.

At the hearing, Judge Morris granted the Secretary's motion to amend the citation to delete the S&S allegation based on evidence that the miners exposed to the respirable dust were wearing airstream helmets. 16 FMSHRC 835, 837 (April 1994). The judge found that these helmets "provid[ed] a virtually dust-free air supply to miners, reducing respirable dust exposure to insignificant levels." Id. at 843. The condition described in the cita-

tion was not abated within the time set in the citation. The inspector determined that an extension of the abatement time was not warranted and he issued a failure to abate order. The judge determined that the inspector did not abuse his discretion in issuing the failure to abate order. Id. at 844. Judge Morris assessed a civil penalty of $3,000 based on his finding that the gravity of the violation was high, given the risk of pneumoconiosis and that such violations are generally considered to be S&S. Id. at 850.

In its decision, the Commission affirmed the judge's decision with respect to the failure to abate order. 18 FMSHRC at 571. The Commission noted that the judge granted the Secretary's motion to delete the S&S allegation because the miners were wearing airstream helmets and were thereby provided with a virtually dust-free air supply. Id. The Commission stated that the judge did not indicate whether he considered this evidence when he determined that the violation was of high gravity or when he assessed the civil penalty. Id. On that basis, the Commission vacated the penalty and remanded the case for consideration of that evidence and the assessment of an appropriate civil penalty.

This case was assigned to me on April 25, 1996. By order dated April 29, I asked the parties to confer for the purpose of reaching agreement on the narrow issue remanded by the Commission. In response, the parties entered into the following stipulation:

> 1. The gravity of the violation was low because the miners affected were wearing personal protective equipment which provided "a virtually dust-free air supply to miners, reducing respirable dust exposure to insignificant levels." For this reason, the Secretary did not consider the violation significant and substantial.
>
> 2. Since the gravity of the violation was low, and the findings in the Judge's decision issued in April 1994 about the other statutory factors for assessment of the civil penalty for the violation were not at issue before the Commission and are not at issue on remand, an appropriate civil penalty for Citation 3850746 is $850.00.

Joint Stipulation at 2 (citations omitted). The parties stated that they entered into the agreement, in part, to conserve the resources of the Commission and the parties, and they request that I issue a final decision assessing a civil penalty of $850.00 without further proceedings.

Based on my consideration of the decisions of Judge Morris and the Commission, the record in this case, and the parties' joint stipulation, I concluded that the proffered agreement contained in the joint stipulation is appropriate under the criteria set forth in section 110(i) of the Mine Act.

Accordingly, the parties' proposal set forth in their Joint Stipulation is **ACCEPTED**, the citation is **MODIFIED** to show that the gravity of the violation was low, and Energy West Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of $850.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Timothy M. Biddle, Esq., CROWELL & MORING, 1001 Pennsylvania Ave., NW, Washington, DC 20004-2595 (Certified Mail)

RWM

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 3 1996

| | | |
|---|---|---|
| UNITED MINE WORKERS OF AMERICA | : | COMPENSATION PROCEEDING |
| LOCAL 1058, DIST. 31, | : | |
| Complainant | : | Docket No. WEVA 95-262-C |
| v. | : | |
| | : | Humphrey No. 7 Mine |
| CONSOLIDATION COAL COMPANY, | : | |

## FINAL ORDER

Before: Judge Fauver

This proceeding concerns a complaint for compensation pursuant to the first sentence of § 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

A decision on liability was entered on April 3, 1996. Without waiving any right to seek review of that decision, the parties have stipulated the amount of compensation due under the liability decision.

**WHEREFORE IT IS ORDERED THAT:**

1. Within 30 days of this Order, Respondent shall pay to Complainant the amounts of compensation and interest stipulated through May 30, 1996, for the benefit of the miners named in the stipulation, plus interest accruing from May 30, 1996, until the date of payment.

2. This Order and the Decision of April 3, 1996, constitute the judge's final disposition of all issues in this proceeding.

William Fauver
Administrative Law Judge

Distribution:

Judith Rivlin, Esq., United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)

Elizabeth Chamberlin, Esq., Consolidation Coal Company, 1800 Washington Rd., Pittsburgh, PA 15241 (Certified Mail)

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 7 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. CENT 95-265-M<br>A.C. No. 23-02068-05509 |
| v. | : | |
| | : | Journagan Portable #12 MO |
| LEO JOURNAGAN CONSTRUCTION COMPANY, INC., Respondent | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. CENT 96-53-M<br>A.C. No. 23-02068-05510-A |
| v. | : | |
| | : | Journagan Portable #12 MO |
| JAMES M. RAY, Employed by LEO JOURNAGAN CONSTRUCTION COMPANY, INC., Respondent | : | |

## DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Bradley S. Hiles, Esq., Peper, Martin, Jensen, Maichel & Hetlage, St. Louis, Missouri, for Respondents.

Before: Judge Amchan

## Findings of Fact

### Respondents' failure to deenergize the crusher

On March 28, 1995, MSHA representative Michael W. Marler conducted an inspection of Leo Journagan Construction Company's portable crusher No. 12 in southwestern Missouri. While Marler was at the site, rocks became stuck in the crusher. Marler and

Journagan's superintendent, James "Mike" Ray, drove to the top of a hill, just above the crusher (Tr. 247-48)[1]. When the inspector approached the crusher, he observed Journagan employee Steve Catron trying to unjam the rocks so that the crusher could operate again (Tr. 31-32).

Catron was straddling the crusher with his feet resting on metal plates located two inches above the jaws of the crusher. He was wearing a safety belt with a lifeline that was tied to a catwalk railing above him. Catron was using a five to six foot long metal bar to dislodge the rocks in the crusher (Tr. 32-33, 162-66, 187-88, 234, 294). The crusher was approximately six feet four inches in depth (Tr. 294). The jammed rocks extended up two feet from the bottom of the crusher (Tr. 296).

Although the crusher was not on, the electrical power to the crusher was not shut off and locked out. Earlier, when Catron and the crusher operator, Keith Garoutte, began to unjam the crusher they turned off the crusher controls and locked out the power at the generator trailer. However, to determine whether the crusher would work, Garoutte restored power to crusher (Tr. 182-83).

After the power was restored, Catron tried to move the rocks and then moved back from the crusher jaws. Garoutte watched him from a vantage point uphill at the doorway of the shed containing the crusher controls (Tr. 162-66, Exh. R-5). When Catron moved back from the jaws of the crusher, he would detach his safety belt from the catwalk railing and step up on the grizzly,[2] which was located on the opposite side of the crusher jaws from the catwalk. He would then reattach his safety belt to a point above

---

[1] I credit Mr. Ray's testimony that he went to the crusher with the inspector, over Inspector Marler's testimony that Ray was at the crusher when he arrived (Tr. 96). I conclude that Ray would have a better recollection of his activities on the day in question.

[2] The grizzly is a flat metal plate with openings to separate smaller rock from larger rock (Tr. 187, Exh. R-5). The grizzly was about 1-½ feet above the metal plate on which Mr. Catron was standing (Tr. 295).

and behind him. Catron then signaled or told Garoutte to start the crusher (Tr. 192-195, 203, 225, 233-34). Garoutte entered the control shed and turned on the crusher.

Inspector Marler issued Respondent Citation/Order No. 4329462 alleging that the failure to lock out the power to the crusher posed an imminent danger under section 107(a) of the Act, and a "significant and substantial" (S&S) violation of section 104(a) of the Act and 30 C.F.R. §56.12016. This regulation states:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it ... .

A $4,000 civil penalty was proposed by MSHA against Journagan and a $1,500 penalty against Mike Ray, pursuant to section 110(c) of the Act.

Although Ray may not have seen Catron straddling the crusher until Inspector Marler saw Catron, Journagan had tried before to dislodge rocks from the crusher with the machine energized (Tr. 169). Catron had dislodged rocks under these conditions even before Ray became his supervisor (Tr. 170). This was apparently a standard practice of Leo Journagan Construction Company. Ray had seen Catron try to dislodge rocks from the crusher with the machine energized 8 months earlier--in the presence of another MSHA inspector (Tr. 266-68).

Superintendent Ray disagreed with Marler that the failure to deenergize the crusher posed a hazard to Catron or that it violated the standard, because Catron was tied off with a safety belt (Tr. 97-99). However, he immediately went to the generator trailer and deenergized the crusher.

Miners working beneath rocks in the crusher's hopper

After Mr. Ray shut off the power to the crusher, he and Inspector Marler climbed up onto the catwalk just below the crusher. When they reached the catwalk they observed miners

Catron and Garoutte inside the crusher removing rocks from the machine. Above the miners, the crusher's hopper was 3/4 full with slightly more than a truckload of rock sitting at an angle of 35 degrees to the horizontal (Tr. 207-08, 281).[3] The rocks, which extended to within a foot of the miners, ranged in size from dust-like particles to stones two inches in diameter (Tr. 55-56, 195).

There was no physical barrier between the rocks and the crusher. Inspector Marler advised Ray that he considered this situation to pose an imminent danger to Catron and Garoutte due to the likelihood that the rocks would slide into the crusher on top of them (Tr. 63-66). Ray argued that the rock pile in the hopper was stable. However, he immediately complied with the order and welded a piece of steel to the end of the grizzly in order to prevent rocks from sliding into the crusher.

Later Marler committed the imminent danger order to writing as Citation/Order No. 4329463. It alleged a violation of 30 C.F.R. § 56.16002(a). That standard provides:

> Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be-
>
> > (1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials ...

---

[3]I have credited Mr. Ray's estimation of the slope over that of Mr. Catron's 25-26 degrees (Tr. 212). Although Catron was in a better position to observe the slope of the rocks, Mr. Ray appears to have superior ability by virtue of his education and training to estimate the angle at which the rocks lay. Mr. Marler did not measure the slope (Tr. 108).

The quantity of rock in the feeder was estimated by Keith Garoutte to be approximately 25-30 tons (Tr. 340).

The citation was characterized as "S&S" and a $4,500 penalty was proposed against Leo Journagan Construction Company. Additionally, a $1,500 penalty was proposed against Mr. Ray pursuant to section 110(c) of the Act.

Although Ray did not order Catron and Garoutte into the crusher he knew they would climb down into the machine (Tr. 287). It was not uncommon for Journagan employees to remove rocks from a crusher with rocks overhead and it was not the company practice to install a barrier between the miners and the rocks in the hopper (Tr. 345).

Respondent Journagan violated the Act in failing to deenergize the crusher before allowing an employee to work above it.

Respondents' first argument is that section 56.12016 is inapplicable to this case because its employees were not performing "mechanical work" within the meaning of the standard (Tr. 269). It further contends that the standard only applies to situations in which miners are exposed to a hazard of electrocution or electrical shock.

I conclude that the term "mechanical work" must be construed broadly in a manner consistent with the purposes of the statute. Therefore, I find that it includes any work that enables electrically-powered equipment to operate in the manner in which it is intended to operate.

Loosening jammed rocks so that the crusher jaw will move is "mechanical work." To conclude otherwise would suggest that, even if Mr. Catron had not been protected by a safety belt and even if the controls to the crusher been left unprotected, no violation of the regulation would have occurred.

Respondent, relying on the decision in Phelps Dodge Corporation v. FMSHRC, 681 F. 2d 1189 (9th Cir. 1982), argues that section 56.12016 cannot be cited in situations where the only hazard is danger of being injured by moving machinery. This decision was followed by a Commission judge in Arkhola Sand & Gravel, Inc., 17 FMSHRC 593 (ALJ April 1995).

The Ninth Circuit found that § 56.12016 (then numbered §55.12-16) did not address hazards arising from the accidental movement of machinery because it appears in a subpart entitled "Electricity" and because the other regulations in that subpart address only the hazard of electrical shock. I decline to follow Phelps Dodge, a decision to which the Commission has never acceded[4].

The dissenting opinion of Circuit Judge Boochever, 681 F.2d at 1193, is far more compelling. He found that the plain language of the standard was clear and unambiguous and saw no reason to qualify its application on account of the title of the subpart in which the regulation was placed. I also agree with the dissent that the Commission should defer to an agency interpretation of the standard which appears to better effectuate the purposes of the Act, than one limiting its reach to situations in which there is a danger of electrical shock.

The fact that miner Catron was tied off at almost all times when he was above the energized crusher is not relevant to the issue of whether the standard was violated. Section 56.12016 requires that electrically powered equipment be deenergized before mechanical work is done--regardless of what other precautions are taken, to protect employees working on the equipment or to prevent reenergizing of the machinery, Ozark -Mahoning Company, 12 FMSHRC 376, 379 (March 1990). Thus, I find that Leo Journagan violated the cited regulation.

The violation was not significant and substantial

The Commission test for a "S&S" violation, as set forth in Mathies Coal Co., supra, is as follows:

---

[4] In Ozark-Mahoning Company, 12 FMSHRC 376 (March 1990), the Commission affirmed a citation issued under §56.12016 in a situation in which miners were exposed to the danger of moving machinery, rather than electrical shock. In that case, it does not appear that the operator argued that the standard applies only to electrical hazards or made the Commission aware of the Court of Appeals decision in Phelps Dodge.

> 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.

I conclude that there was not a reasonable likelihood that the hazard contributed to by Journagan's violation would result in injury. Miner Catron was tied off to a catwalk railing above him while trying to pry the jammed rocks loose. Moreover, the crusher controls were turned off while he was working. Operator Keith Garoutte was standing at the doorway of the control shed watching Catron. This makes it unlikely that anyone else would activate the crusher while Catron was standing over it.

While tied off, Catron could only fall 1-½ to 2 feet (Tr. 81-82, 190, 254). If Catron fell this distance he could not have gotten caught between the jaws of the crusher, one of which moves and one of which is stationary (Tr. 84). His feet could possibly have brushed the movable jaw (Tr. 190, 254).

Even if the miner's feet touched the moveable jaw, it is unlikely that he would be hurt--even if the jaw moved. The jaw moves much further at the bottom of the crusher than at the top. At the top of the crusher the jaw moves only about an inch (Tr. 254-55). The jaw also takes a few seconds to move once it is activated (Tr. 264).

Catron did unhook his safety belt when he stepped up to the grizzly and it is possible that he could have fallen while switching positions. It is also possible that the crusher could have been activated at such a moment due to misunderstandings with Garoutte or due to an electrical fault. However, I conclude that such possibilities do not make injury reasonably likely.

Superintendent Ray is not subject to civil penalty under section 110(c) of the Act

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety or health standard, any agent of the operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to civil penalty. The Commission has held that a violation under section 110(c) involves aggravated conduct, not ordinary negligence, Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994).

While Mr. Ray clearly had reason to know that his employees would be working on the crusher without it being deenergized, I conclude that his conduct was not aggravated. The procedure employed by miners on the day of the inspection and implicitly condoned by superintendent Ray was Journagan's normal procedure (Tr. 169-170). It was not a practice initiated by Ray (Tr. 170).

More importantly, I find that Ray had a reasonable good faith belief that miners were adequately protected by wearing a safety belt that was tied off above them. Mr. Catron was tied off for all but a very brief period, during which it was very unlikely he would fall and that the jaw of the crusher would move. I therefore vacate the penalty proposed under section 110(c) with regards to Citation No. 4329462.

A $500 Civil Penalty is Assessed against Leo Journagan Construction Company for its violation of §56.12016

Section 110(i) requires consideration of the following six criteria in assessing a civil penalty under the Act:

Size of the operator: Leo Journagan is a relatively small mine operator. Other things being equal, this would support a smaller penalty than for a large operator.

Effect on the operator's ability to stay in business: The parties stipulated that the proposed penalties would not compromise Journagan's ability to continue in business (Tr. 11).

Good Faith demonstrated in rapidly abating the citation: The civil penalty should account for the fact that superintendent Ray immediately deenergized the crusher when informed of the violation by inspector Marler.

Previous History of Violations: The Secretary introduced, as it does in every civil penalty case, a computer printout purporting to show the number of penalties assessed against Respondent and those paid (Exh. P-1). This document indicates that between March 28, 1993 and March 27, 1995, Journagan paid $4,124.00 in civil penalties for 23 violations. One of these penalties was assessed for a citation which alleged a violation of section 56.12016 for failure to lock out a conveyor belt (Tr. 171-72, 302).

Exhibit P-1 is of no value to me in assessing a civil penalty. I do not know whether Respondent has more violations than one would reasonably expect for an operator its size, less violations or about the same number. There has been no suggestion made as to how the information in this summary is relevant to assessing a penalty in the instant case.

However, I conclude the prior violation for failure to lock out the conveyor is relevant. A somewhat higher penalty should be assessed on account of this citation.

Negligence: Respondent was negligent in allowing miners to work over the crusher when it was not deenergized and locked out. However, its negligence was "moderate" given the effective precautions it did take to prevent injury. Furthermore, Respondent was apparently under the impression from a prior MSHA inspection that its' procedure complied with the Act (Tr. 201-02, 266-68).

Gravity: Given the fact that Mr. Catron was tied off, except when moving from the crusher to the grizzly, injury was very unlikely to occur. However, it was possible and, if it occurred, an injury was likely to be very serious, or fatal. First, there was a chance that Mr. Catron could fall or enter the crusher and that Mr. Garoutte could activate it due to miscommunication. The facts of my recent decision in Stillwater Mining Company, 18 FMSHRC 34, 35-36 (ALJ 1996) present just such a situation. In Stillwater, a miner misunderstood the instructions of his partner and closed a chute gate on him, fracturing his pelvis.

Another case indicating the seriousness of the hazard presented by the instant violation is Price Construction, Inc., 7 FMSHRC 661 (ALJ Melick 1985). There, the failure to lock-out the power to the rollers of a crushing machine, and miscommunication between miners resulted in the traumatic amputation of the legs of an experienced miner.

The Secretary has also alleged that the violation created a danger that Mr. Catron would be injured by the bar he was using to pry the rocks in the crusher. Inspector Marler contends that if the crusher started, the bar could snap or that Catron could have fallen on the bar and been impaled. I am not persuaded that such a hazard existed.

Assessment: Having considering the penalty criteria in section 110(i), I assess a $500 civil penalty for this violation.

The Secretary has not established a violation of section 56.16002(a)

In order to establish a violation of § 56.16002(a) the Secretary must establish that miners Catron and Garoutte were "exposed to entrapment by the caving or sliding of materials ... ." I conclude that the Secretary has failed to do so. The fact that the miners were working downhill from a hopper filled with 25-30 tons of rock does not establish that the material might cave-in or slide on top of them.

Materials tend to move until they obtain a slope at which they will stop moving, sometimes referred to as the "angle of repose." The Secretary has not established that the rocks in the hopper had not reached the angle of repose. In fact, Respondent's evidence tends to prove that the rocks would not slide.

Inspector Marler did not measure the angle at which the rocks lay in the hopper (Tr. 108). I have credited Mr. Ray's testimony that the rocks were at an angle of about 35 degrees from the horizontal, which is generally regarded a relatively

flat slope[5]. I also credit Ray's testimony that prior to the time that the miners entered the crusher, the action of the feeder to the hopper had flattened the angle to one at which the rocks would not move further (Tr. 273-281).

I further note that 35 degrees is one degree steeper than the slope required by OSHA to protect workers in excavations dug in the least stable type of soil, 29 C.F.R. Section 1926.652(b)(1), and Table B-1. This indicates that a slope of 35 degrees would generally not expose employees to entrapment by caving or sliding.

The rocks in the hopper extended to within a foot or two of the crusher (Tr. 61, 195, 220). When removing rocks from the crusher, Catron and Garoutte threw the smaller stones on the pile in the hopper and stacked the larger rocks (Tr. 340-41). However, I find the record insufficient to establish that whatever alterations this made in the slope of the rocks created a hazard to the miners.

It was not Respondent's general practice to install a barrier between rocks in a hopper and miners working to unjam a crusher (Tr. 345). It is unclear from this record what the general industry practice is with regard to barricading rocks in a hopper which has already flattened the slope of the rocks.

If the record established that industry practice was to barricade the rocks in the hopper in a situation like the instant one, I would be likely to find that Respondent violated section 56.16002(a). Such evidence would indicate that a reasonably prudent mine operator would recognize a danger from sliding or caving materials, see Ideal Cement Co., 12 FMSHRC 2409 (November 1990). However, on the instant record, I am unable to draw such an inference and conclude that a violation of this standard has not been established.

---

[5] Although photographic exhibits P-2 and P-3 indicate that the rocks in the hopper were at a fairly steep angle, it has not been established that these photos accurately depict the slope of the rocks (Tr. 108, 229-231, 283).

## ORDER

Citation No. 4329462 is **AFFIRMED** as a non-S&S violation of the Act. A $500 civil penalty is assessed against Leo Journagan Construction Company for this violation.

The penalty proposed for James Michael Ray under section 110(c) of the Act on account of Citation No. 4329462 is **VACATED**.

Citation No. 4329463 and the penalties proposed therefor against Leo Journagan Construction Company and against James Michael Ray are **VACATED.**

Leo Journagan Construction Company shall pay the assessed $500 civil penalty within thirty days of this decision.

Arthur J. Amchan
Administrative Law Judge

Distribution:

Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Bradley S. Hiles, Esq., Peper, Martin, Jensen, Maichel and Hetlage, 720 Olive St., 24th Floor, St. Louis, MO 63101 (Certified Mail)

/lh

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
June 10, 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEST 95-512-M<br>A. C. No. 10-01900-05505 |
| v. | : | |
| | : | Plant No. 4 |
| DE ATLEY COMPANY, INCORPORATED, Respondent | : | |

ORDER VACATING DEFAULT
DECISION APPROVING SETTLEMENT
ORDER OF DISMISSAL

Before: Judge Merlin

This case is before me pursuant to Commission order dated April 17, 1996.

On March 21, 1996, the operator filed a letter requesting relief from an order of default which was issued on February 7, 1996. The basis for the operator's request is that a settlement was reached prior to the order of default, but that the person responsible for the case resigned and his replacement was unaware of the settlement motion. As a result, the operator did not sign the settlement motion until after the default was issued.

On April 1, 1996, the Solicitor filed a response to the operator's request for relief, recommending that the matter be remanded to the undersigned and stating that the Secretary opposed the reopening of the final order.

On April 29, 1996, I issued an order directing the Solicitor to either file the agreed upon settlement motion or submit a brief supporting his opposition to reopening. In that order I found that the operator's statements constituted grounds for relief from default. See, R B Coal Company, 17 FMSHRC 2153 (November 1995).

On May 16, 1996, the parties filed a joint motion to approve settlement for the one violation in this case. A reduction in the penalty from $1,019 to $570 is proposed. I have reviewed the documentation and representations in this case and conclude that

the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

In light of the foregoing, it is ORDERED that the default dated February 7, 1996, be and is hereby VACATED.

It is further ORDERED that the motion for approval of settlement is GRANTED, and the operator having paid, this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Matthew L. Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101

Mr. Max S. Jensen, Office Engineer, DeAtley Company, Inc., 3665 Snake River Avenue, P. O. Box 648, Lewiston, ID 83501

/gl

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 14 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 95-459 |
| Petitioner | : | A.C. No. 01-01401-04102 |
| v. | : | |
| | : | No. 7 Mine |
| JIM WALTER RESOURCES, INC., | : | |
| Respondent | : | |

## DECISION

Appearances: William Lawson, Esq., U.S. Department of Labor, Office of the Solicitor, Birmingham, Alabama for Petitioner;
R. Stanley Morrow, Esq., Jim Walter Resources, Inc., for Respondent.

Before: Judge Fauver

This is a civil penalty case under § 105(d) of the Federal Mine Safety and health Act of 1977, 30 U.S.C. § 801, et seq.

The central issues are the validity of a § 104(d)(2) order and the appropriate civil penalty if a violation is found. The order alleges accumulations of combustible materials in a 3,500 foot belt entry and charges a significant and substantial violation of 30 C.F.R. § 75.400 and an unwarrantable failure to comply with the standard.

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

## FINDINGS OF FACT

1. Respondent operates No. 7 mine, which produces coal for

sales in or substantially affecting interstate commerce.

2. On June 8, 1995, MSHA Inspector John Terpo inspected the West A belt line of the No. 7 mine. Inspector Terpo observed substantial accumulations of loose coal, coal dust and float coal dust. At least 32 rollers were turning in combustible accumulations, and 12 of them were totally submerged in coal dust. Three other rollers were locked up and "extremely hot to the touch." Tr. 96-99. At the section's 7th discharge point, the accumulations averaged 2 feet deep for about 300 feet. The bottom belt was running on top of the accumulations at this location. Two bottom rollers were missing between the No. 26 and No. 28 brattices, allowing the belt to run on the belt's metal structure, which was "extremely hot with the [accumulations] present." Tr. 96-99.

3. Inspector Terpo observed that no one was doing cleaning work on the belt line and the book entries for the pre-shift examination stated that the belt line was clear for work. The two previous pre-shift entries indicated that the area needed cleaning and rock-dusting.

4. Inspector Terpo issued four citations for accumulations of combustible material on the two section belts that dumped onto the West A belt, for failing to maintain the West A belt line in safe operating condition, and for failing to conduct an adequate pre-shift examination. Govt. Exhibits 1, 2, 3, and 6.

5. The four citations are final. In a settlement, the citations in Exhibits 1 and 3 were modified to reflect that "four" persons were affected by the violative conditions.

6. Inspector Terpo also issued Order No. 3194917, under § 104(d)(2) of the Act, charging a violation of 30 C.F.R. § 75.400 for extensive combustible accumulations in the West A belt entry and preventing operation of the West A belt line until the cited violative condition was abated. Respondent assigned about 20 miners to clean up the accumulations. The abatement work was completed in about seven hours and the order was terminated.

## DISCUSSION WITH FURTHER FINDINGS, AND CONCLUSIONS

Respondent called no witnesses, and offered no exhibits.

There is no dispute of the violative accumulations of combustible materials at the cited locations in the West A belt line entry. The case turns on the sufficiency of the government's evidence to prove that the accumulations constituted a "significant and substantial" violation and an "unwarrantable" failure to comply with § 75.400 within the meaning of § 104(d) of the Act.

The safety standard involved, 30 C.F.R. § 75.400, is a reprint of a statutory standard, which provides:

> Coal, dust including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

As the Commission has recognized, this standard was enacted to prevent the well-recognized hazards of accumulations of combustible materials in coal mines:

> ***The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed a fire originating elsewhere in the mine.

Black Diamond Coal Co., 7 FMSHRC 1117, 1120 (1985) (citing Old Ben Coal Co., 1 FMSHRC 1954, 1957 (1979); and Old Ben Coal Co.,, 2 FMSHRC 2806, 2808 (1980)). The hazards associated with mine fires and explosions are well documented and actually precipitated the enactment of the Mine Act. See H.R. Rep. No. 95-312, 95th Cong., 1st Sess. 6 (1977), reprinted in Legislative History at 361362; and S.Rep. No. 95-181, 95th cong., 1st Sess. (1977), reprinted in Legislative History at 592.

A Significant and Substantial Violation

The Commission has held that a "significant and substantial violation," as used § 104(d) of the Act, is a violation that presents a "reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature."

Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984).

Respondent contends that, since there is no evidence of an injury resulting from a belt fire at this mine, the violation was not "significant and substantial." However, the Secretary is not required to prove an actual injury. "Reasonable likelihood" of injury is sufficient, and this is satisfied by the "common sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation to miners who are present." Buck Creek Coal, Inc. v. Secretary of Labor, 52 F.3d 133,135 (7th Cir. 1995). The Secretary is not required to show that a mine fire was probable, but need only show that the violation provided substantial fuel to propagate a mine fire or explosion should one occur and that such propagation would be "reasonably likely" to result in injury. The uncontested evidence shows substantial combustible accumulations that could propagate a mine fire or explosion and cause death or serious injury. In addition, the evidence of ignition sources, such as hot rollers and hot rubbing points against a steel structure, shows that if the violative conditions continued unabated they were reasonably likely to result in a fire and injury. For both reasons, I find that the accumulations constituted a "significant and substantial" violation.

An Unwarrantable Violation

The Commission has held that an "unwarrantable" violation, as used in § 104(d) of the Act, is a violation due to "aggravated conduct constituting more than ordinary negligence." Emery Mining Corp., 9 FMSHRC 1977 (1987). Relevant issues include such factors as "the extent of a violative condition, or the length of time that it existed, whether an operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition." Peabody Coal Company, 14 FMSHRC 1258, 1261 (1992).

Inspector Terpo identified in the order and in his notes the numerous areas in which he observed combustible accumulations along the 3,500 foot belt line. At one location, the accumulations averaged about 2 feet deep for 300 feet, with 32 rollers turning in coal dust and 12 of those rollers being totally submerged in coal dust. The bottom belt was rubbing on

the top of the accumulations and the bottom rollers were running totally submerged in coal dust. The accumulations cited can only be described as extensive, and obvious to anyone concerned with safety.

Inspector Terpo and UMWA Safety Committee Chairman Phylar testified that the accumulations were so extensive that they probably existed for at least several shifts. Respondent offered no evidence disputing their testimony, which is supported by the extent of work needed to abate the violation, i.e., about 20 miners doing clean up work for 7 hours.

The abatement work was prompt, but this must be considered in relation to the withdrawal order, which stopped the belt line until the accumulations were removed. There was no evidence of clean up work at the time the order was issued.

Respondent had received repeated notices that greater efforts were necessary to comply with § 75.400. In numerous contacts with Respondent, MSHA had discussed the continuing problem of its failure to comply with § 75.400. Many of those discussions had occurred in the same quarter in which the subject order was issued. The UMWA, as well, brought the continuing problem of accumulations to management's attention. The repeated prior notices of violations of §75.400 are also shown by Respondent's compliance history, which shows that in the two years preceding the subject order Respondent was issued 291 citations and orders charging violations of § 75.400. As of March 27, 1996, nearly all of the citations and orders had become final (by payment of the penalties or by becoming uncontested, final penalty orders).

The facts fully sustain the inspector's finding of an "unwarrantable failure" to comply with § 75.400.

## Civil Penalty

Section 110(i) of the Act provides the following six criteria for assessing civil penalties:

(1) Operator's history of previous violations

The No. 7 mine has a very poor record of violations of

§75.400. Its two year history prior to the subject order indicates that violations of § 75.400 actually increased. From June 8, 1993, through June 7, 1994, Respondent was issued 123 citations and orders charging violations of § 75.400. The number of charges increased to 168 for the subsequent year. In nearly all of the cases, the charging citations and order have become final.

Respondent's repeated violations of § 75.400 is consistent with its overall compliance history under the Mine Act, which is very poor.

(2) Whether the operator was negligent

Respondent's repeated violations of § 75.400, the numerous complaints and bi-monthly reports made by the UMWA to management regarding the belt lines, the frequent discussions MSHA had with mine management prior to issuing the subject order, and the on-going litigation resulting from violations on the belt lines "should have engendered in the operator a heightened awareness of a continuing accumulation problem." Mid-Continent Resources, Inc., 16 FMSHRC 1226, 1232 (1994). Instead, Respondent showed no improvement.

The accumulations in the instant case were obvious, extensive, and dangerous and no one was working on the violative conditions at the time the inspector examined the area. I find that Respondent's negligence was high, and demonstrates a serious disregard for the safety of its miners.

(3) The gravity of the violation

The seriousness of the violation is underscored by the fact that 32 rollers were turning in coal dust accumulations up to two feet deep. Twelve of the 12 rollers were totally submerged in the accumulations. Three rollers were locked up creating friction sources, and in places the conveyor belt was rubbing against the steel belt structure. The stuck rollers and rubbing points on the structure were "extremely hot" to the touch. I find that the gravity of the violation was high.

## Assessment of a Penalty

Respondent's prior history and the instant violation demonstrate a serious disregard for the safety requirement to prevent combustible accumulations in an underground coal mine. Respondent's repeated violations of § 75.400 indicate that there has been no deterrent effect from prior civil penalties.

Considering Respondent's very poor compliance history, the need for an effective deterrent, and the six statutory criteria as a whole, I find that a civil penalty significantly greater than the $7,000 proposed by the Secretary should be assessed. Accordingly, I find that a civil penalty of $15,000 is appropriate for the violation proved in this case.

## CONCLUSIONS OF LAW

1. Respondent's No. 7 mine is subject to the Act.

2. Respondent violated 30 C.F.R. § 75.400 as charged in Order No. 3194917.

## ORDER

1. Order No. 3194917 is AFFIRMED.

2. Respondent shall pay a civil penalty of $15,000 within 30 days of this Decision.

William Fauver
Administrative Law Judge

Distribution:

William Lawson, Esq., U.S. Department of Labor, Office of the Solicitor, Suite 150, Chambers Building, High Point Office Center, 100 Centerview Drive, Birmingham, AL 35216 (Certified Mail)

R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Mining Division, P.O. Box 830079, Birmingham, AL 35283-0079 (Certified Mail)

nt

# 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 1996

| | | |
|---|---|---|
| LINDA S. SPARKS, | : | DISCRIMINATION PROCEEDING |
| Complainant | : | |
| v. | : | Docket No. LAKE 95-378-D |
| | : | MSHA Case No. VINC CD 95-03 |
| OLD BEN COAL COMPANY, | : | |
| Respondent | : | Central Cleaning Plant Mine |

**DECISION**

Appearances: Linda S. Sparks, Pro se, Steeleville, IL, for the Complainant; Thomas A. Stock, Esq., Crowell & Moring, Washington, D.C., and William A. Miller, Esq., Zeiger Coal Holdling Company, Fairview Heights, IL, for the Respondent.

Before: Judge Weisberger

## Statement of the Case

This case is before me based upon a Complaint filed by Linda S. Sparks, pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (The Act). In the Complaint, Sparks alleges, in essence, that Old Ben Coal Company (Old Ben) unlawfully discriminated against her by placing her in its Chronic and Excessive Absenteeism Program ("C & E program"), in retaliation for her having complained about the condition of steps leading up to the gob scrapper truck that she had operated. Old Ben filed an Answer. Old Ben subsequently moved to amend its Answer, and the motion was granted at the hearing held on March 12, 1996.[1]

---

[1]Old Ben also filed a motion for an order compelling Sparks to fully comply with a previously issued pre-hearing order. At the hearing, Old Ben was allowed to interview Sparks' witnesses' whose

## Findings of Fact and Discussion

### I. Analysis

The principles governing analysis of a discrimination case under the Mine Act are well established. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (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. Pasula, 2 FMSHRC at 2799-2800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corporation, v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

#### A. Protected Activities

Old Ben operates a central cleaning plant located in Randolf County Illinois, wherein coal from underground mines is cleaned and processed. Sparks started to work at this plant on May 22, 1977. Subsequently, on December 27, 1993, she was evaluated by Robert Cash, the general surface manager, for a position as an operator of a gob srapper truck ("gob truck"). Sparks, whose height is only about five feet, had difficulty negotiating the step to access the cab of the gob truck. The step consisted of a metal bar suspended by a chain from the truck. According to

---

identity had not previously been divulged by Sparks. Accordingly, the motion to comply is moot, and is denied.

Old Ben also had filed a motion in limine. At the hearing, Old Ben's motion in limine was withdrawn.

Sparks, the step was "a good two and a half, three, four feet" below the platform of the cab. (Tr. 105). Sparks complained to Cash, and on subsequent occasions, about her difficulty getting in and out of the cab and asked that an additional step be provided. Sparks indicated that Cash responded by telling her that there was no reason why she could not do the job, and she became an operator of the gob truck. Sparks continued to complain about the steps to Cash, and to an MSHA inspector, Gene Jewell who worked in the Sparta, Illinois, MSHA office. Spark testified that subsequent to December 27, she had to take several days off from work because of the difficulty getting up and down the cab of the truck.

Sparks indicated that in the period between 1993 and 1995, she went to the MSHA office in Sparta to make various safety complaints. Among the safety complaints she made to MSHA were the following:

> (1) In 1994, Sparks' shoes and clothes, which had been left on the site, became soaked on the 2nd shift when a fire in the area was extinguished with water. When Sparks reported for work on the 3rd shift, she was provided with replacement work shoes that were too large and she was unable to work in them;
>
> (2) The lack of an adequate berm on the gob hill; [2]
>
> (3) the lack of a lock inside the women's shower which had resulted in a construction worker entering the women's shower while Sparks was showering[3]; and
>
> (4) that a boss had threatened her life.

---

[2]According to Sparks she also had communicated this concern to her supervisor, Larry Seacrest, at a safety meeting at the end of February 1995.

[3]According to Sparks, when she reported this incident to Cash, he laughed, and told her that she should have chased the intruder out with a broom.

I find that all the above complaints constituted protected activities.

On January 5, 1995, while descending from the cab of the gob truck, Sparks fell and injured her right breast and her left wrist. She described these injuries as being very painful. She subsequently underwent four surgeries, and was told by her treating physician not to work. Sparks was off from work for 28 days. I find that all these actions were within the scope of protected activities.

B. Adverse Action and Motiviation.

On or about February 10, 1995, Old Ben notified Sparks that she was being placed in step 1 of the C & E program. The notice advised her that failure to maintain an absentee rate below 9 percent for the next 12 months may result in her being moved to the next step of the C & E program i.e., a one day suspension without pay, and that continued cronic and excessive absentism may result in suspension with intend to discharge. Since placement in the C & E program could result in loss and pay, I find that placement in this program constituted an adverse action. It must next be determined whether there was any nexus between the engagement of Sparks in protected activity, and her being placed in the C & E program.

According to Bill Patterson, who was the general manager of operations at the central cleaning plant in the period at issue, the C & E program was instituted about 10 years ago. According to the program, if the rate of an employee's noncon- tractual absence[4] exceeds 9 percent, and there have been at least two occurrences during the previous six months, then an employee is to be placed in the program and given a written warning. The C & E program further provides as follows: "If an employee works one year from the date of his or her last step with an absentee rate below 9 percent, this employee will be removed from the program." (Exhibit R-3, par. 8).

---

[4]In essence, non-contractual absence is defined in the C & E program as absences due to, inter alia, injuries, but that contractual vacation, and personal and sick leave are excluded.

From December 16, 1993 thru December 29, 1994, Sparks did not have any absences from work as defined in the C & E program. On December 30, 1994, Sparks was absent, as defined in the C & E program, when she attended the funeral of a fellow miner. In addition, commencing January 5, 1995, she was absent, as defined in the C & E program, for 28 days. As defined in the C & E Program, this constituted an absentee rate of 12.75%.

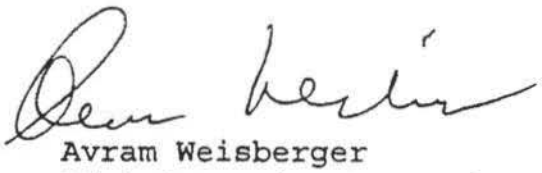
In essence, Sparks alleges that her absence subsequent to January 5, 1995, was not her fault, as it was caused by her injury, which was in turn was caused by an unsafe step leading up to the gob truck. Patterson, who was responsible for all actions taken against emplyees under the C & E program, and Cash, who administered the program relative to Sparks, indicated that her placement in the program was automatic, and would have been taken regardless of her safety complaints.

It is not for this forum to decide the propriety or legality of the C & E program, nor whether it constituted sound management. Nor is this the proper forum to decide whether there were extenuating circumstances which, based upon principles of fairness, should have excluded Sparks from being placed in the C & E program.

There is no evidence that Sparks received any disparate treatment in being placed in the C & E program based upon her protected activities. There is no evidence that Sparks had been singled out, or that other employees with similar absentee rates were excluded from the program. I find that Sparks had not established that her placement in the C & E program was not based upon Old Ben's application of the C & E program criteria to her absentee rate, but rather was motiviated, in any part, by her protected activities. I find that Sparks has not established any causal nexus between her protected activities, and the action taken by Old Ben. For these reasons, I find that Sparks has failed to establish that she was discriminated against in violation of Section 105(c) of the Act.

II. **ORDER**

It is **ORDERED** that the Complaint be **DISMISSED**, and that this case be **DISMISSED**.



Avram Weisberger
Administrative Law Judge

Distribution:

Linda S. Sparks, 607 West Chardon, Steeleville, IL 62288 (Certified Mail)

Thomas A. Stock, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2595 (Certified Mail)

William A. Miller, Esq., Zeigler Coal Holding Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

/ml

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

JUN 17 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEST 94-661-M<br>A.C. No. 48-01148-05512 |
| v. | : | Irigaray/Christensen Project |
| COGEMA MINING, INC., (COMIN) (Formerly TOTAL MINERALS CORPORATION), Respondent | : | |

**SUMMARY DECISION**

**Before: Judge Cetti**

On September 20, 1993, Jack Miller, an employee of an independent roofing contractor was fatally injured when he inadvertently walked backwards and fell off the edge of a 19-foot high roof to the ground below. At the time of the accident Mr. Miller was applying water-proof roofing material (top coat) with a roller on Respondent's administration/office building located on Respondent's surface mine premises. The building was little more than a quarter of a mile from that area of the mine site where well holes had been drilled into a vacuum bearing zone and water and oxygen injected to mobilize the uranium deposit on site.

I

MSHA investigated the accident and (in addition to citing the victim's employer, the independent roofing contractor) issued a citation charging Respondent, the mine operator, with the failure to provide Miller with the hazard training required by 30 C.F.R. § 48.31. The citation describes the violation as follows:

> The hazard instruction given to employees of Dave Loden Construction, a contractor hired to apply waterproofing materials to the roof of the administration building, did not contain explicit information concerning or regarding safety hazards which may be encountered while working on the roof. Specific regulations requiring the use of a safety belt or harness and life line while working in an area where a danger of falling exists was not discussed with the contractor. A contractor employee suffered severe injuries

when he fell from the roof of the administration building on 9/20/93.

The cited standard, 30 C.F.R. § 48.31 in pertinent part reads as follows:

> (a) Operators shall provide to those miners, as defined in § 48.22(a)(2)(Definition of miner) of this subpart B, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners:
>
> (1) Hazard recognition and avoidance; ... .

The referenced § 48.22(a)(2) defines "miner" for purposes of the cited standard § 48.31, as follows:

> (2) Miner means, for purposes of § 48.31 (Hazard training) of this subpart B, any person working in a surface mine or surface areas of an underground mine. This definition includes any delivery, office, or scientific worker, or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine. (Emphasis added).

**II**

The primary issues in this case is whether or not the independent contractor's employees applying water-proofing to the roof of the mine's administration building were "occasional, short-term maintenance or service workers contracted by the operator." For the reasons that will be discussed below, I find that they were miners for purposes of § 48.31 (Hazard training). Said employees come within the meaning of the definition of miners set forth in subsection 48.22(a)(2). It is undisputed that hazard training instructions given by COMIN to the Contractor's roofers did not discuss or specify the use of safety belts and lines when working near the edge of the relatively flat 5,000 square foot roof [1] where there existed the danger of falling.

**III**

---

[1] The roof of the administration/office building consisted of 5,000 square feet of corrugated metal with a five degree slope to allow drainage of water. (Joint Ex. B).

## III

The parties have filed cross motions for summary decision and filed joint stipulations of fact. Under stipulation No. 14 the parties incorporate by reference certain portions of MSHA's Accident Investigation Report prepared by Mine Safety and Health Inspectors Roger G. Nowell and Lloyd Ferran. The stipulated factual portions of that accident report, Ex. B, reads as follows:

GENERAL INFORMATION

At approximately 1635 hours on Sunday, September 20, 1993, Jack Miller, age 54, SSN 4317 (victim), was injured when he inadvertently walked backward off the edge of the administration/office building roof while applying roofing material (topcoat) with a roller. Miller fell approximately 5.50 m (19 ft) to the ground below and sustained a skull fracture along with several broken bones. He later died on October 4, 1993, while undergoing treatment at the Casper Wyoming Medical Center.

The Irigaray/Christensen Project, owned and operated by Total Minerals Corporation, was located 52 miles southeast of Buffalo, Johnson County, Wyoming. Two individual well fields had been identified and developed with accompanying mill processing plants. Well holes have been drilled into the uranium bearing zone and water and oxygen injected to mobilize the uranium deposit in site. The solution is then pumped to the processing facility and through an ion exchange system. The spent fluid was then passed through sand filters and recycled back into the injection holes. The resulting yellow-cake product was trucked out of state to enrichment facilities.

Operating officials were:

Dave Loden Construction

Dave Loden, Owner
Bill Edwards, Project Superintendent

Total Minerals Corporation

Charles J. Foldenauer, Manager of Wyoming Operations
William Chapman, Radiation Safety Officer

Total employment was 35 employees, working two, twelve hour shifts, seven days a week.

C.F.R. 30, Part 48 training had been fulfilled by the company under a training plan approved October 7, 1991, with subsequent updates and attachment letters to change key personnel. Hazard training under part 48.31, had been given to the contractor's employees.

The victim was working as a construction roofing laborer for Dave Loden Construction, a contractor hired by Total Minerals Corporation, to weatherproof the roof of the administration/ office building.

The last regular inspection of this operation was conducted on May 25, 1993.

On September 20, 1993, at 1710 hours, William Chapman, Radiation Safety Officer, Irigaray/Christensen Project, notified the MSHA, Rapid City, South Dakota Field Office, via telephone, that a non-fatal fall of person accident had occurred to a contractor hired to weatherproof the administration/office building roof at the Irigaray Mine. The call was recorded on the answering machine due to the time of day.

An investigation was initiated on September 22, 1993, by the Rapid City, South Dakota Field Office.

## PHYSICAL FACTORS INVOLVED

The administration/office building was constructed primarily of metal, including the roof area of approximately 5000 square feet. The corrugated roof section was provided with a five degree slope to allow water drainage. The roof where the victim fell was located over the laboratory. This roof adjoined the administration/office building's roof at the southeast corner, creating a dog leg or two areas of roof at right angles. The roof edge was 6 m (19 ft) above the ground. Only materials necessary to weatherproof the roof were present on the roof. Weather was not considered to be a factor in the accident. September 20, 1993, was a sunny day and approximately 72 degrees and calm.

## DESCRIPTION OF ACCIDENT

Weatherproofing work was started on Sunday, September 19, 1993. Bill Edwards, Project Superintendent and William Jennings, Roofer, were getting the roofing materials and rollers on the roof and taping seams of corrugated roof steel.

Jack Miller, age 54, SSN 4317, (victim), and Martin Edwards, both laborers, reported at the mine office on September 20, 1993, at 0858 hours, read and signed the company hazard training form and climbed to the roof of the administration/office building. Bill Edwards, Project Superintendent, assigned the men to continue with the taping and application of topcoat, a weatherproofing sealant material.

This work progressed normally throughout the day. At approximately 1635 hours, Miller, who was using his personal roller equipped with an aluminum 1.83 m (6 ft) handle, was

applying topcoat while walking backward toward the edge of the roof. Miller was talking to Edwards at this time and was giving advice on how to apply the material without missing any spots. When Miller stopped talking, Edwards looked up and saw Miller trying to regain his balance at the roof edge. Miller then fell to the ground.

The other employees were told of Miller's fall and all proceeded to the ground to render assistance.

Bill Edwards went into the administration/office building and told Bill Chapman, Radiation Safety Officer for Total Minerals Corporation of the accident. Chapman immediately dialed 911 and notified the Wyoming Medical Center in Casper, Wyoming, who dispatched a lifeflight helicopter.

First aid was rendered to Miller, who remained coherent. Miller was treated for possible shock and was constantly talked to until the arrival of lifeflight at approximately 1720 hours.

Miller's injuries included a skull fracture, broken and dislocated left knee cap, broken left leg, broken right shoulder, broken nose and jaw bone and fractured left wrist along with numerous scrapes and bruises.

An interview with Miller at the hospital, confirmed the statements made by his fellow workers. Miller had looked over his right shoulder to ascertain how far he was from the roof edge while talking to Martin Edwards and didn't realize he was on the adjoining section of roof approaching the edge. Miller stated it was a critical misjudgment on his part and the first accident he had in 30 plus years of roofing experience.

Miller, victim, succumbed to his injuries while undergoing treatment at the Casper Wyoming Medical Center on October 4, 1993.

## IV

In addition to the above stipulated factual information, the parties have filed the following stipulations:

## PARTIES' JOINT STIPULATION OF FACTS

The Secretary of Labor and the Respondent, by their undersigned counsel, stipulate and agree, as follows:

1. On September 23, 1993, the Mine Safety and Health Administration (hereinafter "MSHA") issued Citation No. 4337819 to Total Minerals Corporation (hereinafter "TMC") at the Irigaray/Christensen Project Mine for an alleged violation of 30 C.F.R. § 48.31 (Hazard Training). TMC has since changed its

corporate name to COGEMA Mining, Inc., (hereinafter, "COMIN"). Said citation has been timely contested by the Respondent.

2. At the time of the issuance of Citation No. 4337819, COMIN (then named TMC) was the operator of the Irigaray/ Christensen Project Mine, MSHA I.D. No. 48-01148.

3. Currently, COMIN, is the operator of the Irigaray/ Christensen Project Mine, MSHA I.D. No. 48-01148.

4. If, by hearing or on appeal, the Federal Mine Safety and Health Review Commission and/or any other federal court finds that a violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801, et seq. ("the Act") occurred with regard to Citation No. 4337819, COMIN agrees to abide by the court's ruling, subject to any appeal or assertion of other legal rights.

5. At the time of the alleged violation, TMC was engaged in the production of uranium in the United States by in-situ leaching, and its production operations affect interstate commerce.

6. At the time of the alleged violation, TMC was subject to the jurisdiction of the Act.

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

8. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness of any statements asserted therein. The citation is attached as Exhibit A.

9. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic.

10. The proposed penalty of $5,000.00 will not affect Respondent's ability to continue in business.

11. Citation No. 4337819 was abated by TMC by holding a company/contractor safety meeting on September 23, 1993, during which the job was analyzed and pertinent safety regulations applicable to the job were discussed. The operator demonstrated good faith in abating the alleged violation.

12. TMC was a small mine operator, with 115,134 hours of production in 1993.

13. Citation No. 4337819 states the following as the reason for the citation:

The hazard instruction given to employees of Dave Loden Construction, a contractor hired to apply waterproofing materials to the roof of the administration building, did not contain explicit information concerning or regarding safety hazards which may be encountered while working on the roof. Specific regulations requiring the use of a safety belt or harness and life-line while working in an area where a danger of falling exists was not discussed with the contractor. A contractor employee suffered severe injuries when he fell from the roof of the administration building on 9/20/93.

14. Roger G. Nowell, Mine Safety and Health Inspector, and Lloyd Ferran, Mine Safety and Health Inspector, prepared an Accident Investigation Report, released January 11, 1994. The parties hereby stipulate and adopt the facts and information contained only under the following headings of said report: General Information, Physical Factors Involved, and Description of the Accident. The information and allegations contained under the headings Conclusion, Violations, and Recommendations are not adopted as fact by the parties. The specific portions adopted by the parties are attached hereto as Exhibit B, which is incorporated herein by reference.

15. The office/administration building where Loden Construction was performing its roofing duties, and where the accident occurred, is located more than a quarter-mile from the mining site/injection wells. See Irigaray Project General Location Map, attached hereto as Exhibit C, and incorporated herein by reference.

16. Exhibit D, attached hereto and incorporated herein by reference, is the MSHA-approved hazard training form read and signed by Jack Miller, and the other members of the Loden Construction crew, on September 20, 1993, prior to beginning work on the roof of the mine administration/office building.

17. Other than the MSHA-approved hazard training described in paragraph 16, no hazard training regarding the inherent dangers of roofing was provided to Jack Miller by TMC in regards to Miller's work on the mine administration/office roof.

18. MSHA issued Citation No. 4337819 to Dave Loden Construction for an alleged violation of 30 C.F.R. § 56.15005 (safety belts and lines). Said citation was uncontested and the fine has been paid.

Exhibit C, incorporated by reference in Joint Stipulation No. 15 is the Irigaray Project General Location Map.

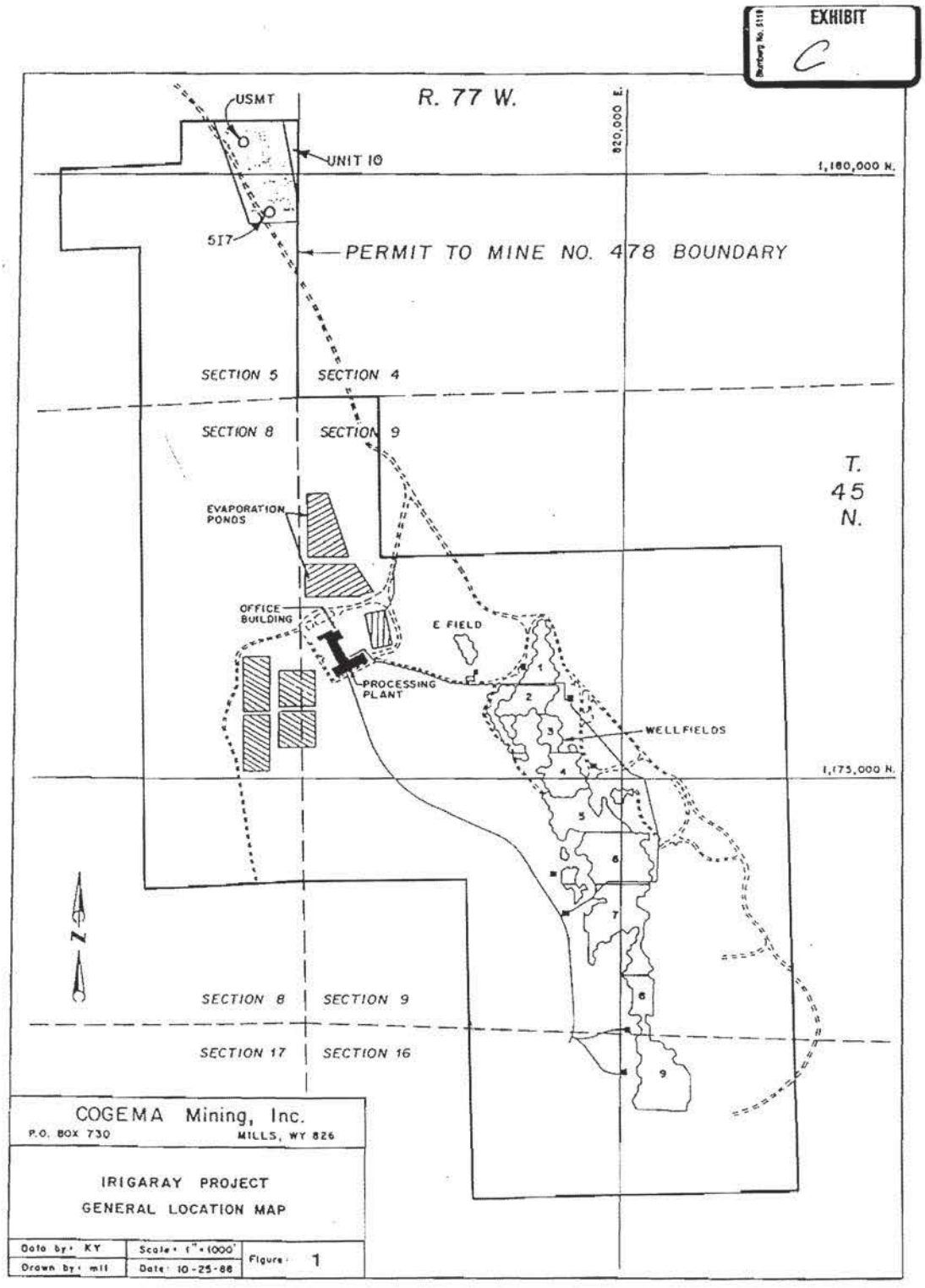


Exhibit D, incorporated by reference in stipulation No. 16 is the MSHA approved hazard training form read and signed by Jack Miller and the other roofing contractor employees. It reads as follows:

TOTAL MINERALS CORPORATION

HAZARD TRAINING - VALID FOR ONE YEAR

Pursuant to § 48.31 of 30 C.F.R. Parts 48, you must be given Hazard Training at least once every 12 months, before entering or working on this property. The training provided herein is intended to inform you of the potential hazards that may exist on this property. Failure to follow these instructions may result in forfeiture of entrance privileges.

1. Hazard Recognition and Avoidance

A. If you are a visitor, you enter at your own risk and must report to the posted office area.

B. If you are a visitor you must be accompanied by a Total Minerals employee while on the mine site.

C. If you are a contractor working on the property, you must report to the Total Minerals Supervisor in charge, before proceeding.

2. Emergency and Evacuation Procedures

A. If there is a fire, exit the area by the nearest door.

B. If a supervisor or other site personnel requests you use the telephone, it can be found in the main office area. Use the posted emergency phone numbers as directed.

C. If an accident occurs near you, give first aid and call for the supervisor responsible for your clearance and have him instruct you on the emergency procedures to be used.

3. Radiation Hazards

Designated restricted areas exist in the plant and wellfield buildings, which are controlled for the purpose of protection of individuals from exposure to radiation and radioactive materials. Low level radiation may exist in these areas. The following rules apply to all restricted areas:

A. No smoking, eating or drinking.

B. Avoid handling of yellowcake, resin or the interiors of pipes and tanks.

C. All individuals must survey themselves at one of the monitoring stations and not exceed the posted limit, before they can leave. Instruction will be provided by the mine site personnel you are accompanied by.

4. Health and Safety Standards, Safety Rules and Safe Work Procedures.

A. The following protective equipment will be worn at all times except when in the office areas: Hard hat, hard toed shoes, safety glasses, and where needed, ear protection.

B. Never look directly at electric arc or gas welding operations without the proper personal protective equipment.

C. Obey all signs and postings.

D. Do not walk under suspended loads.

E. Stay clear of operating equipment.

F. Do not get on or off moving equipment.

5. Respirator Devices

A. It is very unlikely that as a visitor or contractor you will be asked to use a respirator. In the event that a request is made, follow the instructions of the mine site personnel.

6. Understanding Procedures

A. "I have read and understand the above hazard training procedures and will comply with these procedures while on the mine site property."

9-20-23
Date

/s/ Jack Miller
Signature of Visitor

Loden Const
Company Represented

**VII**

**DISCUSSION**

Respondent's assertion that the independent contractor's employees working on the roof of the office/administration

building at the mine site were not miners for purposes of § 48.31 because they were not working "in" a surface mine is rejected.

It is stipulated that the Irigaray Project is a surface mine engaging in the production of uranium. (Stipulation No. 5 and Ex. B). Based on the mine map, the office/administration building is clearly located within the mine's boundaries. (Ex. C). The map shows the office/administration building is located between the mine processing plant and the evaporation ponds. The building is located a little more than a quarter-mile from the injection wells, the extraction area. (Stipulation No. 15 and Ex. C). With the office/administration building location between the evaporation ponds and the processing plant, it is clearly located on mine property, near mining activities.

As defined in section 3(h)(1) of the Federal Mine Safety and Health Act of 1977 (Act) 30 U.S.C. § 802(h)(1) a mine includes not only an area of land from which minerals are extracted but includes among other things appurtenant structures and thus, in this case, the surface mine includes the administration building located about a quarter of a mile from the area where the uranium was being extracted from the earth. Based on the record before me, I find the contractor's employees working on the roof of the office/administration building were working in a surface mine. They were working in the surface mine known as the Irigaray/ Christensen Project Mine, MSHA I.D. No. 48-01148. Thus they were miners within the meaning of subsection 48.22(a). The contractor's employees were "occasional short-term maintenance" workers within the meaning of that subsection. Consequently, the operator of the mine was in violation of 30 C.F.R. § 48.31 as it is clear the hazard training instructions given by the mine operator were inadequate because it did not specify the use of safety belts and lines when working near the edge of the roof where there existed the danger of falling.

**SIGNIFICANT AND SUBSTANTIAL ISSUE**

There still remains the question of whether the violation was significant and substantial (S&S).

The S&S terminology is taken from section 104(d)(1) of the Act and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Div., Nat'l Gypsum Co., 3 FMSHRC 822, 825-26 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the

> Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted). See also Buck Creek Coal, Inc. v. FMSHRC, 52 F.3d 133, 135 (7th Cir. 1995); Austin Power, Inc. v. Secretary of Labor, 861 F2d 99, 103 (5th Cir. 1988) (approving Mathies criteria).

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission emphasized that in determining whether a violation is S&S, it is the contribution of the violation of the standard to the cause and effect of a hazard that must be significant and substantial. The Commission stated:

> We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984). (Emphasis in the original).

See also U.S. Steel Mining Co., Inc., 6 FMSHRC 1866 at 1868 (1985) when the Commission again states:

> In our decisions we have emphasized that, in line with the language of Section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. (Emphasis in original).

The Commission has consistently held that in cases decided under National Gypsum and Mathies, and U.S. Steel I, S&S determinations have been based upon the particular facts surrounding the violation in issue, E.g., Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988). In reviewing the particular facts surrounding this case it is noteworthy that the mine operator was dealing with experienced professional roofers. The victim, Mr. Miller, age 54, had more than 30 years of roofing experience without an accident. The parties stipulated that an interview with Miller at the hospital, confirmed the statements made by his fellow workers. Miller had looked over his right shoulder to ascertain how far he was from the roof edge while

talking to Martin Edwards and didn't realize he was on the adjoining section of roof approaching the edge. Miller stated it was a critical misjudgment on his part and the first accident he had in 30 plus years of roofing experience.

Upon review of the record and the stipulations in this case, I conclude that under the particular facts of this case the contribution of the mine operators violation of § 48.73 to the cause and effect of the hazard of an experienced roofer falling from the relatively flat roof is speculative and the evidence does not persuasively establish that the contribution was significant and substantial. The Petitioner has the burden of proof and a fair evaluation of the record leads me to conclude the preponderance of the evidence in this case fails to establish that the contribution of the mine operator's violation of § 48.31 to the cause and effect of the hazard of falling off the roof under the facts of this case was significant and substantial contribution. Consequently, the S&S designation should be deleted.

It is obvious from the record that the major contribution to the hazard of falling off the roof was by far, the failure of Miller's employer, the independent roofing contractor to instruct, train and make sure his roofers complied with the provisions of 30 C.F.R. § 57.15005. It was the violation of that safety standard, not § 48.31 that significantly and substantially contributed to the hazard of falling from the roof of the building. Perhaps the mine operator could also have been charged with the violation § 57.15005 but the mine operator was not so charged in this case. What the mine operator was charged with is not giving the roofers adequate hazard training regarding "(1) Hazard training and avoidance," specifically not discussing with the roofers the need to use a safety belt or harness and lifeline while working near the edge of the relatively flat roof of the office/administration building.

It is also noteworthy that under the stipulation facts it is clear that Miller did not even know he was near the edge of the roof where the hazard of falling existed. Consequently, assuming (the stipulation record does not establish one way or the other) that Miller had training and the equipment from his employer, the roofing contractor and had every intention of complying with MSHA and OSHA requirement that he "tie off" while working near the edge of a roof he was nevertheless unaware he was in an area where he was required to "tie off."

## PENALTY

In assessing a civil penalty I am required by the Mine Act to consider the statutory criteria set forth in section 110(i) of the Act. That section states in pertinent part:

> [T]he Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

With respect to this penalty criteria the parties stipulate that the size of the business of the mine operator was small, with 115,134 hours of production in 1993; that the MSHA proposed penalty would not affect Respondent's ability to continue in business; that the operator demonstrated good faith in timely abating the violation. The inspector evaluated the mine operator's negligence as "moderate" and I see no basis for evaluating it any higher than that in this case. The citation indicates the number of persons affected as one. With respect to gravity, this unlikely fall of an experienced roofer from a relatively flat roof unfortunately did happen and resulted in death. Upon consideration of the statutory criteria in § 110(i) I find a civil penalty of $200.00 is appropriate under the facts of this case for the Respondents violation of the cited safety standard, § 48.31.

**ORDER**

On the basis of the foregoing findings and conclusion, it is **ORDERED** that Citation No. 4337819 be and is modified by deleting the S&S designation and, as so modified, this citation is affirmed. It is further **ORDERED THAT RESPONDENT PAY** a civil penalty of $200.00 to the Secretary of Labor within thirty (30) days of this decision and order. Upon receipt of payment, this matter is dismissed.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Sean P. Durrant, Esq., OMOHUNDRO, PALMERLEE & DURRANT, 130 South Main Street, Buffalo, WY 82834 (Certified Mail)

/sh

# 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 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA)<br>Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEST 94-251-M<br>A. C. No. 26-02184-05514 |
| v. | : | |
| | : | Bullfrog Mine Underground |
| BARRICK BULLFROG, INCORPORATED<br>Successor to LAC BULLFROG INC.,<br>Respondent | : | |
| | : | |
| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA)<br>Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEST 95-129-M<br>A. C. No. 26-02184-05520 A |
| v. | : | |
| | : | Bullfrog Mine Underground |
| TIMOTHY HARTER, employed by,<br>BARRICK BULLFROG INCORPORATED<br>Successor to LAC BULLFROG INC.,<br>Respondent | : | |

DECISION

Appearances: Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, and Paul A. Belanger, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Vacaville, California, for Petitioner; Charles W. Newcom, Esq., and Andrew W. Volin, Esq., Sherman & Howard, L.L.C., Denver, Colorado, for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against LAC Bullfrog, Inc.,[1] and Timothy Harter pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that the company violated sections 50.10, 57.3200 and 57.3401 of the Secretary's mandatory health and safety standards, 30 C.F.R. §§ 50.10, 57.3200 and 57.3401, and that Harter, as an agent of the company, knowingly carried out the violations of sections 57.3200 and 57.3401. The Secretary seeks penalties of $73,000.00 against the company and $16,500.00 against Harter. For the reasons set forth below, I find that the company violated the regulations, and that Harter knowingly carried out the violations of sections 57.3200 and 57.3401; I assess penalties of $71,500.00 and $5,000.00, respectively.

A hearing was held on February 12 - 15, 1996, in Henderson, Nevada. In addition, the parties filed post-hearing briefs in these matters.

## BACKGROUND

The Bullfrog gold mine in Beatty, Nevada, has both an open pit and an underground section. The underground section consists of a series of horizontal passages, called "drifts," heading off of a main decline, which follow the ore vein. The drifts are identified and distinguished by their elevation in meters and the direction that they head.

Mining in the underground section is carried out by the underhand cut and fill method. Mining in a drift is advanced by blasting until the vein runs out. Any ore left on the ribs is then mined by "slab rounds" as the miners retreat out of the drift. When this has been accomplished, the drift is "backfilled" with a concrete mix. Another drift may be cut underneath the filled drift with the backfill serving as the roof of the new drift.

---

[1] Between the issuance of the citations and order in this case and the hearing, LAC Bullfrog, Inc., was purchased by Barrick Bullfrog, Inc. (Tr. 6-10.)

Sometime between the cessation of mining operations on Friday, May 28, 1993, and the beginning of operations on Tuesday, June 1, 1993,[2] a ground fall occurred in the 990 North drift.[3] Larry Phillips was assigned to "muck out" the ground fall with a front-end loader. The "muck" was loaded into a 16-ton truck located at the entrance to the drift. The truck was driven by Matt Riddle/Mertz.[4]

When Phillips did not come out of the drift after indicating to Riddle/Mertz that he was finished, Riddle/Mertz walked into the drift to see what was delaying him. Riddle/Mertz discovered that the front-end loader had been engulfed by a second ground fall. Rescue attempts were futile. Phillips was found dead at the rear of the loader.

MSHA Mine Inspector Stephen A. Cain was assigned to investigate the accident. As a result of his findings, he issued the order and two citations at issue.

MSHA Special Investigator Dave Brabank conducted an investigation of the accident during August and September 1993 for the purpose of determining whether any of the violations had been knowingly committed by any agents of the company. Based on his conclusions, the Secretary filed civil penalty petitions against Timothy Harter and William F. Lucas, under section 110(c) of the Act, 30 U.S.C. § 820(c), for the alleged violations of sections 57.3200 and 57.3401.[5]

---

[2] Monday, May 31, was the Memorial Day holiday.

[3] Because of a slight change of elevation in part of it, the 990 N drift was also known as the 994 N drift. To avoid confusion, it will be referred to as the 990 N drift throughout this decision.

[4] Sometime between June 1, 1993, and the hearing, Riddle changed his last name from Riddle to Mertz. Thus, while the testimony refers to Matt Riddle, he testified as Matt Mertz. To avoid confusion, he will be referred to as Riddle/Mertz.

[5] At the request of the Secretary, the civil penalty petition (Docket No. WEST 95-130-M) against William F. Lucas was dismissed by an Order of Dismissal on January 19, 1996.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Citation No. 4138306

Citation No. 4138306 alleges a violation of section 50.10 of the Regulations because the first ground fall was not reported to MSHA.[6] Section 50.10 provides, in pertinent part, that: "If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine." Section 50.2(h), 30 C.F.R. § 50.2(h), lists 12 types of incidents which are to be considered accidents under the Regulations. Among them, section 50.2(h)(8), 30 C.F.R. § 50.2(h)(8), states that an accident is "[a]n unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage."

It is the company's position, that the first ground fall consisted of material that Ralph Crowley took down from the left

---

[6] The citation alleges that:

> An unplanned fall of ground occurred above the anchorage point of 6 ft. split set bolts (approx. 12-16 bolts) in heading 990 N sometime over the weekend of 5-28-93 to 6-1-93. Approx. 50 tons of material fell from hanging wall side of drift to center (arch) of drift and approx. 20 ft. from face of heading. Fall of ground was not reported to MSHA immediately as required by Part 50. A second fall of ground occurred on 6-1-93 resulting in a fatal accident while original fall of ground that occurred over the weekend was being mucked out in preparation for back filling of drift. Company officials (Tim Harter and Bill Lucas) observed roof fall that occurred over weekend on 6-1-93 while making rds. Information gathered from company officials stated that they thought personnel had to be trapped or injured before fall of ground was reportable to MSHA.

(Pet. Ex. 5, at 12-13.)

rib when he was mucking out the 990 N on May 27, 1993, and that since it came from the rib and not the roof and did not impair ventilation or impede passage, it was not reportable. (Resp. Br. at 19-21.) This argument, made for the first time in the brief, is rejected.

It is based solely on the following statements by Crowley. In his statement to Inspector Brabank, Crowley was asked if material was falling from the back or left rib on May 27. He responded: "Yes from the left rib. I took the big hunk down, the one I was worried about, there was still small material falling; enough that you wanted to keep your eye on it." (Pet. Ex. 16a, at 84-85.) At the hearing, Crowley testified:

> Q. Mr. Crowley, were you mucking in the 994/990 North drift near the end of May 1993?
>
> A. Yes.
>
> . . . .
>
> Q. And was there any material in between the brow and the face along the left rib?
>
> A. Yes.
>
> Q. And did you clean all of that material out?
>
> A. No, I didn't.
>
> Q. You indicated in a statement to MSHA that you had concerns about the material there on the left rib; is that correct?
>
> A. Yes.
>
> Q. Is the location of the material about which you spoke to MSHA being concerned about, is the location of that material -- where was it; in between the face and the brow or on the other side of the brow, away from the face?

A. It was between the face and the brow.

(Tr. 676-77.)

No one, including Crowley, testified that the "big hunk" Crowley took down on the 27th was the five to six truckloads of material that Riddle/Mertz took out of the mine on June 1. Furthermore, there is absolutely nothing in the evidence to support the conjecture that the material that Crowley referred to and the ground fall were one and the same.

On the other hand, Harter, when interviewed by Inspector Cain on the day of the incident, stated that the initial roof fall that occurred over the weekend was "14 ft. high approx. Not sure how deep and 8-10 ft. in length." (Pet. Ex. 2, at pp. 39-40; Tr. 97.) Harter testified that "[i]n that portion, in the smaller area where it was 13 by 13, we found a pile of material. That's the first ground fall that -- ." (Tr. 552-53.) Clearly, the first ground fall included part of the roof.

All of the evidence in the case refers to a ground fall.[7] No witness suggested that it was a rib fall rather than a roof fall. If the Respondent had raised this issue earlier in this proceeding than its post-hearing brief, the evidence might have been more specific. However, I am satisfied that this was a roof fall at or above the anchorage zone and thus was required to be reported immediately.

Since the company officials professed not to understand that this was a reportable accident until they were so advised by the inspectors investigating the fatal accident, it is not disputed that they did not report it immediately. Accordingly, I conclude that by not doing so, the Respondent violated section 50.10.

The inspector found this violation to result from "high" negligence on the part of the company. As noted above, all of the management officials at the mine claimed that they did not understand that a roof fall at or above the anchorage points was a reportable accident. They thought that a roof or rib fall was

---

[7] The parties stipulated that "a ground fall (different from the fatal ground fall) had occurred." (Tr. 14.)

only reportable if ventilation was impaired or passage was impeded. David McClure, the Mine Superintendent, testified that when he told this to Inspector Cain, the other MSHA inspector with them, Inspector Inman, agreed with him. Inspector Inman did not testify and Inspector Cain could not recall whether such a conversation took place.

The Secretary argues that the standard is clearly written and that confusion about its requirements is not a defense. It is plainly not a defense to whether a violation was committed, but I find that it does affect the degree of negligence. No evidence intimates that mine management was completely unaware of the reporting requirement, or that they understood it but deliberately did not report the accident. Nor was there any evidence that the company had been previously advised of the requirement and was still professing ignorance. Clearly, by their responses to Inspector Cain they had some familiarity with the regulation.

I find that management's misunderstanding of the regulation was not so egregious as to amount to "high" negligence. Consequently, I conclude that the company was "moderately" negligent in not reporting the first ground fall.

**Citation No. 4138307 and Order No. 4038308**

The same facts are involved in the violations alleged in Citation No. 4138307 and Order No. 4038308, which were issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1).[8]

---

[8] Section 104(d)1) provides:

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

Citation 4138307 states that section 57.3200 was violated.[9]

---

fn 8 cont.
comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

[9] The citation states:

> An unplanned fall of ground occurred sometime during the weekend from 5-28-93 to 6-1-93 approx. 20 ft. from the face on hanging wall side of 990 N drift. This fall of ground in 990 N was observed by two supervisors (Tim Harter & Bill Lucas) on 6-1-93 at approx. 8:45 a.m. while making examination rounds of headings. Anywhere from 2 to 6 sixteen ton haul truck loads of material were involved in ground fall. According to interview statements by both supervisors cracks were observed adjacent to fall of ground on hanging wall side of drift 990 N while they were performing examination. Effected [*sic*] ground was not taken down or supported prior to Lawrence Phillips being directed by supervisor Bill Lucas to muck out fallen material in preparation for backfilling 990 N drift. While Lawrence Phillips was mucking out 990 N a subsequent ground fall occurred at approx. 9:30 a.m. from hanging wall side which fatally injured Lawrence Phillips. The subsequent ground fall was approx. 30 ft. in length, 12-14 ft. in height and 6-8 ft. in depth and buried the ST-6C Wagner LHD that was being used to

That section provides: "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 with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry."

Order No. 4138308 charges a violation of section 57.3401.[10] The section requires, in pertinent part, that "[a]ppropriate 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."

It is undisputed that Harter and Lucas visually examined the area of the first ground fall, as well as the rest of the left rib in the drift, but did not test the ground conditions any

---

fn 9 cont.
muck out 990 N drift.

This area 990 N was not posted against entry while being mucked out in preparation for backfilling. This is an unwarrantable failure.

(Pet. Ex. 5, at 1-2.)

[10] The order states:

On 6-1-93 at approx. 8:45 a.m. supervisors Tim Harter and Bill Lucas performed an examination of ground fall in 990 N drift that had occurred sometime over the weekend from 5/28/93 to 6/1/93. During examination both supervisors stated they had observed cracks in roof and rib area adjacent to fall of ground. Neither supervisor performed any testing of ground conditions in area prior to assigning Lawrence Phillips to muck out ground fall material in preparation for backfilling drift. As subsequent ground fall occurred fatally injuring Lawrence Phillips. This is an unwarrantable failure.

(Pet. Ex. 5, at 3.)

where. Nor did they take down any ground along the left rib or support or re-support any ground along the left rib. Further, they did not post a warning against entry into the area or install a barrier to impede unauthorized entry. The Respondent argues that the visual examination was sufficient to comply with the regulations. I find that it was not.

In *Asarco, Inc.*, 14 FMSHRC 941 (June 1992), the Commission discussed both of these regulations. With regard to section 57.3401, it noted that "[t]he 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 interpretive material." *Id.* at 947. The issue in *Asarco* was whether adequate testing had been performed. The Commission went on to state that "[t]he 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." *Id.* at 951.

In this case, however, the issue is not whether adequate testing was performed, but whether testing was required to be performed. The Commission did not discuss in *Asarco* what the phrase "where applicable" with regard to testing means. Nevertheless, in cases such as this,

> [w]hen 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).

*Id.* at 948.

The following facts were available to Harter and Lucas when they examined the 990 N after the first ground fall: (1) a ground

fall of an area of the rib and roof 14 feet high, eight to ten feet in length and of an undetermined depth had occurred; (2) somewhere between two and six 16-ton truckloads of material had fallen; (3) prior to the fall, the area had been supported with split sets, plates and wire mesh; (4) ground conditions in the mine were difficult because the ground was weak;[11] and (5) ground falls happened frequently in the mine.

When viewing the requirement that "where applicable" ground conditions should be tested through the eyes of a reasonably prudent person, I find that the above facts should have lead such a person to determine that testing was applicable. While a visual examination may have been sufficient if conditions in the drift had not changed, in this case they had changed significantly. Based on the changed conditions, I conclude that more than a visual examination, *i.e.*, testing, was required.

In reaching this conclusion, I reject Respondent's arguments that nothing appeared to have changed at the exact place where the second ground fall occurred, and that there was no way to test the ground conditions. The Respondent asserts that the first and second ground falls were separated along the rib by 10 to 20 feet and, therefore, that the two were not linked. Unfortunately, the evidence on the exact location of the two is less than precise.

Inspector Cain and Nevada State Inspector Tomany both testified that they believed that the two ground falls ran into each other. However, they did not go all the way down the drift, nor could they see the face of the drift from where they were in the drift, so that it is possible that all they saw was the second fall and that the first fall was farther in the drift.

Only Harter and Lucas actually saw the first ground fall. They both estimated that the two falls were separated by about 10 to 20 feet. However, Harter also drew a diagram of the ground falls, (Pet. Ex. 2a), on the day it occurred, which appears to

---

[11] Elvin Hansen, a roof bolter with 20 years of mining experience, described ground conditions as "[p]robably the worst ground I've seen." (Tr. 377.) Other witnesses described it similarly.

show them if not actually touching, then within two or three feet of each other. Further, the Respondent's scale diagram of the drift, (Resp. Ex. A), shows that there were 30 feet from the toe of ramp to the face and that the second fall extended past the toe of the ramp toward the face by several feet. Perhaps significantly, the diagram does not show the distance of the first fall from the face, but Harter and Lucas agreed that it was 20 feet.

Based on this evidence, I find that the two falls were separated by 10 feet or less. When a ground fall of the magnitude of the first fall has occurred, one would have to be very indifferent to the safety of miners to conclude that the fall area needed to be tested, but the area within 10 feet of it did not. Therefore, I conclude that the separation between the two falls made no difference in the Respondent's duty to test.[12]

For this reason, I also reject the claim of Harter and Lucas that they did not need to test the crack observed in the area of the second fall because it did not appear to have changed since the first time they observed it. The first fall changed conditions so that a visual examination was no longer sufficient.

The Respondent argues that the loose nature of the rock in the mine makes it difficult to test ground conditions with a scaling bar. (Resp. Br. at 6.) However, a scaling bar is not the only method of testing ground conditions, as the Commission noted in *Asarco. Id.* In that case, testing with a jumbo drill was approved. I do not accept that a visual examination was all that could have reasonably been done in this instance.

For the same reasons that the Respondent violated section 57.3401, I conclude that it also violated section 57.3200. Because it performed no testing, it is not possible to say what further action should have been taken either in supporting the ground or taking it down. However, at a minimum, the area of the first ground fall, which had previously been supported, should have been re-supported. Furthermore, it is undisputed that the Respondent neither "posted" the 990 N drift after the first ground fall nor barricaded it.

---

[12] This conclusion would hold true even if the two falls had been separated by 20 feet.

It may be that if the Respondent had tested the ground and supported or taken down any hazardous conditions, the second ground fall still would have occurred in view of its nature and size. Nonetheless, the fact that the fall may have been unpredictable did not relieve the company of its obligation to do everything possible to insure miner safety based on the facts available to it at the time. In this case, the company did nothing.

Significant and Substantial

Both of these violations were alleged to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); Austin *Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

In this case, there can be little doubt that these two violations contributed to a measure of danger to safety, *i.e.*, a ground fall; that there was a reasonable likelihood that a ground fall would result in an injury; and, that there was a reasonable likelihood that the injury would be serious. In fact, that is exactly what happened. The Respondent does not even bother to address this issue in its brief. Consequently, I conclude that these two violations were "significant and substantial."

Unwarrantable Failure

Inspector Cain found that both of these violations resulted from the company's unwarrantable failure to comply with the Regulations. The Commission has held that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The Respondent argues that there was no unwarrantable failure regarding these violations because

> no one at the mine had any knowledge of conditions, or reason to believe of conditions, that should have precluded sending Phillips into the drift. Instead, the evidence showed that the mine had a reasonable and good faith belief under the circumstances that the regulations were being complied with and that it was safe for Phillips to muck out the drift so it could be backfilled.

(Resp. Br. at 30.)

The company misses the point. It was not sending Phillips into the drift which constituted the unwarrantable failure. It was the failure to make sure that the drift was safe for him to enter by testing the ground conditions and supporting or taking down hazardous ground as necessary which was unwarrantable. No one at the mine had any knowledge of conditions that should have precluded sending Phillips into the drift because Harter and Lucas made only a cursory attempt to ascertain what the conditions were.

In view of the facts available to Harter and Lucas at the time they examined the drift, their belief that they were complying with the regulations by doing no more than visually examining the drift was unreasonable. Their dereliction in not

making further attempts to test ground conditions and to support it or take it down was inexcusable. At best, it reflected indifference or a serious lack of reasonable care; at worst it amounted to reckless disregard of the safety of miners. Accordingly, I conclude that the company's violations of sections 57.3200 and 57.3401 resulted from an unwarrantable failure to comply with the regulations.

**Section 110(c)**

Harter faces personal liability under section 110(c) of the Act for having "knowingly" violated sections 57.3200 and 57.3401.[13] I find that by not testing ground conditions after the first ground fall and not taking down or supporting hazardous ground, Harter knowingly carried out the violations of those two sections.

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: "If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." The Commission has further held, however, that to violate section 110(c), the corporate agent's conduct must be "aggravated," *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (August 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987).

In this case, Harter was aware of the first ground fall, was aware that the area of the first ground fall had been supported prior to the ground fall, was aware of the weak ground conditions

---

[13] Section 110(c) provides, in pertinent part: "Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon [the operator] . . . ."

in the mine, and was aware of the numerous ground falls that had already occurred. Yet he took no action to prevent a further ground fall by testing and taking down or supporting hazardous ground. He took no action because he stated that a visual examination indicated nothing had changed from the previous times that he had been in the drift.

If there had been no first ground fall, his examination might have been sufficient. However, the ground fall was obviously a significant change, and his failure, as general mine foreman, to take any preventative action in the face of this change amounted to more than ordinary negligence. I find that this was aggravated conduct within the meaning of the cases cited above, and accordingly, I conclude that Harter knowingly carried out the violations of sections 57.3200 and 57.3401 and is, therefore, personally liable under section 110(c).

## CIVIL PENALTY ASSESSMENT

The Secretary has proposed the following penalties for the violations in these cases: $3,000.00 for the company's violation of section 50.10, $40,000.00 for the company's violation of section 57.3200, $30,000.00 for the company's violation of section 57.3401, $9,500.00 for Harter's knowing violation of section 57.3200, and $7,000.00 for Harter's knowing violation of section 57.3401. However, it is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the six criteria, the parties stipulated that the Bullfrog mine is a large mine, that payment of the assessed penalties would not affect the company's ability to remain in business, and that the mine demonstrated good faith by timely abating each of the violations.

While the mine had no history of having received previous citations for the same offenses, there is some question as to the accuracy of this, particularly with regard to section 50.10, in view of the fact that mine management was not fully aware of all of the types of accidents required to be reported. The mine's

history of violations indicates that from June 1991 through June 1993, 33 citations had been issued for violations of the Regulations, including the ones at issue here. This is not a large amount. On the whole, I conclude that the mine's history of violations does not provide a basis either for increasing or decreasing the penalties proposed by the Secretary.

I find the gravity of these violations to be very serious. The fact that they resulted in a fatality says it all. I include in this finding the violation of section 50.10 since if the first ground fall had been reported promptly, an MSHA investigation may have halted further work in the drift and prevented the second one. In addition, the operator was highly negligent in committing the violations of sections 57.3200 and 57.3401.

Taking all of these factors into consideration, I conclude that the penalties of $40,000.00, for the violation of section 57.3200, and $30,000.00, for the violation of section 57.3401 are appropriate. In view of my finding that the company was "moderately" rather than "highly" negligent in connection with the violation of section 50.10, I will reduce that penalty to $1,500.00.

Only gravity, negligence and history of violations, of the six penalty criteria, are directly applicable to an individual. No evidence that Harter knowingly committed any other violations was offered. In his case, the negligence and gravity are the same as for the company.

The effect of the penalty on the company's ability to remain in business and appropriateness to the size of the business can be applied to an individual by analogy. Unfortunately, no evidence was presented to show the effect of the proposed penalty on Harter's ability to support himself or his family, if he has one, or to demonstrate the appropriateness of the penalty to his income. Nonetheless, I find that the proposed penalty of $16,500.00 would have a much greater effect in such areas on Harter, than the proposed penalty of $73,000.00 would have on the company.

Taking all of these factors into consideration, I conclude that a penalty of $5,000.00 should be assessed against Harter.

## ORDER

Citation No. 4138306 issued to the company is **MODIFIED** to reduce the degree of negligence from "high" to "moderate," and is **AFFIRMED** as modified. Citation No. 4138307 and Order No. 4138308 and the civil penalty petition alleging that Timothy Harter knowingly carried out the violations in the citation and order are **AFFIRMED**.

Accordingly, Barrick Bullfrog, Inc., is **ORDERED TO PAY** a civil penalty of **$71,500.00** and Timothy Harter is **ORDERED TO PAY** a civil penalty of **$5,000.00** within 30 days of the date of this decision. On receipt of payment these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Room 1110, San Francisco, CA 94105-2999 (Certified Mail)

Charles W. Newcom, Esq., Andrew W. Volin, Esq., Sherman & Howard L.L.C., 633 17th St., Suite 3000, Denver, CO 80202 (Certified Mail)

/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 19 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 95-261-M |
| Petitioner | : | A.C. No. 39-00993-05514 |
| v. | : | |
| | : | Docket No. CENT 95-267-M |
| HIGMAN SAND AND GRAVEL, INC., | : | A.C. No. 39-00993-05515 |
| Respondent | : | |
| | : | Docket No. CENT 96-30-M |
| | : | A.C. No. 39-00993-05516 |
| | : | |
| | : | Screener Plant #1 |

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Amchan

Findings of Fact

On July 18, 1995, MSHA representative Lloyd Ferran inspected Respondent's sand and gravel mine in the southeast corner of South Dakota. Two Higman employees were at the mine, Mark Rasmussen, the foreman, who was feeding the hopper to the plant with a front-end loader and Eldon Seely, who was loading customer trucks with another front-end loader. Neither miner accompanied Mr. Ferran as he inspected the plant area.

Docket No. CENT 95-261-M

Citation No. 4643516, unguarded chain drive and tail pulley

When inspecting the hopper feed conveyor, Inspector Ferran discovered a chain drive and a self-cleaning tail pulley which were not guarded. They were located underneath the hopper in an enclosed area. There were doors that could close off the area in which the drive and pulley were located, but these doors were open on July 18. Inspector Ferran observed a shovel and fresh foot prints near the tail pulley, which led him to conclude that a miner had been in the area while the conveyor belt was running. Foreman Rasmussen greased equipment in the area every morning before turning on the equipment (Tr. 11-23, 169, 317-26, 372-73).

Ferran issued Citation No. 4643516 to Respondent, alleging a significant and substantial (S&S) violation of 30 C.F.R. §56.14107(a). This regulation requires the guarding of moving machine parts that can cause injury. Section 56.14107(b), on which Respondent relies in challenging the citation, exempts moving parts that are at least seven feet away from walking or working surfaces.

The inspector required termination (abatement) of the citation by the next morning, July 19, 1995. When he arrived at the worksite on the 19th, Foreman Rasmussen advised him that he had been instructed not to abate this or any other citation issued on July 18. Ferran waited until noon, then issued section 104(b) withdrawal Order No. 4643528 and left the worksite (Tr. 24-26).

The next morning, July 20, 1995, the inspector returned and found the plant operating. No action had been taken to terminate the citation. After some discussions involving Respondent, Ferran and MSHA's headquarters office in Denver, the plant shut down about noon. Respondent terminated the violations by replacing the entire plant with other equipment (Tr. 30-33).

Respondent violated §56.14107(a)

The issue regarding the unguarded chain drive and tail pulley is whether they could "cause injury" within the meaning of §14107(a), or whether there were seven feet away from walking or

working surfaces, and thus exempt from the guarding requirement under section 56.14107(b).

Respondent contends the regulation was not violated because the only person who ever came within seven feet of the unguarded chain drive and tail pulley was Foreman Rasmussen. More importantly, it argues that Rasmussen only was in this area before turning on the moving equipment. Each morning before turning on the equipment he greased it and shoveled under the tail pulley (Tr. 326). Nevertheless, exposure to moving parts and injury was possible.

Although Rasmussen's normal procedure may have made injury unlikely, I believe that reliance on his practices does not preclude injury--particularly from the unguarded tail pulley. Rasmussen was asked if he ever shoveled while the tail pulley was in operation. He responded, "You can't, cannot. You'd end up with your arm when the shovel went in there." (Tr. 326).

I understand this to mean that you ordinarily do not shovel while the tail pulley is moving because it is dangerous. I infer that a situation may arise where material may build up under the tail pulley while it is running. Under such conditions, one must either turn all the equipment off or shovel with the pulley running; otherwise, the conveyor belt will tear.

The record does not indicate that Respondent had a work rule preventing shoveling when the machinery was in operation. When Ferran visited the same site a month later, Rasmussen was on vacation and Eldon Seely was in charge of the worksite. The equipment was running (Tr. 175). Although, this was different equipment than that cited in July, it convinces me that Mr. Rasmussen's routine did not eliminate the possibility that someone might be injured by the unguarded tail pulley. I therefore find a violation of the standard.

The Secretary has not established that the violation was S&S

The Commission test for a "S&S" violation, as set forth in Mathies Coal Co., supra, is 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.

I conclude that given the fact that Mr. Rasmussen was normally the only person to enter the area in which the chain drive and tail pulley were located, and that he routinely did so only before the equipment was turned on, that it was not reasonably likely that the hazard would have resulted in injury in the normal course of mining operations.

Section 104(b) Order No. 4643528 is affirmed

Upon discovering a failure to abate, an inspector must apply a rule of reason in determining whether to issue a section 104(b) order or to extend the abatement date, Martinka Coal Co., 15 FMSHRC 2452 (December 1993). I conclude that Inspector Ferran acted reasonably in issuing the instant order.

On July 18, the inspector reviewed the citations and time allotted to terminate them with Foreman Rasmussen. The latter did not indicate that he would be unable to abate the citations in the time period allowed by Ferran. On July 19, Rasmussen did not tell the inspector that he needed more time to abate, he told him that Respondent would not abate (Tr. 34-35). Moreover, on July 20, when Respondent decided to comply with the abatement requirements of this and other citations, it was able to do so within a matter of hours.

I assess a $150 civil penalty for Citation No. 4643516 and Order No. 4643528

The Secretary proposed a penalty of $240 for the instant citation and order. I assess a $150 penalty on the basis of the penalty assessment criteria in section 110(i) of the Act.

Given the fact that I deem the violation to be "non-S&S," I believe a penalty of $50 would be appropriate for the original citation, taking into account the low likelihood of injury (gravity), the low degree of negligence of the original violation, the fact that Respondent is a small mine operator and the absence of an indication that Respondent has a poor record of MSHA compliance in the past. The parties have stipulated that the proposed penalties will not compromise Respondent's ability to continue in business (Tr. 5).

I deem the degree of negligence to be low because I believe that Respondent did have a reasonable good faith belief that its procedures adequately protected its miners from the unguarded moving machine parts. However, when a mine operator decides to ignore the abatement requirement in an MSHA citation, it does so at the risk that the citation will be upheld and that it may be assessed much higher penalties for its failure to abate.

The sixth factor in assessing penalties under section 110(i) is the good faith of the operator in rapidly abating a violation once it is brought to its attention. When an operator refuses to abate, and the original citation is affirmed by the Commission, the provisions of section 110(b), providing for a civil penalty of not more than $5,000 for each day during which the violation continues, should be considered. In this case, I deem it appropriate to assess an additional $50 penalty for Respondent's failure to have abated the violation by the beginning of the work day on July 19 and July 20, 1995.

Citation No. 4643517: Inadequate handrails on an elevated platform

On July 18, Inspector Ferran observed an engine located on a platform 11-12 feet above ground level. Mr. Rasmussen climbed up a ladder each morning to turn on the engine and in the evening to turn it off. Although there was a handrail and midrail on the part of the platform furthest from the engine, the side of the platform between the ladder and the engine was unguarded for a horizontal distance of 1-1/2 feet. On the opposite side of the platform, a distance of two feet horizontally was unguarded (Tr. 36-41).

Ferran issued Respondent Citation No. 4643517, alleging an "S&S" violation of 30 C.F.R. Section 56.11002. This regulation requires that handrails be provided and maintained on elevated crossovers, walkways, ramps and stairways. I find that the regulation is applicable. The platform provided access to the engine and therefore was an elevated walkway within the meaning of the standard.

I conclude further that the Secretary has established a violation, but not a S&S. It is possible, as claimed by Inspector Ferran, that a miner could trip and fall off the unprotected portion of the platform. However, I find that it was not reasonably likely. The only task to be performed by miners on the platform was to turn on the engine at the middle of the platform. It is therefore unlikely that one would accidently approach the unguarded portions of the edge of the platform and fall off.

Penalty Assessment for Citation No. 4643517 and section 104(b) Order No. 4643529

The Secretary proposed a $292 penalty for this citation and the section 104(b) order issued when Respondent initially refused to abate the citation. I assess a $150 penalty for reasons that are essentially the same as those considered with regard to the previous citation and order[1].

Given the assessment criteria, other than good faith rapid abatement, I would assess a $50 penalty for the original citation. I would note, with regard to the negligence factor, that Respondent did have a reasonable belief that its employees were adequately protected from injury and that the platform was in the same condition as when it was purchased (Tr. 327-29). With respect to gravity, although injury was unlikely, the likely result of an accidental fall of 11-12 feet would be death or serious injury.

---

[1] My consideration of the penalty criteria is essentially the same for all the citations in these dockets unless specifically noted. Similarly, my analysis as to the validity of the section 104(b) orders will not be repeated unless it differs from that concerning Order No. 4643528.

As with the previous citation and order, I believe that the appropriate penalty for Respondent's unwillingness to abate within the time period allowed by Inspector Ferran is a $50 per day additional penalty for both July 19, and July 20, 1995. Therefore, considering the lack of good faith in rapidly abating the original citation, I assess a total penalty of $150 for Citation No. 4643517 and Order No. 4643529.

Citation No. 4643518: Unguarded V-belt(s)

On the engine located on the elevated platform discussed above were two unguarded v-belts. One, the direct drive belt, was located on the side of the engine, right at the edge of the platform, approximately 1-½ feet about the platform. It is clearly shown in the photographic Exhibits, G-3.

The other unguarded belt was on the engine's alternator and was located at the front of the engine, near the start/stop button about 3-1/2 feet off the ground. It can be seen in the bottom photograph of Exhibit G-3 and in Exhibit G-4 (albeit mounted upside down).

Inspector Ferran issued Respondent Citation No. 4643518 which states:

> The v belt on the direct drive unit was not guarded adequately to prevent accidental contact with the pinch point. This hazard was approximately one foot off the landing, and extending to 1 ½[.] employee (sic) are in this area on a daily basis starting and stopping the motor.

The citation initially alleged a non-S&S violation of §56.14107(a), but was modified on July 20, 1995, to allege an "S&S" violation.

Inspector Ferran exhibited a great deal of confusion in describing this citation at hearing. At first, he testified that the citation referred to the direct drive belt. Then he recanted and testified that the citation referred to the alternator belt (Tr. 51-62). The inspector conceded that the direct drive belt does not require a guard because its location precludes employee contact while it is moving (Tr. 70).

The Secretary's counsel moved at hearing to amend the citation to allege a violation with respect to both belts (Tr. 64-65). Respondent opposed the motion, moved to dismiss the citation and moved to exclude Exhibit G-4, which depicts the alternator belt.

The citation clearly describes the direct drive belt. I find no violation of section 56.14107(a) with respect to this belt. Aside from Inspector's Ferran's concession, the record establishes that the belt was started and stopped from the ground and that it was not moving when Foreman Rasmussen was on the elevated platform to start the engine[2] (Tr. 339-42, 375-76).

It is a close question as to whether I should allow the Secretary to amend Citation No. 4643518 to include the alternator belt. Respondent claims prejudice in that it was not on notice from the language of the citation that the absence of a guard on the alternator belt was an issue in this proceeding. Ferran claims that he discussed this belt with Rasmussen during the inspection (Tr. 69). Rasmussen testified that Ferran never mentioned the alternator belt to him (Tr. 339). I credit Rasmussen's testimony in this regard, because it is corroborated by the language of the citation itself.

The Commission's procedural rules do not address amendment of pleadings. Therefore, the Commission looks for guidance to the Federal Rules of Civil Procedure and particularly Rule 15, Cyprus Empire Corporation, 12 FMSHRC 911, 916 (May 1990). The portion of Rule 15 that is relevant to the instant proceeding starts with the third sentence of Rule 15(b):

> If evidence is objected to at the trial on the ground that it is not within the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining

---

[2]To start the direct drive belt Rasmussen pushed the clutch with a pole from the ground. To turn the belt off, he pulled a string attached to the clutch from ground level (Tr. 339-342).

> the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

See, J. Moore, Moore's Federal Practice Par. 15.14, 20 ALR Fed 448.

When Respondent's counsel prepared for the hearing, he did not discuss the alternator belt with either Foreman Rasmussen or Harold Higman, Jr., part-owner of Respondent (Tr. 338, 396-397). Nevertheless, I conclude that Respondent is not substantially prejudiced by the amendment. Mark Rasmussen was familiar enough with the alternator belt to adequately defend Respondent against the allegation that the absence of a guard violated section 56.14107(a).

Rasmussen testified that the alternator belt is recessed approximately three inches inside the housing of the front of the motor, but was not completely inside the housing. He was able to recognize the location and configuration of the belt from Exhibits G-3 and G-4. He testified that a miner would "have to try hard" to get caught in the belt. Finally, when asked if he could lean up against the metal housing without "getting in trouble with the belt," Rasmussen responded, "I could but I don't know about the next guy... ." (Tr. 343).

I conclude that Respondent had a sufficient opportunity, through Rasmussen, to prove that the alternator belt was either adequately guarded or posed no hazard to miners without a guard. Therefore, I conclude that Respondent was not materially prejudiced by the amendment, which is granted so that the citation includes an allegation of lack of guarding of the alternator belt. Further, I conclude that the record clearly establishes a violation of section 56.14107(a) with regard to this belt.

In allowing the amendment, I have also considered that while the violative equipment was removed from service by Respondent, it is possible that it will be returned to service. Given the lack of material prejudice to Respondent from the amendment, I believe the purposes of the Act are best served by imposing a legal requirement to guard the alternator belt if this equipment is used again.

Citation No. 4643518 is affirmed as a non-S&S violation and a $50 civil penalty is assessed. Section 104(b) Order No. 4643530 is vacated

The record is insufficient to establish that there was a reasonable likelihood of injury resulting from Respondent's failure to guard the alternator belt. The belt was partially recessed in the housing of the engine motor and exposure to the belt was limited to the brief period of time that Rasmussen or another miner would turn the engine on or off (Tr. 42, 343). I therefore find the violation to be non-S&S.

Respondent was also issued section 104(b) Order No. 4643530, for its refusal to terminate this citation. Since the citation does not accurately describe the violative condition, Respondent cannot be fairly held accountable for its failure to immediately guard the alternator belt. I therefore vacate Order No. 4643530.

Having considered the penalty criteria in section 110(i), I assess a $50 civil penalty for Citation No. 4643518. In assessing such a low penalty, I have placed great weight on the fact that it is not clear the violation was even detected by Inspector Ferran, which I think indicates that Respondent's negligence in not guarding the alternator belt was very low. My consideration of good faith attempts at abatement and gravity are included in my discussion of the "S&S" issue and the section 104(b) order.

Citation No.4643519: Opening in cover of a self-cleaning tail pulley

Inspector Ferran observed a two-foot by nine-inch opening in the cover of a self cleaning tail pulley on the stacker conveyor (Tr. 74-86, Exh. G-5). He then issued Citation No. 4643519 to Respondent alleging a non-S&S violation of section 56.14107(a).

This citation is affirmed. Although there were no grease fittings inside the opening of the cover, it was possible for a person to trip, fall and get a hand in the tail pulley. Moreover, although cleaning under this pulley was usually done with a front-end loader, it could have also been done with a shovel (Tr. 345-49).

Ferran also issued section 104(b) Order No. 4643531 for Respondent's failure to timely abate this citation. Taking into account the small likelihood of injury, I conclude that a $25 civil penalty is appropriate for the initial citation. An additional $50 is assessed for the two days that the violation continued after termination was required for a total penalty of $75.

Citation No. 4643522: Failure to provide records of continuity and resistance tests

On July 18, Inspector Ferran asked Foreman Rasmussen to show him the continuity and resistance records of the plant's electrical grounding systems. No such records were provided to Ferran, although some records of continuity and resistance tests were kept at Respondent's offices in Akron, Iowa, eight miles from the Richland Pit. I credit Inspector Ferran's testimony that he was not told about the records at Akron (Tr. 218).

Ferran issued a non-S&S citation alleging a violation of section 56.12028. That standard requires that continuity and resistance testing of grounding systems be performed after installation, repair, and modification; and annually thereafter. It provides further that the most recent test results shall be provided to an inspector upon request.

I conclude that the standard requires that the mine operator bring the test results to the mine site, if the Secretary's authorized representative so requests. An operator who insists that the inspector travel elsewhere is in violation of the regulation. Moreover, I conclude that Respondent did not have results of resistance and continuity tests performed in the previous year on the grounding systems at Richland because none had been performed.

On July 20, 1996, Inspector Ferran assisted Rasmussen in terminating the citation by helping him perform the continuity and resistance tests. Rasmussen testified that he "had kind of forgotten how to do it" (Tr. 350-51).

Ferran discovered that one of the grounding wires on the motor junction box had been disconnected (Tr. 92). Rasmussen believed the wire may have become detached in the early spring of

1994 when the motor had been repaired in Akron (Tr. 351). There is no indication that any other event occurred after the spring of 1994 that would have knocked the grounding wire loose.

I infer that had continuity and resistance testing been performed since that repair work, the detached ground wire would have been detected. Moreover, if records of continuity and resistance tests performed within the year prior to the inspection were in Respondent's files at Akron, copies could have been produced at hearing. I infer from the failure to produce such records that there were no such records for the year prior to July 18, 1995.

I assess a $25 penalty for Respondent's initial failure to provide records that complied with the requirements of the standard. I assess $25 for each day that it persisted in this refusal, for a total penalty of $75 for Citation No. 4643522 and 104(b) Order No. 46435532. This assessment does not take into account the gravity of Respondent's failure to perform continuity tests on its equipment within the year prior to the inspection. I decline to assess such a penalty since the Secretary did not cite for failure to perform the test. I note, however, that the failure to test created a situation where inadequate grounding of the equipment was allowed to persist and posed serious potential hazards.

Citation No. 4643524: Failure to conduct workplace examinations

On July 18, Inspector Ferran issued Citation No. 4643524 alleging a violation of section 56.18002(a). That regulation requires that a competent person examine each working place at least once each shift in order to detect safety hazards. Mr. Rasmussen told the inspector that he performed such examinations but that he kept no records of his examinations (Tr. 97-98). Ferran concluded that if daily workplace examinations were being performed, he would not have found the number of violations that he detected (Tr. 102).

I vacate this citation and credit Mr. Rasmussen's testimony that he examined all working places each day when he greased the equipment (Tr. 352-53). The fact that Ferran found a number of violative conditions may be the result of Respondent's belief

that the conditions cited were not violations, rather an indication that workplace examinations were not performed.

Citation No. 4643525: Absence of Berms on ramp leading to the hopper

On the first day of the inspection, Ferran observed Mr. Rasmussen feed the hopper with his model 980 Caterpillar Front-End Loader. There was a short ramp to the hopper which had no berms on either side. When feeding the hopper, the front wheels of the vehicle were five to six feet above the floor of the pit and only a foot or foot and a half from the edges of the ramp (Tr. 104-110).

Ferran cited Respondent for a violation of section 56.9300(a). That regulation provides that:

> Berms or guardrails shall be provided and maintained on the banks of roadways where a drop off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

Inspector Ferran believes that the ramp presented a hazard because it was at a three or four percent grade and because the loader's bucket was raised 8-10 feet in the air when feeding the hopper (Tr. 106-109). Both Mr. Rasmussen and Harold Higman, Jr., dispute the inspector's contention that there was a danger of the loader tipping due to the absence of berms (Tr. 355-356, 392-396).

Higman, who has significant experience operating such vehicles, opined that the incline of the ramp and the differential in height between the wheels is insufficient to cause the loader to tip over (Tr. 396). I conclude that the opinions of Respondent's witnesses on this issue have at least equal validity to those of Mr. Ferran. Therefore, I find that the Secretary has not established that a drop off of sufficient grade or depth to cause an accident existed and I vacate this citation.

Docket No. CENT 95-267-M

Citation No. 4643513: Failure to notify MSHA prior to commencement of intermittent operations

Respondent also received Citation No. 4643513 alleging that it violated section 56.1000. That standard requires an operator to notify MSHA of the actual **or approximate** date that mine operations will commence. The standard requires that the notification include the mine name, location, the company name, mailing address, person in charge, and whether the operations will be continuous or intermittent.

In challenging this citation, Respondent asserts that it was not required to notify MSHA of commencement of operations at the Richland Pit in 1995 because the pit had never been closed down the previous fall. Nevertheless, I conclude that Respondent is subject to the notification requirement contained in section 56.1000.

Vice-President Harold Higman, Jr., conceded that Respondent reports to MSHA that Richland is an intermittent operation (Tr. 404-05). I consider Respondent estopped from asserting otherwise. By virtue of its status as an intermittent operation, the Richland Pit is generally subjected to only one inspection per year, rather than the two inspections it would receive if it were a continuous operation, MSHA Program Policy Manual, section 103.

MSHA proposed a $50 civil penalty for this violation. I assess a $20 penalty. The penalty must account for the fact that Respondent was issued a citation for a violation of the same requirement in 1994. However, it should also reflect that most of the information required was conveyed to Inspector Ferran by Mr. Rasmussen in early 1995.

Sometime prior to April 1, 1995, Inspector Ferran encountered Mr. Rasmussen at Respondent's pit near Volin, South Dakota (Tr. 117). Rasmussen informed the inspector that Respondent would start mining at a site near Richland in April and gave him directions to the pit (Tr. 234-5).

It appears that Respondent resumed its full-time production operations at Richland in May or June 1995 (Tr. 370-71). Since the date on which this occurred depended upon the weather, it appears that when Rasmussen informed Ferran that he would start in April, he provided virtually all the information required by the standard. The gravity of the violation was therefore very low and I assess a penalty of $20.

Citation Nos. 4643513 and 4643520: failure of miners to wear seat belts while operating front-end loaders on July 18, 1995

On July 18, 1995, Inspector Ferran observed both foreman Rasmussen and miner Eldon Seely operating their front-end loaders while not wearing a seat belt (Tr. 119-20, 124-25). He issued Citation Nos. 4643513 and 4643520, alleging S&S violations of 30 C.F.R. Section 56.14130(g), as a result.

Rasmussen was feeding the hopper with his loader, which also had weak service brakes (Tr. 121). Seely was using his loader primarily to load customer trucks (Tr. 125). I affirm these violations as S&S violations and assess civil penalties of $100 for each of these citations.

Anytime a driver operates in an occupational setting without a seat belt, there is a reasonable likelihood of an accident resulting in serious injury. Thus, I find the gravity of these violations to be high. I also find the negligence of Rasmussen, which is imputed to Respondent, to be high. If supervisors do not feel compelled to observe MSHA's safety regulations, it is likely that their subordinates will be lax in complying with them as well. If a mine operator expects its employees to comply with the Act, it is essential that its foremen set an example and comply with MSHA's requirements.

Docket No. 96-30-M

Citation No. 4643521: First Aid Training

On July 18, Ferran asked foreman Rasmussen and miner Eldon Seely if either had been trained in first aid. Rasmussen showed him a card issued by Respondent indicating that his first aid training had expired a month earlier. The inspector thereupon

issued Citation No. 4643521, alleging a violation of 30 C.F.R. Section 56.18010 (Tr. 132). This regulation states that:

> Selected supervisors shall be trained in first aid. First aid training shall be made available to all interested employees.

Mr. Rasmussen did have some sort of first aid training several times prior to July 1995 (Tr. 360-61). This training primarily concerned cardio-pulmonary resuscitation (CPR), rather than other facets of first-aid (Tr. 382)[3].

I vacate the citation because the regulation only requires that some degree of first aid training be provided to supervisors, which I conclude Mr. Rasmussen received. The standard does not specify the details of the first aid training or require any periodic retraining or any demonstration that the supervisor learned or remembered anything from the training. The standard also does not require an active first aid card.

I do not believe that such requirements can be extrapolated from section 56.18010. If MSHA wants to assure that there is a supervisor present at every metal/non-metal surface mine who is competent to administer first-aid, it will have to revise its regulations.

Citation No. 4643526: Inoperative horn on front-end loader

Inspector Ferran determined that the horn on Mr. Rasmussen's front-end loader was not operable on July 18, 1995 (Tr. 137-39). He therefore issued Citation No. 4643526 alleging a non-S&S violation of section 56.14132(a). Although it is rare for persons or vehicles to come near Mr. Rasmussen's vehicle, it is possible (Tr. 363-64). Therefore, I affirm the citation and assess a $25 civil penalty.

---

[3]With regard to this issue I credit the testimony of Harold Higman, Jr., that Rasmussen's training included more than CPR (Tr. 401-02). Rasmussen did not recall such training (Tr. 382).

Citation No. 4643527: Inadequate service brakes on front-end loader

Mr. Ferran also determined that the compressor supplying air to the service brakes of Mr. Rasmussen's front-end loader was leaking. Due to this leak, the service brakes would not hold the loader when idling on the ramp to the hopper (Tr. 143-48).

Although Rasmussen normally operates his loader when no other people or vehicles are around him, he has had occasion to use his service brakes to stop the loader quickly (Tr. 365). Thus, I conclude that the Secretary has established a S&S violation of section 56.14100(b), as alleged in Citation No. 4643527.

Rasmussen's vehicle had a problem with slow-reacting brakes for several months prior to the inspection(Tr. 365, 384-85). This indicates a considerable degree of negligence on Respondent's part in letting this condition persist. Given this negligence and the reasonable likelihood of a serious injury due to the slowness of the brakes, I assess a $100 civil penalty for this violation.

Citation No. 4643552: Failure to wear seat belt at August 1995 inspection

On August 15, 1995, Inspector Ferran returned to the Richland Pit. Mr. Rasmussen was on vacation and Eldon Seely was in charge at the mine. Ferran observed another miner operating Rasmussen's front-end loader without wearing a seat belt (Tr. 152-57).

The driver told Ferran that he had not been told by anyone that he was required to wear a seat belt (Tr. 153). Ferran issued Citation No. 4643552 alleging a S&S violation of 30 C.F.R. 56.14130(g). MSHA subsequently proposed a $102 penalty for this citation.

I affirm this citation as an "S&S" violation and assess a $400 civil penalty. The Commission assesses penalties de novo after considering the six penalty criteria in section 110(i) of

the Act. It is not bound or limited by MSHA regulations or determinations regarding proposed penalties, United States Steel Mining Co., 6 FMSHRC 1148 (May 1984).

I believe that with customer trucks operating at the pit, there is a reasonable likelihood that failure of the loader driver to wear a seat belt would result in a serious injury. Thus, I believe that gravity factor would call for a penalty of about $100, when combined with consideration of Respondent's size, good faith in rapidly abating the citation, and the fact that Higman's ability to stay in business is not affected.

However, when consideration is given to Respondent's prior history of violations and negligence, a considerably higher penalty is warranted. I believe it would be entirely inconsistent with the purposes of section 110(i) to ignore the two seat belt citations Respondent had received a month before. Also, the fact that the driver had not been told that wearing of a seat belt was a condition of his employment establishes a high degree of negligence given the recent prior citations. Therefore, I conclude that a $400 civil penalty is appropriately assessed.

## ORDER

The citations, orders and proposed penalties in these dockets are resolved as follows:

### Docket No. CENT 95-261-M

| Citation/Order | Proposed Penalty | Assessed Penalty |
|---|---|---|
| 4643516/4643528 | $240 | $150 |
| 4643517/4643529 | $292 | $150 |
| 4643518/4643530 | $240 | $ 50; citation affirmed; order vacated |
| 4643519/4643531 | $195 | $ 75 |
| 4643522/4643532 | $108 | $ 75 |
| 4643524 | $ 50 | Vacated |
| 4643525 | $102 | Vacated |

| | | |
|---|---|---|
| 4643513 | $ 50 | $ 20 |
| 4643515 | $ 81 | $100 |
| 4643520 | $102 | $100 |

Docket No. CENT 96-30-M

| | | |
|---|---|---|
| 4643521 | $ 50 | Vacated |
| 4643526 | $ 50 | $ 25 |
| 4643527 | $102 | $100 |
| 4643552 | $102 | $400 |

Respondent shall pay the total assessed penalties of $1,245 within thirty (30) days of this decision.

Arthur J. Amchan
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, 1999 Broadway, Suite 1600,
Denver, CO 80202-5716 (Certified Mail)

Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr,
750 Pierce St., P.O. Box 717, Sioux City, IA 51102
(Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 20 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), on | : | Docket No. CENT 96-72-DM |
| behalf of IRINEO G. BELTRAN, | : | MSHA Case No. SC MD 95-02 |
| Complainant | : | |
| v. | : | Chino Mine |
| | : | Mine I.D. No. 29-00708 |
| TERRAZAS, INCORPORATED, | : | |
| Respondent | : | |

**DECISION**

Appearances: Ernest A. Burford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Complainant;
Matthew P. Holt, Esq., Sager, Curran, Sturgess and Tepper, Las Cruces, New Mexico, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the Secretary against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq, on behalf of the respondent Irineo G. Beltran, a laborer employed by the respondent. The respondent is an independent contractor, who at all times relevant to this proceeding was performing work at the Chino Mine, a mining operation located in Bayard, Grant County, New Mexico, and owned and operated by the Phelps-Dodge Corporation (Phelps-Dodge is not a party to this proceeding).

The record reflects that Mr. Beltran was employed by the respondent from April 5, 1993, through March 21, 1995, as a full time laborer earning $6.75 per hour. Mr. Beltran filed his

initial complaint on April 10, 1995, by mail with the MSHA field office located in Albuquerque, New Mexico, and his verbatim complaint states as follows:

> On March 21st 1995 at 12:20 p.m. I was on lunch break. I was setting inside unit #5 pickup truck, Cruz Terrazas came to the truck where I was eating lunch in a very angry mode, and ask me what kind of shit I was doing. I ask him why? He replied that kind of shit you are doing is no good. I told him I could not do any better because the sweeper was no good. I told him this sweeper is not so safe to do the job. Cruz then left. In about 2 minutes he returned, was still very angry and approached me again. He was saying to me to do a better job then that or get the fuck out. He was so close to my face I could feel spit hitting my face. I told Cruz this sweeper is not safe and I will not continue to operate it. Cruz told Carlos Miranda, another employee, to get me out of the mine. He repeated very angry over and over get him out get him out. I feel I should get back and be payed (sic) for all the time and money I have spent on gas looking for work.

A supporting statement by laborer Carlos Miranda, included as part of Mr. Beltran's complaint, states as follows:

> On March the 21st at 12:20 p.m. I Carlos Miranda was having lunch with Mr. Irineo Beltran. When Cruz Terrazas was telling Mr. Beltran he had to do a better job then what he was doing or to get the fuck out of the mine. Mr. Beltran told Cruz he could not do any better because the sweeper was no good and not safe to work with. Cruz was very angry with Mr. Beltran because he want him to do a better job. Mr. Beltran explained the conditions of the sweeper, but Cruz told me in a very angry voice to get this man out of the mine. Over and over. He was right in Mr. Beltran's face. Mr. Beltran walked away.

The Secretary initially filed a combined Complaint of Discharge and Application for Temporary Reinstatement on December 4, 1995, alleging that the respondent unlawfully

discriminated against Mr. Beltran by unjustly terminating him on or about March 21, 1995, "for refusing to work in unsafe conditions." The Secretary requested (1) a finding that Mr. Beltran was discriminated against and discharged for engaging in protected activity, (2) an assessment of an appropriate civil penalty for the alleged violation, and (3) Mr. Beltran's temporary reinstatement pending an adjudication of the merits of the complaint.

The respondent filed an answer to the complaint and stated, in relevant part, as follows:

> *** We are of the belief that Mr. Beltran was not terminated, but instead chose to leave of his own free will. He was told to do a better job on the project that he was involved with at the time, or else to go ahead and go home. We came to the conclusion that Mr. Beltran's choice was to leave his work site rather than to do a better job.
>
> We would also like to say that Terrazas, Inc. did not and has not received any correspondence in the form of citations, or any other that would show that the Gehl sweeper in question was inspected and found to be unsafe for operations. In fact, Mr. Fred Garcia, MSHA Inspector #00495 was at the job site in Santa Rita. He inspected the sweeper and commented on the newness of the equipment and said as far as he could see the sweeper was fine and was safely operable.

A temporary reinstatement hearing was held on February 6, 1996, and on February 26, 1996, I issued a decision finding that the Secretary's complaint was not frivolously filed and ordering the temporary reinstatement of Mr. Beltran pending a hearing on the merits of his complaint.

Following my temporary reinstatement decision, the Secretary filed a second separate complaint on March 12, 1996, alleging that the respondent unlawfully discriminated against Mr. Beltran on March 21, 1995, by terminating his employment for refusing to work in unsafe conditions, making a complaint under the Act, and notifying the respondent mine operator or its agent of a danger

at the mine. The Secretary requested an order affirming and making permanent the temporary reinstatement of Mr. Beltran to his laborer's position, at the prevailing wage rate and with the same or equivalent duties, backpay, and employment benefits, with interest, and payment of all expenses incurred by Mr. Beltran, with interest, associated with his complaint. The Secretary also requested an appropriate civil penalty assessment for the alleged violation. On April 15, 1996, the Secretary amended his complaint and requested a civil penalty assessment of $5,000 for the alleged violation.

The respondent did not file answers to the Secretary's March 12 and April 15, 1996, complaints and relied on its initial response and defense made in the course of the initial temporary reinstatement proceeding.

A hearing on the merits of the complaint was held in Las Cruces, New Mexico, and the parties appeared and participated fully therein. The parties filed posthearing briefs and I have considered their arguments in the course of any adjudication of this matter.

## Issues

The issues presented include: (1) whether the respondent discriminated against the complainant by terminating his employment for engaging in protected activities, (2) the appropriate remedies to be applied on behalf of the complainant, and (3) the imposition of an appropriate civil penalty assessment to be assessed against the respondent for the alleged discriminatory conduct. Any additional issues are identified and disposed of in the course of this decision.

## Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2), and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

## Stipulations

The parties stipulated that all of the testimony and evidence presented during the prior temporary reinstatement proceeding may be incorporated by reference and considered by me in the adjudication of the merits of the Secretary's complaint of discrimination.

The parties further stipulated to the following (Tr. 13-15):

1. The respondent is an independent contractor performing work for a mining company, and the respondent is subject to the jurisdiction of the Mine Act.

2. The presiding judge has jurisdiction in this matter.

3. Mr. Beltran was earning $6.75 per hour and was working 40 hours a week at the time his employment with the respondent ceased.

4. Mr. Beltran seeks backpay from March 21, 1995, less credit for payment received pursuant to his temporary reinstatement.

The parties also agreed that the respondent spent $132,145 maintaining and repairing equipment in 1995 (Tr. 333-334).

## Procedural Ruling

The Secretary's motion for a default judgment on the ground that the respondent failed to respond to his second and amended complaints was denied (Tr. 11).

## Petitioner's Testimony and Evidence

Irineo Beltran, the complainant, testified at the temporary reinstatement hearing that he has worked for the respondent for two or three years. He stated that he operated the Gehl sweeper on March 20, 1995, and inspected it before using it. He found that it was low on hydraulic fuel, had no front or rear reflectors, no backup alarm, no safety belt, and the left front tire was flat. He reported these conditions to Jesus Perez, the

general foreman, and Mr. Perez told him to call the mechanic to start the machine and that Ms. Perez would send someone to take care of the flat tire. Mr. Beltran said he operated the machine, and inflated the tire three times during the course of cleaning up that day (Tr. 107-111).

Mr. Beltran stated that the next day, March 21, 1995, while eating his lunch in his truck, respondent's Vice President Cruz Terrazas confronted him about the work that he was performing and told him "to get the fuck out" if he could not do a better job. Mr. Beltran stated that he told Mr. Terrazas that the equipment was not safe and offered to prove it to him, but that Mr. Terrazas replied, "I don't want to hear nothing you say" (Tr. 111). He stated that Mr. Terrazas then instructed Carlos Miranda to escort him from the property, told someone in the security office that he had fired him, and Mr. Beltran left the property (Tr. 113).

Mr. Beltran testified about his prior experience and training operating similar equipment, and he explained that the sweeper flat tire was changed, but the new tire was too big. When asked if this created a safety problem, he responded as follows (Tr. 114-115):

Q. Does that create a safety problem?

A. I felt that's not safe to do the work because, if you run it too fast, you can turn over or you can hurt somebody.

Q. What about --

JUDGE KOUTRAS: Excuse me. What if you didn't run it too fast?

THE WITNESS: If you run it too fast with the big large tire and one small tire on the right side, you can turn over.

JUDGE KOUTRAS: What does too fast mean? Why would you run it too fast?

THE WITNESS: I never run it too fast.

JUDGE KOUTRAS: If you didn't run it too fast, would there be a problem?

THE WITNESS: No.

Mr. Beltran further stated that the sweeper attachment had one bolt missing and one bolt was four inches too high, and with an uneven front tire, "it's impossible for you to do the work" (Tr. 115). He confirmed that he informed Mr. Perez about the sweeper conditions on March 20, but that Mr. Perez "didn't pay too much attention to me." Mr. Terrazas was not present at that time. Mr. Beltran stated that he tried to tell him about the sweeper conditions on March 21, "but he didn't listen to me, he just walked away and said I don't want to hear nothing about the equipment because I bought that equipment brand new and I'm pretty sure it will work" (Tr. 117).

Mr. Beltran explained the problem of operating the sweeper with no reflectors and low hydraulic oil. He stated that he was not a sweeper operator, but was "forced to do the job in the sweeper" without training or qualifications. He stated that he had not previously used such a sweeper (Tr. 118).

On cross-examination, Mr. Beltran testified about his prior experience operating equipment similar to the Gehl sweeper. He denied ever being laid off by the respondent (Tr. 121-122). He also denied any prior reprimands or disciplinary actions against him (Tr. 124-125). He explained that he could have done a better job with another sweeper, but the one he was operating "was unsafe to work" (Tr. 129). He confirmed that he operated the sweeper 15 hours on Monday and Tuesday, before Mr. Terrazas spoke with him, but denied that the sweeper was safe and stated that he operated it because he was told to (Tr. 130). He maintained that Mr. Terrazas fired him because he got mad when he told him the equipment was unsafe, and became angrier when he told him the equipment was no good (Tr. 132).

Mr. Beltran confirmed that Mr. Miranda and Anthony Maynes were present during his encounter with Mr. Terrazas, but that Mr. Maynes was 75 to 80 feet away and did not hear their conversations (Tr. 133). Mr. Beltran stated that on March 21, he never refused to work or state that he was not going to do the job (Tr. 134).

In response to bench questions, Mr. Beltran stated that on March 20 and 21, he was competent to operate the Gehl sweeper and had previously operated a similar machine to transport barrels (photographic Exhibit R-5). He further stated that he had not previously operated the sweeper in question in this case, but had operated others in better shape and good condition (Tr. 138-140). He conceded that he operated the sweeper that he considered was unsafe, but did so because the general foreman told him he did not have the time to take care of it and that he was to go ahead and use it to do the job (Tr. 141). He did not consider parking the sweeper because he believed he would be fired and needed the job (Tr. 142-143).

At the hearing on the merits, Mr. Beltran again described the condition of the sweeper when he inspected it on March 21, 1995. He stated that he operated it with a flat tire for the entire time he was doing the cleaning work. He then stated that he first drove the machine to the shop to put air in the tire and operated it with a flat tire "because he had to do the cleaning work" (Tr. 30-31). He further stated that he inflated the tire three times on March 20, in the morning at 7:30, and later at 11:00 a.m., and 2:00 p.m., because it had a slow leak (Tr. 34).

Mr. Beltran stated that he first saw Mr. Terrazas at 12:20 p.m., on March 21, 1995, and Mr. Terrazas "told me that the work that I was doing wasn't worth shit" (Tr. 35). Mr. Beltran stated that he told Mr. Terrazas that he had a flat tire and no hydraulic oil in the machine, and Mr. Terrazas "told me he did not want to hear any more shit about what I was saying" (Tr. 36).

Mr. Beltran denied that he refused to operate the sweeper, and confirmed that he informed Mr. Terrazas about his belief that the machine was unsafe because "it was not specified to do that type of cleaning" because the tire was flat, had no hydraulic oil, no reflectors, and no backup warning alarm. Mr. Beltran further believed the sweeper was unsafe because he could not continue to operate it "because of the tire, because, also, it had no oil, and it was very windy." He believed the lack of hydraulic oil would cause the bucket to drop and injure him, and that the windy conditions presented a hazard because there were no lights and someone could run into him from the front or rear (Tr. 36-37).

Mr. Beltran stated that Mr. Terrazas did not offer to put him on another sweeper or assign him to a different task (Tr. 41). He stated that the tire that was flat was fixed at 10:00 a.m., on March 21, 1995, when it was replaced by a bigger tire (Tr. 42). He stated that he operated the machine at five to six miles an hour, and that another Gehl was operating near him at the same speed. That machine was behind him picking up the dirt that he was leaving (Tr. 43).

Mr. Beltran stated that on March 21, 1995, personnel at the mine security office (not respondent's employees) were complaining that he was leaving a lot of dirt behind, and he told them that "I could not do a good job because this sweeper would not help me to do the good job" (Tr. 45).

Mr. Beltran stated that he did not quit his job and that he was fired by Mr. Terrazas and received a discharge slip. He confirmed that he looked for other work, but has never been called. He stated that he has always worked as a laborer and that he attended school for five to six days. His job with the respondent is his only source of income (Tr. 47). He has held six jobs in the past 40 years, and acknowledged that he considers himself a complainer "whenever I am issued equipment that I cannot utilize to perform my work" (Tr. 48).

On cross-examination, Mr. Beltran stated that he was not trained in the use of the Gehl machine, but he acknowledged his prior testimony that he used Gehl machines for 7-1/2 years while in Chicago and that the Gehls used by the respondent are "the same thing" and that he was trained to park and lock the machine if it were unsafe (Tr. 51). He acknowledged that he operated the machine in question for 10 hours on March 20, 1995, and five hours on March 21, and that it would not be unsafe as long as he did not drive it too fast. He confirmed that he never drove the sweeper too fast and that there were no injuries or accidents, and that he never complained to any Phelps Dodge personnel that he was driving any unsafe equipment (Tr. 52-53).

Mr. Beltran confirmed that he knew that an important tour of the mine was coming and that the respondent was trying to clean the place up. He acknowledged that Mr. Terrazas was mad at him because he had left dirt behind while he was sweeping, and Mr. Beltran commented "that was not my problem" (Tr. 53). He

further confirmed that he told Mr. Terrazas that it was not his fault, but the equipment's fault, and that Mr. Terrazas did not accept his explanation and told him to either do a better job or get out. Mr. Beltran told Mr. Terrazas he could not do a better job with the sweeper in question, but never refused to work (Tr. 54).

In response to questions concerning his March 21, 1995, conversation with Mr. Terrazas, Mr. Beltran stated (Tr. 64-65):

Q. When we had the hearing in Truth or Consequences, you heard Cruz testify that the only thing you said about the machine was that it was junk or no good; is that right?

A. To me, that it is not any good or not safe is the same thing.

Q. So anything that doesn't work as well as you think it should work is not safe?

A. If you cannot do the work with the machine that is designed to do the work, if you cannot do the work without a machine, how can you do it?

Q. Therefore it's unsafe?

A. At this moment, I say, yes.

Q. Now, you filed a claim for unemployment compensation benefits, didn't you.

A. Yes, sir.

Q. And in that claim, you said that the equipment was no good; is that right?

A. The word "no good" or "unsafe," what is the difference? That's the same thing, isn't it?

When it's not any good, it's not any good. When it's unsafe, it's unsafe, isn't it?

Mr. Beltran confirmed that he was represented by a legal services attorney at the State unemployment hearing and that he testified that "the machine I'm using is not working well. It's not helping me" because of the lack of hydraulic oil. When asked if he told the hearing judge that the machine was unsafe, Mr. Beltran stated, "I did not know the meaning of that word in English, "unsafe." But I know that the word "no good" to me, whatever doesn't serve any purpose, I just throw it away (Tr. 71).

Mr. Beltran acknowledged that in an application for employment that he filed with the respondent he stated that he had six years of schooling, but only attended school for six days (Exhibit R-4). He also acknowledged that he was in error when he stated in his MSHA complaint that he averaged 20 hours a week in overtime, and he explained that "perhaps I misunderstood" the question (Tr. 76-77).

Mr. Beltran acknowledged his signature on a company accident report of October 4, 1993, indicating that he was driving "the Gehl" when one of the tires failed. However, he stated that he could not recall the incident (Exhibit R-9; Tr. 77-78). He testified about prior statements that he made to an MSHA investigator indicating that he had not previously operated a Gehl or other kinds of machinery prior to March 20, 1995, and that he told Mr. Terrazas that the Gehl was unsafe when he first started work on the morning of March 21 (Exhibit R-10; Tr. 84-85).

Mr. Beltran stated that "most" employees have complained about unsafe equipment conditions and have been fired, and he identified two of them as Carlos Miranda and Daniel Avila (Tr. 92-93). When asked about his earlier testimony that he never heard of Mr. Avila, Mr. Beltran responded "could be somebody else. I don't know" (Tr. 97).

Mr. Beltran stated that the Gehl sweeper machine that was brought to the hearing site parking lot for a viewing by the presiding judge and the parties was not the machine he operated on March 20 and 21, 1995, because it was machine No. 961, and he operated machine No. 963 (Tr. 353-355).

Carlos Miranda, formerly employed by the respondent as a laborer, testified at the reinstatement hearing that he was present at the job site on March 21, 1995, and heard the conversation between Mr. Beltran and Mr. Terrazas. He stated that Mr. Terrazas told Mr. Beltran that he was not doing a good job and Mr. Beltran told Mr. Terrazas that the machine was not working properly (Tr. 146). Mr. Terrazas then told Mr. Beltran that "he was going to run him off" and told Mr. Miranda three times to remove Mr. Beltran from the property (Tr. 147).

Mr. Miranda stated that he normally operated the sweeper in question and was familiar with it. He stated that he checked it on Tuesday morning, March 21, and found that one of the tires had a slow leak, insufficient hydraulic oil, missing front reflectors, and no turn signals. He then told Mr. Beltran that he could not use the sweeper "because it wasn't safe to work on the machine" (Tr. 148-149; 154, 155). He further stated that Mr. Beltran told Mr. Terrazas that "the machine was not working correctly," and Mr. Miranda commented that "they spoke a lot of words in English, and I didn't know what they were saying" (Tr. 150). He also confirmed that he was the only person who heard the entire conversation "because I was the one closest to them" (Tr. 150). He confirmed that foreman Jesus Perez told him to report safety complaints to him and not to Mr. Terrazas.

At the hearing on the merits, Mr. Miranda stated that on March 21, 1995, he and Mr. Beltran were operating the Gehl sweepers at a speed of five to six miles an hour. He stated that he was following Mr. Beltran's sweeper and it was leaving "trails of dirt" behind and that he (Miranda) was cleaning this up as he followed Mr. Beltran. He stated that Mr. Beltran's sweeper was leaving dirt behind "because the machine was not working well. It was unsafe" (Tr. 100). He explained that Mr. Beltran's sweeper "was not working well" because it was low on hydraulic oil and needed more speed so that the sweeper could go faster and pick up the dirt (Tr. 101).

Mr. Miranda reiterated that he inspected the Gehl sweeper in question on March 21, 1995, and found it unsafe to operate because it was low on hydraulic oil, and if the sweeper is lifted to dump trash, "it could drop down on you, and then you could tilt forward" (Tr. 103). The sweeper also lacked a seat belt, and he told Mr. Beltran that it was not safe to operate.

Further, low hydraulic oil would also make it difficult to operate the sweeper directional lever (Tr. 105).

With regard to the Beltran-Terrazas conversation of March 21, 1995, Mr. Miranda stated that Mr. Terrazas was angry and that he told Mr. Beltran "that the work he was doing was not any good" and that Mr. Beltran "told him the machine was not any good, that it was not safe" (Tr. 108).

Mr. Miranda confirmed that he gave a prior statement to MSHA a year ago regarding the condition of the sweeper that Mr. Beltran was operating on March 21, and he acknowledged that he stated at that time that "the bucket was not straight and, when sweeping, there would be dirt left on both sides of the bucket because the bucket was oval. In the mornings, when started up to use it, and it was just sitting there with no one in it, it would start to move by itself" (Tr. 112). Mr. Miranda could not remember that he first told MSHA that "the steering was okay" (Tr. 112).

Mr. Miranda stated that Mr. Beltran never told Mr. Terrazas that he was not going to operate the sweeper because it was unsafe, and he did not remember Mr. Beltran ever refusing to work on that machine. He responded to further questions regarding his prior statement to MSHA (Tr. 116-119).

In response to further questions, Mr. Miranda confirmed that he made a prior statement that was submitted to MSHA with Mr. Beltran's original complaint and that he stated at that time that Mr. Beltran told Mr. Terrazas that he could do no better with the sweeper because it was no good and "not safe to work with" (Tr. 120; Exhibit R-12). Mr. Miranda confirmed his prior testimony concerning the condition of the sweeper, and he reiterated his opinion that it was unsafe on March 21, 1995 (Tr. 125).

Richard Arzola testified that he was employed by the respondent from 1992 to 1994, as a foreman, and was Mr. Beltran's first supervisor. He had no problems with Mr. Beltran's work, and never had any conversations with Mr. Terrazas. Mr. Arzola explained the procedure used by employees to report equipment problems, including the filling out of a preoperational safety inspection check list. He stated that he would turn the forms in

to the office at the end of the day and a field mechanic would take care of the problem. However, if the machine were operable, it would be operated until repairs were made (Tr. 129-132).

Mr. Arzola stated that he was trained to operate a Gehl sweeper and operated it "off and on because I helped my people." In his opinion, if a Gehl sweeper were operated with a flat tire, no seat belt, and no headlights or respirator, there would be "safety concerns." If the sweeper was "low, extremely low" on hydraulic fluid, it would work, but not properly, because it "wouldn't turn the brushes around, and would "cause the employee to be unable to properly do the job" (Tr. 136-138).

The check list referred to by Mr. Arzola (Exhibit C-5) was identified as one signed by Carlos Miranda for the machine that he was operating on March 20 and 21, 1995, and it did not pertain to the machine operated by Mr. Beltran (Tr. 139). The form was offered only for the purpose of demonstrating the type of form used as an equipment check list (Tr. 142, 146).

Judy Peters, MSHA Supervisory Safety and Health Inspector, testified at the temporary reinstatement hearing that she conducted the investigation of Mr. Beltran's complaint and initially contacted and interviewed Mr. Beltran, Mr. Miranda, Mr. Vigil, Mr. Terrazas, and other company personnel, and she confirmed that she either took their statements personally, or was present transcribing their statements taken by a fellow inspector (Tr. 66-67).

On cross-examination, Ms. Peters stated that she evaluated whether or not Mr. Beltran sincerely believed the sweeper was unsafe by the statements made by Anthony Maynes and Carlos Miranda. Mr. Maynes stated that Mr. Beltran said that someone was going to get hurt on the sweeper (Tr. 76). She stated that she was not provided with any information that Mr. Beltran had ever been reprimanded, and she was unaware of his state unemployment compensation claim until after her investigation (Tr. 77).

In response to bench questions, Ms. Peters stated that an MSHA inspector went to the work site the week the complaint was filed to inspect the Gehl sweeper in question. However, the only one he found was being repaired and could not be inspected, and a

second one could not be found (Tr. 83-84). No determination was made as to which sweeper Mr. Beltran may have been operating on March 21, 1995, because there was some confusion as to the sweeper serial number and Mr. Beltran was not present to point it out (Tr. 84).

Ms. Peters stated that when she interviewed Mr. Beltran he described in detail several things that were wrong with the sweeper, including a missing pin, lack of reflectors, an inoperable back-up alarm, and difficulty in controlling the directional hydraulic controls, and he expressed his fear that the missing pin might cause him to overturn and that he had to use both hands on the hydraulic controls (Tr. 85).

Ms. Peters stated that she determined that Mr. Maynes and Mr. Miranda were present on March 21, when Mr. Terrazas and Mr. Beltran had their discussions and that they both told her that Mr. Beltran stated that the machine was unsafe (Tr. 96). She further explained (Tr. 101-102):

> THE WITNESS: Correct. Two witnesses said that he did say -- one said he said someone was going to get hurt on it, and the other one said he said it was unsafe.
>
> JUDGE KOUTRAS: These witnesses said he said that to Terrazas or he said that to the two witnesses?
>
> THE WITNESS: He said that to Terrazas.
>
> JUDGE KOUTRAS: To Terrazas?
>
> THE WITNESS: They witnessed the altercation.
>
> JUDGE KOUTRAS: Both of these people indicate to you that Mr. Beltran specifically told Mr. Terrazas that this piece of equipment, in addition to what else he said here, is, someone is going to get killed and its unsafe?
>
> THE WITNESS: Somebody is going to get hurt.
>
> JUDGE KOUTRAS: Somebody is going to get hurt.

THE WITNESS: Right. And the individual that said that also said that he didn't understand a lot of Spanish, and he couldn't understand everything that was being said, but he did understand that he said someone was going to get hurt, because for most of the conversation, evidently, Terrazas and Beltran were speaking Spanish.

Ms. Peter stated that Mr. Terrazas did not state to her that he fired Mr. Beltran for complaining about safety, but did say that "he gave him a choice" (Tr. 104).

At the hearing on the merits, Ms. Peters testified that during her investigation Mr. Terrazas reviewed Mr. Beltran's personnel file with her, and it contained an application and two handwritten notes. She did not make copies of these documents, and there was no accident report in the file (Tr. 153). She stated that in April, 1995, MSHA Inspector Alfredo Garcia attempted to inspect the Gehl sweeper in question, but he was unable to confirm whether it was unsafe (Tr. 156).

Ms. Peters stated that she took statements from Mr. Beltran on April 18 and 19, 1995, and calculated that the respondent's history of prior violations for the 24 month period prior to the alleged violation in this case, from May 1993 through May 1995, consists of five violations. Further, the respondent worked 73,000 "plus" annual man hours for 1994 (Tr. 159-161; Exhibit C-6).

Ms. Peters stated that in her opinion, a Gehl sweeper that did not have a seat belt, was low on hydraulic fluid, and had no lights or reflectors "would indicate it might have been operated in unsafe conditions, and I believe the ones you didn't name off was backup alarm and a bolt missing in the sweeper." She stated that Mr. Terrazas told her that he fired Mr. Beltran (Tr. 166).

On cross-examination, Ms. Peters stated that it was never determined whether Mr. Beltran was operating the Gehl No. 961 or 962, and that "we didn't have a serial number" (Tr. 167). She stated that Mr. Garcia saw one Gehl on the property, but it was being repaired, and it may or may not have been the one Mr. Beltran was operating on March 21, or the one that

Mr. Miranda was operating. In any event, Mr. Garcia did not cite the machine (Tr. 169).

Ms. Peters stated that after her initial interview with Mr. Beltran, he called and asked for another interview. He informed her that he had spoken with Daniel Avila, a mechanic, and that he told him that low hydraulic fluid could cause the Gehl control levers to be difficult to operate, and that Mr. Beltran had a later opportunity to review and sign his statement (Tr. 170-171).

Ms. Peters identified Exhibit R-10 as Mr. Beltran's statement of April 18, 1995, and she confirmed that it was a transcript of the taped interview, as reviewed and corrected by Mr. Beltran (Tr. 171-172). She explained that the "white outs," and handwritten responses were apparently made by Mr. Beltran and stated "that's the way we got it back" (Tr. 178).

Ms. Peters was recalled and stated that the MSHA complaint form showing 20 hours a week overtime for Mr. Beltran was filled out and mailed in by Mr. Beltran. She independently verified his overtime by reviewing the payroll records provided by Mrs. Terrazas, and they indicated "four or five hours for the time period I was given." She did not believe that 20 hours of overtime for the entire year was unreasonable (Tr. 356).

Ms. Peters stated that several times during her interview with Mr. Terrazas, he referred to Mr. Beltran's job "termination." She stated that when she requested Mr. Beltran's personnel file, she saw some handwritten notes, but was not given copies of any reprimands or accident report involving Mr. Beltran (Tr. 358).

On cross-examination, Ms. Peters agreed that Mr. Beltran's employment "ceased," and regardless of whether it was terminated by Mr. Beltran or Mr. Terrazas, Mr. Beltran's employment was "terminated" (Tr. 358).

Ms. Peters stated that when she interviewed Mr. Terrazas, he told her that on March 21, 1995, he gave Mr. Beltran a choice "to do a better job or go to the house," and later in the interview told her that he had given him three choices and wanted Mr. Beltran "to go slower and do a better job or he could leave"

(Tr. 358). She stated that Mr. Terrazas told her when he went back to the area where Mr. Beltran was eating lunch, they argued some more, and at that time he gave Mr. Beltran the option to get on the machine and do a better job, use a broom and shovel to clean the roadways, or get out of the mine. She stated that this was consistent with Mr. Terrazas' hearing testimony (Tr. 359).

Respondent's Testimony and Evidence

Anthony Maynes, a former employee now working for Phelps Dodge Mining Company, testified at the reinstatement hearing that he was operating a scraper on March 21, 1995, and Mr. Beltran was operating one of two Gehl sweepers that were in operation that day. Mr. Maynes observed no problems with the sweeper operated by Mr. Beltran, noticed no difficulties in driving it, and Mr. Beltran did not complain to him about any problems (Tr. 172-174).

Mr. Maynes stated that he operated the same Gehl sweeper that Mr. Beltran operated before he left the mine on March 21, 1995, and that he took his time, slowed the machine down, and finished the job. He observed no machine defects, had no problem operating it, and there was nothing about it that made him feel unsafe. He never told anyone that he felt the sweeper was unsafe, and he acknowledged that he gave a statement to Ms. Peters during the investigation. He stated that he told Ms. Peters that he never had any problems with the sweeper. He stated that he had no conversation with Mr. Beltran concerning the sweeper, could not recall hearing Mr. Beltran state that the sweeper was not safe, and he did not tell Ms. Peters that the sweeper was going to hurt someone (Tr. 175-176).

On cross-examination, Mr. Maynes confirmed that during his interview with Ms. Peters she took his statement and he read, initialed, and signed each page, and he recalled that he told Ms. Peters that Mr. Beltran stated that the machine "was junk and stuff," and that "it was unsafe because it was junk" (Tr. 178).

Mr. Maynes stated that he only heard some of the conversation between Mr. Terrazas and Mr. Beltran "because I was further back," and that "a lot of it was in Spanish, and I don't speak Spanish" (Tr. 180).

At the hearing on the merits, Mr. Maynes stated that he was unaware of any problems experienced by Mr. Beltran while operating the Gehl sweeper on March 21, 1995. He noticed nothing wrong with the machine and Mr. Beltran never complained to him or to anyone else about the machine. He stated that the "safe operating speed" for the machine was "just take it easy, go slow and nothing happens. You'll be all right" (Tr. 188). He stated that he and Mr. Beltran "were going a little bit faster than usual," and when this happens "the job won't get done right, and you leave lines of dirt behind" (Tr. 188-189).

Mr. Maynes stated that the conversation between Mr. Beltran and Mr. Terrazas on March 21, 1995, was mostly in Spanish and "there were some spots in English" (Tr. 189). He heard Mr. Terrazas tell Mr. Beltran to "either finish the job, do it right, or he could leave, and he left" (Tr. 189).

Mr. Maynes never heard Mr. Beltran give any excuse for doing a bad job, but he has heard him complain about a vehicle being "a piece of junk," without saying anything specific. Mr. Maynes stated that he used the sweeper after Mr. Beltran left the site and he had no problems with it and was aware of no defects. He did not believe that the machine was junk or unsafe (Tr. 190-191).

On cross-examination, Mr. Maynes stated that he worked for the respondent for approximately 10 months and never had any complaints about the equipment that he operated, and this included excavators, Gehls, backhoes, loaders, and dump trucks (Tr. 191). He once reported the lack of a backup alarm on a piece of equipment, and it was repaired, and he explained that maintenance forms are filled out and needed repairs are reported to a supervisor (Tr. 193).

Mr. Maynes stated that he and Mr. Beltran were doing "a sloppy job" by "going too fast" and that Mr. Terrazas told them to slow down. Mr. Maynes agreed that Mr. Beltran was having a problem doing the job properly (Tr. 194). He explained that for sweeping purposes, the machine should be operated at "a couple miles per hour. You go slow, and it will pick up your dirt" (Tr. 196). He did not believe that operating at five miles an hour was too fast.

Mr. Maynes stated that Mr. Beltran's comments that "the equipment was junk, no good and someone was going to get hurt on it" were not directed at Mr. Terrazas, but were comments made to him (Maynes) and Mr. Miranda when Mr. Beltran was preparing to walk to the mine gate to leave the site, and Mr. Terrazas was not present at that time (Tr. 303-304). Mr. Maynes denied that he changed his prior testimony, and denied that he ever said that Mr. Beltran's comments concerning the sweeper were directed at Mr. Terrazas (Tr. 305). Mr. Maynes' prior statement to Ms. Peters was received in evidence, and it states, in relevant part, as follows (Tr. 307-308; Exhibit C-8):

> After Mr. T told Miranda to drive Beltran to the gate Beltran came over there and tell me what his side of the story was.
>
> Most of it was in Spanish and what I understood was that Mr. T told him he wasn't doing a good enough job. Beltran told him it wasn't his fault it was the junk equipment. They were yelling so fast in Spanish I couldn't understand all of it. Mr. T wasn't just referring to Beltran not doing a good enough job, he was telling all three of us to do a better job.
>
> Beltran just said the equipment was junky and it wasn't our fault. After that we did do a better job. We did a real good job. The Gehl he had used was used to finish the job and no one else complained about it.
>
> What Mr. Beltran would say was that the equipment was junk, no good, and someone was going to get hurt on it. He did not specifically say it was unsafe. He did not say anything specific that was wrong with it. He would say it was unsafe because it was junk.

Commenting on Mr. Maynes testimony, counsel Burford responded as follows to a bench comment (Tr. 308-309):

> JUDGE KOUTRAS: He's testifying today. It seems to me, his testimony is -- you seem to think he's changed his testimony. Today he doesn't recollect that Mr. Terrazas was present when Mr. Beltran made these statements about the equipment being unsafe, correct?

MR. BURFORD: That's correct, based on the statement, the way I read and interpret it, he's clarified his statement, and I accept that.

Lillian Medina testified that she was employed by the Phelps Dodge Company at its Chino Mines as a safety inspector. She stated that on April 5, 1995, she was with MSHA Inspector Alfredo Garcia when he came to inspect a Gehl piece of equipment owned by the respondent in response to a complaint. She accompanied Mr. Garcia to the parking lot, and he inspected the machine and commented that "it was a pretty new piece of equipment" and "looks pretty good" (Tr. 200-203).

Mrs. Medina stated that she has made no inquiry as to whether any safety violations were reported to the mine security office by Mr. Beltran on March 21, 1995, and no such claims of any violations were ever brought to her attention (Tr. 210). She explained that there are 1,200 employees at the Chino Mines, which encompasses a 20-mile radius, and that safety complaints are handled by the mine safety department, and any complaints by contractors made after hours are turned in to the security office or a supervisor (Tr. 215-216).

On cross-examination, Mrs. Medina stated that she did not check the serial number of the piece of equipment inspected by Mr. Garcia, and it was not tagged out. A sweeper attachment was by a fence next to the machine, but it was not attached to the machine (Tr. 21).

Roberto Carreon testified that he has worked for the respondent for approximately two years, and is a foreman and supervisor. He has worked with Mr. Beltran and considers him to be "just like anyone else." The only problem he had with Mr. Beltran was that he had to order him to do something and Mr. Beltran would complain and "was always negative to this" (Tr. 227).

Mr. Carreon identified copies of notes he gave to management stating that Mr. Beltran "was negative" whenever he receives an order to do work and requesting that Mr. Beltran be removed from his crew (Tr. 227-228; Exhibit R-16). He also identified a note asking a supervisor for permission to no longer work with

Mr. Beltran. He explained that the request was made because "I did not want to have the same problem" (Tr. 228).

Mr. Carreon stated that he did not supervise the clean-up job at the mine site on March 20 and 21, 1995, and never observed Mr. Beltran operate the sweeper (Tr. 230). He confirmed that he was present when MSHA Inspector Garcia inspected a Gehl sweeper and commented that "it was all right" (Tr. 231).

On cross-examination, Mr. Carreon stated that when Mr. Garcia looked at the machine, the sweeper mechanism was disconnected, and he could not recall if Mrs. Medina was present (Tr. 233-235). He confirmed that when he wrote the notes concerning Mr. Beltran he was asking that he be transferred and not fired. He confirmed that Mr. Beltran did good work, but could not recall how long he supervised him (Tr. 242-243).

Cruz Terrazas, respondent's vice-president, testified at the temporary reinstatement hearing that his company was performing contractual cleanup work on March 21, 1995, at the Chino Mine, a copper mine located in Santa Rita and operated by the Phelps Dodge Company. Mr. Beltran was employed as a laborer and had worked for his company "on and off" for more than two years. Mr. Beltran was assigned to operate a Gehl sweeper to clean the mine parking lot. Mr. Terrazas considered him to be a trained equipment operator, but did not know who trained him, and he was not aware of any training records for Mr. Beltran at that time. Mr. Terrazas considered Mr. Beltran to be a "complainer" who always found someone else, or the equipment, to be at fault. He stated that he was unaware of any employees who were fired in 1995 (Tr. 10-18).

Mr. Terrazas stated that he could not recall testifying at Mr. Beltran's unemployment claim hearing that the sweeper in question had two uneven tires. He believed that the sweeper operated by Mr. Beltran on March 21, had the same sized tires and that the sweeper mechanism was a new attachment. He was not aware that the sweeper had a pin missing or that it leaked hydraulic oil. He stated that the sweeper was approximately one year old (Tr. 27-28).

Mr. Terrazas identified Exhibit No. C-1 as a copy of a discharge slip stating that Mr. Beltran was discharged on March 21,

1995, and he confirmed that Sammie Vigil, whose signature appears on the slip, is one of his superintendents. Mr. Terrazas was of the opinion that Mr. Beltran quit his job (Tr. 28-30).

Mr. Terrazas denied that he had a bad temper, but admitted that he is impatient. He confirmed that he and Mr. Beltran were arguing at the time of the March 21, 1995, incident, and stated that he told Mr. Beltran that he wanted the job done and gave him the option of using a broom and shovel, rather than the sweeper, to get the job done.

On cross-examination, Mr. Terrazas stated that he had a contractual obligation to complete the mine clean up job by the next day, March 22, 1995, and to remove all of his equipment by one o'clock. He stated that other employees were using brooms and shovels to clean up, and he did not believe that this was unsafe. He stated that no one informed him that there was anything wrong with the sweeper, and Mr. Beltran simply told him that it was an piece of junk that was "not worth a shit." He further stated that Mr. Beltran said nothing about any missing pins, hydraulic leaks, or uneven wheels (Tr. 35-39).

Mr. Terrazas stated that the sweeper and the machine to which it is attached operate at one speed, and if it is operated too fast, it will not pick up all of the dirt and will leave it in rows on the ground. He stated that he told Mr. Beltran to slow down while operating the machine and that he assigned someone else to operate it after Mr. Beltran quit and left the work site (Tr. 39-40).

Mr. Terrazas stated that no one advised him that there was a problem with the sweeper machine and that MSHA inspected it after the complaint was filed and that it was not "red tagged" as unsafe. He denied that Mr. Beltran was discharged for safety reasons or out of retaliation for making safety complaints (Tr. 42-45).

Mr. Terrazas stated that he was at the work site on March 21, for approximately 45 minutes and recalled that he spoke with Mr. Beltran for 10 to 15 minutes. He stated that Mr. Beltran did not want to hear anything else and kept repeating that the sweeper machine "was a piece of shit" and that he was upset and angry (Tr. 45-46). He denied that his employees were

afraid to complain to him out of fear of being fired, and stated that all complaints were to go to their foreman (Tr. 46-51).

In response to bench questions concerning the company separation form stating that Mr. Beltran was discharged, Mr. Terrazas stated that the superintendent who signed it assumed that Mr. Beltran had been fired because Mr. Beltran told everyone that this was the case and the form had already been filled out (Tr. 52-53).

At the hearing on the merits, Mr. Terrazas stated that Mr. Beltran "was not a very good" employee and that two reprimands were in his personnel file (Exhibit R-16 and R-17; Tr. 252). He explained the process and the forms for disciplining employees, and confirmed that he signed one of the reprimand forms (Tr. 254-255). He stated that Mr. Beltran was temporarily laid off on May 10, 1993, and June 4, 1994, for lack of work and rehired (Exhibit R-20, Tr. 257-259).

Mr. Terrazas considered Mr. Beltran to be a satisfactory employee in 1993, but in 1995 he stated that he "pretty well had a bellyful of him" (Tr. 259). He explained that "his ability is there, if he wanted to, but the problem was you sure didn't know when he was going to work and when he wasn't. That was the biggest problem" (Tr. 260). He stated that Mr. Beltran never made any safety complaints to him.

Mr. Terrazas explained what transpired on March 21, 1996 (Tr. 261-163):

> A. Okay. The last day. It was around noon, and I don't know what time it was again. I showed up, and they were eating lunch. There was Mr. Beltran, Carlos Miranda and a tall, young kid. He just testified here --
>
> Q. Go ahead.
>
> A. -- whatever his name is. Anyway, they were eating lunch. And I went down there, and there was piles of dirt where it was supposed to have been cleaned. I mentioned the fact that was definitely not the way we were going to leave it, and right about that time,

Mr. Beltran, he was on the driver's side, he started complaining about the equipment.

Q. What were his complaints?

A. He said that the sweeper wasn't worth a shit, is what he said. So I told him, I said, Well, I said the problem is, I said, is that you're going too fast. He said, No, that's not the problem. It's just not worth a shit.'

So I told him, I said, Mr. Beltran, I'm not here to argue with you. I'm here to get the job done. I said, We need to finish this thing and finish it up in time. I said, You're going to have a choice. You've got a choice. You can take this piece of equipment whether it's worth a shit or not, you take it and you do the job; you can get a broom and a shovel and do the job; or you can leave the job site. I said, That's completely up to you. And that's what happened. I instructed --

Q. What happened?

A. At that time, he said, Put it on paper. I said, No problem. I said, Go ahead and take him -- I told Carlos Miranda, Go ahead and take him to the gate. And he said, I don't need it. I can walk, or something to that effect.

So I went around the building, went around the west side of the building and waited. And he wouldn't come out, so I made a turn and came back and said, What are you waiting for? At that time, he went ahead and started to walk out.

Mr. Terrazas stated that Mr. Beltran did not specify what was wrong with the sweeper, said nothing about a flat tire, and never told him that it was not safe (Tr. 263). He further stated that no one told him that the machine was unsafe and he had no reason to believe that it was unsafe or that Mr. Beltran was making a safety complaint (Tr. 264).

On cross-examination, Mr. Terrazas stated that Mr. Beltran quit his job (Tr. 267-268). He could not recall whether he furnished Ms. Peters with copies of two warning notices given to Mr. Beltran, or whether he showed them to her during her investigation. He denied that he went through every document in Mr. Beltran's personnel file, and stated that his best recollection is that he gave the file to Ms. Peters (Exhibits R-17 and R-18; Tr. 274).

Mr. Terrazas stated that he discussed the October 11, 1994, warning slip that states that Mr. Beltran was "standing around pickup truck and not working" with Mr. Beltran (Tr. 278-279). He further stated that he knew about the September 9, 1994, warning notice which indicates that Mr. Beltran left the mine for personal business without authorization because the supervisor asked him if he had been given permission. He did not discuss this notice with Mr. Beltran (Tr. 280).

Mr. Terrazas confirmed that he was aware that a miner had a right to voice a safety complaint to his employer without being discriminated against or terminated (Tr. 282). He stated that he did not inspect the sweeper in question on March 21, 1995, and that someone else operated it after Mr. Beltran left the mine (Tr. 285). Mr. Terrazas stated that when he gave Mr. Beltran his options, and Mr. Beltran told him to put it in writing, he construed this to mean that Mr. Beltran chose to leave (Tr. 289).

Mr. Terrazas confirmed that he has fired and hired people back "over and over again," and if Mr. Beltran had returned the next day and talked to him he would have given him back his job (Tr. 294). He believed that Mr. Beltran had an opportunity on March 21 to tell him about the machine before they began to argue. He denied that Mr. Beltran tried to explain what was wrong with the machine and stated that Mr. Beltran kept telling him that "It's a piece of shit" (Tr. 295-296). Mr. Beltran never returned to ask for his job back (Tr. 301).

Jesus Perez, respondent's job superintendent, also known as "Chuy," testified that he supervised the cleaning project on March 20 and 21, 1995, and he told Mr. Beltran that he needed to operate the sweeper slower to avoid leaving lines of dirt behind. Mr. Beltran operated the sweeper on March 20, and again on

March 21, until noon, and never informed him about any safety problems (Tr. 182-186).

Mr. Perez stated that he was not present on March 21, when Mr. Terrazas spoke with Mr. Beltran, but he did speak with Mr. Beltran before he left the mine, and Mr. Beltran told him that he "wasn't going to put up with any more shit," and left the site. Mr. Perez stated that Mr. Beltran mentioned that he would "get even; that he wasn't going to be treated the way he was treated" and indicated that he might file a grievance against Mr. Terrazas (Tr. 187-188).

Mr. Perez stated that some of the foremen believed that Mr. Beltran was hard to work with and they had problems with his work (Tr. 190-193; Exhibits R-6 and R-7). Mr. Perez stated that Mr. Terrazas never said anything to him that would lead him to believe that Mr. Beltran was terminated for complaining about any safety issue, and he had no reason to believe that the termination was for reasons other than Mr. Beltran's unwillingness of inability to do the quality of work that was expected of him (Tr. 194).

On cross-examination, Mr. Perez recalled giving a statement to an MSHA inspector stating that he would hire Mr. Beltran back (Tr. 195). He explained the operation of the Gehl sweeper and confirmed that there were several cleanup jobs that Mr. Beltran could have performed on March 21, if he had refused to work on the sweeper. He did not offer Mr. Beltran any of this work. He did not believe that two written supervisory complaints against Mr. Beltran over a two-year period was excessive, and he did not recall any other complaints (Tr. 199-200).

Mr. Perez agreed that a Gehl sweeper with different sized tires, a lack of hydraulic fluid, missing or loose attachment bolts, and missing reflectors would cause a safety problem and create a hazard for the operator or other people (Tr. 201).

In response to bench questions concerning the discharge slip reflecting Mr. Beltran's discharge (Exhibit C-1), Mr. Perez stated that he and project superintendent Vigil had the authority to fire employees. Mr. Perez did not believe that anyone fired Mr. Beltran and stated that Mr. Vigil "just wrote the paper," but he had no idea why he did so and only saw the

discharge slip "after the fact," and did not try to correct it (Tr. 213-214).

At the hearing on the merits, Mr. Perez confirmed that Mr. Beltran was operating a Gehl sweeper on March 21, 1995, cleaning the roadway and that he was Mr. Beltran's supervisor. He stated that the clean up was a three day job and that he spoke with Mr. Beltran "a couple hours after the cleanup had started." Mr. Beltran informed him that the sweeper "wasn't sweeping right, and it was leaving a line, and he couldn't do the job like that" (Tr. 311). He stated that Mr. Beltran did not tell him about any sweeper safety defects, or that it was unsafe.

Mr. Perez stated that Mr. Beltran told him that the machine "needed some hydraulic fluid" and Mr. Perez had "Ruben" check it, and Mr. Perez believed that hydraulic fluid was added. The next day, Mr. Beltran was still complaining that the machine "was still leaving a line," and Mr. Perez told him that he needed to slow down and that a bend in the sweeper bucket scoop would leave "a sifting of dirt" (Tr. 311-312). Mr. Perez was not aware of any safety-related concerns with the machine on March 20 or 21, 1995, and Mr. Maynes operated it for the rest of the day after Mr. Beltran left, and until 1:00 p.m. the next day without any problems (Tr. 324).

Mr. Perez confirmed that he was present when MSHA Inspector Freddie Garcia came to the mine site to inspect the Gehl machines and other equipment and found nothing unsafe (Tr. 314-316).

On cross-examination, Mr. Perez stated that he observed a Gehl sweeper in the parking lot across from the April 18, 1996, hearing location, but did not look at it carefully. He stated that it was the same machine that Mr. Beltran operated on March 21, 1995, and the same one that Inspector Garcia looked at. He believed it was the same machine because it had a bent bucket (Tr. 319). He stated that the machine is numbered 961 and "I know it was that one" (Tr. 323).

Mr. Perez confirmed that the Gehl machine that he looked at did not have any headlights, and it was in that condition when Mr. Garcia inspected it. He also confirmed that he did not look at the machine on March 20 or 21, 1995 (Tr. 320). He did not believe that a low level of hydraulic fluid would cause a

difficulty in operating the machine controls, but if the fluid ran out completely, the machine will stop (Tr. 321).

Mr. Perez was not aware of any accidents involving Mr. Beltran, and if Mr. Beltran were so involved, Mr. Perez would not necessarily be informed about it and it would be a matter for the mine safety personnel (Tr. 326).

Mr. Perez acknowledged his prior temporary reinstatement hearing testimony that he could not recall the equipment identification number for the Gehl sweeper that Mr. Beltran operated on March 21. He explained that in the interim between the two hearings, he checked his files and time sheets to determine the machine number (Tr. 328). He confirmed that Mr. Beltran never complained to him that he was not properly trained on the Gehl sweeper (Tr. 333).

Ruben R. Gomez, respondent's maintenance mechanic, testified that he was mechanically familiar with Gehl sweepers and their hydraulic systems. He stated that the Gehl sweepers owned by the respondent in March 1995, were approximately nine months to a year old and "were in good shape." He explained the procedure for adjusting the steering, and if it were out of adjustment, it could cause difficult steering, but would not require the use of both hands to steer. The speed of the machine is controlled by a throttle control, and the hydraulic oil capacity is approximately 14 gallons. He recently field tested a Gehl machine, and it will run with five gallons low on hydraulic fluid, but may not if its "very low on hydaulic, we're talking approximately half or less" (Tr. 337-338).

Mr. Gomez stated that on Tuesday, March 21, 1995, Mr. Beltran called because of the low hydraulic fluid, and Mr. Gomez added fluid. He also repaired two missing safety chains on the sweeper attachment, and checked the sweeper adjustment and found that it performed properly. Mr. Beltran also told him about a low tire, and it was aired up to its proper capacity. He stated that the tire was not changed with a larger tire because the machine has a standard tire size that will rub with each other if a bigger tire is installed (Tr. 338-339).

Mr. Gomez stated that he watched Mr. Beltran operate the Gehl "a little bit too fast," and told him to "run it kind of

slow" to provide better sweeper performance. Mr. Gomez stated that he adjusted the height of the sweeper, but could not resolve Mr. Beltran's complaint about the bent sweeper bucket. Mr. Gomez confirmed that a bent or bowed bucket "would cause the sweeper not to pick up right," but Mr. Beltran did not tell him that he felt this was dangerous (Tr. 341).

Mr. Gomez stated that Mr. Beltran had used a Gehl with a sweeper attachment prior to March 21, and he had prior dealings at another job site with Mr. Beltran when throttle linkage cable adjustments were made (Tr. 341). Mr. Beltran never complained to him about an inoperable backup alarm or missing bolts, and when Mr. Gomez adjusted the sweeper in question, the bolts were in place. Mr. Beltran never told him that the Gehl in combination with the sweeper was dangerous. Mr. Gomez stated that he inspected the items that Mr. Beltran brought to his attention, and found nothing that was dangerous (Tr. 343).

On cross-examination, Mr. Gomez stated that equipment maintenance problems can also be safety problems and that employees are required to report these problems to him. He also indicated that there are occasions when a safety problem may not be a maintenance problem, and that this would depend on the type of equipment, and the experience level of the operator (Tr. 344-345). He confirmed that he has operated Gehl sweepers since 1985, and is aware of no condition that would cause an operator to have two hands on an operating lever (Tr. 345). He confirmed that prior equipment complaints by Mr. Beltran were reasonable and that he made the repairs when he was the mechanic on duty (Tr. 350). He believed all of the equipment concerns he discussed with Mr. Beltran were just maintenance problems which were resolved, and not safety problems (Tr. 352).

## Findings and Conclusions

### Fact of Violation

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company,

2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 633 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev's on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983).

The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commissions's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ____ U.S. ____, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Protected Activity

It is clear that Mr. Beltran had a right to make safety complaints about the sweeper that he was assigned to operate, and that these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him. Secretary of Labor ex rel Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 633 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or a foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. The miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management,

MSHA ex rel Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

Mr. Beltran's Safety Complaint to the Respondent

When a miner has expressed a reasonable, good faith fear of a safety or health hazard, and has communicated his complaint to mine management, management has a duty and obligation to address the perceived hazard or safety concern in a manner sufficient to reasonably quell his fears, or to correct or eliminate the hazard, Secretary v. River Hurricane Coal Co., 5 FMSHRC 1529, 1534 (September 1983); Gilbert v. Sandy Fork Mining Company, 12 FMSHRC 177 (February 1990), on remand from Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), rev'g Sandy Fork Mining Co., 9 FMSHRC 1327 (1987).

In a number of safety related "work refusal" cases, it has been consistently held that a miner has a duty and obligation to communicate any safety complaints to mine management in order to afford the operator with a reasonable opportunity to address them. See: Secretary ex rel. Paul Sedgmer et al. v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986); Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia, No. 89-1097.

There is no credible evidence in this case that prior to leaving the job site on March 21, 1995, Mr. Beltran ever refused to operate the sweeper because of any perceived safety hazard. Indeed, the credible evidence establishes that Mr. Beltran operated the sweeper on March 20, for approximately 10 hours, and again on March 21, for approximately 5 hours, in spite of his assertions that the sweeper was not safe to operate. Further, he unequivocally testified that he never refused to operated the sweeper.

Although I find that Mr. Beltran never refused to operate the sweeper, I conclude that the same "work refusal" principles apply to any complaint that he may have made and that the Secretary has the burden of establishing that Mr. Beltran in fact made a safety complaint, that he communicated his complaint to mine management, that management knew or had reason to know about the complaint, and that any adverse action against Mr. Beltran which followed his complaint was the retaliatory and discriminatory result of the complaint. In short, the Secretary must establish a nexus between the communicated complaint and any adverse action which followed. See: Sandra Cantrall v. Gilbert Industrial, 4 FMSHRC 1164 (June 1982); Alvin Ritchie v. Kodak Mining Company, Inc., 9 FMSHRC 744 (April 1986); Eddie D. Johnson v. Scotts Branch Mine, 9 FMSHRC 1851 (November 1987); Robert L. Tarvin v. Jim Walter Resources, Inc., 10 FMSHRC 305 (March 1988); Connie Mullins v. Clinchfield Coal Company, 11 FMSHRC 1948 (October 1989).

In a March 22, 1995, statement filed in connection with his State unemployment compensation claim, Mr. Beltran did not state that he informed Mr. Terrazas that the sweeper was unsafe to operate (Exhibit R-4; Temporary Reinstatement Hearing). He simply states that "I told him (Terrazas) I can't do any better because the sweeper is no good." Subsequently, on April 10, 1995, when he filed his discrimination complaint with MSHA, Mr. Beltran stated that during his March 21, 1995, encounter with Mr. Terrazas, he told Mr. Terrazas that the sweeper was not safe and that he would not continue to operate it.

Following the filing of his MSHA complaint, Mr. Beltran was interviewed by Ms. Peters and two other MSHA special investigators on April 18, 1995, and he gave them a 17 page statement which he signed and dated November 5, 1995 (Exhibit R-10; Merits Hearing). In relating what occurred during his encounter with Mr. Terrazas, and in response to Mr. Terrazas' admonition that he do better work, Mr. Beltran stated that "I told him No, I can't do any better work because the sweeper and the Gehl is no good. * * I said No, Cruz I cannot do better work. I refuse to do the work because I already told you, and I told my foreman, Chuy Perez, that machine was no good, and I cannot do better."

At the reinstatement and merits hearing, Mr. Beltran testified under oath that he never refused to work, never stated that

he was not going to do the job, and never refused to operate the sweeper (Tr. 134, 136, 154). I find that Mr. Beltran's testimony is in direct conflict and contrary to his prior statements to MSHA, and casts doubts in my mind regarding his credibility.

The only persons who witnessed Mr. Beltran's March 21, 1995, confrontation with Mr. Terrazas were Mr. Miranda and Mr. Maynes. MSHA Inspector Peters testified during the reinstatement hearing that Mr. Miranda told her that Mr. Beltran was trying to tell Mr. Terrazas that the sweeper was unsafe, and that Mr. Maynes told her that Mr. Beltran stated to Mr. Terrazas that "someone was going to get hurt on it," but that Mr. Terrazas would not listen (Tr. 76, 90). She later testified that Mr. Miranda and Mr. Maynes both told her that Mr. Beltran stated that the sweeper was unsafe (Tr. 96). Still later, she testified that only one of these individuals told her that Mr. Beltran said the sweeper was unsafe, and the other individual said that someone could be hurt. She explained that this individual, who I have concluded was Mr. Maynes, told her he did not understand a lot of Spanish and that most of the conversation between Mr. Terrazas and Mr. Beltran was in Spanish (Tr. 101-102). I find Ms. Peters' testimony to be inconsistent and contradictory with respect to what these witnesses may have told her.

Carlos Miranda, in his April 18, 1995, statement to MSHA's investigator, stated that Mr. Beltran told Mr. Terrazas that he would not operate the equipment because it was unsafe (Exhibit R-11, p. 3). In his April 10, 1995, statement filed with Mr. Beltran's MSHA complaint, Mr. Miranda stated that Mr. Beltran told Mr. Terrazas that he could not do a better job because the sweeper was no good and not safe to work with. However, during his sworn merits hearing testimony, Mr. Miranda initially could not recall whether Mr. Beltran refused to operate the sweeper, but then testified that Mr. Beltran indeed never refused to operate the machine because it was unsafe (Tr. 116). I find Mr. Miranda's testimony contradictory and in conflict with his prior MSHA statements, and I have serious reservations about his credibility.

I also take note of Mr. Miranda's inconsistent and contradictory testimony at the reinstatement and merits hearings. He initially testified that on March 21, 1995, Mr. Beltran told Mr. Terrazas that the sweeper "was not working properly or

correctly" (Tr. 146, 149). He testified that Mr. Beltran told Mr. Terrazas "that the machine was not any good, that it was not safe" (Tr. 108). In view of Mr. Miranda's unequivocal testimony and admissions that Mr. Beltran never informed Mr. Terrazas in his presence that he would not operate the sweeper because it was unsafe, I find Mr. Miranda's testimony and prior statement that Mr. Beltran told Mr. Terrazas that the sweeper was unsafe to be incredible and not believable.

At the reinstatement hearing, Anthony Maynes confirmed that he gave a statement to Inspector Peters recalling that Mr. Beltran said that the equipment was "junk and stuff ... No good, and someone was going to get hurt on it." He further stated that "Mr. Beltran did not say anything specific that was wrong with it, he would say it was unsafe because it was junk." He went on to explain that he heard some of the conversation between Mr. Terrazas and Mr. Beltran, that a lot of it was in Spanish which he does not speak, and that the part he recalled hearing in English was when Mr. Terrazas told Mr. Beltran that he could either leave or stay, and asking Mr. Miranda to escort him to the gate (Tr. 178-179).

At the hearing on the merits, Mr. Maynes stated that Mr. Beltran's comments concerning the sweeper were not directed at Mr. Terrazas, but were comments made to him (Maynes) and to Mr. Miranda when Mr. Beltran was preparing to leave the site and Mr. Terrazas was not present at that time (Tr. 303-304). Mr. Maynes denied that he ever previously stated to Inspector Peters that Mr. Beltran's comments concerning the sweeper were directed at Mr. Terrazas (Tr. 305).

Mr. Maynes' prior statement of April 19, 1995, is a matter of record (Exhibit C-8; Tr. 307-308). After carefully reviewing that statement, I cannot conclude that Mr. Maynes lied, or that his prior testimony was inconsistent or contradictory. It may be somewhat confusing, but I find it credible, particularly with respect to the question of whether Mr. Beltran's statements concerning the condition of the sweeper were directed at Mr. Terrazas, or were simply stated to Mr. Maynes. Significantly, Mr. Maynes' prior statement begins with a credible narrative explanation as to what Mr. Beltran told him as "his side of the story." Further, any suggestion that Mr. Maynes overheard any remarks by Mr. Beltran directed at Mr. Terrazas

with respect to the condition of the sweeper was disputed by Mr. Beltran himself when he testified that at the time he spoke with Mr. Terrazas on March 21, 1995, Mr. Maynes was 75 or 80 feet away and "didn't hear nothing, and he didn't see nothing" (Tr. 133), and that he (Beltran) told Mr. Maynes that he did not know why Mr. Terrazas was mad at him (Tr. 132).

In his prior MSHA statement of April 18, 1995, Mr. Beltran testified that he told Mr. Terrazas that the sweeper was unsafe "when we started to work in the morning" (Exhibit R-10, pg. 13). At the temporary reinstatement hearing, Mr. Beltran testified that his encounter of March 21, 1995, with Terrazas occurred while he was eating his lunch and that this was the first time he saw Mr. Terrazas that day (Tr. 111, 131). Mr. Beltran confirmed that this was the case when he testified at the hearing on the merits that he first saw Mr. Terrazas at 12:20 p.m., on March 21, 1995. I find Mr. Beltran's earlier statement to MSHA that he told Mr. Terrazas that the sweeper was unsafe at 10:30 a.m., when he started work to be less than credible and in direct conflict with his later sworn testimony that he first encountered Mr. Terrazas after 12:00 p.m. during his lunch break.

Mr. Beltran testified at the reinstatement hearing that he tried to tell Mr. Terrazas about the sweeper conditions on March 21, 1995, but that Mr. Terrazas would not listen to him (Tr. 117). However, at the merits hearing, Mr. Beltran testified that he told Mr. Terrazas that he had a flat tire, no hydraulic oil, no reflectors, no backup warning alarm, and that he believed the equipment was unsafe (Tr. 36). I find this testimony to be contradictory and inconsistent. On the one hand, Mr. Beltran claims that Mr. Terrazas would not listen to his sweeper complaints and on the other hand he claims that he specifically informed Mr. Terrazas about the specific sweeper conditions that he claims were unsafe.

Mr. Beltran testified that on March 21, 1995, personnel at the mine security office near where he was cleaning complained that he was leaving a lot of dirt behind the sweeper and that he told them he "could not do a good job because this sweeper would not help me to do the good job" (Tr. 45). He did not claim that he stated anything at that time about the safety of the sweeper. The security personnel were employees of the mine operator (Phelps Dodge), and Mr. Beltran confirmed that he never

complained to any Phelps Dodge employees that he was operating unsafe equipment (Tr. 52-53).

Mr. Beltran further testified that on March 20, 1995, the sweeper was low on hydraulic fluid, had no front or rear reflectors, no backup alarm, no safety belt, and a flat front tire. He characterized these conditions as "problems" and said that he reported them to foreman Perez. He stated that Mr. Perez told him he would call a mechanic to start the machine and that when he had time, he would send someone to take care of the flat tire. Mr. Beltran then proceeded to operate the sweeper for the rest of the shift and inflated the tire three times, all without further incident (Tr. 109-112). Mr. Beltran did not testify that he told Mr. Perez that the sweeper was unsafe, and confirmed that Mr. Terrazas was not at the mine that day.

Foreman Perez testified at the temporary reinstatement and merits hearings that when he spoke with Mr. Beltran on March 20 and 21, 1995, he told Mr. Beltran that he needed to operate the sweeper slower to avoid leaving dirt behind. Mr. Perez confirmed that Mr. Beltran informed him that the machine hydraulic fluid was low, and Mr. Perez had the mechanic check the machine and he believed that fluid was added. Apart from this condition, Mr. Perez testified consistently, and I find credibly, that Mr. Beltran's principal complaint was that he was unable to do a good job with the sweeper because it was leaving a line of dirt behind, and that Mr. Beltran never complained to him about any sweeper safety defects, and never told him that he believed the sweeper was unsafe to operate.

Maintenance mechanic Ruben Gomez testified credibly that in response to a call from Mr. Beltran on March 21, 1995, he added some hydraulic fluid to the sweeper machine, repaired two sweeper attachment safety chains, and checked and adjusted the sweeper height adjustments. He also put air in one tire, which was low, but did not change the tire and install a larger one because only one size fits the machine and a larger tire would rub the tire close by.

Mr. Gomez stated that he spent 45 minutes with Mr. Beltran and observed him operating the sweeper "a little bit too fast," and told him to slow down in order to obtain better sweeper performance. He stated that Mr. Beltran also complained about a

bent bucket that was bowed, causing the sweeper "not to pick up right," but Mr. Gomez did not consider this condition to be dangerous and Mr. Beltran never indicated that it was.

Mr. Gomez stated that all of the sweeper conditions brought to his attention by Mr. Beltran were maintenance items that he took care of, and he did not consider any of them to be safety problems. He stated that Mr. Beltran never complained to him about any inoperable backup alarm or missing sweeper bolts, and that the bolts were in place when he adjusted the sweeper.

Mr. Terrazas consistently testified in these proceedings that Mr. Beltran never informed him that the sweeper in question was unsafe to operate on March 21, 1995, and having viewed him in the course of two hearings, while I find him to be a rather short-tempered and excitable individual, I nonetheless consider him to be credible.

At the hearing on the merits and in response to Mr. Terrazas' testimony that Mr. Beltran only told him that the sweeper "was junk or no good," Mr. Beltran stated "to me that it is not any good or not safe is the same thing." He was also of the opinion that if he could not do the work that the machine was designed to do, he would consider the machine to be unsafe, even "at this moment" (Tr. 19). In short, I can only conclude that Mr. Beltran would consider any machine not kept in good operational condition to be ipso facto unsafe. However, I reject any such notion.

After careful review and consideration of all of the testimony and evidence in this case, I find less than credible support for Mr. Beltran's assertion that on March 21, 1995, he informed Mr. Perez or Mr. Terrazas that he considered the sweeper to be unsafe, and that he specifically told them about the sweeper conditions that led him to conclude that it was unsafe. To the contrary, I conclude and find that the thrust of Mr. Beltran's complaints about the sweeper lies in his communicated belief to Mr. Terrazas that he considered the sweeper to be less than capable of doing the sweeping job without leaving trails of dirt behind, or more to the point, his belief that the sweeper was a "piece of shit, or junk." I simply cannot equate this equipment complaint communication with an equipment safety communication. In short, I cannot conclude that

Mr. Beltran communicated a safety complaint to the respondent within the meaning of the previously cited case law on this issue.

The evidence establishes that MSHA never inspected the sweeper, and no citation was ever issued by MSHA citing that machine. However, MSHA Inspector Peters was of the opinion that a Gehl sweeper machine that was low on hydraulic fluid, lacked a seat belt, lights, reflectors, a backup alarm, and had a missing bolt might indicate that the machine was unsafe (Tr. 166).

Respondent's foreman Arzola agreed that a Gehl sweeper operating with a flat tire, and no seat belt or headlights would present a "safety concern," and if the hydraulic fluid was "extremely low," the sweeper brushes would not work or turn properly, and this would prevent one from doing the job properly (Tr. 137-138). Superintendent Jesus Perez also believed that a sweeper with different sized tires, a lack of hydraulic fluid, missing or loose attachment bolts, and missing reflectors would cause a safety problem and create a hazard for the operator (Tr. 201).

Although the opinions of Ms. Peters, Mr. Arzola, and Mr. Perez that a sweeper in the condition that they described would be a safety problem are relevant, the critical question is whether or not Mr. Beltran informed Mr. Terrazas about the sweeper conditions that he claims he found on March 21, 1995, and, if so, whether his belief that the machine was unsafe to operate that day was reasonable given the conditions under which it was in fact operated.

Even if I were to find that Mr. Beltran communicated a safety complaint to the respondent, based on the credible and unrebutted testimony of Mr. Perez and Mr. Gomez, I find that the respondent made a reasonable effort in addressing and correcting any sweeper mechanical problems. Further, for the reasons which follow, I conclude and find that Mr. Beltran's belief that operating the sweeper in question on March 21, 1995, would not have been safe was unreasonable and not credible.

Ms. Peters testified that during her investigation of Mr. Beltran's complaint, Mr. Beltran claimed that he had never been task-trained to operate the Gehl sweeper (Tr. 93). I have

reviewed a copy of Mr. Beltran's statement of April 18, 1995, given to two other MSHA investigators, and in the presence of Ms. Peters, and I find no such claim made at that time by Mr. Beltran (Exhibit R-10). As a matter of fact, in that statement, Mr. Beltran states that his laborer's tasks included "sweeping and a lot of cleanup," and one of the questions asked by an inspector states, "Q. You said part of you job was to operate the sweeper. Would you describe the sweeper?" (Exhibit P-10, pg. 3).

At his reinstatement hearing, Mr. Beltran testified on direct that he was "forced" to operate the sweeper with no training or qualification (Tr. 118). I find no credible evidence to support any conclusion that Mr. Beltran was "forced" to operate the sweeper. The evidence establishes that he operated it for approximately 15 hours prior to leaving the mine, and I find credible Mr. Terrazas' testimony that he gave Mr. Beltran the option of joining other employees in completing his cleanup job with a broom and shovel.

Mr. Beltran further testified that during his prior 12 years of working in factories in Chicago, where "they have the same kind of machine, and I have also trained," he viewed training films on the operation of the equipment and was trained to lock it out if it were unsafe (Tr. 114, 134). Further, Mr. Beltran, on cross-examination, confirmed that he had seven and one-half years experience on the operation of Gehl equipment in Chicago, and was trained to use that equipment. Although he asserted that he had not previously used a sweeper attachment, he admitted that he had previously used a Gehl bobcat machine, with forklift or bucket attachments, and that it was the same type of bobcat that he used at the respondent's operation, and he admitted that he knew how to use it before he was employed there (Tr. 120).

Mr. Beltran further admitted that on March 20 and 21, 1995, he knew how to operate the Gehl sweeper, knew where the controls and brakes were located, and had previously operated another Gehl machine "almost the same" (Tr. 137-138, 140). At the merits hearing, Mr. Beltran testified that the mining company provided him with safety training at the mine (Tr. 94-95). Under all of these circumstances, I find Mr. Beltran's suggestions that he was at risk by being forced to operate a sweeper with no prior

training or experience to be contradictory, inconsistent, and less than credible.

The evidence in this case reflects that Mr. Terrazas was highly upset when he found that the sweeper operated by Mr. Beltran was leaving piles of dirt behind, and that during the ensuring confrontation that took place, Mr. Beltran expressed his opinions concerning the mechanical condition of the sweeper in rather colorful terms that escalated Mr. Terrazas' anger and anxiety level. The evidence suggests that the resulting piles of dirt left behind by Mr. Beltran's sweeper may have been caused by operating the machine too fast, a bend or bow in the sweeper bucket mechanism, worn brushes, or as found by the state unemployment hearing officer, a larger sized front tire.

I cannot conclude that the operation of the sweeper with a bent bucket condition was in and of itself unsafe, and no evidence was produced to show that it was. This condition may not have allowed Mr. Beltran to do the job to Mr. Terrazas' liking, but I cannot conclude that it placed Mr. Beltran at risk, and he has not contended that it did.

With regard to operating the sweeper too fast, Mr. Beltran testified at the reinstatement hearing that operating the machine too fast with one large tire and one small tire posed a risk of turning over. No such statement was made in his prior April 18, 1995 MSHA investigation statement. Indeed, in that statement Mr. Beltran stated that the sweeper bolt condition could cause the sweeper to come loose, posing an accident risk, but not a turn over, and he does not mention the absence of a seat belt.

I have reviewed Mr. Beltran's prior statement of April 18, 1995, with regard to missing sweeper attachment bolts, and find that when asked whether this condition would cause him to turn over, Mr. Beltran responded, "No" (Exhibit R-10, pg. 3). This is in direct conflict with Ms. Peters testimony that Mr. Beltran was concerned about over-turning the machine. As for the sweeper directional controls, Mr. Miranda's prior April 18, 1995, statement reflects a "Yes" answer to the question, "[w]as the steering Okay?" (Exhibit R-11, pgs. 2). Further, I find no credible evidence that Mr. Beltran would have encountered any other traffic while operating his sweeper at five to six miles an hour. Mr. Miranda was operating behind Mr. Beltran sweeping up the dirt

left behind by Mr. Beltran, and there is no evidence that he was at risk, and Mr. Miranda never mentioned anything about any adverse weather conditions that may have affected the safe operation of the sweeper.

Mr. Maynes also operated a scraper at the same time as Mr. Beltran, and operated the sweeper after Mr. Beltran left the site, and he said nothing about any adverse wind or dust conditions. Indeed, apart from Mr. Beltran, no other equipment operators were produced to testify that any weather conditions adversely affected the safe operation of the equipment used on March 20 or 21, 1995, and I reject as less than credible Mr. Beltran's self serving testimony that it did. I find credible Mr. Maynes' testimony that he continued to operate the sweeper after Mr. Beltran left the mine site, and that he completed the job with no safety problems.

I conclude and find that the issue concerning the safe operation of the sweeper was laid to rest when Mr. Beltran admitted that a sweeper safety problem would only exist if he operated the sweeper too fast, and he unequivocally insisted that he never operated it too fast. Testimony by other witnesses confirmed that the sweeper was operated at five to six miles an hour, a relatively low speed that I conclude posed no hazard to Mr. Beltran.

With respect to Mr. Beltran's state unemployment hearing proceeding, I recognize the fact that his rights in connection with his qualifications for unemployment benefits are different from his protected safety rights pursuant to the Mine Act. However, I may nonetheless give deference or weight to the findings and conclusions of a state hearing officer. See: Chadrich Casebolt v. Falcon Coal Company, Inc., 6 FMSHRC 485, 495 (February 1984); David Hollis v. Consolidation Coal Company, 6 FMSHRC 21, 26-27 (January 1984); Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. V. Marshall, 663 F.2d 1211 (3d Cir. 1981).

The record reflects that Mr. Beltran was represented by counsel when he was denied unemployment compensation on June 1, 1995, after the hearing officer concluded that he left his job with the respondent voluntarily without good cause connected

with his employment (Exhibit C-2; Temporary Reinstatement Hearing). I take note of the absence of any safety complaint allegation in Mr. Beltran's statement of March 22, 1995, in connection with his compensation claim, and he simply stated that he told Mr. Terrazas that, "I can't do any better because the sweeper is no good" (Exhibit R-3, Temporary Reinstatement Hearing). This is consistent with the credible evidence in the instant case.

The hearing officer found that on March 21, 1995, Mr. Beltran complained that the sweeper was not working properly and that one of his complaints concerning an oversized tire that caused the sweeper not to be sitting evenly and therefore leaving a streak in the middle on each pass with the sweeper "appears to have been substantiated by the record" (Finding No. 1). The hearing officer further found that Mr. Beltran did not specify to Mr. Terrazas any particular problems with the machine, and simply told him "your equipment isn't worth a shit" (Finding No. 2). This too is consistent with the credible evidence in the instant case.

In finding that Mr. Beltran failed to establish "good cause" for voluntarily leaving his job, the hearing officer concluded that Mr. Beltran "was not confronted with forceful and necessitous circumstances of such magnitude that he had no reasonable alternative to leaving his job" (Exhibit C-2; page 3).

I agree with, and give weight to, the hearing officer's findings that Mr. Beltran informed Mr. Terrazas that he could not do a better job because the sweeper was no good and "not worth a shit." I also give weight to the hearing officer's finding that Mr. Beltran "was not confronted with forceful and necessitous circumstances," but I do so in the context of my findings and conclusions that the prevailing circumstances concerning the sweeper do not support a reasonable belief by Mr. Beltran that the sweeper was unsafe for him to operate.

I find no credible evidence of prior animus on the part of respondent's management towards Mr. Beltran. Although Mr. Terrazas did not consider Mr. Beltran to be a model employee and considered him to be a complainer about his work, Mr. Beltran testified that he never had any arguments with Mr. Terrazas prior to March 21, 1995 (Tr. 134).

I take note of the fact that in his April 18, 1995, MSHA statement, Mr. Beltran stated that the respondent ignores safety complaints. However, in response to follow-up questions as to how the respondent would address a dump truck that lost its oil, Mr. Beltran responded, "[h]e would park the truck or tell the operator to fix it." With regard to any potential major damage if the equipment is continued to be used, Mr. Beltran stated that "they just park it. They don't do nothing" (Exhibit R-10, pg. 11). However, the unrebutted testimony of Mr. Maynes, Mr. Perez, and Mr. Gomez reflects that equipment repair needs are taken care of when they are reported.

Mr. Beltran's claim that respondent's employees who complained about unsafe equipment, including Mr. Miranda and Mr. Abilar, were summarily discharged for doing so (Tr. 92-93) is not supported by any credible evidence, and I find this was not the case. Indeed, in his prior April 18, 1995, statement to MSHA's special investigators, Mr. Beltran stated that "lots of people" were terminated by the respondent. However, in response to a specific question as to whether anyone had ever been terminated for refusing to operate an unsafe piece of equipment, he responded, "not that I know of" (Exhibit R-10, pgs. 15-16).

Although Mr. Miranda's statement of April 18, 1995, to MSHA's special investigators includes a "yes" answer to the question of whether anyone else had ever been terminated "for anything similar to Beltran," Mr. Miranda's explanations reflect that his brother-in-law was fired for eating his lunch where he was not supposed to, Mr. Abilar was fired for not having a doctor's excuse to support a day of sick leave, and Mr. Miranda was fired for an unexcused absence from work (Exhibit R-11, pgs. 5-6). It does not appear that any of these terminations were safety related, and if one were to accept a conclusion that the terminations were similar to Mr. Beltran's, one would have to conclude that he was terminated for reasons unrelated to any safety complaints.

Mr. Beltran's Employment Termination

The Secretary takes the position that Mr. Beltran was fired by Mr. Terrazas for voicing a safety complaint about the sweeper, and that Mr. Terrazas fired him because he was faced with a work

deadline that he had to meet and did not want to take the time to address Mr. Beltran's concern. Contrary to the Secretary's position, I have concluded that Mr. Beltran did not communicate a safety complaint to Mr. Terrazas, and that even if he had, his complaints were addressed by foreman Perez and maintenance mechanic Gomez and they did not amount to safety defects that rendered the sweeper unsafe to operate under the conditions that prevailed at the time of Mr. Beltran's encounter with Mr. Terrazas on March 21, 1995.

The Secretary asserts that when a mine operator offers a miner the choice between the work he has perceived as dangerous, or no work at all, the operator has in effect fired the miner, even though the operator has not said so in explicit words. While this may be true, I cannot conclude that Mr. Beltran's options were limited to a choice of operating the sweeper in the manner that he was observed operating it, or "no work" at all. To the contrary, I find credible and plausible Mr. Terrazas' testimony that one of the choices he gave Mr. Beltran was to use a broom and shovel and join other employees who were also cleaning the parking lot. The entire area that was being cleaned was approximately one acre, which included the roadways and parking lot (Tr. 33). Instead of accepting Mr. Terrazas' offer, which I conclude was not unreasonable, or offering or agreeing to operate the sweeper at a lower speed as he was asked to do, Mr. Beltran continued to engage Mr. Terrazas in further heated conversation over the condition of the sweeper and challenged Mr. Terrazas to put his choices in writing. At that point in time, Mr. Terrazas reacted angrily by instructing Mr. Miranda to escort Mr. Beltran off mine property, and Mr. Beltran found himself "heading for the gate."

The Secretary's posthearing assertion that Mr. Miranda "heard Terrazas fire Beltran (Tr. 109)" is inaccurate. The evidence reflects that Mr. Terrazas instructed Mr. Miranda to escort Mr. Beltran off mine property after giving Mr. Beltran the choices which he did not accept. I find no evidence to support any conclusion that Mr. Terrazas directly stated to Mr. Beltran that he was fired. Further, the Secretary's contention that Mr. Beltran was denied employment with the respondent "as a result of filing a complaint of discrimination with MSHA" is rejected. Mr. Beltran's MSHA complaint was filed after his termination.

At the temporary reinstatement hearing, Inspector Peters testified that during her investigation Mr. Terrazas did not tell her that he fired Mr. Beltran for complaining about safety, and simply commented that he gave Mr. Beltran "a choice" (Tr. 104). At the merits hearing, Ms. Peters stated that Mr. Terrazas informed her that he fired Mr. Beltran (Tr. 166). However, she later testified that Mr. Terrazas referred to Mr. Beltran's "termination" several times, and she concluded that Mr. Beltran's employment "ceased" and was "terminated" regardless of whether Mr. Beltran or Mr. Terrazas terminated the employment (Tr. 358). She confirmed that Mr. Terrazas' prior statements to her that he had given Mr. Beltran a choice of getting back on the sweeper and doing a better job or leaving was consistent with his merits hearing testimony (Tr. 359).

The respondent takes the position that Mr. Beltran quit his job voluntarily after refusing Mr. Terrazas' alternative choices and opting to leave the mine. However, I have difficulty in reconciling the separation notice signed by respondent's general superintendent Sammy Vigil which clearly shows that Mr. Beltran was separated by discharge, effective March 21, 1995 (Exhibit C-2, temporary reinstatement hearing). The document reflects a work evaluation of "satisfactory" for Mr. Beltran and "unsatisfactory" for conduct. It further reflects that he would not be re-employed, and the reason for the discharge is shown as "conduct."

Mr. Terrazas did not deny that the discharge notice was authentic, and the record reflects that Mr. Vigil had the authority to discharge Mr. Beltran. Mr. Vigil was not called by either side to explain the circumstances under which the notice was issued. Mr. Terrazas suggested that the notice was filled out after Mr. Beltran informed the mine security personnel that he had been fired. In the absence of any credible or probative evidence explaining the discharge note, it remains unrebutted.

Mr. Terrazas does not deny that one of the options given to Mr. Beltran was "to hit the gate." In the mining community such terms as "hit the gate" and "go to the house" are not terms of endearment. They usually and commonly connote that one's employment has ceased or terminated.

On the facts of this case, although there is no evidence of any direct discharge, other than the discharge notice, one may reasonably conclude that Mr. Beltran was "constructively discharged." Such a discharge as a result of protected activity covered by the Mine Act would be illegal. However, a discharge for unprotected activity would be a matter outside Mine Act jurisdiction. See: Phelps Dodge Corporation, 3 FMSHRC 2508, 2516 (November 1981), where the Commission stated that "the Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity.

It is clear that ary discrimination prohibited by the Mine Act requires a showing of some nexus to protected activity, Simpson v. FMSHRC, 842 F.2d 453, 464 (D.C. Cir. 1988). Further, in order to establish a successful claim of constructive discharge pursuant to the Mine Act, Mr. Beltran must show that he engaged in protected activity and that the respondent retaliated against him by creating or maintaining intolerable working conditions that compelled him to leave his job. Rosalie Edwards v. Aaron Mining, Inc., 5 FMSHRC 2035 (December 1983); Simpson v. FMSHRC, supra; Ramsey v. Industrial Constructors Corp., 12 FMSHRC 1587 (August 1990).

In view of my findings and conclusions that Mr. Beltran did not refuse to operate the sweeper, that he failed to communicate any safety complaint, and failed to establish that operating the sweeper on March 21, 1995, would not be safe, I conclude and find that the circumstances under which his job was terminated did not result from any protected activity on his part, or any retaliation on the part of the respondent.

## ORDER

In view of the foregoing findings and conclusions, and on the basis of the preponderance of all of the credible and probative evidence adduced in this case, I conclude and find that the Secretary has not established that the respondent discriminated against Mr. Beltran in violation of section 105(c) of the Mine Act. Accordingly, the complaint **IS DISMISSED**, and the claims for relief **ARE DENIED**.

The respondent's request for an award of its costs and attorney's fee **ARE DENIED**. The Mine Act does not provide for such payments.

George A. Koutras
Administrative Law Judge

Distribution:

Ernest A. Burford, Esq., Office of the Solicitor,
U.S. Department of Labor, 525 Griffin Street, Suite 501,
Dallas, TX 75202 (Certified Mail)

Matthew P. Holt, Esq., Sager, Curran, Sturgess and Tepper,
P.O. Box 2065, 201 North Church Street, Las Cruces,
NM 88004-2065 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 20 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 96-3 |
| Petitioner | : | A.C. No. 48-01215-03521 |
| v. | : | |
| | : | Coal Creek Mine |
| S & M CONSTRUCTION, INC., | : | |
| Respondent | : | |

## DECISION

Appearances: Ann Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Stephen Kepp, Safety Director, S & M Construction, Inc., Gillette, Wyoming, for the Respondent.

Before: Judge Koutras

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for alleged violations of mandatory training safety standards 30 C.F.R. 48.25(b) and 48.26(a). The respondent filed a timely answer and a hearing was held in Gillette, Wyoming. The petitioner filed a posthearing brief, but the respondent did not. However, I have considered its oral arguments made on the record in the course of the hearing, as well as the arguments advanced by the petitioner.

### Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) whether

the alleged violations were "significant and substantial" (S&S), and (3) the appropriate civil penalties to be assessed for the violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

## Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.,

2. 30 C.F.R. §§ 48.25(b) and 48.26(a).

3. Commission rules, 29 C.F.R. § 2700.1 et seq.

## Stipulations

The parties stipulated to the following:

1. The respondent is the owner and operator of the subject mine.

2. The respondent is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce. The mine is subject to the jurisdiction of the Mine Act.

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

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

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

6. The respondent demonstrated good faith in abating the violations.

7. The respondent produced 3,356,712 tons of coal in 1994.

8. The certified copy of the MSHA Assessed Violations History (Exhibit P-1) accurately reflects the history of the mine for the two years prior to the date of the citations.

Discussion

Section 104(g)(1) "S&S" Order No. 3848781, issued at 5:30 p.m. on February 21, 1995, by MSHA Inspector Herbert A. Skeens, cites an alleged violation of 30 C.F.R. 48.26(a), and the condition or practice cited is described as follows:

> The following employees have not received the training required by 30 C.F.R. 48.26: Derward Lint employed since 5/17/94.
> Richard Chesmore employed since 1/17/95
> Raymond Holzer employed since 6/24/94
> John Milliken employed since 10/6/94
> Bill Morris employed since 5/13/94
> Craig Olson employed since 11/29/94
> Richard Villmow employed since 6/14/94
> Wilbert Williams employed since 5/31/94
> Burt Gleason employed since 10/26/94

All of the cited miners were ordered to be withdrawn from the mine. The order was modified on February 22, 1995, to allow miners Williams, Villmow, Holzer, and Chesmore to return to work because they received the required training. Miner Milliken was allowed to return to work on February 23, 1995, after his newly employed experienced miner training was documented. Except for miner Morris, who was no longer employed at the mine, the remaining miners were allowed to return to work on March 10, 1995, when their newly employed experienced miner training was documented.

The respondent's answer states, in relevant part, as follows:

> This order states 9 employees were inadequately trained as experienced miners working at Coal Creek mine. The order states that due to inadequate training these individuals were reasonably likely to be injured and that the injury would result in a fatality.
>
> In fact: The least experienced miner had 4 years practicing his craft. Seven of the 9 have 15 years experience in their craft. All nine individuals had current training certificates issued by S&M Construction. Seven of the nine individuals have been employed by S&M for more than 4 years and had received annual training during that time frame.

The Secretary's regulatory training requirements for miners working at surface mines and surface areas of underground mines are found in Part 48, Subpart B, Title 30, Code of Federal Regulations. Section 48.26(a) provides as follows:

> (a) A newly employed experienced miner shall receive and complete training in the program of instruction prescribed in this section before such miner is assigned to work duties.
>
> (b) The training program for newly employed experienced miners shall include the following:
>
> (1) Introduction to work environment. The course shall include a visit and tour of the mine. The methods of mining or operations utilized at the mine shall be observed and explained.
>
> (2) Mandatory health and safety standards. The course shall include the mandatory health and safety standards pertinent to the tasks to be assigned.
>
> (3) Authority and responsibility of supervisors and miners' representatives. The course shall include a review and description of the line of

authority of supervisors and miners' representatives and the responsibilities of such supervisors and miners' representatives; and an introduction to the operator's rules and the procedures for reporting hazards.

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

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

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

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

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

Section 104(g)(1) "S&S" Order No. 3848782, issued at 8:05 a.m., on February 22, 1995, by Inspector Skeens, cites an

alleged violation of 30 C.F.R. 48.25(b), and the cited condition or practice states as follows:

> Judy Gerber and Jack Knoell have not received new miner training required by 30 C.F.R. 48.25(b)(4)(8), and (12). Gerber has been employed at the mine since May 11, 1995, and Knoell since July 11, 1994. Both miners are to be withdrawn.

Both of the cited miners were allowed to return to work on February 24, 1995, when their new miner training was documented.

The respondent's answer states, in relevant part, as follows:

> This order states 2 employees were inadequately trained as inexperienced miners working at Coal Creek Mine. The order states that due to inadequate training these individuals were reasonably likely to be injured and that the injury would result in a fatality. Gerber, one of the two individuals, was one of the first people hired by S & M at Coal Creek. She received her inexperienced miner training at the same time the original hires did -- over a period of days. She developed into our best, most versatile employee before taking a temporary leave. And Knoell has been a heavy machine mechanic for 20 years and traveled with experienced S & M mechanics when he first started working at Coal Creek.

30 C.F.R. 48.25(a) requires new miners to receive no less than 24 hours of prescribed training, and except as otherwise provided, the training shall be received before they are assigned to work duties. Subsection (b) of section 48.25(a), requires the training program for new miners to include the following courses:

> (1) Instruction in the statutory rights of miners and their representatives under the Act; authority and responsibility of supervisors.
>
> (2) Self-rescue and respiratory devices.

(3) Transportation controls and communication system.

(4) Introduction to work environment.

(5) Escape and emergency evacuation plans; firewarning and firefighting.

(6) Ground control; working in areas of highwalls, water hazards, pits and spoil banks; illumination and night work.

(7) Health.

(8) Hazard recognition.

(9) Electrical hazards.

(10) First aid.

(11) Explosives.

(12) Health and safety aspects of the tasks to which the miner will be assigned.

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

Petitioner's Testimony and Evidence

MSHA Inspector Herbert A. Skeens testified that he has been so employed for three and one-half years, and previously worked in the mining industry for 18 years. He is a high school graduate, attended the MSHA Academy in Beckley, West Virginia, and has Virginia and Kentucky mine foreman's certificates (Tr. 10-12). He confirmed that he conducted a "spot inspection" at the mine in February, 1995, for the purpose of reviewing the Part 50 reporting and Part 48 training records, and that respondent's representative Steve Kepp accompanied him. Mr. Skeens described the mine as an open pit surface coal mine, and stated that the respondent began operating it sometime in April or May 1994 (Tr. 13).

Mr. Skeens confirmed that he issued the two contested orders in question. He explained that Mr. Kepp provided him with the information regarding employee training records, including MSHA training certificate 5000-23 forms. Mr. Skeens stated that he reviewed the training records for approximately 60 employees, and he and Mr. Kepp determined their hire dates. Mr. Skeens then reviewed the training certificates for each employee and found that the individuals who are named in the orders had not received the required training. He identified Exhibit P-7 as a training record Form 5000-23, and he explained the information on the form and how it is filled out (Tr. 15-20).

Mr. Skeens stated that it took him approximately 10 hours to review all of the training records furnished to him by Mr. Kepp. He explained that the "hire dates" shown for each cited employee were obtained from dated training certificates or from information provided by Mr. Kepp. (Mr. Kepp did not dispute any of the "hire dates" listed in the orders (Tr. 21).)

Mr. Skeens identified Exhibit P-2 as a copy of his order of February 21, 1995, citing nine employees for lack of training. He stated that these employees should have received newly experienced miner training. With regard to cited miner Derward Lint, Mr. Skeens stated the records reflected that he had received annual refresher training through a contractor with an approved training program, but had not received any newly employed experienced miner training. He explained that newly employed experienced miner training includes three subjects that are not covered or included in annual refresher training, and he identified them as hazard recognition, introduction to work environment, and authority and responsibility of supervisors and miners' representatives, and explained the course contents (Tr. 22-25).

Mr. Skeens stated that eight of the nine employees listed received annual refresher training, but not the proper newly employed experienced miner training, which would have included the aforementioned three training course subjects. In short, they missed these three courses. With regard to one employee, Burt Gleason, he could find no records indicating that he had any training (Tr. 26). Further, there were lapses of a week to six months from the hire dates of some of the employees until they were trained, and he testified to the hire dates and

training dates for cited employees Lint, Chesmore, Holzer, Milliken, Morris, Olson, Villmow, and Williams (Tr. 26-28).

In support of his gravity findings associated with the February 21, 1995, order, Mr. Skeens stated as follows (Tr. 29-30):

Q. Okay. You indicated on the citation form that an injury was reasonably likely. What did you mean by that?

A. Go ahead.

Q. How did you come to that conclusion?

A. Well, any miner that doesn't have the proper training is considered to be a hazard to themselves and a hazard to others. These subjects that we discussed earlier are pertinent to a miner's health and safety. Going out there and not knowing anything about the mine site, the mine conditions, the traffic patterns, the blasting rules, the blasting procedures, the authority and responsibility of the supervisors, those types of things could easily lead to an accident.

Q. And you said that injury might be fatal. How did you come to that conclusion?

A. Well, with just the hazards associated with that mine. You've got high walls 60 to 80 feet in height. You got people working underneath them; working above them; working close to them; spoil banks. You've got the conditions of the mine that a person could drive off that high wall if they didn't know where he was.

There's a lot of work before daylight hours, a lot of work after dark. I know when you're out there if you don't know where you are, you better make sure, because you could run off of a high wall face.

Mr. Skeens defined a "significant and substantial" violation as "a violation of health or safety standard, and that violation is reasonably likely to result in injury or illness, and that injury or illness would be of a reasonably serious nature" (Tr. 31).

Mr. Skeens stated that the mine has a complicated work schedule with four crews reporting for work between the hours of 4:00 a.m. and 10:00 a.m., and working different shifts, but he could not explain the work schedule and indicated that work might be taking place around the clock at any given time (Tr. 30).

Mr. Skeens stated that he based his "high" negligence finding on the fact that during a prior inspection in November, 1994, he issued two section 104(g)(1) orders, and during a close-out conference and other discussions with Mr. Kepp, and possibly other management persons, compliance with Part 48 was discussed (Tr. 31, 52).

Mr. Skeens reviewed a copy of a settlement decision issued by Commission Judge Manning on October 26, 1995, and he identified two November 28, 1994, orders citing a violation of section 48.26(a) and a mechanic for not receiving newly employed experienced miner training, and a blaster for not receiving hazard training required by section 48.31 (Tr. 32, 35).

With regard to the order he issued in this case on February 22, 1996, Mr. Skeens confirmed that he based the order on the fact that his review of Training Forms 5000-23 indicated that cited miners Gerber and Knoell had not received all of the required training. He identified the three missing training segments as introduction to work environment, hazard recognition, and health and safety aspects of tasks assigned (Tr. 35).

Mr. Skeens stated that he did not determine the job positions held by each of the eleven employees that he identified in his orders as lacking the required training. He stated that "some of these people are what I call utility; they do a lot of different things" (Tr. 37). He stated that Richard Villmow was a front-end loader operator, but "could very well end up doing mechanic work on it if something happened to the loader. He has observed Mr. Villmow steam cleaning or washing the loader, and doing maintenance work. He stated that "most of these

employees, if something happens, then they're required to pitch in and help the mechanic or do another job task." He stated that Mr. Chesmore is a mechanic, and he has observed Mr. Lint operating a pan scraper several times. He believed that Ms. Gerber worked in the coal handling plant in the control room or performing clean-up duties. He also believed that people working in the large plant could be at any plant location at any time (Tr. 38).

Mr. Kepp took issue with Mr. Skeen's testimony regarding the job tasks in question. He stated that Mr. Lint was a welder and would not be operating a scraper. He stated that Ms. Gerber's primary job was truck driver, but conceded that she could be engaged in clean-up duties if the plant was not running coal (Tr. 39-41). Mr. Skeens did not dispute Mr. Kepp's information, and Mr. Kepp agreed that an employee needed to be trained regardless of his job task or assignment (Tr. 41).

On cross-examination, Mr. Skeens identified the contractor who trained one of the cited employees as "S & M Construction, Inc.," and he confirmed that this company had an approved training plan (Tr. 42). In reviewing the records of the individuals identified in Order No. 3848781, he found other training certificates for different types of training, such as annual refresher or task training, but he was not sure that S & M Construction, Inc., provided that training (Tr. 42).

Mr. Skeens stated that there is a difference between training provided by a contractor and a operator because they have different training plans, even though they may be similar. He explained that a contractor employee who goes to work for a mine operator must be trained by that operator. He confirmed that Mr. Lint had received contractor training, and that except for Mr. Lint and Mr. Gleason, the other employees received annual refresher training "in an untimely manner" from the Coal Creek Mine operator. If these employees were working for the contractor, they should have been trained under the contractor's plan (Tr. 44).

Mr. Skeens stated that he was not sure about the length of time required for training. He was of the opinion that taking 30 to 45 minutes for experienced miner training could be "cutting it a little short," and it would depend on the individual miner,

the trainer, and the mine policy (Tr. 45). Mr. Skeens agreed that if a miner is absent from the mine site for any period of time, he cannot receive training and he would not be exposed to the particular hazards at that mine (Tr. 47).

Mr. Skeens confirmed that the "employed since" dates for each of the listed cited employees only refers to the dates they started work at the Coal Creek Mine, and one cannot infer from the dates shown that these were the first dates they started working at a coal mine performing their particular job tasks (Tr. 48).

In response to further questions, Mr. Skeens stated that task training for anyone working in a mine must be given before commencing a new task, and that a newly employed experienced miner must receive training before commencing any work duties. Newly employed persons, regardless of experience, have to be trained the day they are hired (Tr. 50).

When asked to reconcile one of his prior violations of November, 1994, concerning a blaster who had not received hazard training, where he nonetheless made a gravity finding that he would not be exposed to a fatal injury, Mr. Skeens explained that the cited individual (Hansen) was an experienced blaster who was comprehensively training at other mines, but not at the mine where he was performing duties when the violation was issued. Mr. Skeens characterized the lack of mine specific hazard training as "a technicality" (Tr. 53).

In response to further questions concerning the jobs performed by the cited employees, Mr. Skeens and MSHA counsel stated as follows (Tr. 54-56):

> THE COURT: In the case at hand now, with the exception of one or two people, you really don't know what these other people did in terms of their jobs?
>
> THE WITNESS: I can't recall what they did. I know I've observed each one of them at one time or another. Some are mechanics, some are dozer operators, loader operators, heavy equipment operators is most of them.

THE COURT: Do you have any information as to what the accident record is at this mine operation? Have they had accidents? Have they had fatalities? Do you know what their profile might be?

MS. NOBLE: No. We have statistics as to the number of violations this mine and several other mines in this area, which we intend to introduce. But as to accident rates, I don't have those available here. I don't have any reason to think that their accident rate is any higher than mines in this location -- in this area.

* * * * * *

THE COURT: What kind of situation results in fatal accidents?

MS. NOBLE: What kind would result?

THE COURT: Yeah. Someone working under a high wall? And if he's not trained in high wall recognition, that's the kind of situation you're testifying to?

MS. NOBLE: Yeah.

THE COURT: Is there any information that any of these individuals were required to work under a high wall?

MS. NOBLE: No.

Larry L. Keller testified that he is the manager/supervisor of the MSHA field office in Gillette, Wyoming, and that he is Inspector Skeen's supervisor. He testified as to his experience and training, including service as an inspector from 1972 to 1978. He confirmed that he visited the mine in question in June and November, 1994, accompanying inspectors who were inspecting the mine. He confirmed that he attended a conference with Mr. Kepp in connection with the section 104(g)(1) orders that were issued during the November, 1994, inspection and that he and Mr. Kepp discussed "cross-over training from S & M Construction,

Incorporated, three digit contractor number to the seven digit mine identification number as a mining operator and entity" (Tr. 58-61).

Mr. Keller stated that S & M Construction, Inc. is a local contractor engaged in highway construction projects, road construction, and "probably pipe laying." A part of that company, S & M Construction, Incorporated, has a seven digit mine operator's entity number and is the operator of the mine. The construction company can provide all of the training required of a miner who works at the mine except for the three of four training items, such as the introduction to work environment, duties and responsibilities of the foreman, and miners' representatives at the mine site, and some additional hazard type training. A contractor cannot provide this training for the mine operator (Tr. 62-63).

Mr. Keller stated that the respondent had approximately 50 employees in 1994 and produced 3,000,000 tons of coal, and in 1995 the mine produced approximately 8,000,000 tons. MSHA's prior history computer print-out for the mine for the period January, 1994, through January, 1996, reflects 72 violations (Tr. 64).

On cross-examination, Mr. Keller confirmed that on November 27, 1994, MSHA training specialist Judy Tate from the McAlester, Oklahoma office, conducted a review of training records at the mine and no violations were issued as a result of this review. He stated that Ms. Tate was not authorized to issue any citations and reviewed Part 48 training records and Part 50 accident reporting records for completeness. She would probably bring any errors to his attention, and he would probably send someone to the mine to check the matter (Tr. 69-73).

In response to a question as to how an inspector can reasonably conclude that lack of training will result in a fatality if he does not, on a case-by-case basis, determine the hazard exposure for the particular individual, Mr. Keller responded as follows (Tr. 74-75):

> THE WITNESS: Through the years, the statistics in the mining industry has shown this agency that newly employed inexperienced miners suffer more injuries and

have suffered more fatalities in this industry than older, more experienced employees.

Therefore, we base a lot of those type of determinations on the gravity of what our experience has been in this industry, and what our experience has been in compiling the information that would require mine operators to present to us.

THE COURT: That's an inexperienced miner you're talking about?

THE WITNESS: Basically, yes, inexperienced.

THE COURT: Let's take an experienced miner. An experienced miner who hasn't had hazards recognition, statutory rights of miners and introduction to work environment. My first question is, is that likely to be a fatality in all cases?

THE WITNESS: No, not in all cases. He's probably experienced through his work history. Each one of those things are individual, anyway. He probably knows what those hazards are, basically, but going from one mine site to another on those three open topics, we're asking -- each mine presents unique hazard in itself.

THE COURT: Right.

THE WITNESS: Each mine has traffic rules that are different from a previous mine. Or different mines, their blasting signals could be different. If he's gained all that experience at a particular mine, his association to those hazards is probably pretty knowledgeable just what he gained by being there.

Mr. Keller acknowledged that an inspector who issues training citations based on his review of records would have no way of knowing whether an employee is knowledgeable about his work environment or whether he can recognize a hazard unless he speaks with the employee. He stated that in cases where an entire mine is under 104(g) withdrawal because of training, it

would be impossible to interview every miner and the inspector must assume that the mine operator cannot provide what was not done during any training (Tr. 76).

Inspector Skeens was recalled by the petitioner and he confirmed that when he issued Order No. 3848781 concerning the newly employed experienced miners, he explained to Mr. Kepp that the employees in question needed newly employed experienced miner training, including the three courses previously mentioned, rather than the annual refresher training that their training certificates indicated they received. He stated that Mr. Kepp did not indicate to him that any of the nine individuals had taken the three missing courses (Tr. 79-80).

Respondent's Testimony and Evidence

Stephen Kepp testified that he has served as the respondent's safety director for five years, is a certified MSHA surface instructor, and holds Wyoming State surface mining foreman's papers. He also holds a bachelor's degree in accounting and a master's degree in business administration. He has 16 years of mining experience and is aware of MSHA's training and paperwork requirements that are his responsibility as safety director (Tr. 82).

Mr. Kepp stated that S & M Construction was awarded the contract to operate the mine over eight other companies because of its continuously improved safety record. There have been three lost-time accidents since the respondent has operated the mine, and there have been no lost time accidents since October 28, 1995 (Tr. 83).

Mr. Kepp stated that the employees cited in Order No. 3848781 are all experienced in their crafts, are aware of their surroundings, and are knowledgeable of any hazards that may exist in the course of performing their duties. He did not believe that any of them presented a hazard to themselves or to others (Tr. 85).

Mr. Kepp discussed the experience level of the cited employees as follows (Tr. 83-85):

... Derward Line is a welder; he has 15 years of experience. Dick Chesmore has 19 years of experience working -- he is a plant mechanic. That's how he's classified; he has 19 years of experience. He has 17 years with Amax Coal at Belle Ayr Mine. Very knowledgeable individual, and very, very safety conscious.

Ray Holzer is a dozer operator. He has been with S & M Construction since the company was founded ten years ago. He has 25 years of experience as a dozer operator. John Milliken is a blade operator with 20 years of experience. And has been with S & M Construction since March of 1987. Bill Morris is a welder; he has four years of experience, and has been with S & M since 1992.

Craig Olson is another blade operator, with 11 years of experience. He is our finished blade operator, meaning that his skills are extremely high. Richard Villmow has 18 years of experience as an equipment operator. He's operated several pieces of equipment for S & M while out at Coal Creek. Bill Williams is 72 years old. He has four years of experience with S & M Construction as an equipment operator. He currently operates a 627 Caterpillar scraper. Burt Gleason is a plant mechanic with 16 years of experience. And I believe that experience was from Exxon's Rawhide Mine here in the basin.

Mr. Kepp stated that Mr. Knoell is a mechanic who received the proper training when he arrived at the mine, but it was not documented. He indicated that Mr. Knoell was escorted for the first several days so he could learn the roads to the pits where the machines might be working. Judy Gerber was one of the first individuals hired, and she was trained on the equipment, and was part of a mine tour when she was informed of mine areas that may present hazards. She is the daughter of another construction company owner and she has been around construction equipment all of her life (Tr. 86).

Mr. Kepp stated that Lint, Holzer, Milliken, Morris, Olson, Villmow, and Williams had annual refresher training provided by

S & M Construction, the contractor, and it was similar to the training provided by S & M Construction, the operator of the mine. He stated that every employee who starts out at the mine is escorted around so that he knows the roads and traffic patterns, and they each must watch a hazard training film which covers all topics, except the responsibility of supervisors and miners' representatives. However, he could not state with certainty that the topic was covered with newly employed individuals (Tr. 86-87).

On cross-examination, Mr. Kepp stated that he is in charge of safety for both the mine operator part and contractor part of S & M's operations. His experience includes loading coal trains, the limited operation of some heavy equipment, and 16 years of surface coal experience (Tr. 90-92).

Mr. Kepp believed that Mr. Chesmore was very safety conscious because he was an active participant in a January 1995 refresher training course. Mr. Kepp also believed that, based on their experience, the nine cited employees were aware of their work surroundings and had the ability to recognize hazards. Further, with the exception of Mr. Villmow, none of the employees had any lost time accidents (Tr. 94-97).

Mr. Kepp stated that a 20-minute video that is mine specific to Coal Creek Mine is viewed by the employees, and that one would "have a good idea of what went on at the mine" by watching the video. He conceded that simply viewing the video would not cover all of the training requirements for newly employed experienced miners or inexperienced miners (Tr. 97).

Mr. Kepp stated that the three training topics previously mentioned were covered as part of the employee training, but the training was not documented by preparing a Form 5000-23. He stated that all personnel who start work at the mine are given a mine tour, and an equipment operator would be tested and given hazard training before he is hired and starts work. He confirmed that the training subject related to the authority and responsibility of supervisors and miners' representatives was not included as part of the hazard training video, but that it was "very likely" included as part of the mine tour conducted by him

or a shift supervisor (Tr. 95-100). He also alluded to first day tours and escorts for Mr. Knoell and other new employees (Tr. 101).

Mr. Kepp stated that all of the cited employees were "probably" trained in his office after the orders were issued, and that the Forms 5000-23 were then executed and shown to Inspector Skeens in order to abate the orders (Tr. 102-104, 112). In response to a question as to why he would need to re-train the cited employees if they had in fact been trained in the first place, Mr. Kepp stated that after the prior record reviews by Ms. Tate, MSHA's training representative, she was not sure of the kinds of training that needed to be provided and suggested that he provide newly employed experienced miner training to all mine employees and that he did so in his capacity as the mine operator's trainer and that this "would probably get me covered" (Tr. 104-105).

When asked why he had not prepared the 5000-23 Forms for the cited employees after they were trained, Mr. Kepp stated that "with respect to these nine individuals, they did have what I thought was correct and current training forms" (Tr. 105). He also believed that the employees had been trained by the contractor (S & M) and, although not trained by the mine operator (S & M), he believed "all along that these people did have current training" by "technically the same corporate entity" (Tr. 107).

Mr. Kepp believed that the orders issued by Inspector Skeens were exaggerated because seven of the cited nine employees had current craft training and had been trained in the introduction to their work environment, hazard recognition, and the statutory rights of miners, but conceded that there was no documentation of this training (Tr. 108).

With regard to the order citing Mr. Knoell and Ms. Gerber, Mr. Kepp stated that "these people did receive their training. I just didn't get three boxes checked off on these individuals." After subsequently filling out the form, the inspector abated the order (Tr. 112).

Petitioner's counsel agreed that in view of the fact that the cited employees worked for the contractor and the mine

operator, basically the same company, there may have been confusion in early November, 1994, regarding the type of training that was required. However, after the prior orders were issued in late November, 1994, for the same type of violations, there was no confusion and Mr. Kepp "should have gotten everything up to date then and kept it up to date" (Tr. 110). Mr. Kepp conceded the lack of documentation, and further explained as follows (Tr. 113-114):

> THE WITNESS: What I've agreed to is that documentation has not been done and these orders are exaggerated. They should have been not S and S citations for failure to document training. That's my position.
>
> THE COURT: How would the inspector know whether or not all these people received all this training when he appears at the mine there and starts perusing the records? Did you tell him what you testified to today about how you thought all these people had been trained.
>
> THE WITNESS: I'm sure at the time -- no, I did not make any statements along that line.

Mr. Kepp stated that he filled out new training forms to abate the orders that were issued, and when asked why he simply did not document the training, rather than re-training the cited individuals to abate the orders, he responded (Tr. 116-117):

> A. I guess maybe to answer that question, I wanted to get something established. Something organized with a pattern such that when I made a statement, '[y]es, he did receive newly employed experienced miner training,' it was the steps that I covered, and I wanted to start with the first individual. Through and up to today, I do it the same way.
>
> * * * *
>
> Q. So you wanted to make sure the second time that you filled it out in order to terminate the withdrawl order. You wanted to make sure that everything was really included?

A. Something I cannot do, something I will not do is just check off a box and sign the form. That carries it's own set of penalties, including personal penalties, and I'm not going to do that.

* * * *

A. I guess maybe it's just dotting the i's and crossing the t's.

Q. So this time you dotted the i's and crossed the t's, and the withdrawal orders were terminated?

A. That's correct.

## Findings and Conclusions

### Fact of Violations

Order No. 3848781. The respondent is here charged with a violation of 30 C.F.R. 48.26(a), because of its alleged failure to provide newly employed experienced miner training to nine of its employees. Inspector Skeens testified credibly that he issued the violation after reviewing the respondent's employee training records, and comparing their "hire dates" (which are not disputed) with the available training records. Although Mr. Skeens found that eight of the cited employees had received annual refresher training by the respondent in its contractor capacity, and that one had received no training, he determined that the refresher training for the eight employees in question did not include three of the training courses required by section 48.26(a), namely, Introduction to Work Environment, Authority and Responsibility of Supervisors and Miners' Representatives, and Hazard Recognition, as required by section 48.26(b)(1), (3), and (7) (Tr. 22-26).

Inspector Keller explained that the respondent's company consists of two parts, a road and highway construction contractor with a three digit MSHA identification number, and a contractor mine operator with a seven digit MSHA identification number. He stated that a construction contractor may provide all of the training required of a miner working at a mine **except** for the

items that were omitted in this case, and that a contractor cannot provide this training for the mine operator (Tr. 62-63).

Inspector Skeens testified that when he issued the order he explained to Mr. Kepp that the cited employees needed newly employed experienced miner training, including the three omitted courses, rather than their annual refresher training, and that Mr. Kepp did not indicate to him that any of them had taken the three missing courses (Tr. 79-80).

None of the cited miners were called to testify in this case. Mr. Kepp asserted that seven of the miners had annual refresher training provided by the respondent in its "Contractor" capacity, and that it was "similar" to the training provided by the respondent in its mine operator capacity (Tr. 86). Although he alluded to a video viewed by nine employees, he conceded that simply viewing and video would not cover the training requirements in question (Tr. 97).

Although Mr. Kepp maintained that the three training courses in question were covered as part of employee training, he admitted that it was not documented by the proper MSHA forms and that the course dealing with the authority and responsibility of supervisors and miners' representatives was not part of the video, but "very likely" a part of a mine tour (Tr. 99). Since the cited employees were trained by the "contractor," but not the "mine operator," he believed that they had current training by "technically" the same corporate entity (Tr. 107).

Mr. Kepp admitted that he did not inform Inspector Skeens about his belief that the employees had been trained, and he agreed that he did not document the alleged training that he claims was given. He believed that the order in question was exaggerated and that it should have been issued as a non-"S&S" citation for failure to document training (Tr. 113).

After careful review of all of the testimony and evidence, I conclude and find that the petitioner has established a violation of the cited training standard by a preponderance of the credible and probative evidence adduced in this case. Accordingly, section 104(g)(1) Order No. 3848781 **IS AFFIRMED.**

Order No. 3848782. The respondent is charged with a violation of 30 C.F.R. 48.25(b), for its alleged failure to provide new miner training for two employees who had worked at the mine for 8 and 10 months prior to the issuance of the violation on February 22, 1995. The inspector cited the employees after determining that they had not been trained in three of the 13 courses required by section 48.25(b)(4), (8) and (12), namely Introduction to Work Environment, Hazard Recognition, and Health and Safety Aspects of Assigned Tasks.

Inspector Skeens confirmed that he issued the violation after reviewing the training records provided by Mr. Kepp and determining that the two cited employees did not receive all of the required training, namely, the three missing cited training courses (Tr. 35). He stated that newly employed individuals must be trained the day they are hired, and must be task trained before commencing a new task (Tr. 50).

Mr. Kepp asserted that cited employee Knoell received "proper training" when he arrived at the mine, but that it was not documented. As for Ms. Gerber, Mr. Kepp stated that she has been around construction and equipment all of her life, was trained on the equipment, and was part of a mine tour when she was informed of mine areas that may present hazards (Tr. 86). As noted earlier regarding the viewing of a video, Mr. Kepp admitted that it would not cover all of the training requirements for newly employed inexperienced miners (Tr. 97). He also alluded to first day tours and escorts for Mr. Knoell and other new employees (Tr. 101), but none of this is documented or corroborated and, as previously noted, none of the cited employees were called to testify. Mr. Kepp conceded the lack of documentation (Tr. 113).

After careful review of the testimony and evidence, I conclude and find that the respondent has not rebutted the credible testimony and evidence adduced by the petitioner in support of this violation. I conclude and find that the petitioner has established a violation of the cited training standard by a preponderance of the credible and probative evidence. Accordingly, section 104(g)(1) Order No. 3848782 **IS AFFIRMED**.

## Significant and Substantial Violations

A "S&S" violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contributed to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonable serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 3-4 (January 1984), the Commission explained its interpretation of the term "S&S" 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.

See also Austin Power, Inc. V. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8 (January 1986).

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984).

The Commission recently reasserted its prior determinations that as part of his "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. Peabody Coal Company, 17 FMSHRC 508 (April 1995); Jim Walter Resources, Inc., Docket No. SE 94-244-R, decided April 19, 1996.

In Highwire Incorporated, 10 FMSHRC 22, 67-68 (January 1988), I affirmed an inspector's "S&S" findings where the facts and circumstances clearly established that a lack of task training presented a reasonable likelihood of serious injuries associated with such a violation. Highwire involved a fatal truck accident that occurred when the driver lost control of the truck on a curve and overturned. The mine operator was charged with several violations, including a violation of 30 C.F.R. 48.26, for failing to provide newly employed experienced miner training to the truck driver. Contrary to the instant case, the Secretary in Highwire provided probative testimony and evidence concerning the operator's training plan, the driver's job and experience, and sufficient evidence supporting its "S&S" position.

In Patch Coal Company, 10 FMSHRC 782 (June 1988), I affirmed several citations for failure of the mine operator to give newly employed experienced miner training to equipment operators in violation of 30 C.F.R. 48.26(a), but vacated the inspector's S&S

findings associated with each of the citations. My reasons for vacating these findings were based on the inspector's general and speculative testimony regarding certain perceived hazards, and his assumptions that a lack of training would expose miners to injuries and fatalities generally associated with any mining operation, rather than on any specific prevailing mining conditions from which one could reasonably conclude that the newly employed miners were in fact exposed to mine hazards in their new work environment which would likely result in injuries of a reasonably serious nature.

In Sunny Ridge Mining Company, Inc., 13 FMSHRC 928, 931 (June 1991), former Commission Judge James A. Broderick affirmed a violation of 30 C.F.R. 48.26(a) because of the operator's failure to train 11 newly employed experienced miners. However, he vacated the inspector's "S&S" findings and modified the violation to non-"S&S" after concluding that the evidence did not establish that the hazard contributed to by the violation would reasonably likely result in a serious injury. In support of his findings, Judge Broderick noted that the evidence established that the miners were experienced and that the mine environment was not particularly dangerous or threatening.

In the instant case, there is no evidence of any fatal accidents at the mine, and the petitioner has no information concerning the mine accident profile (Tr. 54). However, Mr. Kepp testified that the respondent was awarded the contract to operate the mine because of its continuously improved safety record, and while there were three lost time accidents since the respondent has operated the mine, there have been no lost time accidents since October 28, 1995. He confirmed that the three accidents involved two broken wrists and a broken ankle, and explained that the mine operated for 462 days accident free before the accidents which occurred within a seven-week period (Tr. 83). There is no evidence that any of these incidents involved a lack of training.

While it is true that most of the miners completed the required training after their "hire dates," there is no credible or probative evidence to establish that the delay exposed them to any particular hazards. Mr. Kepps' credible and unrebutted testimony reflects that all of the cited employees were experienced equipment operators with many years of service with the

respondent or other mining companies. Although Mr. Kepps did not dispute any of the employee "hire dates" listed in the orders, Inspector Skeens agreed that these dates only reflect when the individuals began work at the mine, and he conceded that one cannot infer that these were the dates the individuals first started performing their particular job tasks. He also confirmed that in reviewing the training certificates of eight of the cited employees, he found training certificates for different types of training, such as annual refresher or task training, and he confirmed that the respondent had an approved MSHA training plan.

As noted earlier, Mr. Kepp testified credibly to the work experience of the cited miners. In addition to annual refresher and other training that they had received, he testified that employees who start work at the mine for the first time are escorted so that they know the roads and traffic patterns, and that they are required to watch hazard training films and a 20-minute mine specific video about the mine. He further testified that cited employee Knoell was escorted to his work location for the first several days to familiarize himself with the roads, and that Ms. Gerber was informed about the mine areas as part of a mine tour. Although I cannot conclude that these procedures necessarily fulfilled MSHA's training requirements to the letter, absent any evidence to the contrary, they do mitigate the hazard and gravity exposure associated with these violations.

Inspector Skeens testified that a lack of knowledge about the mine site, the mining conditions, traffic patterns, and the blasting rules and procedures "could easily lead to an accident." However, Mr. Skeens admitted that he did not determine the job positions held by the cited employees, did not speak with them, could not recall what they did, and simply observed them "at one time or another" (Tr. 37, 54-56). Supervisory Inspector Keller acknowledged that an inspector who issues training citations based solely on a review of the training records would have no way of knowing whether or not the cited employee is knowledgeable about his work environment and can recognize a hazard unless he speaks with him (Tr. 76).

Although it may be burdensome for an inspector to develop all of the relevant facts in determining the potential hazard exposure for all employees at a large mining operation, the instant case only involves less than 12 employees who received

annual refresher training, and who apparently completed the training courses required by the cited regulations, except for those dealing with their work environment, hazard recognition, and the responsibilities of supervisors and miners' representatives. I find no evidence in this case to support any reasonable conclusion that missing a course on the responsibilities of supervisors and miners' representatives had any adverse impact on the safety of the cited miners.

With respect to the required training course subjects on hazard recognition and work environment, I agree that they are important components of any approved training program. However, in this case, the inspector's conclusion that injuries were reasonably likely was based on his belief that improperly trained miners are considered a hazard to themselves and to others. Although one may agree with this generalized conclusion, I conclude and find that an inspector must develop some factual evidence, on a case-by-case basis, to establish that the cited miners would reasonably likely suffer injuries of a reasonably serious nature because they were not timely trained on hazard recognition and their work environment at the particular mine where they are employed.

In the absence of any evidence concerning the required job tasks performed by the cited employees and the presence or likelihood of any adverse mining conditions that they would encounter in performing these tasks, I cannot speculate or conclude that the absence of some of the required training would reasonably likely lead to an accident or fatality.

In support of his findings that any injury could reasonably likely be expected to be fatal, Mr. Skeens testified that the mine has 60 to 80 feet highwalls, and that "people" work above, below, or close to these highwalls, and that a "person could drive off that highwall if they didn't know where he was." He also indicated that work is performed at the mine before and after daylight hours, and that someone "could run off a high wall face" if they did not know where they were. However, there is no evidence that any of the cited miners worked at times other than a normal daylight work shift, and no evidence was presented connecting any of the cited employees with these hazards. Indeed, in response to a bench question as to whether there was any information in this case that any of these individuals

were required to work under a highwall, petitioner's counsel responded, "No." (Tr. 56).

I take note of one of the prior November 1994, violations issued by Inspector Skeens to the respondent citing a blaster who had not been hazard trained as required by 30 C.F.R. 48.31, before commencing his work duties in a coal pit (Exhibit P-3, pg. 15). Mr. Skeens determined that the blaster was allowed to work on the day of the violation and on one prior occasion, and although he found that the cited blaster was exposed to the cited condition and could suffer "a lost workday accident," he concluded that an accident was unlikely, and that the violation was non-"S&S."

Mr. Skeens explained that the cited blaster in question was experienced, had hazard training from other mines, and the fact that he did not have the particular hazard training for the respondent's particular mine "really came down to a technicality" (Tr. 53). In the instant case, I have difficulty reconciling the petitioner's concern about the lack of training to assure that a miner is aware of the potential hazards at a particular mine where he is employed, with Mr. Skeens' rather contradictory belief that the failure to task train the blaster in question was merely "a technicality," warranting a non-"S&S" finding.

On the facts of this case, and after careful review and consideration of Inspector Skeens' testimony in support of his "S&S" findings as to each of the violations, I conclude and find that these findings were based on general and speculative assumptions that a lack of training would expose miners to injuries and fatalities generally associated with any mining operation, rather than on any reliable and probative evidence that the job tasks performed or expected to be performed by the miners, coupled with their lack of several required training courses, and the prevailing mining conditions under which they were expected to work, presented conditions from which one could reasonably conclude that they were in fact exposed to mine hazards likely to result in injuries of a reasonably serious nature. In short, I conclude and find that the petitioner has failed to establish by a preponderance of the credible and probative evidence adduced in this case that the violations were "S&S." Accordingly, the inspector's findings in this regard are rejected and they **ARE VACATED**.

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

Inspector Keller believed that the mine was producing "in the neighborhood of eight million" tons in 1995, and had approximately 50 employees in 1994 (Tr. 63-64).

The parties stipulate that the respondent's 1994 coal production was 3,356,712 tons, and that the respondent is a medium-to-large sized mine operator (Tr. 4-5).

Although the respondent's representative "lined through" a proposed stipulation that MSHA's proposed penalty assessments will not affect the respondent's ability to continue in business, he stated that "what I was concerned about is our company is in a loss situation for the year and it certainly would have an impact" (Tr. 118). In response to a bench inquiry as to whether or not MSHA's proposed penalty assessments would put the respondent out of business, Mr. Kepp stated "No, sir, it would not, I did not mean to imply that" (Tr. 118).

Absent any information or evidence to the contrary, I cannot conclude that the penalty assessments that I have made for the violations in this case will adversely affect the respondent's ability to continue in business, and I conclude and find that they will not.

## History of prior Violations

Inspector Keller made reference to a computer print-out for the 24-month period from January 1994 through January 1, 1996, and indicated that it reflected a total of 72 violations (Tr. 64). However, the actual print-out referred to by Mr. Keller was not offered, and it is not part of the record.

MSHA's computer print-out for the subject mine for the period April 18, 1994 to February 21, 1995 (Exhibit P-1) reflects that the respondent paid civil penalty assessments for 28 violations, including one violation of section 48.25(a), two violations of section 48.29(c), and one violation of section 48.31. The violations that were the subject of a prior settlement (Exhibit P-3) are included in the print-out, and I note that three of these violations were issued because of the respondent's

failure to have the training records for two miners available at the mine, and for not completing a training form for one miner. In each of these instances, the miners were in fact trained.

For an operation of its size, I cannot conclude that the respondent has an overall poor compliance records. However, in view of its prior training violations, I believe that the respondent needs to pay closer attention to MSHA's training regulations. Mr. Kepp, in his capacity as safety director and the mine official responsible for training, must devote more time and attention to insure that all miners are properly trained, and that all of the required training documentation is timely and properly maintained. In several instances during the course of the hearing, Mr. Kepp appeared uncertain when he stated that one training segment "very likely" was included as part of a mine tour, and that all of the cited employees were "probably" trained in his office to abate the violations (Tr. 95-102). In any event, I have considered the respondent's compliance record in assessing the penalties for the violations which I have affirmed and find that on the record here presented, any additional increases over those penalty amounts are not warranted.

Good Faith Compliance

The petitioner asserts that the respondent was cited for high negligence "since it failed to exercise reasonable care in locating violations within a reasonable period of time and in taking appropriate action to see that those violation were abated" (Posthearing Brief pgs. 5-6). I agree with the conclusion that the respondent failed to exercise reasonable care, but I reject the petitioner's assertion that the respondent failed to abate the violations that are in issue in this case. The petitioner stipulated that the respondent demonstrated good faith in abating the violations, and, at page 7 of its brief, the petitioner recognizes that the respondent demonstrated good faith in abating the violations cited in this case.

The petitioner's "failure to abate" argument is apparently based on the notion that after the November 1994 training violations were issued, abated, and terminated, any subsequent training violations may be construed as non-abatement. I find absolutely no support for any such theory, and it is rejected.

I conclude and find that the respondent demonstrated good faith in abating the violations in this case.

Gravity

Although I have found that the violations were not "S&S," I nonetheless conclude and find that the failure to provide the prescribed training were serious violations.

Negligence

Inspector Skeens testified that his "high" negligence finding associated with Order No. 3848781 (Exhibit P-2) was based on two prior section 104(g)(1) training orders that he issued in November, 1994, and his close-out conference discussions, and other discussions that he had with Mr. Kepp, and possibly other mine management people, concerning compliance with MSHA's Part 48 training requirements (Exhibit P-3, Tr. 31).

With regard to Order No. 3848782 (Exhibit P-4), Inspector Skeens checked the "high" negligence block on the face of the order form, but offered no testimony in support of this finding. The hearing transcript reflects that Inspector Skeens was handed hearing Exhibits P-2 and P-4 by petitioner's counsel, and after looking at Exhibit P-2 confirmed that it was one of the orders that he issued (Tr. 20). He then proceeded to testify about that order (Tr. 20-31).

Inspector Skeens identified page 6 of Exhibit P-3 as one of the prior section 104(g)(1) orders he issued on November 28, 1994, and confirmed that it was "related" to Order No. 3848782, the second citation that had not as yet been discussed (Tr. 32).

Inspector Skeens then proceeded to testify as to his reasons for issuing Order No. 3848782 (Tr. 35-38). After cross-examination (Tr. 58), MSHA witness Larry Keller was called to testify. Apart from his comment that his prior order of November 28, 1994, where he also found "high" negligence "was related to Order No. 3848782, Inspector Skeen offered no testimony in support of his "high" negligence finding with respect to that order.

MSHA field supervisor and manager Larry L. Keller confirmed that he accompanied inspectors during the November 1994 inspection when some section 104(g)(1) orders were issued and that he attended a conference with Mr. Kepp where "cross-over" training and three-digit contractor and seven-digit mine operator entity identification numbers were discussed (Tr. 59-60). However, Mr. Keller offered no testimony concerning Inspector Skeens' negligence findings with respect to the contested orders in this case, and he was never questioned about this issue.

Apart from Inspector Skeens' testimony that his "high" negligence finding concerning Order No. 3848781 was based on two prior orders issued in November, 1994, and his discussions with Mr. Kepp at that time concerning MSHA's training requirements, and his testimony that one of the prior November orders "was related" to Order No. 3848782, the petitioner offered no further testimony in support of the inspector's "high" negligence findings.

At page 3 of its brief, the petitioner states that the special penalty assessments followed the respondent's "unwarrantable failure to comply with MSHA's training regulations," and at page 6, the petitioner states that the violations "exhibited an unwarrantable failure" by the respondent to ensure the health and safety of its miners. Following these statements is a conclusion (page 8) that the violations in this case were designated as "unwarrantable failure," a statement at page 7 that MSHA elected to special assess the violations "because the operator exhibited an unwarrantable failure to comply" with the cited training standards, and arguments in support of the alleged unwarrantable failure violations (Brief, pgs, 6-7).

Inspectors Skeens and Keller presented no testimony or evidence either alleging or supporting any section 104(d) unwarrantable failure findings in this case. Inspector Skeens' orders were issued as section 104(g)(1) orders, and the pleadings filed by the petitioner never alleged or charged the respondent with any unwarrantable failure violations. Although the inspector was free to issue citations or orders pursuant to section 104(d)(1) or (d)(2), and ordering the withdrawal of miners pursuant to section 104(g)(1), he did not do so. He simply issued the section 104(g)(1) orders withdrawing the affected miners, and he never modified the orders to reflect any

unwarrantable failure charges and the petitioner never amended its pleadings to reflect any unwarrantable failure charges. It's attempts to do so now through its posthearing brief **ARE REJECTED**. I find no evidentiary support for the petitioner's assertions that the violations constitute unwarrantable failures by the respondent to comply with the cited standards.

I take note of the fact that the petition for assessment of civil penalties filed in this case by the petitioner includes an MSHA Form 1000-179, containing the notation "Special Assessment-See Attached Narrative." However, the narrative statement was not attached as part of the initial pleadings, and it was produced by the petitioner for the first time at the hearing (Exhibit P-6).

MSHA's narrative special assessment findings reflect a decision to specially assess the violations in accordance with its penalty assessment criteria found in 30 C.F.R. 100.5. This regulation contains eight violations categories under which special assessments are appropriate, including unwarrantable failures and violations "involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances." The narrative findings in support of the specially assessed violations in this case do not mention any unwarrantable failures to comply and include no discussion with respect to any "extraordinary" negligence, gravity, or "unique aggravating circumstances." Indeed, the gravity finding reflects "serious" violations, and negligence findings based on a failure to exercise reasonable care.

As part of his inspection report in this case, Inspector Skeens executed an MSHA Form 7000-32, recommending a "special assessment," and he described the "serious or aggravating circumstances" involved as the previously issued November 1994 training violations, and the closeout conference with the respondent following that inspection. I cannot conclude that the eight prior training violations, three of which did not involve a lack of training, and the fact that they were conferenced with the respondent, standing alone, constitutes "aggravating" circumstances. However, considering the fact that most of the prior violations were issued on November 28, 1994, just two or three months prior to the issuance of the violations in this case, and the unrebutted testimony of the inspectors that

these matters were discussed with safety director Kepp, I conclude and find that Mr. Kepp had a heightened duty to review his training records to insure compliance with the cited standards in question.

While there may have been some confusion concerning the respondent's bifurcated contractor-operator training obligations prior to November, 1994, I agree with the petitioner's argument that no such confusion existed when the February 1995 violations were issued. Under all of these circumstances, although the inspector's testimony in support of his "high" negligence findings associated with the violations is rather sparse, I conclude and find that the record, as a whole, supports his "high" negligence findings as to both violations, and they **ARE AFFIRMED**.

Civil Penalty Assessments

The petitioner has proposed a "special penalty assessment of $7,500 for Order No. 3848781, and a "special" assessment of $5,000 for Order No. 3848782. The petitioner asserts that these proposed "special" penalty assessments reflect an objective and fair appraisal of the facts presented, particularly in light of the respondent's unwarrantable failure to comply with the cited standards, the "gravity of its negligence," its history of prior violations (especially of the same type), and its failure "to identify the potential violations after having been notified of them in November 1994."

It is clear that I am not bound by the petitioner's proposed penalty assessments, and that I may impose penalty assessments de novo, after consideration of the penalty criteria set forth in section 110(i) of the Act, Westmoreland Coal Co., 8 FMSHRC 491, 192 (April 1986); Sellerburg Stone Co., 5 FMSHRC 287, 290-94 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). Where appropriate, it is clearly within my discretion to assess penalties higher or lower than those proposed by the petitioner, or accept and affirm those proposed by the petitioner. On the facts and evidence of record in this case, I conclude and find the petitioner's proposed penalty assessments are unsupported and not warranted.

On the basis of my foregoing findings and conclusions, and my de novo consideration of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following penalty assessments are reasonable and appropriate for the violations that have been affirmed in these proceedings:

| Order No. | Date | 30 C.F.R. Section | Assessment |
|---|---|---|---|
| 3848781 | 2/21/95 | 48.26(a) | $2,500 |
| 3948782 | 2/22/95 | 48.25(a) | $1,000 |

**ORDER**

**IT IS ORDERED** as follows:

1. Section 104(g)(1) "S&S" Order Nos. 3848781 and 2848782 **ARE MODIFIED** as non-"S&S" Orders, and as modified, they **ARE AFFIRMED.**

2. The respondent shall pay civil penalty assessments in the amounts shown above for the violations that have been affirmed. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is **DISMISSED.**

George A. Koutras
Administrative Law Judge

Distribution:

Ann Noble, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Stephen Kepp, S & M Construction, Inc., P.O. Box 2606, Gillette, WY 82717 (Certified Mail)

\lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 2 1 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 96-96-D |
| On behalf of ANDY HOWARD, JR., | : | MSHA Case No. PIKE CD 95-21 |
| Complainant | : | |
| v. | : | Martiki Surface Mine |
| | : | Mine I.D. No. 15-07295 BLH |
| BRUCE YOUNG AND YOGO, INC., | : | |
| Respondent | : | |

**DECISION APPROVING SETTLEMENT;**
**ASSESSMENT OF CIVIL PENALTY**

The parties have submitted an executed settlement agreement in this matter which includes, but is not limited to, the following items:

1. Complainant, Andy Howard, Jr., agrees not to institute any further legal action arising from his alleged discharge of August 31, 1995;

2. Mr. Howard and the Secretary of Labor agree to waive permanent reinstatement for Mr. Howard;

3. Mr. Howard agrees to dismiss the appeal of his Kentucky unemployment insurance claim;

4. Respondents agree to pay Mr. Howard $4,350 for alleged mental and emotional distress in accordance with a schedule set forth in the agreement;

5. Respondents agree to expunge from Mr. Howard's personnel file any references to his separation of August 31, 1995, and any references to the discrimination complaint he filed with MSHA, or the resulting proceedings before the Federal Mine Safety and Health Review Commission;

6. Respondents agree not to inform any prospective employers of Mr. Howard of the discrimination complaint filed with MSHA, or the resulting proceedings before the Federal Mine Safety and Health Review Commission;

7. Respondents agree to provide Mr. Howard's prospective employers with only the following information: dates of employment with Yogo, Inc., job title and rate of pay;

8. The parties agree that $1,000 is an appropriate civil penalty in this case.

I have considered the representations set forth in settlement agreement and have determined that they are consistent with section 105(c) of the Act.

## ASSESSMENT OF CIVIL PENALTY

Applying the penalty criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of $1,000 is appropriate.

## ORDER

The parties' motion for approval of the settlement agreement is **GRANTED.** Respondents Bruce Young and/or Yogo, Inc. are ordered to pay to the Secretary of Labor a civil penalty of $1,000 within 30 days of this decision. They are also ordered to pay the agreed upon compensation to Mr. Howard in accordance with the terms of the settlement agreement, and to complete making these payments no later than August 1, 1996. Upon completion of these payments, and payment of the civil penalty, this case is **DISMISSED.**

Arthur J. Amchan
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Road,
Suite B-201, Nashville, TN 37215-2862

Tony Oppegard, Esq., Mine Safety Project of the
Appalachian Research & Defense Fund of Kentucky, Inc.,
630 Maxwelton Court, Lexington, KY 40508

Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C.,
415 Second Street, P.O. Box 351, Pikeville, KY 41502-0351

/lh

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 2 1 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF CARROLL JOHNSON, Complainant | : | DISCRIMINATION PROCEEDING<br><br>Docket No. SE 93-182-D<br><br>MSHA Case No. BARB CD 92-20 |
| v. | : | Mine No. 7 |
| JIM WALTER RESOURCES, INC., Respondent | : | |
| and | : | |
| UNITED MINE WORKERS OF AMERICA, Intervenor, | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. SE 93-104<br>A.C. No. 01-01401-03938 |
| v. | : | |
| | : | Mine No. 7 |
| JIM WALTER RESOURCES, INC., Respondent | : | |

## DECISION ON REMAND

Before: Judge Weisberger

On April 24, 1996, the Commission remanded this case to reconsider the assessment of penalties with respect to violations of Section 103(f) and 105(c) of the Federal Mine Safety & Health Act of 1977 ("the Act"). Specifically, the remand required reconsideration of the issues of the Operator's history of violations and good faith, and the gravity of the violations. Also required was reconsideration of the expenses incurred by the Complainant as a result of his pursuing the discrimination action.

On June 18, 1996, the Secretary filed a Joint Motion to Approve Settlement. The motion seeks to increase the penalty for the Section 105(c) violation to $3,000. The parties agree that the penalty for the section 103(f) violation should remain at $1,000. It was further agreed that the Complainant be paid $261.56, less legally required withholdings, as a result of attending the hearing in this matter.

Based on the evidence of record and the representations set forth in the motion, I conclude that the settlement is consistent with the purposes of the Act, and the motion is granted.

**ORDER**

It is ORDERED that the Operator pay, within 30 days of this decision, a total civil penalty of $4,000. It is further ORDERED that the Operator within 30 days of this decision, pay the Complainant $261.56 less legally required withholdings.

Avram Weisberger
Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 150, Chambers Building, Highpoint Office Center, 100 Centerview Drive, Birmingham, AL 35216 (Certified Mail)

David M. Smith, Esq., Maynard, Cooper & Gale, 1901 Sixth Avenue North, 2400 AmSouth/Harbert Plaza, Birmingham, AL 35203-2602 (Certified Mail)

Barry A. Woodbrey, Jr., Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

/ml

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 2 5 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 93-238-M |
| Petitioner | : | A.C. No. 03-01619-05503 |
| v. | : | |
| | : | Blue Bayou Sand and Gravel |
| BLUE BAYOU SAND AND GRAVEL, | : | |
| Respondent | : | |

## DECISION ON REMAND

Before: Judge Weisberger

On June 19, 1996, the Commission issued a decision in this matter reversing my initial conclusions that the violation at issue was not S&S and did not present any imminent danger. The Commission remanded "for reassessment of the civil penalty consistent with this decision (Docket No. CENT 93-238, June 19, 1996, slip. op. at 8).

Consistent with the Commission's decision that the violation at issue was S&S and an imminent danger, I find that the level of gravity of the of the violation is very high. In evaluating the factors set forth in Section 110(c) of the Act, I consider most significant the factor of gravity due to its high level. I find accordingly, that a penalty of $1,200 is appropriate.

## ORDER

It is ORDERED that, within 30 days of this decision, Respondent shall pay a civil penalty of $1,200 for the violation set forth in citation/order No. 4116491.

Avram Weisberger
Administrative Law Judge

Distribution:

Susan E. Long, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

David J. Potter, Esq., 901 North State Line Avenue, Texarkana, TX 75501-5268 (Certified Mail)

/ml

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 2 6 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-229-M |
| Petitioner | : | A.C. No. 11-02963-05501 |
| v. | : | |
| | : | Northern Illinois Service |
| NORTHERN ILLINOIS SERVICE CO., | : | |
| Respondent | : | |

**DECISION**

Appearances: George F. Schorr, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Duluth, Minnesota, for the Petitioner; David A. North, Esq., Rockford, Illinois, for the Respondent.

Before: Judge Feldman

This matter is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (the Mine Act). The petition seeks a $50.00 civil penalty for each of two alleged non-significant and substantial (non-S&S) violations[1] of the mandatory safety standards contained in 30 C.F.R. Part 56.

[1] A violation is not significant and substantial if it is not reasonably likely that the hazard contributed to by the violation will result in a serious injury. Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981).

This case was heard in Rockford, Illinois, on March 19, 1996.[2] The parties stipulated the respondent is an operator subject to the jurisdiction of the Act, the cited violations were abated in a good faith and timely manner, and, the proposed civil penalties will not affect the respondent's ability to continue in business. The parties' post-trial briefs are of record.

Preliminary Findings of Fact

Wayne Klinger is the sole owner of Northern Illinois Service Company. The company extracts limestone at the subject quarry located north of Rockford, Illinois, on Swanson Road. The quarry had been inactive for approximately five years before it was leased by Klinger in September 1993, for a five year term. Normally, there are three employees working at the quarry -- a "scale girl," loader operator Steven Yancy, and the Foreman, Dan Kentner. (Tr. 99). The extraction process consists of drilling and dynamiting the limestone deposits. The extracted material is then transported to the primary crusher by a front-end loader where it is processed and transported by belt to stacker conveyors.

Blasting by an independent contractor began in October 1993. Klinger purchased new equipment including a Kamatsu loader, a Boehringer primary crusher that was assembled by Murawski Engineering in Rockford, Illinois, a screen and conveyors. The primary crusher was installed in May 1994. The first bucket of extracted limestone was loaded into the crusher on June 18, 1994.

In April and May 1994, prior to commencing operations, Klinger made several telephone calls to the Mine Safety and Health Administration's (MSHA's) field office in Peru, Illinois, to request a compliance assistance visit (CAV). A CAV is performed, at an operator's request, in order to ensure compliance with mandatory safety standards by operators who are

---

[2] The March 19, 1996, hearing in this matter was initially scheduled for November 9, 1995. The hearing was continued until January 23, 1996, due to an interruption in government operations as a consequence of the budget impasse. The January 23, 1996, hearing date was once again continued because of the government shutdown.

opening new mines, or who are operating new mining equipment. Under this CAV program, an MSHA inspector visits the facility and informs the operator of potential violations. The operator is then given a reasonable period of time to correct the violative conditions without the imposition of civil penalties.

In response to Klinger's request, MSHA Inspector Robert Flowers performed a CAV on June 9 and June 16, 1994. At that time, the primary crusher was out of service. Therefore, Flowers could not perform a CAV to determine if the quarry was operating in compliance with the mandatory standards pertaining to dust and noise. However, Flowers issued numerous CAV Nonpenalty Notices on MSHA FORM 4000-51. The CAV notices cited various conditions including several for apparent violations of the mandatory guarding requirements for conveyor belts and tail pulleys. These CAV Nonpenalty Notices did not specify a termination date before which the cited conditions had to be corrected. (See Ex. R-1). The conditions were corrected during the period June 15 through July 6, 1994. Foreman Dan Kentner testified Flowers did not state that he would return for a noise and dust inspection or that the CAV was otherwise incomplete. (Tr. 103).

In August 1994, MSHA Inspector William Hatfield reviewed MSHA's files on the subject quarry. Hatfield talked to Flowers and his supervisor, Ralph Christiansen. They informed him the CAV visits were completed. Christiansen assigned Hatfield to perform a regular inspection. Ordinarily, Flowers would have conducted the inspection. However, Hatfield was assigned because Flowers was behind on his inspections due to illness.

Hatfield arrived at the Swanson Road quarry at approximately 8:00 a.m. on August 4, 1994. Hatfield went to the scale house, identified himself, and requested to speak to the foreman. According to Hatfield, Foreman Kentner arrived at the scale house, whereupon Hatfield, consistent with his normal procedure, advised Kentner he was there to conduct a regular inspection. Hatfield also testified he had no reason to represent that his visit was for a CAV, as his assignment was to conduct a routine inspection. Kentner testified Hatfield informed him that he wanted to do a noise and dust inspection, although Hatfield did not specify whether the purpose was a CAV or regular inspection. (Tr. 103).

Kentner informed Hatfield that the primary crusher had been out of service since August 1, 1994, due to a major breakdown involving the clutch. Hatfield had intended to inspect the entire operation including noise and dust compliance. (Tr. 48). Hatfield observed two different types of material beneath the stacking conveyor which led him to believe that extraction operations had commenced. (Tr. 20). Kentner conceded there were stockpiles of material, although he characterized the piles as insignificant. (Tr. 185). Since the crusher was not operational, Hatfield, accompanied by Kentner, inspected other areas of the facility.

Hatfield and Kentner were in the scale house at approximately 9:30 a.m. when Hatfield observed an energized, uncovered 110 volt duplex outlet box on the east wall. Hatfield testified that the purpose of an outlet cover is to prevent contact with inner wires that could result in electric shock injuries. Consequently, Hatfield informed Kentner that a cover was required and he issued Citation No. 4313030 citing a non-S&S violation of the mandatory safety standard in section 56.12030, 30 C.F.R. § 56.12030. This standard requires electrical boxes to be covered at all times except during testing and repair. Hatfield returned to the facility the following morning to ensure that the violations had been abated. Hatfield terminated the citation at 8:00 a.m. on August 5, 1994, after he observed that a cover had been installed on the cited outlet.

At approximately 10:00 a.m. during the August 4, 1994, inspection, Hatfield and Kentner proceeded to the generator trailer which contained the generator that powered the crusher unit, screens and conveyors. Hatfield observed an acetylene tank and an oxygen tank without valve covers. Acetylene is used as fuel and the oxygen is used as an enhancer to power the cutting torch. When in use, the valve caps must be removed to install the regulator on the tanks. A regulator is attached to the tanks and a 100-foot hose is attached to the regulator with the cutting torch at the end of the hose. The long hose enables torch cutting operations to occur outside the generator trailer without removal of the tanks. The tanks remain stored in the generator trailer when not in use.

Hatfield concluded the tanks, also referred to as cylinders, were not in use because they were not attached to any regulator

gauges or torches. (Tr. 29, 58). Hatfield testified that these cylinders contained compressed gas under pressure of up to 2,000 pounds per square inch. Hatfield opined these cylinders could explode if an exposed valve was accidentally damaged by contact with a tool or other object. Hatfield informed Kentner that the valve caps were required. Hatfield issued Citation No. 4313031 for a non-S&S violation of section 56.16006, 30 C.F.R. 56.16006. This mandatory standard requires valves on compressed gas cylinders to be covered when the cylinders are transported or stored. Kentner had the valve caps reinstalled within 30 minutes.

Hatfield testified that he wrote Citation Nos. 4313030 and 4313031 during the evening of August 4, 1994, after returning to his motel room after completing the day's inspection. Hatfield returned to the quarry the following morning where he conducted a close-out conference with the end-loader operator because Kentner was not available. Hatfield does not recall the name of the end-loader operator and he could not identify Yancy who was the respondent's the end-loader operator at that time. Yancy could not recall ever meeting Hatfield. (Tr. 145). The meeting related by Hatfield reportedly occurred approximately 18 months before the trial in this proceeding. Hatfield explained it is difficult for him to recognize someone in a courtroom who had been wearing a hard hat and who was last seen 18 months earlier. (Tr. 197-98).

The respondent alleges it received the subject citations via certified mail on or about August 30, 1994, in an envelope postmarked August 28, 1994. Hatfield testified that citations are personally served on operators rather than mailed, with the exception of citations that require subsequent laboratory analysis such as respiratory dust samples. Therefore, Hatfield maintained he personally served the subject citations to an individual identified as the end-loader operator during a close-out conference in the scale house on August 5, 1994.

Ultimate Findings and Conclusions

As a threshold matter, the respondent asserts that Hatfield went to its mine site to complete the noise and dust CAV started by Fowler in June 1994. The respondent contends that Hatfield issued the subject wall outlet cover and tank valve cover

citations only after Hatfield learned he could not conduct a CAV for noise and dust compliance because the crusher was not operational. The respondent speculates that the subject citations were intended to be CAV warnings but were later written as formal citations and initially served by certified mail on or about August 30, 1994. Thus, the respondent argues the citations should be treated as nonpenalty CAV warnings.

The nature and extent of a CAV inspection is within the discretion of the Mine Safety and Health Administration (MSHA). Although the respondent characterized the stockpiles as insignificant when Hatfield conducted his August 1994 inspection, it is undisputed that mining activities began on June 18, 1994, when the first bucket of limestone was loaded into the crusher. The evidence also reflects Flowers had already conducted a CAV which noted a variety of non-crusher related violative conditions. (See Ex. R-1). Therefore, there is no basis for disturbing Hatfield's decision to conduct a regular inspection on August 4, 1994.

Moreover, it is well settled that MSHA is not estopped from citing a violative condition simply because the violation was overlooked during a prior inspection. See King Knob Coal Co., Inc., 3 FMSHRC 1417, 1421-22 (June 1981). Judge Morris addressed this issue with respect to CAV reviews in Brighton Sand & Gravel, 3 FMSHRC 127 (ALJ, Jan. 1991). Judge Morris stated:

> When A CAV inspection takes place, MSHA cannot guarantee that all areas of a mine will be inspected, nor can it guarantee that all possible violations will be detected by the inspector. This is because the primary obligation for compliance with the regulations rests with the mine operator. Id. at 128.

Therefore, the Secretary is not precluded from enforcing these citations even if they existed but were not cited by Flowers during his June 1994 CAV visit.

The citations in this matter identified as Exs. P-1 and P-2 were issued pursuant to section 104(a) of the Mine Act, 30 U.S.C.§ 814(a).[3] They cite violations of mandatory safety standards that were observed by Inspector Hatfield on the morning of August 4, 1994, in the presence of Kentner, the quarry Foreman. In accordance with section 104(a), the citations describe with particularity the nature of each violation and the mandatory standard violated. The citations also provide a reasonable period of time for abatement of the cited violative conditions.

I credit the testimony of Hatfield that he served the citations on the morning of August 5, 1994, when he returned to the quarry to determine the cited conditions were abated. (Tr. 55-56). In this regard, the citations reflect the last violation was terminated at 8:00 a.m. on August 5, 1994. (Ex P-4). However, even if the citations were first served by certified mail on or about August 30, 1994, as alleged, they were served with "reasonable promptness" as required by section 104(a) of the Mine Act, and, the respondent has not shown any prejudice by its purported receipt by certified mail. Therefore, whether Hatfield personally served the citations, or mailed them, is not a relevant issue that impacts on the citations' validity.

---

[3] Section 104(a) provides:
If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard rule, regulation ,or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

With respect to the issue of Hatfield's credibility, there is no evidence that Hatfield represented that he was performing a CAV inspection. Moreover, the respondent's prompt abatement efforts reflect these violations were not viewed as informal CAV warnings. CAV warnings are advisory in nature and do not have a formal abatement date. Review of the subject citations reflects the violative conditions were abated within one day -- well in advance of the termination date specified in the citations. This prompt abatement evidences that Kentner was aware that these were formal violations that, unlike CAV violations, required immediate correction.

Having determined that the citations are valid, we turn to the question of the fact of occurrence of the cited violations. Citation No. 4313030 was issued for an uncovered, energized 110 volt duplex outlet box on the east wall of the respondent's scale trailer. The uncovered condition of this outlet box is not in dispute. The respondent does not contend this outlet box was undergoing testing or repair at the time it was observed by Hatfield. Therefore, the Secretary has met his burden of establishing the cited violation of the mandatory safety standard in section 56.12030.

With respect to remaining Citation No. 4313031, section 56.16006 requires valves on compressed gas cylinders to be covered when not in use. The dispositive question is whether or not the cited cylinders were in use when they were observed by Hatfield without valve covers at approximately 10:00 a.m. The respondent asserts the tanks were in use because: (1)they were connected to a regulator and a hose; (2) they had been used by Yancy immediately prior to Hatfield's inspection; and (3) Yancy used the cylinders for torch operations throughout the day, both before and after the inspection. As noted below, the evidence fails to support these assertions.

Contrary to the respondent's claim that a regulator and torch were connected, Hatfield testified the regulator and torch were not connected and there was no one observed preparing to use the cylinders. (Tr. 29, 58). Similarly, Kentner testified that no one was "physically cutting" at the time. (Tr. 122).

The respondent's self-serving statements that the cylinders were being used were not expressed to Hatfield by Kentner at the

time of the inspection. (Tr. 137). Such exculpatory testimony, the substance of which was first presented at trial, is of little evidentiary value. Moreover, Citation No. 4313031 reveals the valve caps were installed at 10:30 a.m., shortly after the condition was cited. There is no evidence to support Kentner's self-serving assertion that the regulator was removed prior to installation of these valve caps. (Tr. 123). For example, as noted above, Kentner admittedly did not question Hatfield about why he was required to remove the regulator if the cylinders were being used. (Tr. 137). Kentner's testimony that the 100-foot hose was "wrapped inside" next to the cylinders and not seen by Hatfield is inconsistent with the respondent's assertion that the torch was being used outside the generator trailer. (Tr. 138). In short, the regulator, hose and torch were not observed by Hatfield because there is no objective evidence that they were connected to the cylinders and being used. (Tr. 58).

Significantly, although Yancy allegedly remembers using the tanks off and on all day on August 4, 1994, his testimony is inconsistent with his purported recollection. (Tr. 151-52). In this regard Yancy testified:

> Q. On that day [August 4, 1994], were you aware of the fact that there was some comment about the use of the oxygen and torch equipment?
>
> A. Yeah, later towards quitting time in the afternoon he had gone, Dan [Kentner] was telling me -- about some caps that he had put on. (Tr. 151).

Yancy testified "it [doesn't] make any sense" to remove the regulator and replace the valve caps when the cylinders are used intermittently throughout the day. (Tr. 152). However, the substance of the above quoted testimony is that Yancy first learned that valve caps had been installed by Kentner at quitting time. If Yancy had used the cylinders throughout the day, as alleged, he would have known Kentner had installed the caps earlier that morning because Yancy would have had to remove the caps and reinstall the regulator and hose in order to resume his purported use of the torch.

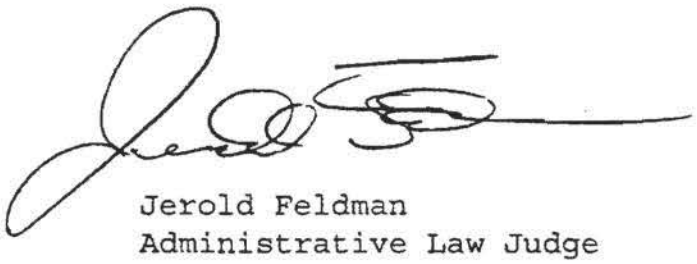
Thus, on balance, I credit Hatfield's testimony that there was no evidence that the cylinders had been in use on the morning of August 4, 1994. Accordingly Citation No. 4313031 is affirmed.

In considering the appropriate penalty to be assessed, I must consider the penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). The minimal $50.00 civil penalties proposed by the Secretary for each of the two cited violations takes into account that the respondent is a small operator that has cooperated with MSHA during the CAV process. These small proposed penalties also reflect the low gravity of the violations, the low degree of negligence attributable to the respondent, and the respondent's good faith efforts to achieve rapid compliance. Accordingly, there is no basis for disturbing the $50.00 penalties sought to be imposed.

In affirming the proposed civil penalties, I am cognizant of Hatfield's testimony that the respondent is safety conscious and runs "a very good operation." (Tr. 95). This mitigating factor is a consideration in the imposition of this small penalty. However, concerns for safety are not a defense to the cited violations.

## ORDER

In view of the above, Citation Nos. 4313030 and 4313031 **ARE AFFIRMED**. The respondent shall pay a total civil penalty of $100.00 to the Mine safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of payment, this case **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:

George F. Schorr, Conference and Litigation Representative,
Mine Safety and Health Administration, U.S. Department of Labor,
Duluth Federal Building, U.S. Courthouse, 515 W. First Street,
Room 228, Duluth, MN 55802-1302 (Certified Mail)

David A. North, Esq., 216 Court Street, P.O. Box 17,
Rockford, IL 61105 (Certified Mail)

/mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 2 6 1996

| | | |
|---|---|---|
| DONALD S. WALLACE, | : | DISCRIMINATION PROCEEDING |
| Complainant | : | |
| v. | : | Docket No. WEST 95-282-DM |
| | : | MSHA Case No. WE MD 95-01 |
| BARRICK GOLDSTRIKE MINES, INC., | : | |
| Respondent | : | Mine I. D. # 26-01089 |
| | : | Barrick Goldstrike Mine |

## DECISION

Appearances: James L. Kennedy, Jr., Esq., Ketchum, Idaho, for Complainant;
Charles R. Zeh, Esq., Zeh, Polaha, Spoo and Hearne, Reno, Nevada, for Respondent.

Before: Judge Amchan

### Procedural History

On October 21, 1994, Donald Wallace filed a complaint with the Mine Safety and Health Administration (MSHA) alleging that he had been fired from his job at Barrick Goldstrike Mines in retaliation for activities protected by section 105(c) of the Federal Mine Safety and Health Act. On February 17, 1995, MSHA notified Mr. Wallace that it had determined that no violation of the Act had occurred. Mr. Wallace filed a complaint on his own behalf with the Commission.

On January 17, 1996, I denied the parties' cross-motions for summary judgment in this matter, 18 FMSHRC 103. Wallace's motion was denied because I concluded that Mr. Wallace was not engaging in activity protected by the Federal Mine Safety and Health Act when he advised a fellow miner over his radio to "punch through" or skip his assigned lunch break. Wallace told his friend to take two or three Delay-80s (an unscheduled break to combat fatigue) later if necessary. Respondent contends that this

conversation, which occurred on September 26-27, 1994, the last night Complainant was allowed to work for Barrick Goldstrike, led to his termination.

I denied Respondent's motion for summary judgment because Mr. Wallace alleged that he would not have been discharged had he not engaged in other activities, which appeared to be protected under the Act. A hearing was held in Elko, Nevada, on March 28-29, 1996, to afford Complainant an opportunity to establish that his discharge was related to these protected activities.

## Findings of Fact

Donald S. Wallace worked for Respondent at its mine near Carlin, Nevada, from September 1990 until September 27, 1994, when he was suspended and then terminated (Tr. 336, 361-62). Mr. Wallace worked as a haul truck driver, sometimes on the night shift. At the time of his discharge, this was a 12 ½-hour shift, beginning at 7:00 p.m. Miners were allotted a 30 minute lunch break and two 15-minute scheduled breaks during each shift (Tr. 75-77). Respondent also allowed for unscheduled bathroom breaks ("Delay-40s") and unscheduled breaks to combat fatigue ("Delay-80s") (Tr. 77, Exh. R-1, Tab 26).

Mr. Wallace's first involvement with Respondent's disciplinary program occurred in November, 1993. Prior to this time, shovel operators on Wallace's shift worked with an oiler, who assisted the operator in running and maintaining the shovel. Respondent abruptly stopped assigning employees to work as oilers. When Wallace discovered this, he got on the radio in his haul truck and asked shovel operator Donald Randall whether Randall was working without an oiler. When Randall responded in the affirmative, Wallace made a comment questioning the safety of this practice (Tr. 210-14, 340-41).

Wallace was then summoned to the office of his foreman, Vern Goglio. Mr. Goglio orally reprimanded Mr. Wallace for making his comments about the lack of an oiler over the radio (Tr. 74, 340-41, 465-66, Exh. R-1, Tab 8)

Mr. Wallace's second brush with Respondent's disciplinary program occurred in January, 1994. At this time, Complainant was given "decision-making leave" as the result of another comment he

made over the radio in his truck. Mr. Wallace was put on a one-year probation as the result of this incident (Tr. 51-52, 70-71, Exh. R-1, Tabs 14 & 15).

Respondent was in the process of changing its lunch-break system for the night shift. Previously, miners on the night shift had some discretion as to when they took their lunch break. Barrick was implementing a system in which miners would eat at times assigned by the supervisory employee serving as dispatcher. This change was implemented so that equipment continued to operate at maximum efficiency throughout the shift[1]. A number of miners did not like the change (Tr. 72-76).

On January 12, 1994, a shovel broke down and foreman Mo Cunliffe announced that lunch breaks would start at 11:00 p.m.. Mr. Wallace sarcastically asked over his radio, "[w]hy don't you give us our breaks at the beginning of the shift and just work us the rest of the night" (Tr. 339, 344). Wallace was thereupon summoned to Mr. Cunliffe's office and was reprimanded for making an insubordinate remark over the radio. During Wallace's discussion with Cunliffe, both lost their temper.

Afterwards, Complainant was given a "decision-making leave day (DMLD)" for making disruptive comments over the radio. On this day, he was not allowed to come to work, but was paid. The objective of the DMLD was to make an employee aware of the seriousness of his violation of company policy. The DMLD was a step in Respondent's progressive discipline program beyond verbal and written reprimands (Exh. R-1, Tab 15, Tab 38, Policy and/or Procedure 90-202, pp. 2-3, Tr. 465-66)).

Mr. Wallace had a meeting with Respondent's Human Resources Manager Ron Sled and Assistant Mine Manager Ron Johnson in

---

[1]Glenn Wyman, general foreman of mine operations at this time, stated that under the old system not enough equipment operators were choosing an early lunch break, thus causing inefficiencies in equipment utilization. Foremen were also unsystematically assigning employees an early lunch to make up for the lack of volunteers, creating tension among some operators who believed the early lunch breaks were assigned inequitably (Tr. 430).

February 1994, to discuss the DMLD. Following this meeting, Wallace signed a form which advised him that "any further policy or procedure violations may cause other discipline or termination of employment." He also executed a statement indicating his willingness to change his behavior to conform to Respondent's policies. Further, he acknowledged his understanding of his position in the progressive discipline policy (Exh. R-1, Tab 15).

The decision-making leave day form remained active in Mr. Wallace's personnel file for one year. Seven and a half months after he signed it, the incident which led to his termination occurred.

During this period, Respondent continued to have difficulty establishing a lunch break system for the night shift that satisfied management and the equipment operators. It tried a "mass break" system whereby the entire pit shut down at the same time and then abandoned it. In September Barrick changed to an "autobreak" system, whereby lunch was assigned to operators by computer (Tr. 419-20, 430-34, 504).

Respondent also experimented with its procedure for equipment operators to take unscheduled breaks to combat fatigue. To take such a break an operator entered the code "delay-80" on the computer onboard his truck (Tr. 420). In late September 1994 Respondent was concerned on the one hand, that some miners were not taking "delay-80" breaks when they should, and on the other hand, that some miners were abusing the "delay-80" breaks (Tr. 183-86, Exh. R-1, tabs 24 & 28).

At about midnight on September 26-27, 1994, miner David Paules was notified by a computer message that he had been scheduled for a midnight lunch break. Paules complained to the dispatcher over his radio that he had been assigned an "early" lunch break several nights in a row (Tr. 199-200).

The dispatcher told Paules to take his lunch break as assigned. He apparently promised to try to rectify the situation afterwards. After a few minutes Complainant Wallace got on the radio (Tr. 200).

Wallace said to Paules, "Dave, why don't you punch through lunch and take two or three Delay-80s later when needed to help

you make it through the night." These remarks were heard by everyone in the pit (Tr. 74, 201, 206-07, 266, Wallace Deposition I: 131-32).

At the conclusion of the night shift on the morning of September 27, 1994, Complainant was suspended from his employment by Terry Sheehan, Mine Operations Superintendent. Wallace described Sheehan as being "very agitated" (Tr. 361-62). On September 28, Wallace had a meeting with Jeff Marrott from Barrick's Human Relations Department and Glenn Wyman, a general foreman in Respondent's Mine Operations Department. They discussed with him his comment over the radio to Mr. Paules and decided to recommend that the suspension become a termination of Wallace's employment (Tr. 425-30, 476-77).

On October 3, 1994, a committee of managers from the Mine Operations Department formally recommended that Mr. Wallace be terminated(Exh. R-1, tab 35). This committee consisted of Marrott and Wyman, Terry Steinhausen, another general foreman, Terry Sheehan and George Bee, Mine Division Manager (Tr. 61-62). On October 10, 1994, Wallace met with Charles Geary, Vice-President and General Manager of the mine, to appeal his termination. At this meeting, Wallace told Geary that he believed that he was being terminated because he had inquired about a "miners' representative" at the mine and because he had contacted MSHA about safety and health concerns at the mine. Mr. Geary ratified Complainant's termination (Tr. 314-16, Exh. R-1, tab 36).

Complainant's allegations of protected activity

Complainant alleges that the comments for which he was counseled in November 1993, concerned safety. Pursuant to a sudden change in policy, Respondent required an operator to run and maintain a large electric shovel by himself. Wallace contends his comments over the radio were intended to raise concerns over the safety of this decision (Tr. 340-41).

On July 28, 1994, Complainant contacted State of Nevada Mine Safety officials to complain of a lack of air conditioning in his haul truck. Drivers sit near the vehicle's engine which generates heat (Tr. 141, 352). The air conditioning in Complainant's vehicle had not been working for 5½ shifts prior to

this telephone call. Wallace had brought this to Respondent's attention without result. The day after his call the air conditioning was repaired (Tr. 347-53, Wallace deposition I: 68-75).

Wallace never informed management of this phone call and there is insufficient evidence to establish that Respondent knew of it. Complainant informed several fellow miners that he made the call, but there is no evidence that any of them informed any supervisory employees (Tr. 349-51).

On one occasion in the late summer or early fall of 1994, haul truck driver William Pennell approached foreman Mo Cunliffe and asked if Cunliffe could get his truck's air conditioner fixed (Tr. 145-46). Cunliffe pointed to Wallace, who was in his office. Without any apparent hostility, the foreman said, "[h]ere's the man who can get your air conditioner fixed" (Tr. 145-6, 148, 366-68). I am unable to conclude from this remark that Cunliffe had determined that Wallace had been responsible for the MSHA inspection.

Wallace had a reputation for being one of the most outspoken employees at Respondent's mine, if not the most outspoken miner (Tr. I: 267-70, 275, 468). Cunliffe's comment may simply have been a reference to Wallace's willingness to let management know what was bothering him, including inoperable air conditioning (Tr. 368). Moreover, even if Cunliffe thought Complainant called MSHA, there is no evidence that he bore Wallace any animus as a result. Wallace testified that he got along "well enough" with Cunliffe and only had a problem with him regarding the lunch break system (Tr. 366).

John Kirkwood is a haul truck driver who was terminated by Respondent in March 1995 (Tr. 151-53, 166-67). He testified that in mid-August 1994, he was sitting at a computer terminal in the foremen's office when he heard Vern Goglio, one of the foremen who superivsed Mr. Wallace, talking to another foreman. According to Kirkwood, Goglio said:

> Something to the effect that, since Don [Wallace] had called MSHA it wasn't going to be tolerated, something to do with nails and coffins, he had driven a nail in a coffin or something like that. (Tr. 155)

Mr. Kirkwood also testified that in September 1994, while turning in his time card, he overheard one foreman say to two other foremen, "[t]hat could result in somebody calling MSHA." Then Mr. Kirkwood states that foreman John Simler responded, "[n]o, they know what happens around here if you call MSHA" (Tr. 158).

I find Mr. Kirkwood's testimony regarding these alleged conversations to be insufficiently credible to support any factual findings. In addition to his animus towards Respondent regarding his own termination, there are other puzzling aspects to Kirkwood's testimony. I can understand why Mr. Kirkwood may not have reported these conversations to Barrick Goldstrike management or MSHA (Tr. 168). However, if Mr. Goglio made the remarks attributed to him, I cannot understand why Kirkwood did not warn Complainant. There is no evidence from either Kirkwood or Wallace that he did so.

Finally, if Goglio was looking for an excuse to have Complainant fired, one would think that this would be revealed in Goglio's attitude towards Mr. Wallace prior to his discharge. To the contrary, Wallace testified that he got along well with Goglio (Tr. 367).

The comment attributed to Foreman Simler is similarly suspect because there appears to have been no reason for him to make it. There may have been a belief amongst miners after Mr. Wallace's discharge that his termination was related to calling MSHA (Tr. 147). However, there is no indication prior to Wallace's discharge that Respondent had taken any action that would lead miners to think that a call to MSHA would lead to retaliation.

State MSHA officials conducted an inspection pursuant to Wallace's complaint and Wallace's air conditioning was repaired almost immediately following this inspection. However, the inspectors did not talk to Wallace or inspect his haul truck (Tr. 352-53, Wallace deposition I: 68-75). Repair of his vehicle on July 29, may have had nothing to do with the inspection (Tr. 258).

Mr. Wallace was not the only equipment operator who complained about his air conditioning (Tr. 368). There were

approximately 120-130 miners working on his crew (Tr. 500). Thus, the shift on which he worked was sufficiently large that Barrick could not necessarily identify Complainant as the source of the inspection request by process of elimination. Finally, there is no evidence that any state or federal MSHA official violated the law in identifying Wallace to Barrick as the source of the complaint (Tr. 351).

There is no evidence that any citations resulted from this inspection (Tr. 361). This makes it very difficult to infer that Barrick management would have retained sufficient animus towards Wallace to consider this inspection in terminating him two and a half months later--assuming that it did suspect him of initiating the inspection.

Between September 1 and September 10, 1994, Wallace contacted State mine inspector Norman Pickett on at least two occasions. He asked Pickett about the procedures for designating a "miners' representative" at Respondent's mine.[2] He had a similar discussion or discussions with Federal MSHA Inspector James Watson during this period. There is no evidence that Respondent was aware of either inquiry (Tr. 354-55, 358, 406).

Wallace's September 17, 1994 discussion with General Foreman Glenn Wyman

Immediately after Wallace's crew assembled for their shift on Saturday, September 17, 1994, General Foreman Glenn Wyman approached Complainant and asked for his opinion regarding a

---

[2]A "miner's representative" is a person who represents two or more miners for purposes related to the Mine Safety and Health Act, 30 C. F. R. Part 40. Such a representative has the authority to ask MSHA for an inspection of a mine pursuant to section 103(g) of the Act. The representative must also be afforded the opportunity to accompany a MSHA inspector and management representative during an inspection, and an opportunity to participate in pre-inspection or post inspection conferences held at the mine, §103(f) of the Act. There were no "miners' representatives" at Barrick Goldstrike in September 1994 (Tr. 356).

safety meeting at which the lunch breaks and the "delay-80s" were discussed (Tr. 357-59, 383-86, 410-13, Exh. R-1, Tab 23).

Wallace told Wyman he thought Respondent was making the new computerized "autobreak" system fail. Wyman denied this and told Wallace that the company was trying to find a way to make the system work.

The two men then discussed two recent incidents which almost resulted in serious accidents. Wyman told Wallace that both drivers in these incidents had just had a break and therefore he believed they were not related to the new lunch break system (Tr. 411-12).

Complainant then asked Wyman if there should be a "miners' representative" at the mine (Tr. 357-359, 383-86, 410-413). Wyman said that he did not think that was necessary because Barrick's open-door policy and other company procedures were adequate to address employee concerns. Although Wallace described Wyman as "uncomfortable" with his suggestion, there is no evidence that Wyman exhibited anger or hostility either to Wallace or to the suggestion.[3] Wallace then went to work (Tr. 359, 412-13).

Three days later, on Tuesday, September 20, Wyman mentioned his conversation with Wallace to Jeff Marrott, of Respondent's Human Resources Department (Tr. 417). Marrott recalled Wyman saying that Wallace expressed a desire for rank and file miners to have more input at the mine. Wyman also told Marrott that he thought Wallace was "pushing for a union" (Tr. 487, Also see Tr. II: 323). A little more than a week later, Wyman and Marrott decided that Wallace should be terminated after his comments to David Paules over his truck radio (Tr. 452).

In early October 1994, Barrick's Human Resources manager Ron Sled conducted an investigation of Wallace's allegations of

---

[3]Wyman testified that he did not understand that Wallace was suggesting a "miners' representative" for MSHA purposes (Tr. 416). Nevertheless, I credit Wallace's testimony that this is what he was suggesting and thus find the discussion to constitute protected activity under the Act.

retaliatory discharge. When Sled interviewed Wyman, the latter said that he recalled Wallace stating that the miners needed "some representation." Wyman told Sled that he did not recall any mention of MSHA and that he thought that Wallace meant union representation (Tr. 323).

Wallace's call to MSHA the day before his termination

On September 26, 1994, Wallace left a message with MSHA that the air conditioning in his truck was not operating again. There is no evidence that Respondent knew of this call (Tr. 359-60).

Analysis of Mr. Wallace's Complaint

Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any ... miner because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a complainant establishes a prima facie case of discrimination by showing (1) that he engaged in protected activity and (2) that an adverse action was motivated in part by the protected activity.

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 the protected activity. If the operator cannot thus rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

Complainant's termination would not have occurred but for his radio communication with David Paules on September 27, 1994. If I were to conclude that the comment was protected activity under section 105(c), I would find that his discharge violated the Act. However, I reach the opposite conclusion.

A good faith safety or health complaint made to management is protected by section 105(c). However, Mr. Wallace has not established that his comment was a safety and health complaint. Wallace contends that he thought Respondent's new system for assigning lunch breaks was dangerous because it left some equipment operators with seven hours until the end of the shift and only one 15-minute break (Wallace deposition I: 166-68).

I find, however, on the basis of the evidence before me, that Wallace's radio communication was not a good faith safety complaint. First, it was not directed to management, but instead was directed to fellow-miner David Paules and could have encouraged Paules to disregard company policy with regard to lunch breaks. Second, Wallace had no grounds for concluding that Paules' objection to an early lunch-break was made for safety reasons (Wallace deposition II: 48).

The evidence before me is insufficient to indicate that there was anything inherently hazardous about Respondent's new lunch break policy for its night shift. In this regard, I note that the Mine Communication Sheet dated September 22, 1994 (Exh. R-1, Tab 24), allows for more than a 15-minute "delay-80" break if deemed necessary by a supervisor. More than two "delay 80" breaks in one shift also could be taken with the approval of a supervisor (Exh. R-1, Tab 28).

In conclusion, I find that Mr. Wallace's comment of September 27, 1994, was not protected activity. Therefore, to establish that his discharge violated section 105(c) of the Act

he must establish that he would not have been terminated but for other activities that are protected.

Complainant's communications with MSHA

While Mr. Wallace has established that he engaged in activities protected by the Mine Act, he has failed to prove that his termination is related to these activities. As the Commission and Federal Courts have repeatedly noted, it is rare that a link between the discharge and the protected activity will be supplied exclusively by direct evidence. Usually discrimination can be proven only by circumstantial evidence upon which the trier of fact draws an inference regarding the employer's motivation, Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508, 2510 (November 1981).

The most common circumstances upon which such an inference may be based are the employer's knowledge of the protected activity, hostility towards the protected activity (animus), coincidence in time between the protected activity and the discharge or other adverse action, and disparate treatment of the complainant and similarly situated employees, Ibid., at 2510. Mr. Wallace fails to establish a link between his discharge and calls to MSHA primarily because there is insufficient direct or circumstantial evidence that Respondent was aware of them.

Moreover, assuming Barrick knew or surmised that Complainant had engaged in any of these protected acts, there are insufficient grounds to conclude that Respondent bore sufficient animus towards these activities for them to have contributed to his termination.

The November 1993 radio conversation regarding the lack of oilers on shovels and the January 1994 comment regarding the early lunch break.

Complainant contends that he commented upon Respondent's decision to cease assigning oilers to its shovels in November 1993, and the early lunch break of January 12, 1994, out of concern for the safety of equipment operators. I conclude that he has not established that the January incident constituted a good faith safety complaint protected by the Act.

The comment regarding the shovel is a closer question. However, I conclude that it is unnecessary to decide whether it is protected because I see no substantial link between this incident and Wallace's termination, which occurred ten months later.

The September 17, 1994, discussion with Glenn Wyman regarding miners' representatives.

The conversation with Glenn Wyman provides two common indicia of discriminatory intent: knowledge of protected activities and proximity in time to Wallace's discharge. Indeed, with regard to the latter, Wyman and Jeff Marrott, the two individuals who decided to fire Wallace, discussed his request for "representation" little more than a week before making this decision.

My reason for declining to inferentially find a relationship between this conversation and the termination is the complete lack of evidence of hostility or animus on the part of Respondent to Wallace's protected activity. The fact that Foreman Wyman did not agree with Complainant does not constitute hostility or animus sufficient to allow an inference that Wyman was motivated by this discussion in recommending Wallace's termination.

Wallace testified that he believed that he could talk to Wyman about his concerns regarding the break system (Tr. 358). Nothing in his description of the conversation indicates that Wyman reacted to his suggestion with anger or hostility. The closest the record comes to suggesting animus is the fact that Wyman thought Wallace's discussion regarding "representation" sufficiently significant that he told Marrott about it three days later. However, I conclude this fails to provide sufficient basis for drawing an inference that Wyman or Marrott, the only two management officials aware of this conversation, were motivated by it when recommending Wallace's termination.

If Wyman and/or Marrott would not have recommended termination but for activities protected by the Mine Act, I would deem it irrelevant that others involved in the termination were not aware of these activities. I would find a section 105(c) violation. However, in addition to finding an insufficient nexus between the September 17, 1994 discussion and Wallace's

termination, I conclude that retaliation, if it did occur, was not for activity protected by the Mine Act.

There is no suggestion that Wyman or Marrott were hostile or concerned with the possibility that Wallace or another miner would become "miner's representative." While this might not be true with regard to the inception of campaign for a union, such considerations are beyond the purview of the Federal Mine Safety and Health Act.

Complainant's argument that his discharge must have been motivated by his protected activities because Respondent could not have possibly fired him for the September 26-27, 1994 radio comment.

Much of Complainant's case is directed to showing that no reasonable employer would have fired him for suggesting to Mr. Paules that he skip the lunch break and take "delay-80s" later, if he needed them. To the contrary, I conclude that Respondent had sufficient non-protected reasons to fire him.

Mr. Wallace appears to have been genuinely concerned with the welfare of his fellow miners. Further, his work record appears to have been unblemished apart from his use of the truck radio to communicate his disagreement with management decisions on at least three occasions. One might agree with Complainant that Respondent should not have fired him. However, that does not mean that he has established that his discharge violated section 105(c) of the Act.

Respondent's witnesses have established that the scheduling of lunch breaks was a very sensitive issue at the mine in 1994 (Tr. 419-20, 504). Barrick had tried several methods of balancing its concerns for productivity with the wishes of its equipment operators. Each of these apparently met with some resistance from its employees.

In this context, the company might have reacted very strongly to a suggestion from one employee to another, regarding the lunch break that appeared to be inconsistent with the instructions of their supervisors. This is all the more true when this suggestion was made over the mine radio system whereby all employees could hear it.

Finally, when an employee is on a probationary status for criticizing management over the radio, it is certainly possible that he would be fired if he again made remarks over the radio that management could interpret as another challenge to its authority.

In conclusion, I find that Complainant has not established that his termination violated section 105(c) of the Act. His complaint is therefore **DISMISSED**.

Arthur J. Amchan
Administrative Law Judge

Distribution:

James L. Kennedy, Jr., Esq., P.O. Box 2165, Ketchum, ID 83340 (Certified Mail)

Charles R. Zeh, Esq., Zeh, Polaha, Spoo & Hearne, 450 Marsh Ave., Reno, NV 89509 (Certified Mail)

/lh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

JUN 2 8 1996

| | | |
|---|---|---|
| WILLIAM F. METZ, Complainant | : | DISCRIMINATION PROCEEDING |
| | : | Docket No. PENN 95-479-DM |
| | : | NE MD 95-06 |
| v. | : | |
| | : | Millard Lime & Stone |
| WIMPEY MINERALS and TARMAC AMERICA, INC., SUCCESSOR-IN-INTEREST, Respondents | : | Mine ID 36-00017 |

**DECISION**

Appearances: William F. Metz, Lebanon, Pennsylvania, pro se; William Doran, Esq., Smith, Heenan and Althen, Washington, D.C. for Respondent.

Before: Judge Melick

This case is before me upon the complaint by William Metz under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging that Wimpey Minerals discharged him on March 21, 1995, presumably in violation of Section 105(c)(1) of the Act.[1]

---

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

> No person shall discharge or in any manner 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 of the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to

More particularly, Mr. Metz alleges in his May 6, 1995, complaint to the Department of Labor's Mine Safety and Health Administration (MSHA) as follows:

> After several attempts to convey to management our concerns about Gene Graham mainly safety related issues they told us that they did not want to here [sic] any problems related to Gene Graham & on or around March 16th I told Roy Lashbrook again my concerns & that I wanted a meeting with James Gregory, Vice President. Roy told Carrol & Carrol came to see me wanted to know what my problem was now I sad [sic] same thing as [illegible] other than that Gene was trying very hard not to flip out on anybody but that was it and you know the things (safety items) are not getting repaired & also telling people to do things they should not be doing (the safe way) he said bill [sic] whats [sic] your problem everything is running I said thats [sic] my problem thing [sic] running that probably shouldn't on March 21st he came to me about 9:00 p.m. & told me I was fired why I asked he said it just wasn't working out. This is just a brief and to the point response to the action I don't believe people should be fired for voicing their concerns about safety & also they should make a mockery of MSHA since you's [sic] are there for are [sic] safety I will get into that with the investigator
>
> I would like to be reinstated to my job with my seniority and back pay from March 21st and unemployment payed [sic] back because if & when I go back if they lay me off I won't have any unemployment you only get 26 weeks and till this is resolve [sic] I might not have any left and Insurance Reinstated from time of firing.

The Secretary declined to pursue the above complaint and Mr. Metz brought this action before this Commission on his own under Section 105(c)(3).

---

Footnote 1 Continued

> Section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Metz testified at hearing that he began working for Wimpey Minerals in February 1988 as a heavy equipment mechanic and continued to work in that capacity until he was terminated on March 21, 1995. It appears that Metz' difficulties began when Gene Graham took over as Team Leader of the shop in 1993. According to Metz, in late 1993 or early 1994, he observed Graham remove a "tag" that Metz had placed on the fuel truck because it purportedly had no brakes. Metz claims he told Graham that if the truck went out again (presumably without the brakes being repaired) he would see Graham's supervisor, Gary Nolan. There were apparently no further problems with that truck and Metz concedes that nothing happened to him as a result of this complaint.

The next relevant incident apparently occurred on April 11, 1994. In the early morning hours of that date Metz and mechanic John Leffew were working together. Metz had previously noted a series of problems with defective steering cylinders on some of the 50-ton haul trucks so he and Leffew went out to the quarry to check on some of the other 50-ton trucks. Checking the trucks with a flashlight around 3:00 or 4:00 in the morning, Metz found what he deemed to be defective steering problems on four of them. He tagged those trucks, thereby, in effect, barring their use until repaired.

When the drivers appeared for work later that morning they inquired of their boss, Lenny Mussar, why their trucks had been tagged-out and Metz responded that it was because of steering problems. Metz then returned to the shop where Graham later inquired about the tagged trucks. According to Metz, Graham asked him to remove the tag from at least one of the trucks and Metz refused. Metz claims that Graham then told him to come to his office where he presented Metz with two warning slips he pulled out of his desk. One warning was for failing to note the time on a meter reading slip and the second was for failing to stop before driving across the railroad tracks. According to Metz, Graham then again asked him to remove one of the tags and when he again refused, purportedly told Metz he was fired. Metz then went home. He was later called by Human Resources Manager Chris Harvan who set up a meeting for the next day.

At the meeting on the next day, April 12, Harvan, Gene Graham and the Complainant met. As a result of this meeting Harvan presented Metz with a letter (Complainant's Exhibit No. 1) indicating that his suspension with intent to discharge was reduced to a three-day suspension without pay and 90-days probation. Harvan did not testify but, according to Graham, this was based on the warning notice he issued on April 11, 1994 after the "tag-out" confrontation (Respondent's Exhibit No. 3) because Metz was "loud", "insubordinate", and "the biggest thing was his threatening statements" that "I am going to become your worst

nightmare." Graham acknowledged that he also gave Metz two other warning notices after the April 11 confrontation (Respondent's Exhibits No. 1 and 2). Graham further acknowledged that the "conversation got out of hand" only after he asked Metz to reverse his decision about tagging-out the trucks. Both Graham and Carroll Laufmann claim that Metz' suspension was not based however on his tagging-out the trucks.

Metz claims that he also complained at the April 12 meeting about Graham's prior removal of warning tags and was told not to confront Graham about anything. He noted that "everybody" was having verbal exchanges with Graham who, according to Metz, "kept going nuts" and was always arguing about something.

Metz also testified that there had been a meeting between January and April, 1994, at which Graham's supervisor, Carroll Laufmann, told a group consisting of Metz and co-workers, Ted Gress, Jim Shirk, John Leffew, and Feliciano "Chico" Rivera, that "I do not want to hear anything negative to do with Gene Graham, safetywise or otherwise." Laufmann acknowledges that he wanted the mobile equipment shop crew to stop looking at all the negative things Graham was doing as a supervisor but could not recall telling them not to bring safety issues regarding Graham to his attention.

Metz further testified that his discharge on March 21, 1995, was preceded by a meeting with Laufmann on March 16, 1995. Metz described the meeting in the following colloquy:

> [Complainant Metz]: He [Carroll Laufmann] walked in and said, "What's your fucking problem now," and that's a quote.
>
> And I said, "Same thing it's been, just a few more incidents.:
>
> And he said, "What's your fucking problem? Everything's running."
>
> And I said, "That's my problem. Everything's running, and things that shouldn't be running."
>
> And at that point, he just sat there and looked at me. I said, "You've either got to do something [or] I'm going to [c]all MSHA and let them deal with it because I can't take it no more."
>
> BY JUDGE MELICK
>
> Q. This is what Carol said?

A. No, I told this to Carol. And as he walked up, he got up and walked out and didn't say nothing more to me. And I told him, "By the way, tell James I'm the one that sent the letter." And that's all I said to him.

Q. Who is James?

A. James Gregory, I guess he's the vice president. At that time, I guess he was the vice president of Wimpey USA. I don't know what his -- he's some kind of president.

Q. And did Carol know what this letter was? Did you discuss the letter in this conversation?

A. No.

Q. Well, how would he know what this letter was then if he didn't know, if you didn't discuss it?

A. I don't know if he knew or not. The person that the letter was sent to -- and I can only speculate that the day he go it --

JUDGE MELICK: Well, I don't want speculation. Unfortunately, we can only have what you know.

THE WITNESS: Well, I'm the guy that sent the letter.

BY JUDGE MELICK:

Q. Well, what letter is this, by the way?

A. It was a letter of a conversation I'd overheard between Gene Graham and Dave Douville. I was standing right there. Gene was telling me about it. Dave Douville walked in.

Q. Who is Dave Douville?

A. Do you want me to tell you what was said in that conversation?

Q. Well, I'm just wondering what the relevance of this letter has to do with --

A. Well, a guy died.

Q. A guy died?

A. Yes.

Q. And what did the letter have to do with the guy's death?

A. The letter had to do with two weeks prior to the guy dying, Gene Graham and Dave Douville that works for Tire Centers, Incorporated, walked across the same grating and fell through it; didn't fall through it, but almost fell through it.

Q. So who did you send the letter to?

A. I sent it to Bob Furlong.

Q. Who is Bob Furlong?

A. And also sent a copy to George Brandt's wife.

Q. Well, who are these people; Bob Furlong and somebody's wife?

A. Bob Furlong was the president of the company.

Q. This was not then sent to the Mine Safety and Health Administration or any government agency?

A. I don't think so.

Q. So then what happened after this conversation with Carol Laufmann?

A. I can only go by their dates. I wasn't writing stuff down. But I believe it was three days later, I started at, like, 8:30. It was about 9:00. He walked up.

Q. When you say "he," is that Mr. Laufmann?

A. Yes. He told me he wanted to see me in the office. I walked in. He set down. He told me he was going to have to ask for my resignation. I told him I was in no position to give him my resignation nor did I want to.

He asked me again, and I said, "Well, what's the problem? What did I do?" I said, "I asked for a meeting and all of a sudden, I got fired." I said, "I'm using your grievance procedure." They have it right here in a book. And all of a sudden, I got fired because I'm making one more safety complaint about Gene Graham.

And it wasn't just about that letter that I wanted to talk to him about. I never got to tell him anything.

Q. And then what happened at that point?

A. Well, then I was fired because I wouldn't give him my resignation. He followed me up to my toolbox. I took all my personal stuff and left.

Q. Now, I guess we're going to have to get a little more information. When you said you had made a safety complaint about Gene Graham, when did you make this safety complaint?

A. We made many -- we attempted to.

Q. Did you, in fact, ever make a safety complaint?

A. They wouldn't let us. (Tr. 15-19).

Laufmann's description of the March 1995 events leading to the Complainant's discharge is set forth in the following colloquy:

Q. And Mr. Metz was discharged March 21 of 1995. Was there a specific incident that led to his discharge at that time?

A. Yes, there was.

Q. Could you describe that incident for me, please?

A. The incident began a couple days earlier when John Leffew approached Roy Lashbrook, who at this time had been substituted in the sort of chain of command between Gene Graham and myself. John came to Roy and said that Bill had requested that Roy set up a meeting with James Gregory.

Roy suggested that he go back and tell Bill that he needed to go through the chain of command, rather than jumping over Roy and myself directly to James. And I believe Roy, at that time, also sent back the message that he would meet with Bill the next morning at 5:30.

Q. To your knowledge, did Roy meet with Bill?

A. Yes. To my knowledge, that meeting did indeed take place.

Q. Did Roy talk to you after that meeting?

A. Roy talked to me after that meeting and said that he hadn't been able to satisfy Bill, that Bill was still asking to meet with James Gregory and suggested that, to follow the procedure outline, that I come in early the following morning to meet with Bill and see if I could answer Bill's question or problem.

Q. Did Roy explain to you or present any issues to you that Mr. Metz had raised?

A. Not in any detail, no.

Q. Did you meet the next day with Mr. Metz?

A. Yes, I did. I came in, arrived at the quarry site at approximately 5:30 the next morning and went to find Bill. I located Bill and told him that I was there to discuss the situation. Bill was fairly noncommunicative.

I said, "Look, we've got to follow the procedure. I need to know what the problem is, so I can carry it on to James, tell him what I know about it and arrange a meeting."

So I pressed Bill again. I said, What is the problem?

Bill finally said, "It's the same old thing. Gene Graham's blowing smoke up your ass."

Q. What did he mean by that?

A. I am not sure what Bill meant by that.

Q. Did you ask him what he meant by that?

A. No, I did not.

Q. Did you ask what the "same old" problem was?

A. I continued to say, "Let's elaborate more on this situation." Again, I don't recall exact -- that exact phrase sticks in my mind, but after that, I don't recall exact words. It came out something to the effect that it was Gene Graham -- that Bill could just no longer work with Gene.

I said, "Bill, this is directly 180 degrees

against what we put in the letter in April of '94," that was sort of the letter that had saved his job at that time. I said, "Bill, if it's that bad, why didn't you take the opportunity to bid on the job posting to get into the line plant?"

Q. And what's that? Explain that to me. What's the job posting at the line plant?

A. The job postings at Millard are done if a vacancy occurs anywhere on the Millard site. The job, the rate and description are put up in our change building, left up for a week or two. I forget which exactly the time is.

And during that time, people can stop in at our plant office, sign up, put their name on a list of people to be evaluated for filling that position. The advantage to this position was that it would have been a transfer. I believe the two jobs paid the same. So it wouldn't have been -- they're both right at the top of the pay scale at Millard. There wouldn't have been the problem with taking a pay cut or something.

Q. Let me ask you, you had mentioned that you said to Mr. Metz that this was a contravention of his agreement that he made in April of '94.

Can you describe to me what you mean there? What agreement are you talking about?

A. Again, as I said earlier, I had actually made the decision that Bill should be discharged twice. The time in April of '94 was overruled, if you will, I think largely because the person I was working for was brand new to Millard, had only been there three or four weeks, really didn't know me and really didn't know the situation well.

Q. And who is that?

A. James Gregory. He really didn't know me well. I knew part of the reason maybe he was there was because the previous administration, if you will, maybe hadn't been as cautious in all cases and maybe should have been in some of these instances. And he wanted to be very sure he was doing the right thing.

So he basically said, "Let's go back and see if we can't find a way to keep this person's job."

Q. And what did you do at that point?

A. At that point, Chris Harvan and I, who at that point was human resources director, I believe, set down and over a series of a meeting or two hammered out what we felt were the minimum requirements that it would take for me to be willing to keep Bill Metz on his job. (Tr. 308-312)

Q. Focusing back on your decision to discharge Mr. Metz, at any time in making your decision -- well, first of all, let me ask you, did you consult with anyone else in making your decision?

A. In March of '95 now?

Q. That's right.

A. Yes, I basically made the decision. I called my supervisor, the vice president of -- I'm sorry. I'm getting the two instances confused. Let me start over.

In March of '95, once Bill had told me that, number one, that he thought the letter of agreement from April of '94 was "bullshit" and that he could -- and had also made the statement that either he or Gene Graham was going to have to go, I didn't feel like I had any choice. Once Bill made those two positions very clear to me, I thanked him and left, said I would set up a --

JUDGE MELICK: This was at the meeting you had with him in March of '95?

THE WITNESS: This was when I came into the job site at 5:30 in the morning in March of '95, that's correct.

JUDGE MELICK: And he told you at that time that the --

THE WITNESS: He told me at that time that this letter that he unfortunately didn't sign and return was a "bunch of bullshit," that he had never agreed to it in the first place and didn't agree to it now.

JUDGE MELICK: Wait a second. That was at the prior meeting? This was not in March of '95?

THE WITNESS: This was in March of '95, again, bringing up the fact that he did not ever agree to the letter, despite the fact that we had set in Chris

Harvan's office and agreed that this was the terms and conditions he was going to come back to work for. And in March of '95, he's saying "it's bullshit," that he never agreed to it, still doesn't agree to it and basically refused to agree with it.

BY MR. DORAN:

Q. If I can ask you a question, this is the meeting the day after he met with Roy Lashbrook?

A. This is a meeting the day after he met with Roy Lashbrook, yes.

JUDGE MELICK: He had said at that meeting then, again, that the letter of April of '94 was "Bullshit"?

THE WITNESS: Was "bullshit," he didn't agree to it then and doesn't agree to it now.

Q. And the decision to discharge Bill Metz was not given to him on that date; is that correct?

A. That's correct. I left that meeting. I thanked Bill for his time. I said I would set up the meeting with James Gregory, contacted James, told him what had transpired, said that I just couldn't see any option any longer and that I felt that we had to terminate Bill. And that was my recommendation.

At this point, James has worked with me for a year. I'm permanent in my position. James has a better feel for the plant and people and basically agreed with my recommendation.

Q. And did you communicate that decision to Mr. Metz?

A. Yes, I did. It was not intended for me to communicate that decision to Mr. Metz. There was a date set for Bill to talk to James Gregory. James and I had agreed that, unless something came up during that meeting that didn't come up during my meeting with Bill, that at the conclusion of that meeting, that James would inform Bill that he was terminated.

The day before the meeting with James was to take place, we internally in the plant talked the decision over with a few of the team leaders, what we thought in private, to get them ready to -- again, we

just don't like to have decisions like this to be made and then the rumor mill get a hold of them before we can make any kind of announcement for the work place. So we told some people ahead of time.

For one reason or another, that information got out into the work force, yet, that afternoon, Bill was scheduled to come to work that night. I believe Roy Lashbrook received the first call at home at 6:00 p.m. or 7:00 p.m. in the evening saying, "The word's out. You guys maybe ought to consider doing something different." Roy called me and told me.

I called James. I said, "I don't think it's a good idea to have Bill on site, unsupervised," because at that point, we didn't have a supervisor on the night shift, "if he gets word that he is to be discharged the next day."

James said, "Yes," he agreed with that. We agreed that, since I lived closer to the mine site, I would drive back, meet with Bill and give him the word that he was being discharged, but also tell Bill he should, by all means, go ahead and call James Gregory and set up a meeting with James to have the meeting that they were to have had the following day.

Q. And did you meet with Mr. Metz?

A. Yes, I did.

Q. And during that meeting, did Mr. Metz express any safety concerns to you?

A. No, he did not. (Tr. 334-338)

Whether safety issues were considered in discharging Metz was discussed by Laufmann in the following colloquy:

Q. [Mr. Doran] Let me ask you one final question here. In making your decision to discharge Metz, did any effort on your part to prevent Mr. Metz from making safety concerns enter into your decision?

A. No. At no time, if anybody comes to me with a safety concern, it's basically between them and I. And again, if somebody comes and says, "I need five minutes of your time. Can I close the door and can we discuss a safety concern?" by all means, we close the door and discuss a safety concern.

Q. Did Mr. Metz at any time during your tenure as stone plant manager ever make any specific safety complaints or safety concerns regarding Mr. Graham?

A. I don't recall Bill ever coming to me with a specific hard fact that Gene had --

Q. Did you ever ask him for hard facts? Did you ever ask him for specific issues?

A. I never went to Bill Metz and said, "Bill, can you tell me three things that Gene has done unsafe?" At every team meeting, there was a period at the end of the meeting that everyone was invited to bring up a safety concern, if they had one.

And there were some minor things brought up there that tended to be more on the line of, "Can we do a better job of snow removal," or "What's the temperature in the shop going to be this year," or there's maybe a door that needs to be fixed or something.

But in the way of items that I would say are real true safety, life-threatening or injury-threatening safety concerns, no. (Tr. 340-341)

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion the he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, sub nom. *Consolidation Coal Co. V. Marshall,* 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra.* See also *Eastern Assoc., Coal Cor. 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).

It cannot be disputed that Metz' activity on April 11, 1994, in tagging-out Respondent's haulage trucks for steering defects was protected activity. In addition, while not clearly articulated, it is apparent from Metz' credible testimony that he also attempted to report safety issues regarding Team Leader Graham to Graham's supervisor, Carroll Laufmann in early 1994 and again at his meeting with Laufmann on March 16, 1995, five days before his dismissal. At the latter meeting Metz also complained that certain equipment "shouldn't be running" and told Laufmann that "you've either got to do something [or] I'm going to [c]all MSHA and let them deal with it because I can't take it no more," (Tr. 16). It is noted that Laufmann never specifically denied this testimony and was generally evasive on the subject. These too are clearly activities protected under the Act.

As noted, the second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission observed in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case."

In the instant case there is both direct and indirect evidence that Metz' discharge was motivated by his protected activity. The direct evidence is in Respondent's letter confirming the reasons for Metz' dismissal (Complainant's Exhibit No. 2) wherein Respondent cites the April 11, 1994, alleged "insubordination" as an underlying basis for the dismissal. Insubordination is disobedience or the unwillingness to submit to authority. In the context of the April 11 incident Metz' insubordination was essentially only his refusal to comply with his supervisor's (Graham's) request for him to remove at least one of the danger tags he had placed on the haul trucks at the quarry.

While Graham testified that Metz' discipline in April 1994, was also based on his loudness and the fact that he said to Graham "I will be your worst nightmare", neither factor under the circumstances of this case would warrant the subsequent severe

disciplinary action and discharge.[2] No physical threat was cited by Graham in his testimony and Metz' "loud" spontaneous reaction may reasonably be construed as having been provoked by Graham's efforts to have Metz submit to his authority and allow at least one of the trucks Metz found hazardous to operate without repair. A miner does not forfeit his rights to Mine Act protections under such circumstances.

As noted, the latter complaints and threat to call MSHA were made only five days before Metz was discharged and were made to the same person, Laufmann, who had already concluded that Metz should have been fired for his April 11, 1994, protected activity and to the same person who again recommended Metz' discharge.[3] It may reasonably be inferred therefore that Respondent was also motivated by these protected activities in discharging Metz. Metz has accordingly established a *prima facie* case of discrimination that is unrebutted.

In accordance with the *Pasula* analysis the issue then is whether Respondent has affirmatively defended by proving that it would have taken the adverse action in any event on the basis of Metz' unprotected activity alone. In this regard Respondent's evidence is insufficient. Again, looking to the April 21, 1995, letter setting forth the reasons for Metz' termination, it is noted that the warnings for incidents on April 7 and April 8, 1994, were not issued to Metz until after he had engaged in the April 11 protected activity and, according to witnesses, were trivial incidents others had also committed without repercussion. The April 12, 1994, "agreement" or "second chance" was clearly premised on Metz' protected activity on the day before and cannot therefore be considered a non-protected basis for subsequent action. The undisputed charges that Metz ignored his Team Leader, avoided acknowledging instructions from him and often did not complete his paperwork in a timely fashion and the October - November 1994 instances of "poor conduct" where Metz was reportedly "extremely arrogant and argumentative" and when he

---

[2] While the subject dismissal letter states that Metz also said to Graham "I will get you Gene", Graham testified only that Metz said "I will be your worst nightmare". Graham's testimony under oath is accorded the greater weight and is deemed to be the more accurate version of what he claims was said. (Tr. 233-234)

[3] While Metz acknowledged on cross examination that he did not in March 1995 make "safety complaints" to management, this testimony is not necessarily contradictory. Metz apparently did not construe as "safety complaints" his threat to call the Mine Safety and Health Administration (MSHA) if certain equipment was allowed to continue operating.

was overheard by an outside vendor's employee, Charles Vlasic, "shout abusively at his Team Leader for about five minutes" (Tr. 218) clearly provided legitimate and non-protected grounds for disciplinary action but no action was then taken. If this behavior was considered sufficiently serious to warrant dismissal, such action should then have been taken. Here no action was taken until Metz engaged in additional protected activity on March 16, 1995.

Finally the alleged ultimatum, in which Metz purportedly said that either Graham or he would have to go, is credibly denied by Metz. This denial is also corroborated by the testimony of employee James Shirk who was given contradictory reasons for Metz' dismissal by Wimpey Vice President James Gregory. In addition, if such an ultimatum were in fact presented then it may reasonably be concluded that Metz would in fact have resigned.

Under the circumstances Respondent has failed in its burden of proving an affirmative defense. Complainant has established that he was discharged in violation of the Act.

**ORDER**

The parties are directed to confer regarding reinstatement, costs, damages and interest and are directed to report to the undersigned on or before July 16, 1996, regarding whether such issues can be stipulated. If such issues cannot be stipulated by that date, further hearings will be held on these issues on July 25, 1996, in Harrisburg, Pennsylvania. This decision is accordingly not final and a final decision will not be issued until such issues are resolved. *Boone v. Rebel Coal co.*, 3 FMSHRC 1900 (August 1981)

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Mr. William F. Metz, 2404 Long Lane, Lebanon, PA 17046 (Certified Mail)

William Doran, Esq., Smith, Heenan & Althen, 1110 Vermont Ave., N.W., Washington, D.C. 20005 (Certified Mail)
\jf

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

JUN 28 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 96-130-D |
| on behalf of ARTHUR R. OLMSTEAD | : | DENV-CD-95-20 |
| Complainant | : | |
| v. | : | |
| | : | Savage Mine |
| KNIFE RIVER COAL MINING CO., | : | |
| Respondent | : | |

**DECISION**

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Laura E. Beverage, Esq., and Rebecca Graves Payne, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), on behalf of Arthur R. Olmstead, against Knife River Coal Mining Company under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). For the reasons set forth below, I find that Knife River violated section 105(c) when it discharged Mr. Olmstead on June 30, 1995.

A hearing was held on February 27 through March 1, 1996, in Billings, Montana. In addition, the parties filed post-hearing briefs in the case.

## BACKGROUND

Mr. Olmstead worked for Knife River from September 11, 1967, until his discharge on June 30, 1995, a total of 27 years. He operated the tipple since 1987. During his employment, Mr. Olmstead was well known for raising operational and safety matters, both with management and state and federal mine inspectors. Until 1995, he had never had any disciplinary problems with the company.

Richard Kalina became superintendent of the Savage Mine on March 1, 1993, having been promoted from Knife River's Gascoyne, North Dakota, mine where he had been foreman since 1984. On Mr. Kalina's recommendation, Mr. Olmstead was suspended without pay for five days beginning on March 6, 1995, for an unauthorized absence. The absence occurred when Mr. Olmstead accompanied his son to traffic court, for which he claimed on his time card "Jury or Court Duty." (Comp. Ex. 7.)

Mr. Olmstead's employment with Knife River was terminated effective June 30, 1995, for dishonesty. The dishonesty concerned alleged misrepresentations on Mr. Olmstead's part about his medical status and availability for work following surgery on his right wrist.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

In his Discrimination Complaint filed with MSHA, Mr. Olmstead alleged that Knife River discriminated against him by terminating him. In the Complaint of Discrimination filed by MSHA with the Commission, the assertion that the company discriminated against Mr. Olmstead by suspending him without pay was added. At the hearing a third claim was made, that the Complainant was required to take coffee and lunch breaks at times different than the rest of the employees. I conclude that only the original allegation has merit.

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act,[1] a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2768 (1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F2d. 1211 (2d Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. 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).

---

[1] Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or, (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

It is undisputed that Mr. Olmstead engaged in protected activity. It is apparent that he was constantly making complaints about matters that he considered to be safety and health issues to whomever would listen. Therefore, the questions in this case are whether the company took adverse actions against him, whether the adverse actions were because of the protected activity, and, if so, whether the company would have taken the adverse actions solely because of unprotected activity in which the Complainant may have engaged.

**Solitary Coffee and Lunch Breaks**

Turning first to the claim, that Mr. Olmstead was required to take his coffee and lunch breaks alone, I find that this was not an adverse action. On April 14, 1994, Mr. Kalina instructed Mr. Olmstead to finish crushing the coal in the crusher before taking his coffee or lunch breaks. This caused him to take the breaks at different times than the rest of the employees. While Mr. Olmstead testified that this lasted two or three weeks, in a record he kept at the time, on a page headed "info to establish Harrasment [*sic*] Charges against Management concerning lunch time and dinner time," only four dates are listed, April 14, 15, 18 and 19. (Comp Ex. 4, at 102.)

On the other hand, the other witnesses, including employees Steve Ler and Brian Carr, testified that it was not unusual for management occasionally to require employees to take lunch or coffee breaks at different times, if the job required it. Furthermore, no one corroborated Mr. Olmstead's statement that he was required to do this for two or three weeks. In addition, even his contemporaneous notes, made for the specific purpose of documenting adverse actions, only show four days. Consequently, I conclude that this was no more than a reasonable job request, no different than that made of all employees, and not an adverse action.

**Suspension without Pay**

The suspension without pay is a more difficult question. It is entirely believable that the court may have required a parent to accompany a minor to traffic court. Clearly, however, this was not jury duty, nor did Mr. Olmstead ever claim that he was serving on a jury. That he was uncertain whether accompanying

his son to court entitled him to any type of court leave is supported by his discussions with his fellow employees before going and his putting "Jury or Court Duty" on his time card.

However, despite his apparent confusion, Mr. Olmstead never consulted anyone in a position to give him an answer. The union contract was clear that only jury duty entitled an employee to special leave; he did not bother to read it. Nor did he ever question any of his supervisors about what type of leave he could take, although at least one of is friends, Steve Ler, told him he should check it out.[2] Mr. Olmstead testified that he put the time card on Jody Reed's desk and told her that he did not know how the jury duty applied and would let her figure it out. Jody Reed, a part-time secretary, was plainly not in a position of authority and, further, stated that Mr. Olmstead did not say anything to her about the time card.

The day after the court appearance, Mr. Kalina asked Mr. Olmstead how the "jury trial went" and Mr. Olmstead responded, "it went fine." (Tr. 120.) Nothing further was said about the incident until late February or early March when Mr. Kalina, after finding out that the company had not received any jury fees for Mr. Olmstead's appearance, questioned Mr. Olmstead about the fees. Mr. Olmstead responded that the company should be receiving a check from the court. It was only by calling the court that the company determined that Mr. Olmstead had not served on a jury and was, therefore, not entitled to jury leave.

It is not necessary to determine whether Mr. Olmstead was being disingenuous or really was bewildered in this situation to conclude that the adverse action was not based on his protected activities. Viewing the situation through the eyes of management, a conclusion that Mr. Olmstead was being deceptive with them was perfectly reasonable. In fact, since Mr. Olmstead never bothered to attempt to clarify matters until he was

---

[2] Although the Secretary has advanced that management was aware of his dilemma because his discussions with his friends took place in a room outside of Mr. Kalina's office, I give this evidence no weight. There was no showing that Mr. Kalina was in his office at the time, or that, even if he was, he would have been able to hear the discussion.

suspended, such a conclusion was the only reasonable one to be drawn.

An unauthorized absence is clearly unprotected activity. Even though the company may have been tired of Mr. Olmstead's constant safety complaints and recommendations, I find that the five day suspension was allotted, mainly, if not solely, for the unprotected activity. Accordingly, I conclude that Mr. Olmstead was not discriminated against in this instance.

**Discharge**

Mr. Olmstead injured his wrist in April 1994. In March 1995, he decided to have the wrist fused. The surgery was performed on March 21, 1995. After the surgery, the doctor advised Mr. Olmstead, on March 24, that he expected him to be off work for three months and scheduled a return visit for April 21. Thereafter, return check-ups were scheduled every 30 days.

Mr. Olmstead's next visit was on May 19. After the examination, the doctor gave Mr. Olmstead a slip which stated: "If avail. lite duty -- no shoveling or lifting over 15 pounds rt. hand." (Comp. Ex. 11.) According to Mr. Olmstead, he went to the mine on May 23 and gave the slip to Mr. Kalina. He testified that Mr. Kalina kept the original of the slip, made a copy for him, and wrote down on his desk calendar when Mr. Olmstead's next appointment was.

Mr. Olmstead further testified that he explained to Mr. Kalina that he was not completely healed, that there was a risk that he would reinjure the wrist, but that he could return to work with the restrictions listed. Mr. Olmstead asserted that Mr. Kalina replied that they would wait until after his next appointment before putting him back to work.

Mr. Kalina's recollection of this visit was somewhat different. He testified:

> Q. Now, did Mr. Olmstead visit you at the mine site on or about May 23, 1995?
>
> A. Yes.

Q. And did Mr. Olmstead at that time provide you with a May 19, 1995, doctor's slip?

A. Not that I recall.

Q. Did you discuss with Mr. Olmstead whether he could return to light duty at that time, on May 23, 1995?

A. No, I never did.

Q. Did Mr. Olmstead discuss with you his general medical condition?

A. Yes. The conversation went, Art sat down and we talked about his arm, what it looked like. If I remember right he had a new cast on. And he said his doctor said he could not come back to work, no light duty. He said his diabetes was hindering his healing and he needed more time.

He mumbled something about 15 pounds and what I could do with that. And I said, "I can't," something about "when your doctor releases you, you can come back to work."

(Tr. 655-56.)

Mr. Olmstead's next doctor's appointment was on June 15. His cast was replaced with a wrist brace. He did not receive a work restriction slip when he left the doctor's office. He returned to his home on June 16.

While he was helping his sons adjust a hay rake that was pulled behind a tractor, Mr. Kalina and Junior Etzel, the foreman, came out to the hay field in a pick-up truck. Mr. Kalina remarked that it looked like Mr. Olmstead could return to work. Mr. Olmstead replied that he had not been released to return to work. Mr. Kalina asked Mr. Olmstead for a doctor's slip to update his file.

As a result of this confrontation, both Mr. Olmstead and Mr. Kalina apparently called the doctor's office to obtain a doctor's slip. The slip subsequently received by both indicated that the restrictions were: "No pushing or pulling, cannot carry items up

a ladder. No lifting over 10 pounds. No repetitive or twisting motions." (Comp. Ex. 12.)

A meeting with management was held on June 28, 1995. At the meeting, Mr. Olmstead was represented by counsel[3] who was allowed to be present but not to participate, and Mr. Olmstead was not permitted to question any of the witnesses against him. After the meeting, Mr. Olmstead was informed by a June 30 letter that

> there is a clear discrepancy between your statements to management about your work status and the written work releases. You failed to provide a reasonable, credible explanation for the discrepancy. Therefore, we have concluded that your actions represent dishonesty in violation of Rule 1 of Knife River Coal Mining Company Rules of Conduct and warrant immediate dismissal.

(Comp. Ex. 19.)

The letter gave the following reasons for this conclusion:

> It is the recollection of Rich Kalina, the mine superintendent, that you told him on May 23 that you could not return to work yet. He recalls advising you to provide a doctor's statement for the file. Notes taken by Rich in his daily calendar for May 23 are consistent with his recollection.
>
> You stated at the meeting held at the Savage Mine on June 28 regarding this matter that you knew you were released to light-duty work in May and that you gave the doctor's statement to Rich around May 23 but he told you that you could not return to light duty.
>
> Knife River's long-standing practice is to utilize light duty whenever we can accommodate restrictions.

---

[3] Mr. Olmstead was evidently misadvised by his union that a lawyer could represent him at the meeting in the place of union representation. Apparently, the union contract would have permitted a union representative to participate in the proceedings.

> Your statement that Rich told you in May that you could not return to light duty would be inconsistent with that practice and is not credible in view of Rich's recollection and notes taken at the time.
>
> . . . .
>
> On June 16, 1995, Rich and Junior went to Savage to get Junior's pickup and stopped at your place to see how your last doctor's appointment had gone. You were in the field haying but according to both Rich and Junior, told them you could not return to work for 30 days. Rich told you Knife River would need a doctor's statement regarding work status.
>
> You stated at the June 28 meeting that what you had said was that it would be 30 days until your next doctor's appointment not that you couldn't work for 30 days. This conflicts directly with the recollection of both Rich and Junior and lacks credibility.
>
> Rich followed up by contacting your doctor's office on June 16 and was advised that you had been re-released to return to work on light duty at the appointment on June 15. When he asked what was meant by "re-released," he was advised that you had been released for light duty following your May 19 appointment also.

(*Id.*)

Clearly, the key to this case depends on whether Mr. Olmstead or Mr. Kalina is telling the truth about the May 23 meeting. If Mr. Olmstead's version of the meeting is untrue, then the company had a non-protected reason for discharging him, even if they also wanted to get rid of him because of his constant safety complaints. However, if his version is true, then it becomes clear that Mr. Kalina manipulated the facts so that dishonesty could be used as a subterfuge for dismissing Mr. Olmstead for being a nuisance with his constant complaining. I find that Mr. Olmstead's version of the May 23 meeting is true.

To find Mr. Kalina's story credible, it is necessary to believe that Mr. Olmstead came to the mine office on May 23 and

did not give Mr. Kalina the doctor's slip given him on May 19. Mr. Kalina's version is not supported by the evidence or common sense. He testified that he never saw the original slip and was not aware of it until the doctor's nurse informed him on June 16 that Mr. Olmstead had been re-released for light duty. Indeed, in the letter of termination this was the last discrepancy noted.

However, Mr. Kalina also testified:

Q. Now, Mr. Kalina, the time you called Nurse Durden, had you looked in Art Olmstead's file?

A. Yes, just before I called her.

Q. And did you find a May 19, 1995, slip return -- or a slip with Orthopedic Surgeons on it?

A. Yes, I did.

The termination letter does not mention that management was aware of the May 19 slip as of the date of the letter. It only states that Mr. Kalina "was advised that you had been released for light duty following your May 19 appointment also," even though at the hearing Mr. Kalina claimed to have found the slip on June 16 and had even asked the doctor's nurse to decipher it for him. It is also not mentioned in a June 16 memo from Mr. Kalina to Larry Duppong, the Vice President of Operations who actually discharge Mr. Olmstead, even though the memo relates that Mr. Kalina had talked to the doctor's nurse.

Mr. Kalina was interviewed by Special Investigator Jerry Thompson on August 24, 1995. According to Investigator Thompson, Mr. Kalina originally claimed that he had never seen the May 19 slip and did not know what it said. Then he changed his story and said that he had found a copy of the slip in Mr. Olmstead's file at a later date, that he had no idea how it had gotten there, and that only he and Junior Etzel had access to the file cabinet.

The most impeaching pieces of evidence to Mr. Kalina's story, however, are the various copies of the May 19 slip that were offered at the hearing. None were offered by the company. The first one, sponsored by Mr. Olmstead as the copy he received

back from Mr. Kalina on May 23, is a copy of the slip and has only the doctor's writing on it. (Comp. Ex. 11.) The next one, identified by Mr. Kalina, purports to be the copy he discovered in Mr. Olmstead's file on June 16. In addition to the doctor's writing, the following writing appears in an area where it could have been written on the slip itself: "Nurse -- Pat Durden?sp" at the top, and "will examine 6-15-95 next appt." at the bottom. (Comp. Ex. 36.) Finally, a third copy, also identified by Mr. Kalina, appears identical to the second one, except that at the bottom it says "will examine 6-15-95 next appt. RK."

Mr. Kalina identified the additional writing as his. He could not explain why the "RK" had been added to the third copy, nor why the "will examine" writing had been made darker. Mr. Kalina claimed that he made the "will examine" note when talking to the nurse on June 16. When questioned as to why he had used the future tense for an examination that had occurred the day before, Mr. Kalina stated: "I think she was just probably -- I'm just surmising this -- I think she was reading from a file and I was just putting all pertinent information down that I thought about." (Tr. 742.)

This explanation makes no sense. In the first place, this does not appear to be what would normally be pertinent information. In the second place, nothing else was written down. What does make sense is that Mr. Kalina wrote "will examine 6-15-95 next appt." on the original slip when Mr. Olmstead gave it to him on May 23. This would also explain how Mr. Kalina knew that Mr. Olmstead had been to the doctor on June 15, when he decided to go see him on June 16. It would also explain how Mr. Kalina knew about the 15 pound lifting restriction that he claimed Mr. Olmstead mumbled to him on May 23.

In short, I do not find Mr. Kalina's version of this event credible. While the notes on his calendar seem to support his version, I do not give those notes any weight. Almost all of the entries pertain to Mr. Olmstead, presumably to document the case against him. However, by his own admission, Mr. Kalina did not make all of the entries on the day that they allegedly occurred, but added some at a later date. Furthermore, some of the added ones were inserted on an incorrect date, according to Mr. Kalina. Therefore, there is no way of knowing which were written

concurrently and which were written later to bolster the case against Mr. Olmstead.

This is particularly crucial in view of the self-serving nature of the entry on May 23 which states: "Art stopped in -- not to come to work yet. No lite duty[4] -- needs healing time. Asked Art to get a Drs. slip for his file." (Comp. Exs. 23 and 42.) The credibility of this entry is further put in doubt by the subsequent mysterious discovery of the doctor's slip in Mr. Olmstead's file.

In addition, I do not find that Mr. Olmstead's version is contradicted by "Knife River's long-standing practice [] to utilize light duty whenever we can accommodate restrictions." In the first place, this "long standing practice" is not written down any where in the company's rules and regulations. In the second place, such a practice does not mean that Mr. Kalina could not have concluded that Mr. Olmstead was still too restricted to work any place since he had a cast on his right (dominant) hand.

Having found that Mr. Olmstead's version of the May 23 meeting is the credible one, his actions in the hay field on June 16 cease to appear deceptive. If Mr. Kalina told him there was no light duty, it would be logical that Mr. Olmstead would relay that to the doctor. This would explain why the doctor did not give Mr. Olmstead a doctor's slip after his June 15 visit, and why Mr. Olmstead then told Mr. Kalina and Etzel that he had not been released to return to work. Ironically, the June 16 doctor's slip appears to be more restrictive than the May 19 slip.

Obviously, Mr. Olmstead's constant safety complaints made him an annoyance to the company. Evidently he quickly got under Mr. Kalina's skin. Mr. Olmstead related that shortly after Mr. Kalina arrived at the mine, the mine had an inspection during which Mr. Olmstead pointed out several problems to the inspector. He testified that after the inspector had gone, Mr. Kalina came to him and told him that he did not want Mr. Olmstead discussing safety problems with inspectors unless he had already brought the

---

[4] Interestingly, "lite duty" is spelled the same way it is on the doctor's slip.

problem to Mr. Kalina. He further testified that Mr. Kalina told him that "he always got even with anybody who ever crossed that line with him."[5] (Tr. 27.)

This obviously did not deter Mr. Olmstead, who continued raising safety concerns. Mr. Kalina got more exasperated with Mr. Olmstead, noting on March 8, 1994, "Art argues all the time," (Comp. Ex. 30), on March 23, 1994, "I'm getting very tired of arguing with Art," (Comp. Ex. 31), and in February 1995, having a heated discussion with him over the necessity for replacing guards before operating the crusher, (Tr. 106, 386-90).

The "straw that broke the camel's back" occurred on May 25, 1995. Mr. Olmstead had filed a section 103(g) complaint, 30 U.S.C. § 813(g),[6] over the non-reporting of his wrist injury. Because of the nature of the complaint, it was obvious that Mr. Olmstead had made it. Inspector Herbert Skeens came to the mine on May 25 to investigate the complaint. He testified that when he gave a copy of the complaint to Mr. Kalina, Mr. Kalina appeared to be "frustrated, disgusted, aggravated with the fact that the complaint had been made." (Tr. 351.) He described Mr. Kalina as pacing rapidly in a circle and related that Mr. Kalina

> made a comment something to the effect this had been a problem for some time, something to that effect. I cannot quote him verbatim. I know he made a comment that he had a problem or had a problem with Mr. Olmstead, or something to that effect, for some time. This had been an ongoing situation. That was the comment that was made, something to that -- along that line.

---

[5] Mr. Kalina made a similar statement to Brian Carr. (Tr. 458.)

[6] Section 103(g) provides, in pertinent part, that: "Whenever . . . a miner has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists . . ., such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger."

(Tr. 353.)

Mr. Kalina was out of town from June 5 through June 14. On the June 16, Mr. Kalina and Junior Etzel drove out to Mr. Olmstead's farm to "see how he was doing." Before this date, no one in management had been out to see how Mr. Olmstead was doing. This was not a friendly visit. Shortly thereafter, Mr. Olmstead found himself discharged as a result of this visit. The evidence to support the discharge was provided by Mr. Kalina. As has been seen, it was less than truthful.

While Mr. Olmstead was ostensibly discharged for dishonesty, I find that he was really discharged for continually raising safety concerns at the mine. Accordingly, I conclude that his discharge was based on his engaging in protected activity and that there was no legitimate non-protected activity reason for discharging him.

## CIVIL PENALTY ASSESSMENT

The Secretary has proposed a civil penalty of $1,000.00 for the company's violation of section 105(c). However, it is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the six criteria, the parties have stipulated that the proposed penalty will not affect the company's ability to remain in business. The mine is a small mine and it's *Assessed Violation History Report* indicates that it received only 29 citations or orders, none involving section 105(c), between January 1, 1978, and August 1, 1995. Plainly, its history of prior violations is very good. On the other hand, the gravity and negligence involved in this violation are very serious. Taking all of this into consideration, I conclude that the proposed penalty of $1,000.00 is appropriate.

## ORDER

Having found that Knife River Coal Mining Company's June 30, 1995, discharge of Arthur R. Olmstead was motivated by his

protected activity and, thus, in violation of section 105(c) of the Act, it is **ORDERED** that:

1. The Respondent **REINSTATE** Mr. Olmstead to his former position with full pay and benefits;

2. The Respondent **PAY** Mr. Olmstead full back pay, with interest, and benefits for the period from July 1, 1995, until December 7, 1995, the effective date of his temporary economic reinstatement.

3. The Respondent **REIMBURSE** Mr. Olmstead for any other reasonable and related economic losses or litigation expenses incurred as a result of his discharge.

4. The Respondent **EXPUNGE** from Mr. Olmstead's personnel file and from company records the discharge and all references to the circumstances involved in it.

5. The Respondent is **ORDERED TO PAY** a civil penalty in the amount of $1,000.00 for its violation of section 105(c).

The parties are **ORDERED** to confer within 21 days of the date of this decision for the purpose arriving at a settlement of the specific actions and monetary amounts that the Respondent will undertake to carry out the remedies set out above. If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within 30 days of the date of this decision. For those areas involving monetary damages on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case the parties should so state.

The judge retains jurisdiction in this matter until the specific remedies Mr. Olmstead is entitled to are resolved and finalized. Accordingly, this decision will not become final until an order granting specific relief and awarding monetary damages has been entered. Consequently, payment of the civil

penalty by Respondent is **HELD IN ABEYANCE** until the final order is entered.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Laura E. Beverage, Esq., Jackson & Kelly, 1660 Lincoln St., Suite 2710, Denver, CO 80264 (Certified Mail)

/lt

# 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

June 3, 1996

| | | |
|---|---|---|
| SOUTHERN MINERALS, INC., TRUE ENERGY COAL SALES, INC., and FIRE CREEK, INC. Contestants | : | CONTEST PROCEEDINGS<br>Docket Nos. WEVA 92-15-R through WEVA 92-116-R |
| v. | : | Fire Creek No. 1 Mine<br>Mine ID 46-07512 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent | : | |
| SECRETARY OF LABOR, MINE AND SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner | : | CIVIL PENALTY PROCEEDINGS<br>Docket Nos. WEVA 92-786 through WEVA 92-791 |
| v. | : | Fire Creek No. 1 Mine |
| SOUTHERN MINERALS, INC., TRUE ENERGY COAL SALES, INC., and FIRE CREEK, INC., Respondents | : | |

**ORDER DENYING**
**MOTION IN LIMINE**

The Respondent's motion to limit application of the penalty assessment criteria published in 30 C.F.R. Part 100, is **DENIED**. At trial the issue of the amount of any civil penalty assessed is de novo before the judge, and the judge is not bound by the Secretary's interpretation of Part 100 and the civil penalty criteria as set for in Part 100 (Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 678-679 (1987); Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd 737 F.2d 1147 (7R Cir. 1984)). Consequently, I will admit any evidence relevant to the statutory civil penalty criteria and hear the parties' arguments regarding the proper interpretation and application of such evidence to the criteria.

David F. Barbour
Administrative Law Judge

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 3, 1996

| | | |
|---|---|---|
| SOUTHERN MINERALS, INC., | : | CONTEST PROCEEDINGS |
| TRUE ENERGY COAL SALES, INC., | : | Docket Nos. WEVA 92-15-R |
| and FIRE CREEK, INC. | : | through WEVA 92-116-R |
| Contestants | : | |
| v. | : | Fire Creek No. 1 Mine |
| | : | Mine ID 46-07512 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE AND SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket Nos. WEVA 92-786 |
| Petitioner | : | through WEVA 92-791 |
| v. | : | |
| | : | Fire Creek No. 1 Mine |
| SOUTHERN MINERALS, INC., | : | |
| TRUE ENERGY COAL SALES, INC., | : | |
| and FIRE CREEK, INC., | : | |
| Respondents | : | |

**ORDER DENYING SECRETARY'S AND RESPONDENTS' MOTIONS FOR CONTINUANCE**

A hearing in these proceedings is scheduled to commence on July 15, 1996. The Secretary's counsel has moved for a continuance. She has a previously scheduled hearing commencing on the same date. Counsel for the Respondents likewise has moved for a continuance. Counsel notes that the matter of Berwind Natural Resources Corp., et al., 18 FMSHRC 202 (February 1996), presents many of the same issues regarding operator liability that are attendant in these proceedings, albeit in a slightly different context.

In a partial decision issued on December 15, 1996, I ruled that True Energy Coal Sales, Inc., was not an operator and I dismissed the proceedings with respect to True Energy (17 FMSHRC 2191, 2217). I held further that Southern Minerals, Inc., was an

operator, and I ordered the parties to proceed to hearing on the merits of the cases with respect to Southern Minerals (17 FMSHRC at 2217-2218). The Commission declined to review the partial decision. The Respondents assert that if these proceedings are tried before the Commission decides Berwind, the parties will be burdened by expending significant time and money trying these cases against a legal standard for determining operator status that the Commission may change; or, that the Berwind decision may obviate the need for trying the cases at all. By continuing the cases to allow the law to clarify, the burden and expense to the parties will be lessened.

I am sympathetic to the Respondents' desire to lessen the burden and expense of trial. These proceedings involve aggregate proposed civil penalties of more than one half million dollars and the contests of 102 citations and orders. In another motion, counsel for the Secretary estimates that a trial will last at least four weeks, and I conclude that if each and every alleged violation is contested, that estimate may be correct.

However, putting the trial off until the Commission issues a decision a some indefinite future time -- a decision that ultimately may be appealed to a United States Court of Appeals -- only delays what may well be inevitable. Without prejudging the matter, I believe that it is more likely the Berwind decision will warrant going forward with a trial on the merits than that it will obviate the need for a trial. If I am correct, a continuance at this time will make the allegations, which are already among the oldest on the Commission's docket, more stale and less susceptible to proof when the hearings finally are reconvened.

Balancing these factors, I conclude that the hearings on these proceedings should go forward as soon as possible. **ACCORDINGLY**, I decline to continue these matters pending the Commission's Berwind decision. Given counsel for the Secretary's scheduling conflict, I am prepared to reschedule the proceedings to commence either on July 30, 1996, or August 6, 1996, but no later. I request counsel to advise me at the June 6, 1996, prehearing conference which date is preferable.

David F. Barbour
Administrative Law Judge

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 3, 1996

| | | |
|---|---|---|
| SOUTHERN MINERALS, INC., | : | CONTEST PROCEEDINGS |
| TRUE ENERGY COAL SALES, INC., | : | Docket Nos. WEVA 92-15-R |
| and FIRE CREEK, INC. | : | through WEVA 92-116-R |
| Contestants | : | |
| v. | : | Fire Creek No. 1 Mine |
| | : | Mine ID 46-07512 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE AND SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket Nos. WEVA 92-786 |
| Petitioner | : | through WEVA 92-791 |
| v. | : | |
| | : | Fire Creek No. 1 Mine |
| SOUTHERN MINERALS, INC., | : | |
| TRUE ENERGY COAL SALES, INC., | : | |
| and FIRE CREEK, INC., | : | |
| Respondents | : | |

**ORDER DENYING**
**THE SECRETARY'S MOTION TO REVISE ORDER,**
**DISMISSING TRUE ENERGY COAL SALES, INC.**

In a partial decision issued on December 15, 1995, I ruled that True Energy Coal Sales, Inc. ("True Energy") was not an operator, and I dismissed the proceedings with respect to True Energy (17 FMSHRC 2191, 2217). I held further that Southern Minerals, Inc. ("Southern Minerals") was an operator, and I ordered the parties to proceed to a hearing on the merits of the cases with respect to Southern Minerals (17 FMSHRC at 2217-2218). On January 22, 1996, the Commission declined review of the partial decision because I did not expressly direct that the dismissal "be entered as a final decision" (18 FMSHRC 1) (quoting Federal Rule of Civil Procedure 54(b))).

The Secretary has moved for the entry of an order revising the partial decision of December 15, 1996, by deleting the dismissal of True Energy and thus allowing True Energy to participate in the forthcoming hearing. According to the Secretary, if the partial decision is not revised, the Commission eventually may determine True Energy is an operator and the Secretary may be required to relitigate these proceedings against True Energy, a use of his resources that the Secretary asserts would be wasteful. The Respondents oppose the motion, noting that True Energy already has been dismissed as a party.

While I agree with the Secretary that the present posture of these proceedings permits me to revise the order dismissing True Energy, I decline to do so. If the cases go forward in their current posture, the merits of the alleged violations will be decided. Thus, if True Energy ultimately is found to be an operator, the Secretary will not have to relitigate whether the violations occurred, but rather will have to litigate only the civil penalty aspects of the violations with regard to True Energy.

On the other hand, if I grant the Secretary's motion, and True Energy ultimately is found by the Commission not to be an operator, the civil penalty aspects of the proceedings regarding True Energy will have been tried for naught. Thus, I must balance whether to try the civil penalty aspects regarding True Energy now, or possibly later, or possibly not at all.

It bears remembering that these cases involve more than one half million dollars in proposed penalties, and the contests of 102 citations and orders. Simplification of the forthcoming hearing is desirable. The issue of True Energy's status as an operator has been tried and decided. True Energy has been removed as a participant and evidence regarding the civil penalty criteria and True Energy has been removed from consideration. I see little to be gained from revisiting the issue and enlarging an already extensive record. The motion is **DENIED**.

David F. Barbour

David F. Barbour
Administrative Law Judge

Distribution:

Pamela S. Silverman, Esq., Office of the Solicitor, U.S. Dept. of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203 (Via Facsimile and Certified Mail)

Robert I. Cusick, Esq., Marco M. Rajkovich, Jr., Esq., Jean W. Bird, Esq., Mindy G. Barfield, Esq., Wyatt, Tarrant & Combs, 1700 Lexington Financial Circle, Lexington, KY 40507 (Via Facsimile and Certified Mail)

David Burton, Esq., P.O. Box 5129, 1460 Main Street, Princeton, WV 24740 (Certified Mail)

\nt

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268
June 4, 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. WEST 95-254<br>A.C. No. 05-02820-03735 |
| v. | : | Docket No. WEST 95-255<br>A.C. No. 05-02820-03737 |
| BASIN RESOURCES INCORPORATED, Respondent | : | Golden Eagle Mine |

**ORDER DENYING MOTION TO COMPEL**

Basin Resources, Inc., filed a motion to compel the Secretary to respond to its interrogatories and requests for the production of documents. In response, the Secretary of Labor filed a motion for a protective order on the basis that the requested information is protected by the informant's privilege and the deliberative process privilege. For the reasons set forth below, Basin Resources' motion to compel is denied.

These cases involve eleven citations and orders issued to Basin Resources in 1994 and 1995. The four orders were issued under section 104(d)(2) of the Mine Act. The proceedings were stayed by Administrative Law Judge August F. Cetti for about eight months because MSHA was conducting a special investigation under section 110(c) of the Mine Act. The Golden Eagle Mine is now permanently closed and most of the management employees have moved away. Apparently, MSHA completed its section 110(c) investigation soon after the cases were stayed. MSHA determined that it would not file a section 110(c) proceeding. Basin Resources states that its preparation for hearing has been hampered by the fact that the Secretary did not timely inform the mine that his investigation was completed.

Basin Resources contends that MSHA is prosecuting these cases because of a long-running personality dispute between an MSHA official and mine management. It contends that this dispute began as a result of the litigation in Wyoming Fuels Co. n/k/a Basin Resources, Inc., 16 FMSHRC 1618 (August 1994). It states that MSHA's "power struggle" with the mine has resulted in "extreme and disparate enforcement activity" at the mine. (Motion at 3). Basin Resources contends that all of the citations and orders in these cases are invalid and that MSHA is aware of their invalidity, but that MSHA continues to prosecute these cases because of a "retaliatory animus" by MSHA supervisory personnel. Id.

Basin Resources states that it seeks three kinds of information from MSHA: (1) information establishing a disparity in enforcement activity against it; (2) information identifying witnesses in these cases; and (3) information obtained during MSHA's special investigation. The information that Basin Resources seeks may be summarized as follows:

1. Notes, memoranda, or other documents, including inspector's notes and investigator's notes, which in any way relate to the citations, orders, and penalties in the cases.

2. Special investigator's reports dealing with the citations and orders in these cases. The documents may be redacted so as not to identify current miners.

3. Copies of all citations and orders issued to Respondent alleging unwarrantable failure for the period commencing one year prior to Larry Ramey's assuming authority over enforcement at the Golden Eagle Mine and continuing through the present.

4. Copies of all citations and orders issued at other mines over which Mr. Ramey had enforcement jurisdiction for the same period of time.

5. All documents relating to communications between MSHA personnel concerning enforcement of the Mine Act at the Golden Eagle Mine for the period commencing one year prior to Mr. Ramey's jurisdiction over the mine and continuing to the present.

6. The date on which Mr. Ramey obtained enforcement jurisdiction over the Golden Eagle Mine and a list of the other mines over which Mr. Ramey obtained enforcement authority during the same period of time as he had such authority over the Golden Eagle Mine.

7. Addresses and telephone numbers for all witnesses listed in the prehearing statement including miner witnesses.

## I. Information Concerning Disparity in Enforcement Activity

Under the Mine Act, an MSHA inspector is authorized to inspect a mine for violations of the Mine Act or safety and health standards. 30 U.S.C. § 813(a). The inspector is not required to obtain a search warrant or provide justification for the inspection. If, for example, an unwarrantable failure order of withdrawal is issued, the mine operator may contest the order and penalty in a proceeding before a Commission administrative law judge. The Secretary bears the burden of proving that a safety or health standard was violated and that the

alleged violation was a result of the mine operator's unwarrantable failure. If the Secretary proves that the standard was violated and that the violation was caused by the operator's unwarrantable failure, a penalty must be assessed. The mine operator cannot defend the case and have the order vacated on the basis that other mine operators have not been cited for the same condition or that the inspector is hostile toward the company. Citations and orders, along with the allegations contained therein, stand or fall on their own merits.

Evidence of personality conflicts, power struggles, or disparate enforcement is irrelevant in civil penalty proceedings. A showing that other mines received fewer unwarrantable failure orders over a period of time does not establish disparate enforcement. More importantly, if I accept Basin Resource's allegation that a particular MSHA official was responsible for the issuance of citations in retaliation for some lawful action of the company, I cannot vacate the citations on that basis if the Secretary proves that safety or health standards were violated. The issue is whether Basin Resources violated safety and health standards and whether the violations were the result of its unwarrantable failure, not whether MSHA harbored a grudge against Basin Resources. Of course, if Basin Resource's allegations are true, the Secretary will not be able to meet his burden of proof on the merits.

Accordingly, I will not admit such evidence at the hearing. I find that the information Basin Resources seeks in this regard is not admissible evidence and does not appear likely to lead to the discovery of admissible evidence. 29 C.F.R. § 2700.56(b). On this basis, I deny Basin Resources's motion to compel with respect to the information it seeks to establish a disparity in enforcement activity against it. Specifically, Basin Resources' request for information about Larry Ramey's enforcement activities, as summarized in Paragraph Nos. 3, 4, 5, and 6, above, is **DENIED.**

II. Information Identifying Witnesses

Basin Resources seeks the addresses and telephone numbers of individuals that the Secretary expects to call as witnesses at the hearing. Basin Resources' motion is **GRANTED** with respect to those witnesses listed on the Secretary's response to my prehearing order and for any other witness not covered in the discussion below.

Basin Resources also seeks this information with respect to individuals who are or were miners that are not listed in the Secretary's prehearing submission. The Secretary objects on the basis of the informant's privilege. Basin Resources contends that this privilege does not apply to those individuals who are no longer miners. Since the mine is now closed, most, if not all

of the individuals who were miners at the Golden Eagle Mine when the citations and orders were issued, are no longer miners.

In Bright Coal Co., 6 FMSHRC 1520, 2522-23 (November 1984), the Commission recognized the right of the government to withhold from disclosure the identity of persons furnishing information about violations of the law to law enforcement officials. The Commission stated that the purpose of the privilege is to "protect the public interest by maintaining a free flow of information to the government concerning possible violations of the law and to protect persons supplying such information from retaliation." Id. The Commission further held that:

> [T]he public interest in protecting persons who discuss alleged Mine Act violations with government officials is served regardless of the relationship of the informer to the alleged violator, i.e., whether the informer is an employee of the respondent or a non-employee. Courts have long recognized the obligation of all citizens to cooperate in law enforcement efforts and have encouraged and protected the communications of possible violations of law by shielding the informer's identity.

Id. at 2524. Thus, the informer's privilege applies to witnesses that the Secretary may call to testify whether or not they are currently employed by Basin Resources or are still miners.

I conclude that the informer's privilege applies to Basin Resources' request for the names, addresses, and phone numbers of the Secretary's witnesses who are no longer miners. Because the informant's privilege is a qualified privilege, I must perform a balancing test to determine if Basin Resources' need for the names is greater than the Secretary's need to maintain the privilege to protect the public interest. Bright, 6 FMSHRC at 2526. The burden is on Basin Resources to prove facts necessary to show that disclosure of the names is necessary to a fair determination of the case. Id. Factors to be considered in conducting this balancing test include whether the Secretary is in sole control of the requested information and whether Basin Resources has other avenues available from which to obtain the substantial equivalent of the requested information. Id. In performing the balancing test in this case, I must take into consideration the fact that the mine is closed and the witnesses may not be readily available for deposition. I also take into consideration the fact that only a small number of miners would have knowledge of the facts relevant to the citations and orders at issue in these cases.

I conclude that Basin Resources has not demonstrated a substantial need for the requested information in the discovery phase of these cases. I construe Commission Rule 62, 29 C.F.R. § 2700.62, to apply to witnesses of the Secretary who are former miners. Accordingly, Basin Resource's motion to compel the production of the names, addresses, and telephone numbers of the Secretary's witnesses who are miners or who were formerly miners is **DENIED**. In accordance with Commission Rule 62, the Secretary is **ORDERED** to provide this information to counsel for Basin Resources no later than 48 hours prior to the commencement of the hearing.

III. Special Investigator's Reports

Basin Resources requested reports prepared by MSHA's special investigator. The Secretary opposes this request on the basis of the deliberative process privilege and the informer's privilege. For the reasons set forth above, those portions of the special investigator's report that discuss the statements of miners or former miners is protected by the informant's privilege. In addition, the report is protected by the deliberative process privilege. This privilege protects communications between subordinates and supervisors within the government that are "antecedent to the adoption of an agency policy." Contests of Respirable Dust Sample Alternation Citations, 14 FMSHRC 987, 992 (June 1992), quoting Jordan v. Dept. of Justice, 591 F.2d 753 (D.C. Cir. 1978). The communications must be "related to the process by which policies are formulated." Id. This report contains recommendations concerning whether a section 110(c) action should be brought against an agent of Basin Resources. It is covered by the deliberative process privilege. I conclude that this privilege applies even where the Secretary decides not bring a case under section 110(c). *See,* Buck Creek Coal Inc. 17 FMSHRC 2233, 2235 (December 1995)(ALJ).

In consideration of the above, in balancing the equities in this case, I find that Basin Resources has not shown a substantial need for the special investigator's report during the discovery phase of these cases. As stated above, the issue in these cases is whether Basin Resources violated safety standards and whether the other allegations contained in the citations and orders are supported by the evidence. Whether MSHA was motivated by "retaliatory animus" is not an issue. Accordingly, Basin Resources' motion to compel the production of the special investigator's report is **DENIED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716

Andrew Volin, Esq., SHERMAN & HOWARD, L.L.C., 633 17th Street, Suite 3000, Denver, CO 80202

RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

JUN 6 - 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | MASTER DOCKET WEVA 93-146-B |
| | : | Blacksville No. 1 Mine |
| v. | : | |
| CONSOLIDATION COAL COMPANY, Respondent | : | |

**ORDER GRANTING IN PART AND DENYING IN PART CONSOLIDATION COAL COMPANY'S MOTION TO COMPEL DISCOVERY**

Background:

These civil penalty proceedings were filed by the Secretary with this Commission on March 9, 1993, but were thereafter stayed at the request of the Secretary because of a related criminal investigation. By letter dated December 21, 1994, the Secretary advised that the criminal investigation had been concluded and that, while the basis for the stay was no longer applicable, because of other significant litigation the attorneys for both parties were involved in and, because of the extensive discovery the parties anticipated in these proceedings, the parties were seeking a further delay in trial scheduling.

The cases were subsequently scheduled for trial on August 15, 1995, but the parties again requested a continuance because of the need for additional discovery and the "complex nature of the issues involved". Hearings were accordingly rescheduled to commence on October 31, 1995, in several of the related cases. The instant cases are among those for which the parties requested an additional continuance because of the severability of the issues and limited availability of expert witnesses. Hearings in the instant cases were then rescheduled to commence on December 12, 1995.

Further continuances were necessitated by the disruption caused by several budgetary shutdowns of the government. Hearings were thereafter rescheduled to commence on March 5, 1996. However, on February 22, 1996, Consolidation Coal Company (Consol) moved pursuant to Commission Rule 59, 29 C.F.R. § 2700.59, for an order compelling discovery and it was necessary to again postpone trial. Two of the four categories of information requested in that motion remain at issue, i.e. "all documents prepared by MSHA Investigator George Bowman concerning the investigation of the Blacksville No. 1 Mine explosion" and "all documents prepared, used or reviewed in connection with the

drafting of the 'Internal Review of MSHA's Actions at the Blacksville No. 1 Mine' report published on August 17, 1993". (See Consolidation Coal Company's second motion to compel discovery filed on May 10, 1996).

1. Documents prepared by Investigator Bowman:

Deputy Associate Solicitor Thomas Mascolino states in his memorandum accompanying the Secretary's response to the Motion to Compel Discovery that some of the documents prepared by Investigator Bowman were being withheld from the Secretary at the direction of the U.S. Attorney for the Northern District of West Virginia pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. The Secretary accordingly maintains that those documents are not in his "possession, custody, or control" and are not therefore within the scope of Rule 34 of the Federal Rules of Civil Procedure. The Secretary further notes that Consol may obtain those documents by filing an appropriate motion under Fed.R. Crim. P.6(e)(3)(D) with the Office of the United States Attorney for the Northern District of West Virginia. The Secretary's position in this regard is supported by law and is accordingly upheld.

The Secretary has also provided the undersigned with what has been designated as all remaining documents prepared by MSHA Investigator Bowman, for in-camera review of the Secretary's claimed privilege under the work product rule. The documents, five memoranda of interviews (and the notes of one interviewee), contain only the reported statements of the interviewees and do not contain any mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation. The work product privilege has been codified in the Federal Rules of Civil Procedure, Rule 26(b)(3), which provides in relevant part:

> . . . a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The Commission has explained that the work product privilege offers qualified immunity against discovery for materials that are:

1. documents and tangible things;
2. prepared in anticipation of litigation or for trial; and
3. by or for another party or by or for that party's representative.

*Secretary of Labor v. ASARCO*, 12 FMSHRC 2548, 2558 (December 1990) (*citing* 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, pp. 196-97 (1970); 6 J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 26.64 (2d ed. 1989)). The Secretary claims in this case that the subject memoranda constitute (1) documents and tangible things, (2) prepared in anticipation of litigation, and (3) by or for another party or by or for that party's representative. As noted, the subject memoranda may nevertheless be subject to discovery "upon a showing that the party seeking discovery has substantial need . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id. at 2558*.

The Secretary claims that all of the interviewed individuals provided testimony to the accident investigation team in the presence of Consol's counsel and representatives. He notes that Consol was therefore aware of these witnesses and could have questioned or deposed each of them. The Secretary further notes that two of the five individuals interviewed by Bowman were management officials for Consol, i.e. Russell DeBlossio and Van Wayne Pitman. The Secretary advises that the work notes taken by DeBlossio, which were included with investigator Bowman's memorandum, have been available to Consol from the outset of the proceedings and the Secretary would, in any event, produce a copy of those notes upon request.

Finally, the Secretary notes that two of the remaining three individuals interviewed by Bowman have been listed as trial witnesses by the Secretary and that Consol has not taken their depositions. He notes, moreover, that their initial statements to the accident investigation team have already been provided to Consol. In conclusion, the Secretary argues that because Consol had been able to obtain the substantial equivalent of these materials through other means the files herein should be protected under the work product rule and that Consol's request for production of these documents should be quashed.

Consol argues on the other hand that the Bowman memoranda of interviews should not, in any event, be protected because they were not prepared "in anticipation of litigation" as required by the work product rule. In *Asarco,* however, at page 2559 the

Commission noted that a special investigator does not know at the outset of his investigation whether charges will be filed in that particular case but nevertheless the purpose of his investigation may be deemed to be in anticipation of litigation.

Consol maintains, in essence, that it has a substantial need for the memoranda of interviews to compare present recollections against prior statements and to ascertain whether there are any contradictions in witness statements. Clearly Consol could not make such a critical comparison without the subject memoranda. Accordingly, whether or not the work product privilege applies to the subject documents, Consol has a substantial need for those documents and has no other way of obtaining the precise information. The Secretary is therefore directed to produce copies of the subject documents to Consol within ten (10) days of this order.

(2) The internal review files:

Consol further seeks in its motion to compel discovery "all remaining documents prepared, used or reviewed in connection with the drafting of the 'Internal Review of MSHA's Actions at the Blacksville No. 1 Mine' report published on August 17, 1993, which the Secretary has withheld from discovery." According to Consol fifty-five files of documents from the special investigation remain at issue for in-camera evaluation of the Secretary's various claims of privilege. These have been identified in the Secretary's "Vaughn" index as File Numbers: 2(b), 4, 5, 8(b), 12(a), 14, 16(b), 20, 21, 24(a), 24(b), 29, 31, 33, 35, 37, 39, 63(a), 66, 67, 69(b), 70(b), 71, 74, 75, 76, 77, 79(b), 81(b), 88, 91(a), 91(b), 96(a), 96(b), 97, 103(b), 103(c), 103(j), 103(k), 103(m), 103(n), 103(o), 103(q), 103(r), 105, 106, 107, 109, and 110.

The framework for discovery before this Commission is set forth in Commission Rule 56(b), 29 C.F.R. § 2700.56(b). That rule provides that "parties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." "Relevance" for purposes of my in-camera examination of these documents in this discovery setting was framed by Consol in its first motion to compel discovery and in the following terms:

> The Secretary apparently takes the position that the interviews given by its two inspectors to the investigators, as well as the interviews given by enforcement personnel in District 3, are not in any way relevant to the allegations in this matter. It is Consolidation's position that the eye witness observations, impressions and actions of the two inspectors are directly relevant to whether a reasonable mining person would have recognized the

conditions which led to the Blacksville explosion. In addition, other interviews documented confusion among MSHA district enforcement personnel as to whether the ventilation plan and other applicable regulations were complied with both prior to and during the capping of the production shaft.

The Secretary's 104(d) citations and orders in this case allege either high negligence or reckless disregard of the law by Consolidation. These are very serious accusations, and it appears that the Secretary is trying to shield his own employees from post-accident scrutiny, while Consolidation's agents are being subjected to the very worst sort of Monday morning quarterbacking. The requested information is relevant to the ability of Consolidation's employees to recognize hazards at the production shaft and MSHA's own ventilation plan enforcement practices that existed at the time of the explosion."

As the Secretary noted, however, at the hearing on Consol's first motion to compel discovery held February 23, 1996, the information providing the basis for Consol's request herein was available to Consol when the MSHA internal review report was issued on August 17, 1993. The Secretary further noted at that hearing that Consol had accordingly waited over two years before requesting the information now sought. Because of the potential significance of the information, however, I agreed to further delay trial in these proceedings to resolve these limited pending discovery issues. Under the circumstances and to prevent further undue delay consistent with Commission Rule 56(c), I am strictly limiting the order of production herein to only materials relating to the interviews of MSHA enforcement personnel and specifically to questions regarding compliance with ventilation plan and other relevant regulations. Accordingly after examination of the files from his internal investigation submitted by the Secretary for in-camera review, I conclude that only those portions of the documents within the Secretary's File 16(b) noted below will be included in the order for production.

Document 16(b) is described in the Vaughn index as "Interview questions and review team notes, including notes on interviewee answers and on interviewer's impressions for 24 MSHA employees." It is noted that only the identifying information on page one of each form questionnaire (questions 1-6) and the following questions and answers are relevant to the issues herein: page 3 (questions 2-6), pages 4 and 5, page 11 (questions 6-8), page 12 (question 6), page 25 and page 26 (questions 1-6).

In the most recent filing on this issue, on March 29, 1996, the Secretary has taken the position that these documents are protected only by the deliberative process privilege and by "personal privacy". The deliberative process privilege is a

governmental privilege that has been recognized by the Commission. In Re: *Contents of Respirable Dust Sample Alteration Citations* 11 FMSHRC 987 (June 1992), and the Courts, *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *E.P.A. v. Mink*, 410 U.S. 73 (1973). This privilege protects documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." In Re: *Contents of Respirable Dust Sample Alteration Citations*, 11 FMSHRC at 991, citing *N.L.R.B. v. Sears*, 421 U.S. at 150 (1975).

While the responses by secretarial personnel to the form questionnaire do appear to be "pre-decisional", I do not find that the specific questions and answers at issue are "deliberative", i.e. they are not related to the process by which policies are formulated. In addition, the questions and answers deal primarily with factual information rather than advice, recommendations or opinions.

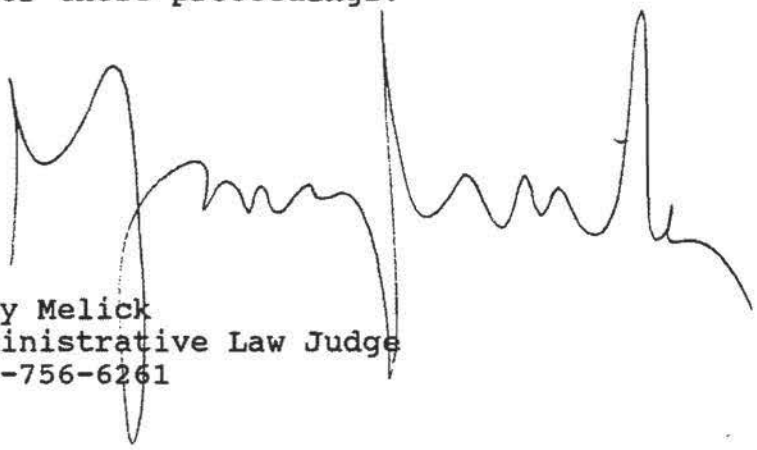
Moreover, to the extent that some of the answers may be deemed to be "opinions", I do not find any to be "deliberative" in the sense that they are related to the process by which a policy is formulated. Accordingly I do not find them subject to the deliberative process privilege. In any event, since the noted questions and answers directly relate to the issues at bar, including the "reasonably prudent person" test, unwarrantable failure and negligence, I conclude that Consol has a substantial need for that information. I further find that Consol would be unable without undue hardship (and without further delay in these proceedings) to obtain the substantial equivalent of the material by other means.

The Secretary's bald assertion of a "personal privacy" privilege is unexplained and without reference to any legal authority. There is no record evidence moreover that any of the interviewees are claiming any such personal privilege. Accordingly no such claim of privilege can be appropriately evaluated and it is rejected.

**ORDER**

The Secretary is accordingly directed to produce for Consol within ten (10) days of the date of this Order (a) copies of the five memoranda of interviews within Investigator Bowman's file, and (b) the noted questions and answers from each of the identified form questionnaires associated with the name of each interviewee from File 16(b) of the Secretary's internal

review files. The Secretary is further directed to resume immediate custody of all of the documents submitted for in-camera review and to segregate those documents for preservation in the event of Commission or court review. In light of this order the hearings on the motion to compel discovery previously scheduled to commence on June 18, 1996, are cancelled. Counsel for the Secretary is directed to initiate a teleconference with all parties and the undersigned at 10:00 a.m. on June 27, 1996, to establish a new trial date for these proceedings.



Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Robert M. Vukas, Esq., Consol, Inc., 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

David J. Hardy, Esq., Jackson and Kelly, P.O. Box 553, Charleston, WV 25322 (Certified Mail)

Robert S. Wilson, Esq., Office of the Solicitor, U.S. Dept. of Labor, 4015 Wilson Blvd., Room 516, Arlington, VA 22203 (Certified Mail)

/jf



☆ U.S. GOVERNMENT PRINTING OFFICE: 1996 — 405 - 710 / 53382

United States Government INFORMATION

Order Processing Code:
* 5708

*Charge your order. It's easy!* VISA MasterCard

**Fax your orders (202) 512–2250**
**Phone your orders (202) 512–1800**

❑ **YES,** send me _____ subscription(s) to **Federal Mine Safety and Health Review Commission Decisions** (FMSHD), at $91 each ($113.75 foreign) per year.

The total cost of my order is $ _____. Price includes regular shipping and handling and is subject to change.

Company or personal name (Please type or print)

Additional address/attention line

Street address

City, State, Zip code

Daytime phone including area code

Purchase order number (optional)

**For privacy protection, check the box below:**
❑ Do not make my name available to other mailers

**Check method of payment:**
❑ Check payable to Superintendent of Documents
❑ GPO Deposit Account ☐☐☐☐☐☐☐–☐
❑ VISA ❑ MasterCard
☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐
☐☐☐☐ (expiration date) *Thank you for your order!*

Authorizing signature 2/96

Mail to: Superintendent of Documents
P.O. Box 371954, Pittsburgh, PA 15250–7954

**Important: Please include this completed order form with your remittance.**