JUNE 1998

NO COMMISSION DECISIONS WERE ISSUED IN JUNE

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JUNE 1998

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

Secretary of Labor on behalf of Donald Zecco v. Consolidation Coal Company, Docket No. WEVA 97-82-D. (Judge Melick, May 13, 1998)

Anthony Saab v. Dumbarton Quarry Associates, Docket No. WEST 97-286-DM. (Judge Manning, May 18, 1998)

No cases were filed in which review was denied

ADMINISTRATIVE LAW JUDGE DECISIONS

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

MAY 11 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-122-M
Petitioner	:	A.C. No. 26-00271-05503
	:	
v.	:	
	:	Genesis Mine
NEWMONT GOLD COMPANY,	:	
Respondent	:	

SUMMARY DECISION

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act" and on cross-motions of the Parties for Summary Decision and Respondent's Motion for Declaratory Relief.

On September 15, 1996, a 150- ton Caterpillar end dump haul truck operated by Respondent's driver Gary Morin backed through a berm at an elevated dump site at the Genesis Mine. The haul truck overturned and traveled 50 feet down the sloped embankment coming to rest upside down at the base of the dump. The driver, Gary Morin, was hospitalized at the Elko General Hospital. The post-accident drug test administered on Mr. Morin by the hospital as well as a pre-accident drug test of September 12, 1996 "yielded results that were positive for marijuana." Newmont did not submit an MSHA 7000-1 Accident, Injury Report on the September 15, 1996, incident prior to October 23, 1996. Newmont asserts that since Mr. Morin was in the hospital on September 16th and retroactively resigned his employment effective September 12th, it was not required to file such a report.

The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), charges the Respondent, the operator of the Genesis Mine with the violation of 30 C.F.R. § 56.9101 and 30 C.F.R. § 50.20.

30 C.F.R. § 56.9101 in relevant part provides:

> Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion.

Newmont asserts that MSHA should not have charged Newmont with the violation of C.F.R. § 56.9101 but instead should have cited Newmont for a violation of 30 C.F.R. § 56.20001 which provides:

> Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job.

CROSS MOTIONS FOR SUMMARY DECISION

When the Secretary and the Respondent, Newmont Gold, were unable to resolve their differences, the parties filed cross-motions for Summary Decision. The parties assert that there are no material facts in dispute and that the issues are ripe for summary decision.

Newmont in its Motion for Summary Decision contends that by charging Newmont for an alleged "accident," and deeming Newmont to have "fail[ed] to control" its equipment, "MSHA interprets its regulations in a manner that obviates the real cause of the incident. Newmont states:

> MSHA, as it has in the past, masks the role that illegal drug use played in creating a safety hazard and damaging a valuable piece of equipment. Most importantly, MSHA's actions mask the drug relationship from identification in its national database and training programs, depriving all interested parties of critical information and violating the purpose, goals and mandates of the Mine Act. Newmont also asserts that declaratory relief is both proper and necessary in this instance in light of the public policy importance of maintaining a drug-free workplace.

Newmont contends that the Commission "should exercise its sound discretion and issue declaratory relief mandating MSHA to list drug abuse as the cause of this incident and all such future incidents."

JOINT STIPULATIONS

The parties, in support of their respective positions, jointly entered into the record under the heading "A. General Stipulations" stipulations Nos. 1 through 8 and under the heading "B.

Specific Stipulations" stipulations Nos. 1 through 15. The parties state these stipulations of fact are admissible for all purposes.

A. General Stipulations

1. The Genesis Mine is owned and operated by Newmont Gold Company ("Newmont").

2. The products of the Genesis Mine enter and affect commerce and the mine is within the jurisdiction of the Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.* ("the Act"). The Administrative Law Judge has jurisdiction to decide these matters.

3. All of the citations at issue in this matter were properly served by an authorized representatives of the Secretary of Labor ("Secretary").

4. All of the civil penalties and/or citations at issue in this matter were timely contested by the operator of the Mine.

5. The size of the Genesis Mine, as of February 12, 1997, was 1,005,387 man-hours and the size of Newmont was 4,059,826 man-hours.

6. Newmont's Genesis i.d. number had 15 assessed violations in the 25 months preceding February 12, 1997.

7. The amount of penalties assessed herein will not affect Newmont's ability to continue in business.

8. The parties agree that Newmont has sought this litigation to challenge positions of the Secretary with respect to the requirements of 30 C.F.R. § 50.20, and the Secretary's enforcement policy with respect to 30 C.F.R. § 56.20001.

B. Specific Stipulations

1. On September 15, 1996, Gary Morin was employed by Respondent Newmont Gold Company (hereinafter "Newmont") as a haul truck driver.

2. On September 15, 1996, Gary Morin was operating a 150-ton Caterpillar model 785 B end dump haul truck (i.d. #HT-094) at the Genesis Mine.

3. At about 1:30 p.m. on September 15, 1996, the haul truck being operated at the time by Gary Morin backed through a berm at the elevated dump site of the north area leach pad, overturned and traveled about 50 feet down the sloped bank coming to rest on its top at the base of the dump.

4. Gary Morin was sent by Newmont to the Elko General Hospital during the early evening of September 15, 1996, and was admitted for observation. He was discharged from the hospital on the morning of September 17, 1996.

5. Gary Morin submitted to a voluntary random drug test administered as part of Newmont's routine program on September 12, 1996.

6. Newmont did not have the results of the September 12, 1996, Morin drug test at the time of the incident on September 15, 1996.

7. Newmont was notified after the accident that the September 12, 1996, Morin drug test yielded results that were positive for marijuana.

8. Elko General Hospital administered a post-accident drug test to Gary Morin which yielded results that were positive for marijuana.

9. Upon notification of the test results on September 16, and while in the hospital for observation, Gary Morin resigned from employment with Newmont, effective September 12, 1996 (the date of the first drug test).

10. Prior to his retroactive resignation, Gary Morin's next scheduled shift was to begin September 16, 1996.

11. Gary Morin also was unable to return to work his next scheduled shift on September 16, 1996, because he had not been discharged by Elko General Hospital.

12. On October 23, 1996, MSHA Inspector Bob Caples issued Newmont Citation No. 7951406 for an alleged violation of 30 C.F.R. § 50.20. The violation was characterized as non-significant and substantial, and the citation was modified to reflect no negligence "based on confusion caused by different information given the company by HSAC (MSHA's statistical center in Denver, Colorado)."

13. Prior to October 23, 1996, Newmont did not submit to MSHA an MSHA 7000-1 Accident, Injury and Illness Report on the Morin September 15, 1996, haul-truck incident.

14. On September 20, 1996, Inspector Caples issued Citation No. 4140633 to Newmont for an alleged violation of 30 C.F.R. § 56.9101. The alleged violation was characterized as significant and substantial, and the citation was modified to reflect no negligence.

15. Newmont has not been cited by MSHA for a violation of standard 30 C.F.R. § 56.20001 related to the September 15, 1996, haul-truck incident, despite MSHA's awareness that Gary Morin tested positive for marijuana on the day of the incident.

Citation No. 4140633

This citation alleges a significant and substantial violation of the mandatory safety standard 30 C.F.R. § 56.9101 which mandates that the operator of mobile equipment, such as the haul-truck in question to "maintain control of the equipment while it is in motion."

Item 8 of the citation describes the alleged violation as follows:

> At about 1:30 P.M. on September 15, 1996 Gary Morin, haul truck driver did not maintain effective control of the 150 ton Caterpillar model 785B, end dump haul truck, company I.D. #HT-094, while in the process of attempting to dump his loaded truck at the North area leach pad at the Genesis Mine. Due to the speed of the truck while backing and not applying the brakes in a timely manner the truck traveled through the berm at the elevated dump site and after over-turning, traveled about 50 feet down the sloped bank coming to rest on its top at the base of the dump.

The parties stipulate that on September 15, 1996, Gary Morin was operating a 150-ton Caterpillar model 785B end dump haul truck (I.D. #HT-094) at the Genesis Mine and that at about 1:30 p.m. on September 15, 1996, the haul-truck being operated at the time by Gary Morin backed through a berm at the elevated dump site of the north area leach pad, overturned and traveled about 50 feet down the sloped bank coming to rest on its top at the base of the dump. (Specific Stipulations Nos. 1 and 2).

On January 12, 1996, Newmont Gold Company ("Newmont"), pursuant to Commission Rule 10(b), 29 C.F.R. § 2700.67 moved that Citation Nos. 7951406 and 4140633 be vacated and requested that "this Court issue Declaratory Relief mandating that MSHA: (1) enforce its prohibition against drug use on mine sites; and (2) abandon its current policy of hiding drug-abuse caused incidents and initiate a national policy of reporting such incidents, identifying them as a hazard to employees and emphasizing prevention through its enforcement and training efforts."

Newmont asserts that MSHA should have cited Respondent for violation of 30 C.F.R. § 56.20001 rather than 30 C.F.R. § 56.9101 for the incident involving the fall of the haul-truck. The citation, nevertheless, alleges a violation of § 56.9101 which provides that:

> The operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion.

On March 16, 1998, all five Commissioners in a unanimous decision interpreting the meaning of this identical safety standard § 56.9101 stated "The reasons for a loss of control are

irrelevant to consideration of whether control over moving equipment was maintained." (Emphasis added). *Daaren and Janssen, Inc.*, slip op. (March 16, 1998). In that case, the operator of a front-end loader traveled through the berm and the loader fell 40 feet to the quarry floor. In that case, as here, there was no evidence that the operator intentionally drove the mobile equipment through the berm.

On consideration of the entire record before me, I find the operator of the haul-truck did not maintain control of the truck while it was in motion. The most reasonable inference that I can draw from the record before me is that the accident would not have happened if the driver of the truck had maintained control of the haul truck while it was in motion. Clearly the driver of the truck did not maintain control of the haul truck while it was in motion as mandated by the safety standard. There is no evidence that Mr. Morin intentionally drove the truck through the berm. Citation No. 4140633 is affirmed.

SIGNIFICANT AND SUBSTANTIAL

Inspector Caples found the violation charged in Citation No. 4140633 to be "significant and substantial". A "significant and substantial" (S&S) violation is described in § 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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 (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). 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 the instant case, it is clear from the particular facts surrounding the violation, primarily the failure to maintain control of the haul-truck as it was backing up to the berm at an elevated dump site, that it was a violation of such a nature that could significantly and substantially contribute to the cause and effect of a mine safety hazard and that there was a reasonable likelihood that the injury that would result would be one of a reasonably serious nature. Accordingly, the violation is properly designated significant and substantial.

DECLARATORY RELIEF

Newmont is to be commended for its enforcement of its drug policy as set forth in Respondent's brief. Newmont is clearly seeking more help from MSHA to assist them achieve its worthy goal of a drug-free workplace. However, I see no legal basis in this case to grant Respondent's motion for declaratory relief seeking to require the Secretary to issue a citation to Respondent charging it with the violation of 30 C.F.R. § 56.20001 or to enforce MSHA's anti-drug abuse policy at the mine and to stop the alleged hiding drug-abuse caused incidents, or to initiate national policy of reporting and identifying such use as hazardous or even emphasizing prevention through its enforcement and training efforts as requested by Respondent..

The Secretary has the authority and the discretion to cite or not cite violations of a particular safety standard under the Mine Act. The Commission in its decision *Secretary of Labor v. Mechanicsville Concrete Inc.*, 18 FMSHRC 877 at 879 (June 20, 1996) stated:

> 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 . . . . (Emphasis added).

I agree with the Secretary that the Secretary of Labor has the sole authority and discretion to cite or not cite a particular violation and to disseminate and develop enforcement policy under section 103 of the Mine Act.

See also *Thunder Basin Coal Co. v. Reich*, 127 L. Ed. 2d 29, 36, 40 (1994); *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (October 1993); *Mettiki Coal Corp.*, 13 FMSHRC 760, 764 (May 1991).

Respondent's Motion for Declaratory Relief is denied.

Citation No. 7951406

MSHA charges Newmont with a non-significant and substantial violation of 30 C.F.R. § 50.20 which requires that an operator file an "MSHA Form 7000-1" report "within 10 working days after an accident, occupational injury or occupational illness." An "occupational injury" is defined in § 50.2(e) as

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

Citation No. 7951406, item 8, accurately states the facts as follows:

> A MSHA 7000-1 Accident, Injury and Illness report was not completed and submitted for employee Gary Morin. Morin was involved in a haul truck roll-over on September 15, 1996. Mr. Morin was admitted to Elko General Hospital in Elko, Nevada on the 15th and released on September 17, 1996. Morin was scheduled to work on September 16, 1996.

Mr. Morin was released from his hospital confinement on September 17, 1996. Mr. Morin's Discharge Diagnosis; attached as Exhibit B to the stipulations filed by the Parties reads as follows:

> DISCHARGE DIAGNOSIS:
> 1. Concussion.
> 2. Cervical strain.
> 3. Lumbar strain.
> 4. Contusion left elbow.
>
> SUMMARY: Patient is a 37 year old Newmont haulpak driver who on 9-15-96 apparently drove his haulpak over a berm and suffered a rollover. He was belted in but struck his head, neck and left elbow. He presented to Elko General Hospital Emergency Room where a work up was undertaken. It was felt that he had significant concussion, cervical and lumbar strains and he was admitted for observation. Patient initially complained of significant head and neck pain but denied any numbness or tingling. Patient's activity was gradually advanced; his discomfort gradually subsided and by 9-17-96, he was mobile enough and feeling good enough to be discharged home.
>
> DISCHARGE MEDICATIONS: Lortab prn.

PLAN: Follow up will be Thursday at Ruby Mountain Orthopedics.

D: 9-19-96
T: 9-22-96
RAF/jmb3 R.A. JONES, M.D.

Although Newmont sent Gary Morin to the Elko General Hospital right after the accident for observation, it is clear from the record that evidence of injury was found by the treating doctors at the hospital, such as significant concussion, cervical strain, lumbar strains and contusion of left elbow. Therefore, Newmont is unable to escape the requirement of filing an MSHA Report Form 7000-1 on grounds that Mr. Morin was hospitalized for observation only since evidence of injury was found. 30 C.F.R. § 50.3(e) clearly implies that medical treatment does include hospitalization for observation where evidence of injury or illness is found.

I also find no merit in Newmont's contention that it was not required to file a 7000-1 report with MSHA because Mr. Morin while still in the hospital on September 16, 1996, retroactively resigned his job with Newmont effective September 12, 1996. The fact remains that Mr. Morin was confined to a hospital at the start of his next scheduled shift.

The purpose of the filing requirement is to notify MSHA of a serious incident occurring on mine property to allow MSHA "to investigate, and to obtain and utilize information pertaining to accidents, injuries, and illnesses." 30 C.F.R. § 50.1. Thus, an operator is not relieved of the requirement to file the report by changing the shift scheduling or obtaining a resignation after the accident or incident resulting in injury. Citation No. 7951406 is affirmed.

PENALTY

The Secretary, on further consideration after issuance of the citations, appropriately reduced the operator's negligence factor for each of the two citations to "none" and has proposed a penalty of $81.00 for Citation No. 4140633 alleging a violation of 30 C.F.R. § 56.20001 and a single penalty assessment of $50.00 for Citation No. 7951406 alleging a violation of 30 C.F.R. § 50.20.

Neither party presented evidence or stipulations that seriously challenged the penalties proposed by the Secretary. Upon my independent evaluation and consideration of the appropriate amount of penalty in accordance with the six penalty criteria of section 110(i) of the Act, I find the penalties proposed by the Secretary to be the appropriate penalty for each of the violations.

ORDER

The Secretary's Motion for Summary Decision is **GRANTED** and the Respondent's Motions for Summary Decision and for Declaratory Relief are **DENIED**.

It is further ordered that Respondent within the next 30 days pay a civil penalty to the Secretary of Labor of $81.00 for the violation of 30 C.F.R. § 56.20001 and $50.00 for the violation of 30 C.F.R. § 50.20. Upon receipt of payment, this case is dismissed.

August F. Cetti
Administrative Law Judge

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/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 10 1998

GARY D. MORGAN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 98-17-D
v.	:	VINC CD 97-02
ARCH OF ILLINOIS, Respondent	:	Conant Mine
	:	Mine ID No. 11-02886

DECISION

Appearances: Leonard D. Rice, Esq., Du Quoin, Illinois, for the Complainant; Frenchette C. Potter, Esq., Arch Mineral Corporation, St. Louis, Missouri, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Complaint filed by Gary D. Morgan, ("Complainant") alleging that he was discriminated against by Arch of Illinois ("Arch"), in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"). Pursuant to notice, the case was scheduled and heard in Nashville, Illinois, on March 17-18, 1998. On May 26, 1998, Complainant filed a brief. Respondent's brief was received on May 29, 1998.

I. Complainant's Evidence

Arch operates a number of underground coal mines including the Kathleen Mine and the Conant Mine. Gary Morgan, a miner with more than 25 years experience, worked in various capacities in mines owned by Arch or its predecessor. In October 1989, he was recalled from an economic layoff to work as a utility person at the Kathleen Mine where he continued to work until he was laid off in July 1995, when the mine closed down. When he was called back to work at the Kathleen Mine, he was not required to take any tests. According to Morgan, most of the time at the Kathleen Mine he operated a scoop. He also drove a ram car, and relieved the regular bolter and continuous miner helper at lunch time and during overtime. Morgan estimated that, in total, at Kathleen Mine he operated a bolter for less than a year.

Morgan indicated that for the entire time he worked at the Kathleen Mine he had many confrontations with his immediate foreman, Ben Williams, and the latter cursed him. Morgan indicated that whenever the section was in production "the dust was always bad" (Tr. 30), and he complained to Williams about the dust. However, according to Morgan, Williams did not listen

to him. Morgan indicated that Williams told that he had no time to water the dust as he was loading coal. Morgan said that he tried to water the roads and scoop the dust out of the way in order to clear the dust.

In 1990, Morgan spoke to the mine manager, Harry Riddle, and told him that there was dust in the air and dust lying around. Riddle said he would try to get something done about it. The following day, there was not much dust, however, dusty conditions reoccurred.

Morgan indicated that on one occasion, in the east side of the mine, there was a very high dust content. In the middle of 1994, Morgan observed that dust pumps worn by miners were being turned off, that the sniffers on some dust pumps were being concealed under the lapels of coats, that curtains were left undone, and that dust pumps were being placed in fresh air. Morgan reported these concerns to Williams who made no effort to rectify them. On two occasions Morgan complained to Jasper Shirley Stirsman, the Safety Committeeman regarding dust violations. Stirsman reported these conditions to the MSHA Sparta Office, and to Dick Berry, Arch's safety coordinator, but he did not divulge to him the name of the person who had made the complaints.

Subsequently, around August 1994, Riddle met underground with William's crew concerning complaints about dust sampling. Morgan testified that he told Riddle, "I'm the one that turned you in" (Tr. 38), and that he had seen the dust pumps being turned off. Lee Summers, the miner who had been wearing the dust pump then called him a liar, and a confrontation ensured. According to Morgan, all this occurred in the presence of Riddle who then informed the men to take the proper dust samples and go back to work.

According to Stirsman, at a monthly meeting to resolve the dust violations, Gene Sharp, the mine superintendent, said that ". . . [d]amn Morgan is the one that's causing the complaint" (Tr 17). Also, on two other occasions, Sharp made derogatory statements about Morgan.

In July 1995, after Morgan was laid off for economic reasons, he placed his name on Arch's panel for recall in September 1996. He was called for an inby position at the Conant Mine, and was given a written test. John Cotter, a shift foreman, told him that he passed the written test and was then to take a "hands-on" test. In order to pass this test he would have to operate three out of four pieces of equipment. Morgan received task training and was then first tested on the ram car, and then on the scoop. Prior to the testing, Cotter allowed him time to familiarize himself with these pieces of equipment. Morgan testified that prior to being tested on the roof bolter, he was not shown where the controls were located, and was not given an opportunity to familiarize himself with this piece of equipment. Cotter told him to back the bolter into position, and install 30-inch bolts. According to Morgan, when he started putting the bolts in the holes that he had drilled, a miner, Kenny Anheuser, made the bolts for him and handed them to him. According to Morgan, Cotter then told Anheuser that he could not continue to help Morgan because he was being tested. Morgan stated that, at the conclusion of the test, he felt confident that he had not done anything wrong. He asked Cotter how he did, and Cotter told

him that he does not evaluate the tests, but merely records information ,and that someone else evaluates it. Cotter then asked Morgan if he wanted to test on the continuous miner, and Morgan told him that he thought he only needed to be tested on three out of four pieces of equipment. Cotter indicated that he thought that he would offer Morgan the opportunity to test on the miner. Morgan testified that no one had introduced him to the controls of the miner, and he was not given any opportunity to "warm up." Morgan testified that,in operating the miner, he let the tail get into the roof which he termed a "bad move" (Tr. 60). Morgan eventually finished the test, and Cotter informed him that he would be notified in a few days.

Approximately 3 days later, Morgan called Bob Blaylock, the supervisor of safety at the Conant Mine, who informed him that he had failed the hands-on test. Blaylock told him that he did not change the bits, that he had bent "a roof bolt steel" (Tr. 62), and that he took too much time. Morgan testified that he told Blaylock that he did not bend any steel, that he changed bits as necessary, and that he did not know that there was any time limit. Morgan testified that Blaylock told him that if he did not pass the bolter test, he could not be considered for any other position at the mine. Morgan said that Blaylock told him that for an outby position he had to be tested on two out of three pieces of equipment, one of which must be the bolter, and that for an inby position he had to be tested on three out of four pieces of equipment. Blaylock told Morgan that if he would enhance his bolting skills, he could be considered for another job. Subsequently, Terry Morris, who had less seniority than Morgan was awarded an outby job. Morgan had not been notified of this position.

Dennis Dwayne Harrison, who was laid off from the Kathleen Mine late in the spring of 1995, had reported various safety concerns prior to being laid off as a pit committeeman. On August 20, 1996, Harrison was called to take a test for an inby position. He was given the hands-on test by Blaylock. The first piece of equipment that he was tested on was the bolter. He was given 25 minutes of familiarization during which time he put in about fifteen 48-inch bolts. After the test started, he drilled 30-inch holes. He had a helper who made up the bolts, and gave them to him. He did not complete the test because the bolter lost power. Harrison then was tested on the hauler, and the scoop. According to Harrison, Blaylock told him that he did not have any time to further test him on the bolter, but that he had passed the hands-on test, and a physical was scheduled.

Harrison testified that a week after he heard that Morgan was to be tested for recall he mentioned this to Williams. Morgan testified that Williams said ". . . I've already told him if he does pass, not to put him in my unit with me" (sic) (Tr. 121-122).

Stanley Dennis Warden was a miner operator at the Kathleen Mine. He indicated that Lee Somers worked with him as a miner helper, and that "we had a lot of trouble with him shutting the dust pump off" (Tr. 127). Warden indicated that when dust sampling was taking place he had to make sure that curtains were up, and the miner operators stayed behind the intake air curtain. He said that one time he was ". . . ordered to stand behind the curtain, and cut a hole in the curtain and look through the curtain to load the buggies" (Tr. 128). Warden also indicated that he had helped several individuals who were tested on the bolter.

Lester Furlow, a miner working at the Conant Mine, testified that he was tested on the bolter by Bill Young and Bob Blaylock in April 1993, for an inby position at the Conant Mine. He stated that he was allowed about 30 to 45 minutes to warm up during which time he drilled between 12 to 15 holes. He said that in the testing on the bolter he broke the steel and a clip that holds the bit onto the steel. A helper showed him how to change the spring and the steel. The helper did not do anything to assist him.

Gerald Selby, a miner who had worked with Morgan at the Kathleen Mine, was aware that Morgan had reported violations in 1994. He testified that he had seen Somers with a dust sampling machine pinned on, but with his coat placed over it. He stated that one time he saw Somers wearing a pump that had been turned off. According to Selby, at times, a dust pump on the section had been placed on the miner in a position where there was not any exposure to dust. Selby testified that during dust sampling, "they" cut out of sequence, and kept the miner in the air entries (Tr. 144).

Selby indicated that on one occasion when Williams was hanging curtains, he told Williams that a dust pump had been turned off. Williams stated that he would take care of it, but he continued to hang curtains.

According to Selby, a few days after the meeting with Riddle he asked Riddle if he had straightened Morgan out regarding the dust sampling. According to Selby, Riddle said that "Gary Morgan will never work in another Arch minerals mines again" (sic) (Tr. 147). Daniel Helmer who was present corroborated Selby's testimony.

In essence, Complainant's witnesses Stirsman, Harrison, and Shelby all expressed concern that they were not comfortable testifying as they feared that Arch would retaliate against them, or prevent them from returning to work.

II. Respondent's evidence

Williams was the section foreman in the Kathleen Mine between 1989 and 1995. In this capacity, he supervised Morgan. According to Williams, "we had a little trouble back and forth" (Tr. 179), and had "some heated arguments, not just over dust sampling" (Tr. 181). Williams indicated that on one occasion Morgan operated a bolter in relief during dinner and "I didn't think he did very well on it, so I took him off of it" (Tr. 160). According to Williams, in 1994, Morgan complained that the roads were dusty, and that Somers was shutting off the dust pump. Williams said that other employees had also complained that Somers was shutting off the pump. Williams indicated that Somers customarily wore his coat tail over the dust pump. In response, Williams said he talked to Somers. He indicated that there was a bad feeling between the bolter operators and Somers, in that the former complained that Somers did not clean up properly.

Williams indicated that he found out that Morgan was the one who initially made the dust complaints to MSHA only after the section 105(c) complaint had been filed. According to Williams, when Riddle met with the crew concerning the dust violations, Morgan did not say that

he had instigated the MSHA investigation, or had filed a complaint with MSHA. On cross-examination, he was "questioned" as follows: "In your testimony you're indicating that Mr. Morgan did not step forward or say anything that he was the one responsible for turning these in" (sic) (Tr. 173). His "answer" is as follows: "No, he did not, not that I remember, no." (Tr. 173).

Williams testified that in September 1996, prior to going underground, in the course of a half hour meeting, Morgan's name was brought up as part of a conversation wherein miners on the crew were asking who would be working on the section. According to Williams, some of the men present asked him if he wanted Morgan on the section and he said "[w]ell, I don't think so" (Tr. 169). He explained, in essence, that he preferred to have someone else in the section because he'd rather have someone with whom he did not have a lot of trouble. Williams testified that he did not say anything at this meeting about Morgan's complaints about dust, or that he had instigated the MSHA investigation. Williams indicated that Cotter was not present at this meeting.

Williams indicated that he did not talk to Cotter prior to the time that Morgan took the tests to be recalled, and that he did not have anything to do with the tests. Williams stated specifically that he did not tell Cotter to fail Morgan, did not talk to Cotter about Morgan, and did not tell anyone to fail Morgan.

Williams indicated that he might have mentioned Morgan's name to Riddle concerning complaints about dust violations. He stated that he reported to Riddle that Morgan and two other bolters had said that the dust pump was being turned off, and that people in the section were "battling back and forth" over this issue (Tr. 181).

Riddle was the shift manager at the Kathleen Mine between 1991 and 1995. Riddle, who supervised Morgan when the latter worked on an idle day or over a weekend, stated that Morgan was always a good worker and there were no conflicts. However, he was aware that Morgan and Williams had squabbled. He indicated that in operating the scoop, Morgan was "[a]s good as anybody at the coal mine could" (sic) (Tr. 206).

According to Riddle, prior to the MSHA investigation concerning dust violations, he had heard rumors concerning dust sampling complaints. He indicated that he went underground to meet with Williams' crew to air the problems. Riddle said that at the meeting there was a lot of bickering, and that the miner operator was having problems with the rest of the crew regarding the dust pump. According to Riddle, Morgan did not state that he was the one who had made complaints to MSHA. He also indicated he did not recall Morgan admitting that he went to MSHA. He was asked whether he had told Helmer or Selby that Morgan would not work again at another Arch mine and he stated, "[N]o absolutely not. I did not say that" (Tr. 194). He indicated that he had become aware that Morgan had made the dust sampling complaint to MSHA only after Morgan had filed the discrimination complaint at issue.

Riddle indicated that he did not speak to anyone about Morgan testing for a job at the Conant Mine, and that he was not involved in the testing procedures. According to Riddle, he did not tell Cotter that Morgan had filed dust complaints with MSHA, and did not ask or tell Cotter to fail Morgan. Nor did he tell anyone else to fail Morgan.

Blaylock explained that pursuant to the National Bituminous Coal Wage Agreement of 1993, ("Agreement") as amended by a Memorandum of Understanding, when a job vacancy occurs, the job is posted and if it is not filled, the company then goes to a panel to select the senior person who is given a written test. The candidate is then provided with hazard and task training, and after a warm-up period, is tested on a piece of equipment. Candidates must pass a test operating three out of the four pieces of equipment in order to pass the hands-on test. He indicated that 100 percent of the candidates are tested on the coal hauler and the scoop, both of which require only minimal skill. Approximately 75 to 80 percent of the candidates are tested on the bolter which requires a high level of skill, and only 20 percent of the applicants are tested on the miner which would requires the highest level of skill.

Blaylock indicated that, in administering the testing, it was standard procedure for him to time how long it took the candidate to load coal with the miner, and to drill holes and bolt with the bolter. He also timed the operation of the scoop. Blaylock indicated that there was no standardized time for the drilling of the holes, and the bolting due to varying roof conditions. According to Blaylock, the standard for the miner to load the coal hauler was 20 to 30 seconds. Blaylock stated that the only exception to the standard procedures occurred on one occasion when a candidate, Terry Morris, was testing on the roof bolter.[1] The tester, who was new in this task, had to interrupt this test to perform some other duties. Morris failed the test, but upon appeal by the union was retested, and he subsequently passed.

Blaylock testified that he found out that Morgan had made complaints to MSHA, and had also complained to Arch about dust problems, only after the discrimination complaint at issue had been filed. He stated that he was not told by anyone to fail Morgan in testing him for the inby position.

Cotter testified that subsequent to 1996, either he or another shift foreman conducted the candidate recall testing. He indicated that, as his standard procedure, once he takes the candidate underground the latter is provided with task training. The candidate then is shown the controls on the equipment he is to be tested on, and he is allowed to warm up. According to Cotter, when the candidate indicates that he is comfortable running the machine, he commences testing. He indicated that it is not possible to warm up the continuous miner which is usually positioned at a

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[1]/ On cross- examination, Blaylock indicated that when he tested another candidate, Dennis Harrison, the former did not fully complete the test by drilling 5-foot or 6-foot holes because the bolter broke. However, in spite of this, Blaylock passed Harrison because he had observed him in practice bolting four rows of bolts, and he was able to evaluate his work and found him to be skilled.

point where the candidate can commence cutting. He allows a helper to assemble the bolts. Cotter indicated that in evaluating the candidate's operation of the bolter, he observes how smooth the latter operates the controls, how he inserts the steel, how deep he drills the hole, and if the hole is appropriate size for the pin. He also observes how the bolter changes the bit, how he swings the boom, and how he places the mast up to the roof.

Cotter indicated that in testing Morgan he did not treat him differently than other candidates. According to Cotter's testimony, Morgan did not pass the bolter test as he was not smooth. The time that it took Moran to perform the bolter test was not a factor that Cotter took into account in making this decision. In Morgan's hands-on test, Cotter indicated that Morgan did not display knowledge of the proper use of drill steels and wrenches, did not display the ability to recognize and correct problems which arise during roof bolt installation, and was not safe and efficient during the test. His comments are as follows: "He had knowledge of what cons are supposed to do, but had problems hitting the wrigh control. Bent 6' steel. [D]id not change bits when necessary. Very slow in operating the bolter. In my opinion he would not do well in a production mode" (sic) (Petitioner's Ex. G p. 7).[2]

Cotter indicated that it is his decision to pass or fail a candidate, and that his decision has always been final. Cotter maintained that he was not told by anyone to fail Morgan, that no one suggested that he fail Morgan, and that no one told him to test Morgan any differently than other candidates. Specifically, he said that at the time of the test, he did not know that Morgan had made complaints to MSHA, and did not know that Morgan had complained to management about dust. He indicated that 6 months prior to instant hearing was the first time that he found out that Morgan had made complaints to MSHA, and had made complaints to the company about dust.

Peter Wyckoff, has been the mine manager at the Conant Mine since March 1996. In this capacity, he oversees the hands-on testing. He said that in September 1996, he heard Williams say that he did not want Morgan on his crew. According to Wyckoff, Williams did not say anything about Morgan having complained to Kathleen Mine management or MSHA about dust sampling. Wyckoff did not tell Cotter what Williams said about Morgan, and did not repeat it "at the test time" (Tr. 297).

Wyckoff stated that during the investigation following the filing of the discrimination complaint by Morgan, he learned for the first time that Morgan had complained to the company, and MSHA about dust sampling. He stated that he did not tell or suggest to anyone to fail Morgan on the inby testing. Nor did he tell anyone to tell Cotter that Williams did not want Morgan on his shift.

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[2]/ Pursuant to the parties' agreement, Petitioner's Exhibits F and G are admitted into evidence post-hearing.

III. Analysis.

The Commission, in *Braithwaite* v. *Tri-Star Mining*, 15 FMSHRC 2460 (December 1993), reiterated the legal standards to be applied in a case where a miner has alleged that he was subject to acts of discrimination. The Commission, *Tri-Star*, at 2463-2464, stated as follows:

> The principles governing analysis of a discrimination case under the Mine Act are well settled. 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, 2797-800 (October 1980), rev'd on other grounds, sub nom. *Consolidation Coal Co.*, v. *Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette* v. *United Castle Coal Co.*, 3 FMSHRC 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 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).

Based on Morgan's testimony, that was not contradicted or impeached by Arch's witnesses, I find that Morgan engaged in protected activities in reporting dusty conditions to Williams, Riddle, and Stirsman. Further, there is no dispute in the record that Cotter determined that Morgan did not pass the hands on test regarding the operation of the bolter, and that Morgan was not recalled by Arch for an inby position in October 1996. I thus find that Arch did take adverse action against Morgan. Thus, the pivotal issue for resolution is whether the adverse action taken by Arch was motivated in any part by Morgan's protected activities.

In general, the commission in *Hicks* v.*Cobra Mining, Inc.*, et al., 13 FMSHRC 523 (1991) discussed the principles to be applied in evaluating motivational nexus as follows (13 FMSHRC, supra, at 530):

> The Commission in previous rulings has acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . 'Intent is subjective and in may cases the discrimination can be proven only by the use of circumstantial evidence.'" *Secretary o.b.o. Chacon* v. *Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), rev'd on other grounds sub nom. *Donovan* v. *Phelps Donge Corp.*, 709 F.2nd 86 (D.C. Cir. 1983 quoting *NLRB* v. *Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965).

> In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC 2510.

In essence, Morgan testified that Williams, to whom he complained about dust violations, had cursed him, and that he had many confrontations with Williams. More importantly, according to Harrison, when he mentioned to Williams that Morgan in 1996, was going to be tested for recall, Williams said that he did not want to have Morgan in his unit. Williams knowledged that he did not want Morgan in his section, because he had had a lot of trouble with him. He knowledged that they had had some "heated arguments, not just over dust sampling" (Tr. 182). I find that Williams did have some animus toward Morgan, in part due to Morgan's complaints about dust violations. However, Williams was not involved in any decisions relating to an evaluation of Morgan's hands on testing, or the decision whether to recall him. There is no evidence that he communicated his animus to either Cotter or Blaylock who made these decisions. Specifically, I accept Williams' testimony, as it was not contradicted or impeached, that he did not tell Cotter to fail Morgan, and did not even talk to Cotter prior to the time Morgan took the hands on test. For the same reasons, I also accept his testimony that he did not tell anyone to fail Morgan on the hands on testing.

According to Morgan, in 1990 he had complained to Riddle about dust violations, and that, in a meeting with the crew in August 1994, he told Riddle regarding dust violations, ". . . that I'm the one that turned you in . . . ." (Tr. 38). This version was corroborated by another miner Jerold Selby, who was present at this meeting.

On the other hand, Riddle maintained that Morgan did not state that he was the one who made the complaints to MSHA, and that he did not recall Morgan admitting that he went to MSHA. Similarly, Williams in testifying regarding this meeting, stated that Morgan did not say that he had instigated the MSHA investigation, or had filed complaints with MSHA. However, on cross-examination, the certainty of his testimony on direct examination was diluted by the following statement concerning his earlier testimony that Morgan did not say that he was the one responsible for turning in the violations "[n]o, he did not, not that I remember, no" (Tr. 173). Also, I take cognizance of Williams' testimony that he had reported to Riddle that two other bolters and Morgan had alleged that a dust pump had been turned off. I accept the version testified to by Morgan inasmuch as I observed his demeanor and found his testimony credible on this point. Also his testimony was corroborated by Selby. I find that Riddle was aware of Morgan's complaints about dust violations and that he had admitted to filing a complaint with MSHA.

According to Selby, a few day after the meeting with Riddle, he asked him if he had straightened Morgan out regarding the dust sampling, and that Riddle replied "Gary Morgan will never work in an other Arch Minerals mines again" (sic) (Tr. 147). Another miner, Daniel

Helmer, who was present, corroborated Selby's testimony. On the other hand, when Riddle was asked whether he made this statement, he responded as follows: "[n]o, absolutely not. I did not say that" (Tr. 194).

Although the version testified to by Morgan and Selby establishes animus on the part of Riddle, who had knowledge of Morgan's safety complaints, there is no evidence that this animus formed the basis, in any part, for the adverse actions taken against Morgan. I observed Riddle's demeanor, and find his testimony credible that he was not involved in the testing procedures, and did not ask or tell Cotter or anyone else to fail Morgan. For the same reason, I accept his testimony that he did not tell Cotter that Morgan had filed dust complaints with MSHA. I also note that there is no direct evidence contradicting or impeaching this testimony.

In essence, according to Morgan, Cotter, contrary to established procedure, did not allow him time to warm up on the bolter before he has tested, and did not allow another miner to continue to help him by assembling the bolts. Morgan also alleges that he was discriminated against in that Harrison was passed for recall by Blaylock even though he did not fully complete the hands-on test on the bolter. Morgan also alleged that contrary to Cotter's expressed rationale for failing him on the test, he did not bend any steel. He maintained that he changed the bits as necessary, and had not been aware that there was any time limit on performing the various bolter tasks.

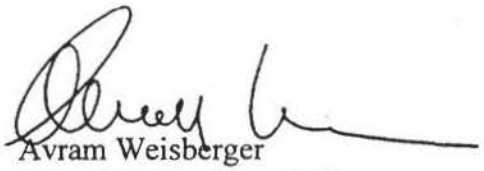
The decision to fail Morgan on the bolter test was made by Cotter. I observed Cotter's demeanor and found his testimony credible. Also, I note that the record does not contain any direct evidence impeaching or contradicting his testimony that he was not told by anyone to fail Morgan, that no one suggested that he fail Morgan, that no one had told him to test Morgan any differently than any other candidate, and that at the time of the test he did not know that Morgan had made complaints to MSHA and Arch. I thus accept his testimony. I find that the record fails to establish that there was any animus on the part of Cotter towards Morgan that related to Morgan's protected activities. I find that it has not been established that Cotter's decision to fail Morgan on the hands-on bolter test, and his actions toward Morgan on the date of the testing were motivated on any part by Morgan's protected activities.

Morgan had been informed by Blaylock that he did not pass the bolter test and that he would not be considered on any other job. Blaylock's testimony, which was not impeached or contradicted by any direct evidence, was that he first found out that Morgan had made complaints to MSHA and to Arch about dust problems only after the discrimination complainant at issue had been filed, and that he was not told by anyone to fail Morgan. I observed Blaylock's demeanor and found his testimony credible on this point. I thus accept his testimony. I find that it has not been established that Blaylock's actions were motivated by any animus toward Morgan regarding safety complaints, as he did not have any knowledge of these complaints.

Hence, for all the above reasons, I conclude that it has not been established that Cotter, the only agent of Arch to have taken adverse action against Morgan, had any animus toward Morgan relating to his protected activities, or even knew of Morgan's protected activity on or before October 1996, when the adverse actions were taken. (See *Hicks*, supra, at 530). I thus conclude that it has not been established that the adverse actions taken by Arch, acting through Cotter, were in any part motivated by Morgan's protected activities. Thus, I find that it has not been established that Morgan was discriminated against in violation of section 105(c) of the Act.

ORDER

It is **ORDERED** that Morgan's Complainant be **DISMISSED**, and that this case be **DISMISSED**.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 1 1 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-1
Petitioner	:	A. C. No. 24-00108-03538
v.	:	
	:	Big Sky Mine
BIG SKY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, Ned D. Zamarripa, Conference and Litigation Representative, Mine Safety and Health Administration, Lakewood, Colorado, for the Secretary; Michael O. McKown, Esq., LaTourett, Schlueter & Byrne, St. Louis, Missouri, for Respondent.

Before: Judge Barbour

This civil penalty cases arises under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §815(d) (Mine Act or Act)). The Secretary of Labor (Secretary), on behalf of the Mine Safety and Health Administration (MSHA), seeks the assessment of a civil penalty against Big Sky Coal Company (Big Sky) for an alleged violation of 30 C.F.R. § 77.404(a), a mandatory safety standard requiring equipment be maintained in safe operating condition or be removed immediately from service. The Secretary alleges the violation occurred at the company's Big Sky Mine, a surface coal mine located in Rosebud County, Montana. The Secretary also alleges the violation was a significant and substantial contribution to a mine safety hazard (S&S violation). She proposes a penalty of $362.

Big Sky denies it violated the standard and contests the Secretary's S&S allegation. The case was heard in Miles City, Montana.

THE DISPUTE

The parties are at odds over whether a nylon ply bias tire on a 150-ton dump truck was in unsafe operating condition.[1] Most of the tire's tread was gone, and there were five areas on the tire where the rubber was worn away and various layers of nylon ply were exposed. The Secretary maintains the tire was so worn it was not safe. The company maintains the tire was not unsafe and the tire's condition did not violate section 77.404(a).

THE CITATION

Citation	Date	30 C.F.R.§	Proposed Penalty
4366332	5/6/97	77.404(a)	$362

The citation states in part:

> The 150[-]ton . . . bottom dump haul truck . . . is not being maintained in a safe operating condition. The . . . tubeless nylon left rear inside tire is in an unsafe condition. The tire has 5 flat spots worn through the tread area and into the nylon cords. The size and depth of the flat spots are: 6" x 15" worn through 5 layers, 8" x 15" worn through 6 layers, 7" x 13" worn through 6 layers, 10" x 15" worn through 13 layers, and 6" x 11" worn through 4 layers . . . (Gov. Exh. 2).

STIPULATIONS

The parties stipulated, among other things: (1) that the company is engaged in coal mining operations that affect interstate commerce; (2) that the company is the owner and operator of the mine; (3) that the mine is subject to the jurisdiction of the Act; (4) that the administrative law judge has jurisdiction over the case; (5) that the subject citation was properly served on the company; (6) that the proposed penalty will not affect Big Sky's ability to continue in business; (7) that the company demonstrated good faith in abating the alleged violation; (8) and that the company is a large operator. The parties also stipulated to the accuracy of MSHA's assessed violations history (See Tr. 8-10; Joint Exh. 1).

THE EVIDENCE

Herbert J. Skeens is the MSHA inspector who issued the citation. He is employed in the agency's Denver, Colorado office, MSHA District 9. He has been an inspector for the past 5 years. Prior to working for MSHA, he had 18 years of experience in the mining industry, first

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[1] Throughout the hearing, the subject tire and tires like it, were frequently referred to as "giant tires".

in the eastern coal fields, then in the west. His experience included the operation and maintenance of equipment using off-road tires similar to the subject tire. Skeens operated 50-ton and 85-ton haulage trucks, but never a 150-ton truck. After working for MSHA, his training included approximately one day of instruction specific to off-road tires.

One of Skeens' assignments was inspecting the Big Sky Mine. At the mine, coal is stripped, loaded into off-road dump trucks, and taken to the hopper and/or stockpiles. On the morning of May 6, 1997, Skeens went to the mine to inspect the dump trucks and other equipment. The inspection was part of a complete inspection of the mine. During the inspection, Skeens was accompanied by Gordon Brannon, the mine's safety director, and David Pemble, the representative of miners (Tr. 49).

While conducting the inspection, Skeens observed the subject dump truck in operation. The truck was a bottom dump truck, which means it discharged its load from the bottom, rather than through a tailgate. The truck consisted of two sections. The front section contained the engine and the operator's compartment. It was supported by two wheels, which steered and turned the truck (Tr. 59, see also Tr. 138).

The trailer section was supported by eight wheels, four dual wheels on the front and four dual wheels on the back. The front wheels received the power that drove the truck (Tr. 59, see also Tr. 138). The rear wheels supported the trailer bed and the majority of the trailer's load (see Tr. 163, 182; Exh. R-6). The rear wheels were located approximately 30 to 35 feet from the truck operator (Tr. 58).

All of the wheels on the trailer were equipped with nylon ply bias tires. When new, each tire cost between $5,000 and $5,500 (Tr. 113,143). Each tire had a rim diameter of 49 inches and an outer tread layer that gave the tire "a certain amount of wear" (Tr. 53). Under the tread layer were six ply pockets made of nylon cords and rubber. The six ply pockets were fused together with rubber. The ply pockets were approximately 2 inches deep (Tr. 222).

Each ply pocket consisted of four plies of nylon cords (a "four-ply") that ran diagonally across the tire (Tr. 214-216, 225-226). The nylon plies looped around an interior base of bundled steel wires (the "beads" Tr. 83, 87). The beads anchored the nylon plies (Tr. 83, 212). The nylon cords ran at opposite angles to each other, and gave the tire its strength (Tr. 51, 83). Air was contained by the inner rubber of the tire (Tr. 51).

When Skeens saw the truck, it had dumped its load of coal and was starting the return trip to be reloaded. Skeens asked the driver to stop. Skeens climbed into the cab and talked to the driver to "see how [he] felt about the brakes and steering" (Tr. 50). Skeens then got out of the cab and inspected the underside of the truck and the tires, working his way from the front to the back (Id.). He concluded all of the tires were in good condition except the trailer's left rear inside tire. In his opinion, it was not safe. The tread was worn from the tire, something that in itself Skeens did not regard as a problem; however, there were five other areas of wear where the nylon plies were exposed and severed. In Skeen's opinion, these areas made the tire unsafe.

Skeens measured the surface size and the depth of the damaged areas and counted the severed plies (Tr. 59, 61, 113). The largest worn area, the one that caused Skeens the most concern, measured 10 by 15 inches on the surface, and, Skeens believed, the area extended to a depth of 13 plies. Skeens speculated the worn areas were caused by the brakes locking and the truck skidding (Tr. 67).

Skeens asked Brannon to look at the worn areas, which he did (Tr. 60). Dave Pemble also looked at the tire. A short time later Mike Schranz, the company's maintenance manager, joined the group, and he too examined the tire (Tr. 58, 144).

Skeens believed the severed plies compromised the tire's structural integrity by lessening its strength. Skeens feared if the tire was not removed from the truck, the tire would blow out or otherwise fail. The wear was to the point where either a hole could be punched in the tire or the remaining plies "no longer [would] withstand the pressure or load . . . upon them" (Tr. 54). If the tire suffered a blowout, anyone in the vicinity of the tire was likely to be injured, perhaps fatally, by flying debris or pieces of the tire. Miners who might be endangered were those checking the tire's air pressure, fueling the truck, inspecting the truck, or inspecting a truck parked behind the subject truck (Tr. 33-34). Moreover, if the tire blew out while the truck was operating, the blowout could cause the rear of the truck to pull to one side thereby endangering the driver and anyone in the truck's path (Tr. 64).

Skeens testified a blowout could be caused by rocks or debris in the roadways. He noted roadways at the mine were composed of crushed scoria. ("A local term for melted or partly melted rock surrounding burned-out coal beds in the Western United States" (American Geological Institute *Dictionary of Mining, Mineral and Related Terms* 484 (1996); see also Tr. 105-106)). Skeens described the scoria as forming "a very good road base," but added, "it has its negatives too. In that . . . it is so rough that it causes abnormal wear on tires. And if you get big chunks of it, you can easily cut a tire and cause damage to it" (Tr. 70).

Erik Sherer, an MSHA mining engineer, who had seen pictures of the tire, noted other stresses to which the tire was subject. There was a stress from air pressure inside the tire. The stress, varied during the mining cycle, from when the tire was cold to when it heated up as the truck was driven. Or, as Sherer put it, "from cold pressure to hot pressure and back again" (Tr. 92). Additional stresses were added when the tire ran over ruts or when the truck was accelerated, slowed, or turned (Tr. 93).

Sherer was asked how damage to the plies related to the safe operation of the truck. He maintained, in effect, if half the total number of plies were damaged, the tire had to be twice as strong to be used safely (Tr. 944, 126, 245-246). He believed the worn areas of the tire were large enough to cause a "significant decrease" in the strength of the tire in those areas (Tr. 98).

Sherer described the damage around the largest worn area as egg shaped, and testified that when the nylon cords were cut, as they were in this area, the tire was weakened. While its strength was "relatively intact" closer to the bead, in the worn areas it was weak. Moreover, where it was weak, it was more subject to severe rock cuts, and hence to punctures and blowouts (Tr. 244-245). Sherer believed the tire was "one hundred percent worn out" (Tr. 95).

Witnesses for Big Sky maintained the tire was not unsafe. Glen Whitear, a tire consultant with 43 years of experience working in the tire industry, explained in detail the way nylon ply bias tires are constructed (Tr. 213-216). Because the plies are layered in opposite directions and at an angle, they cross one another and give the tire added strength. He stated when "you look at the total picture of that tire and the integrity of that tire, a very, very small portion of that overall strength . . . has been affected" (Tr. 215).

Whitear counted the number of damaged plies in the worst area after it was cut out and removed from the tire (Resp. Exh. 13). He could not get a precise count, but he estimated that of the 24 plies, between 9 and 11 remained undamaged (Tr. 225). He found that almost an inch of the original 2 inches of the interior rubber and nylon remained untouched, and Whitear explained why this was more than sufficient to bear the weight put upon the tire (Tr. 227, 337).

All of Big Sky's witnesses maintained the tire was unlikely to experience a blowout. Brannon and Shranz described how haulage roads at the mine were constantly graded to remove rocks and other debris that might cause a puncture (Tr. 152, 167, 183-184) and how the dump trucks are equipped with CB Radios so the truck operators can communicate the location of potential hazards to one another (Tr. 153-154, 184).

Further, Big Sky's witnesses uniformly testified that nylon bias ply tires rarely end their lives in catastrophic failure. Rather, they ware down to the last four-ply and then go flat (Tr. 156, 183, 219-221, 223). This is true, even if the tires are punctured (Tr. 175).

Whitear acknowledged the tire could suffer a blowout if it became overheated, something with which Scherer agreed (Tr. 218, 122-123), or if it became overinflated. However, company witnesses who felt the tire testified there was no indication it had overheated (Tr. 157,188), or that it was overinflated.

Finally, the company's witnesses felt that even if a blowout occurred, there was no reasonable likelihood an injury would result. They maintained if the truck was operating, the blowout would not have significantly affected the truck's steering or braking capacity (Tr. 140, 191, 221). Further, they noted that Skeens allowed the inspection party to stand in the immediate vicinity of the truck for at least 10 minutes while they looked at the tire, and that he did not express any concern for the party's safety (Tr. 146-147, 156).

THE VIOLATION

The Commission has held section 77.404(a) imposes two duties: (1) to maintain equipment in safe operating condition; and (2) to remove unsafe equipment from service immediately (*Peabody Coal Company*, 1 FMSRHC 1494, 1495 (October 1979)). The "[d]erogation of either duty violations the regulation" (Id.; see also *Ambrosia Coal & Construction Co.*, 18 FMSHRC 1552, 1556 (September 1996)).

A tire is an essential part of a truck. It is "equipment" that comes within the meaning of the standard. When Skeens first observed the tire, it had not been removed from service but rather was on the operating truck. Therefore, if the tire was in unsafe condition, Big Sky violated the regulation. The issue of whether the tire was safe to operate is resolved by determining whether "a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action" (See *Alabama By-Products Corporation*, 4 FMSHRC 2128, 2129 (December 1982) (involving identical standard applicable to underground coal mines)). The burden of proof is on the government.

For the following reasons, I conclude the Secretary did not prove a reasonably prudent person, familiar with the tire in question and the circumstances under which it was used at the Big Sky Mine, would have expected the tire to blowout.

Skeens testified the hazard he feared was that the tire "definitely" would blow out because (1) it had worn to the point it would be punctured more easily; or, (2) it had worn to the point the plies no longer would withstand the pressure in the tire or the load the tire carried (Tr. 33, 54). When the tire catastrophically failed, he believed those individuals in close proximity to the tire would be injured, perhaps fatally (Tr.33-35). Also, he feared if the blowout occurred while the truck was moving, the driver could loose control of the truck, which would subject the driver and any person in the path of the truck to serious injury (Tr. 64). While, the testimony establishes the tire could have blown out, it falls short of establishing a reasonable person would have expected it to do so.

Whitear, had more experience in the tire industry and knew more about the manufacture of nylon ply bias tires and their use in the mining industry that any other of the witnesses. He acknowledged any tire can suffer a catastrophic failure, even a brand new tire (Tr. 219). His testimony was confirmed by Schranz, who had actually seen a new tire self-destruct when it ran over a rock (Tr. 191). However, Whitear also testified that blowouts of nylon ply bias tires, even those that have been worn to the point of the subject tire, are very infrequent (Tr. 186. 220). Given their construction, rather than experience catastrophic failure, such tires are much more likely to simply deflate and go flat.

Whitear explained when a tire is kept in service until it wears through to the last four-ply, "a pretty good thing happens" (Tr. 220). The remaining ply "isn't strong enough to have stability and it begins to hinge, and that hinging causes flexing of the liner and puts a small hole in the liner and allows the tire to vent itself safely" (Id.). Even when such a tire is punctured, it usually vents safely. Whitear's contention that the puncture of a tire did not invariably result in a blowout was confirmed by Shranz. He testified he had seen the blade of a front end loader puncture a nylon ply bias tire, and rather than blow out, the tire just "lost its air" (Tr. 186).

Even more compelling was the testimony of Brannon, who had worked at the mine for 25 years. He agreed that whatever their state, most nylon ply bias tires do not end their lives by blowing out. Rather, they "just . . . don't hold air anymore", and they go flat (Tr. 156). He credibly stated, "I've never seen one blow" (Id., emphasis added). Because such giant tires usually end their lives by going flat, the practice at the mine is to "put the bad tires or the worn out tires on the rear and wear them out" (Tr. 158).

Shranz agreed "very few" tires suffer blow outs and he could not recall the last one to do so (Tr. 183). Even Sherer, MSHA's mining engineer, confirmed catastrophic failures are "relatively rare" and most tires end their useful lives with a slow release of air pressure (Tr. 247, see also Tr. 121).

Given the testimony of those with the most experience in the construction and use of the tire and with the use of similar tires at the mine, I find a reasonable person familiar with the tire and its use at the mine would have expected the tire simply to "go flat," even if punctured, and would not have anticipated its catastrophic failure.

I also find, in any event, the Secretary did not establish the tire was likely to be punctured. The evidence is clear that the presence of large rocks and debris that might have caused a puncture was not a problem at the mine. Skeens testified that loose coal, even in large pieces, was not a concern because it would be crushed when run over. Although Skeens believed pieces of scoria could "easily cut a tire" (Tr. 70), neither he nor the Secretary's other witnesses disputed the testimony of Big Sky's witnesses that the haulage roads at the mine usually were kept free of rocks and debris. In this regard, I note the testimony of Brannon that the haulage roads were constantly graded to remove extraneous material and Schranz's testimony that at least one grader worked full-time on this during each of the mine's three shifts (Tr. 152, 167,183-184). Further, I note Skeens' acknowledgment the drivers communicated "pretty well" on their CB Radios, and I conclude it likely they would have avoided potential hazards the graders missed (Tr. 70).

Nor did the Secretary establish that a puncture was more likely because of the worn spots. Whitear, measured the thickness of the remaining plies at the point of worst wear and found that approximately half of the original material was left (Tr. 222). He testified that tire manufacturers "overbuild and over strengthen . . . [giant] tires considerably" (Tr. 232). I accept his first-hand measurement, and his unrefuted testimony. It is common knowledge safety margins are manufactured into products.

The Secretary did not introduce any evidence to establish exactly what the remaining strength of the tire was at the worst of the worn spots and how likely this made a puncture. Sherer, in effect, stated that with half the plies damaged, the tire had to be twice as strong, but his speculation is not a substitute for the kind of expert testimony that might have aided the Secretary's case. Given the lack of any credible testimony regarding the remaining strength of the tire in the worn areas, especially in the worst of the worn areas, I discount Scherer's opinion the tire was "100 percent worn out" (Tr. 95).

Nor do I perceive a basis in the record to conclude it reasonably likely a blowout would have been triggered by causes other than a puncture. Whitear testified the catastrophic failure of nylon bias ply tires can be due to excessive heat, which builds up air pressure, which, in turn, can cause the tire to disintegrate (Tr. 218). Sherer too believed air pressure and heat could put stress on the tire (Tr. 92). Whitear, the most knowledgeable witness, testified the critical temperature was over 238 degrees Fahrenheit — a temperature discernable by touch — and the critical air pressure was 25 percent over the tire's PSI rating (Tr. 217-218). Whitear also observed that heat buildup can be caused by "long distance hauls at high speeds[,] . . . [e]xtreme overloading[,] . . . [o]r tires run[ning] underinflated" (Tr. 217).

There is no evidence to lead to a conclusion the tire was subject to overheating and/or excessive air pressure. While Skeens agreed air pressure and heat are important indicators of tire safety, he did not measure either because he did not have an air pressure or a heat gauge with him (Tr. 48, 60). However, he touched the tire and did not find its temperature abnormal (Tr. 60-61, 67). Brannon and Schranz, who also touched the tire, agreed (Tr. 152, 188).

Further, there is no evidence the truck traveled long distances at high speeds, or was in the practice of hauling while overloaded or with its tires underinflated. Indeed, Whitear's testimony that coal is a relatively light mineral and that it is "very tough" to overload the truck was not challenged (Tr. 227).

Because I conclude the Secretary did not establish that a blowout was reasonably likely to occur, I need not reach the issue of whether an injury was reasonably likely in the event of the tire's catastrophic failure. Nevertheless, I note Skeen's acknowledgment that of the ten tires on the truck, the subject tire was the most safely positioned (Tr. 70), and Sherer's belief that even a catastrophic failure of the tire would not jeopardize the truck's stability and would have "very little" to do with its steering and/or braking (Tr. 117). I also note Schranz agreed with Sherer that if the tire lost air, it would not cause the driver to loose control of the truck (Tr. 191).

Finally, because there is no indication that Skeens considered proximity to the tire to be hazardous during his inspection — testimony he allowed the inspection party to remain in the vicinity of the tire for at least 10 minutes was not challenged (Tr. 146-147, 156) — the credibility of his fear that the tire endangered miners conducting air pressure readings, fueling the truck, or inspecting the truck is questionable (Tr. 34).

For all of these reasons, I conclude the Secretary failed to prove there was a hazard

warranting correction. My conclusion should not be read as critical of the inspector. Skeens conscientiously did what he thought the law required based upon what he saw, and what he saw was a cause for concern. Whitear admitted the tire appeared to be badly damaged (Tr. 214), and he described the area of greatest wear as "look[ing] terrible" (Tr. 226). However, the law requires the citation be judged by what a reasonably prudent person familiar with facts would have concluded, or, put another way, whether the cited equipment could have been used safely by miners (*Southern Ohio Coal Co.*, 13 FMSHRC 913, 915 (June 1991)), since if so, a reasonable person could not have concluded it was unsafe.

What appears "terrible," may or may not be safe. In any event, the burden of establishing reality behind the appearance is the Secretary's. Because the Secretary failed to satisfy this burden, the citation must be vacated.

ORDER

For the reasons set forth above, Citation No. 4366332 is **VACATED,** and this proceeding is **DISMISSED**.

David Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 12 1998

BRYCE DOLAN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. CENT 97-24-DM
	:	MSHA Case No. SC MD 96-05
F& E ERECTION COMPANY,	:	
Respondent	:	Mine ID No. 41-00230-B96
	:	Bayer Alumina Plant

DECISION ON LIABILITY

Appearances: Errol John Dietze, Esq., Dietze & Reese, Cuero, Texas, for the Complainant; James S. Cheslock, Esq., Cheslock, Deely & Rapp, San Antonio, Texas, for the Respondent.

Before: Judge Feldman

The captioned matter before me is based on a discrimination complaint filed on December 27, 1996, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(3), by the complainant, Bryce Dolan, against the respondent, F&E Erection Company (F&E). The trial in this proceeding was conducted on April 15 through April 16, 1997, and April 14 through April 15, 1998, in San Antonio, Texas.[1] [2]

This case concerns whether Dolan's April 16, 1996, refusal to perform his assigned lead abatement duties warrants the statutory protection afforded to complaining miners under section 105(c) of the Mine Act. 30 U.S.C. § 815(c). Lead abatement is the process of removing lead-based paint from the surface of steel structures in preparation for modification or maintenance work. Dolan was performing lead abatement by burning lead paint with a cutting torch, rather than chipping away the paint with a needle gun and grinder.

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of this statutory protection is to encourage miners to play an active role in "improving the working conditions in the Nation's . . . mines in

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[1] Resumption of this proceeding was delayed because F&E's counsel sustained serious leg injuries in an accident that occurred shortly after the initial hearing.

[2] The transcript of the April 1997 and April 1998 hearings are referred to as "Tr. 1" and "Tr. 2", respectively.

order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c). To this end, " the [mine] operators . . . with the assistance of the miners have the primary responsibility to prevent the existence of [hazardous] conditions and practices in such mines." 30 U.S.C. § 801(e).

Although the Mine Act grants miners the right to express safety and health related concerns, it does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the Courts have recognized the right to refuse to work in the face of perceived dangers. *See Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 519-21 (March 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (August 1990) (citations omitted).

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 of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). The purpose of the "good faith" belief requirement is to "remove from the Act's protection work refusals involving frauds or other forms of deception." *Robinette*, 3 FMSHRC at 810.

For a work refusal to be protected under the Mine Act, a miner should first communicate his safety concerns to some representative of the operator. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982). If the miner expresses a reasonable, good faith fear concerning safety, the operator has a duty to address the perceived danger. *Metric Constructors, Inc.* 6 FMSHRC at 230; *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1534 (September 1983).

Having communicated these good faith, reasonable concerns about safety, the analysis shifts to an evaluation of whether the respondent addressed these concerns in a way that should have alleviated the complainant's fears. *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 mem.*, 866 F.2d 431 (6th Cir. 1989). A miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *Bush*, 5 FMSHRC at 998-99.

The central issue in this case is whether F&E Erection Company (F&E) adequately responded to Dolan's concerns regarding his potential exposure to lead poisoning during his torch burning lead abatement duties. The respondent asserts it adequately responded to Dolan's concerns by supplying him with a full-face respirator and a tyvek suit. Notwithstanding the lead exposure issue, F&E contends Dolan acted unreasonably when he quit his job on April 16, 1996, because he had been offered a transfer to a non-lead removal job. Dolan contends F&E's provision of a respirator and tyvek suit was not an adequate response to his complaint about burning lead paint.

As discussed below, although burning to remove lead paint may be a permissible industry practice where surfaces are not accessible to chipping equipment, F&E's practice of burning lead paint, regardless of whether the area burned was accessible to grinding equipment, is not an acceptable safe alternative to chipping as a primary method of lead abatement. F&E's offer to reassign Dolan to non-lead work, rather than adequately address his legitimate safety concerns, does not preclude Dolan from prosecuting his discrimination complaint. Consequently, Dolan's discrimination complaint must be granted.

A. **Lead Toxicity**

The *Alcoa Handbook for Lead Activities* cautions that lead is a toxic substance when inhaled or ingested. Lead has been used in industrial paints for over 100 years as a proven corrosion inhibitor for steel substrates. Standard methods of removal, such as abrasive blasting and power tool cleaning, create greater dangers than those created when paint is in the process of peeling and falling. This is because peeling paint falls to the ground as flakes or chips, whereas paint removed by mechanical means is pulverized into dust. (*Ex. C-12*).

Inhalation of lead is generally the most important source of occupational lead absorption. When lead is released in the air as a dust, fume, or mist, it can be absorbed through the lungs and upper respiratory tract. The smaller the particle of airborne lead, the greater the danger of inhalation or ingestion. By its very nature, fumes containing lead create a significant potential for inhalation. Consequently, airborne dust and fumes containing respirable dust particles pose significant health hazards to workers conducting the lead removal process, to workers in the vicinity of the operations, and to persons in communities adjacent to the lead removal operations. (*Ex. R-9, App. A; Ex. C-12*).

Chronic overexposure to lead may result in severe damage to blood formation, as well as damage to the nervous, urinary and reproductive systems. Common symptoms of overexposure include loss of appetite, metallic taste in the mouth, anxiety, constipation, nausea, pallor, excessive fatigue, weakness, insomnia, headache, nervous irritability, muscle and joint pain, fine tremors, numbness, dizziness, hyperactivity and colic. (*29 C.F.R. § 1926.62, App. A; Ex. R-1; Ex. R-9, App. A*).

The Occupational Safety and Health Administration's (OSHA's) permissible exposure limit (PEL) standard prohibits employee exposure to lead concentrations in excess of 50 micrograms per cubic meter (50 $\mu g/m^3$) of air averaged over an 8-hour period. (*29 C.F.R. § 1926.62; Ex. C-1*). Employees exposed to lead levels in excess of the PEL must wear respiratory protection. Under the OSHA standard, a half-mask air purifying respirator with high efficiency filters protects an employee from exposure levels up to 500 $\mu g/m^3$. (*29 C.F.R. § 1926.62, Table 1*). Similarly, a full-face purifying respirator with high efficiency filters, or a full-face supplied air respirator operated in demand mode, provides employee protection up to 2,500 $\mu g/m^3$. *Id.*

While the OSHA standard reflects that harmful effects from exposure to lead do not usually occur unless an employee's blood level exceeds 40 micrograms per deciliter (40 μg/dl) of blood, the standard does not require temporary removal from lead work until a worker's blood level reaches 50 μg/dl. (*29 C.F.R. 1926.62, App. A; Ex. R-1*). Such an employee may resume lead work when two consecutive blood tests indicate the employee's blood level is at or below 40 μg/dl. *Id.* However, the standard provides that the blood level of employees intending to have children should be maintained below 30 μg/dl. *Id.*

B. **Preliminary Findings Of Fact and Conclusions**

F&E Erection Company is a general contractor engaged in maintenance and construction work with its principal offices located in San Antonio, Texas. F&E performs maintenance and construction for a variety of facilities subject to the Mine Act including ALCOA's smelter in Point Comfort, Texas. F&E became a construction contractor at ALCOA's Point Comfort Plant several years prior to beginning lead abatement work in 1993.

As previously noted, lead abatement consists of removing lead-based paint from older steel structures when modifications are made. In 1993, F&E began construction projects involving lead abatement work at Point Comfort. (*Tr. 1, 398*). In this regard, Steve Whitehead, F&E's mechanical supervisor, testified, "[Alcoa's Point Comfort] Plant is fairly old and there's lead-based paint on (sic) it. Anytime we have to modify a structure that may have some paint on it, or that they think that there's lead on it, we handle it as a lead abatement job." (*TR 1, 399*).

Prior to beginning lead abatement work at ALCOA's facility in 1993, F&E retained Jones & Neuse, Inc. (J&N), an environmental and engineering services firm, to prepare a compliance program for projects involving personnel exposed to lead. (*Resp.'s Prop. Findings*, p.7; *Ex R-9)*. The J&N study was prepared in 1992 and it was revised in 1994. It covers such things as air monitoring, blood level testing, protective equipment and hygiene. The environmental recommendations in the J&N study are based on J&N's conclusion that chipping and grinding should be the method of lead abatement used by F&E. Specifically, the J&N study states:

> Removal and containment of abated lead will be accomplished by using needle guns, roto penes, and grinders attached to high efficiency filter vacuums. Gauges will be used to measure the pressure drop across the filters. The HEPA vacuum sits directly on top of Alcoa supplied 55 gallon drums. (*Ex. R-9, p.11*).

Consistent with the J&N study, ALCOA's *Handbook for Lead Activities* seeks to "reduc[e] lead exposure during welding and cutting operations by stripping the paint away from the area to be cut." (*Ex. C-12, p.8*). ALCOA's lead hazard control standards, with respect to practices and personal protection methods for demolition, construction or modernization, apply to all outside contractors as well as to ALCOA employees. (*Id. at p.1*).

Gary Klatt, F&E's safety director assigned to the company's San Antonio home office, is the individual responsible for coordinating and implementing F&E's safety program. Beginning in 1993, Gary Klatt periodically presented a one day training course to F&E personnel to instruct them on the dangers of lead exposure, and to teach them lead abatement safety procedures. Klatt has conducted the training course four times since 1993. Dolan attended the training course on June 23, 1993. (*Ex. C-1*).

Dolan was initially hired by F&E as a laborer at Alcoa's Point Comfort facility in October of 1991. He continued to work there until he was laid off in February of 1993. Dolan was rehired at Point Comfort in April of 1993 until he was again laid off in January of 1994.

In the fall of 1994, Dolan was rehired by F&E to work at the Reynolds Metal Company plant in Corpus Christi, Texas. Dolan transferred to Alcoa'a Point Comfort Plant on September 29, 1994. Shortly thereafter, in late 1994 Dolan began work as a leadman/welder at Alcoa's R35 tank farm located in its Point Comfort facility. (*Tr. 1, 126*). Dolan was supervised by crew foreman Howard Talbert. Talbert was supervised by Steve Whitehead. Dolan's duties included working with, and supervising, a five-man crew that was removing lead-based paint from metal structures in preparation for welding plates and stiffeners to trusses that support storage tanks. With the exception of the top of the tanks where lead abatement was performed by chipping and grinding, lead abatement at the R35 tank farm from November of 1994 until March of 1996 was accomplished primarily by burning the paint from the metal structures with cutting torches.

From November of 1994 until March of 1996, Whitehead testified that F&E did not provide Dolan and his crew with any personal safety protection, such as respirators or protective clothing. Whitehead testified that personal protection equipment had not been provided because, prior to starting truss work, air monitoring was performed on one occasion at the top of the tank lids at the R35 tank farm by Health and Safety Management, Inc. (HSM), F&E's environmental consulting firm. (*Tr. 1, 404-05*). Whitehead alleged the monitoring results revealed that lead levels were "low." (*Tr. 1, 404*). Whitehead also testified he did not think further monitoring was necessary because "the trusses were up into the air and I figured ventilation was fine and that the lead levels would not be there." (*Tr. 1, 404*).

Dolan and Talbert testified that in March of 1996 Alcoa personnel complained to Talbert that F&E was not providing any personal protective equipment for F&E personnel who were working in lead abatement areas. (*Tr. 1, 45-46; 352*). Talbert testified he "had no idea" the R35 tank farm was a lead abatement area until Alcoa employees brought it to his attention in March of 1996. (*Tr. 352, 355*).

Talbert's purported lack of awareness that the R35 tank farm contained lead-based paint is difficult to accept in view of Whitehead's testimony that Point Comfort was an old plant that was constructed with lead paint. In addition, Talbert knew the R35 tank farm had been monitored in 1994 for lead exposure prior to work on the trusses. (*Tr. 1, 356*). Talbert's

testimony is also difficult to reconcile with the fact that J&N had been retained by F&E to develop safe lead abatement procedures because of the lead-based paint at Point Comfort. Finally, Whitehead's belief that burning lead paint without a respirator was not hazardous because "ventilation was fine" is troublesome in view of the fact that Klatt's training specifically addressed issues concerning lead toxicity and abatement safety procedures.

In short, the evidence reflects, and F&E admitted at trial, that, from November of 1994 until March of 1996, F&E failed to implement the compliance program for safe lead abatement recommended by J&N. (*See Tr. 1, 374-75*). F&E also ignored the safety procedures Klatt taught in his training course on the hazardous nature of the lead abatement process.

As noted above, Talbert testified that Alcoa employees approached him in March of 1996 to inquire why work at the R35 tank farm was not being treated as lead abatement work. (*Tr. 1, 352*). Dolan testified that Talbert communicated Alcoa personnel's concerns to him and his crew. Crew member Darryl Blocker and Dolan spoke to James Koenig, an Alcoa employee, who told them the R35 tank farm was a lead abatement area. Koenig told them he would ask Alcoa why the F&E employees were not "suiting up." (*Tr. 1, 45*).

Dolan became concerned because he observed Alcoa employees doing lead abatement with HEPA needle guns and grinders. The Alcoa employees wore protective clothing and respirators. Approximately three days later, Whitehead sent three crew members for lead abatement training. Whitehead told Dolan, Blocker and Troy Stewart to start "lead abating" on Tank No. 1. The crew was given half-face respirators and tyvek suits.

Dolan complained to safety man Bubba Spears. Spears told Dolan that Whitehead was in charge. HSM performed air sample monitoring on Dolan's crew from March 18 through March 22, 1996. The crew wore tyvek suits and half-face respirators during the monitoring. The half-face respirator provided protection to 500 $\mu g/m^3$. The monitoring results from March 18 and March 19, 1996, are not in evidence. The results from March 20 through March 22, 1996, reflect that Dolan, while using the cutting torch, was exposed to averages of 467 $\mu g/m^3$ on March 20, and 136 $\mu g/m^3$ on March 21, in excess of OSHA's PEL of 50 $\mu g/m^3$ averaged over an 8 hour period. Other crew members were also exposed to impermissible levels of average lead concentration ranging from 60 $\mu g/m^3$ to 136 $\mu g/m^3$. (*Exs. C-3, C-28*).

As a result of its monitoring results, HSM recommended that the employee using the cutting torch be furnished with a full-face respirator while the other crew members used half-face respirators. Full-face air purifying respirators with high efficiency filters provide minimum protection of 25 times the PEL (1250 $\mu g/m^3$). Air supplied full-face respirators provide protection to 100 times PEL (5000 $\mu g/m^3$).

On or about March 25, 1996, Dolan's crew was provided with one full-face respirator. Dolan complained that all crew members should use full-face respirators because sometimes several torches were used at the same time. Dolan also complained about the tyvek suits because they easily ripped and holes were frequently burned in them exposing Dolan's clothes to lead contamination.

Tyvek suits are thin disposable coveralls made of a spun olefin material. (*See sample tyvek suit, admitted as Ex. C-6*). The olefin material melts from the heat of the hot metal particulates which spew onto the suits during the lead burning process. (*Tr. 2, 233*). Although tyvek suits are flame retardant, a fire resistant or fire retardant article of protective clothing that can be laundered to remove toxic materials would provide the maximum worker protection. (*Id.).*

F&E Safety Director Klatt conceded that tyvek suits were susceptible to burn holes which occurred on a daily basis during the burning of lead based paint. (*Tr.1, 533*). Consequently, F&E provided boxes of suits at the work site to allow for the frequent changing of suits whenever necessary. *(Id).* The lack of durability of the tyvek suit is further demonstrated by Klatt's testimony that Alcoa's lead abatement protocol provided the wearing of double tyvek suits as an alternative to removing the clothing worn underneath that may have become contaminated before leaving the job site. (*Tr. 1, 532*).

Before employees departed the lead-work area, they were required to vacuum their clothing with HEPA vacuums. However, Dolan was concerned that the clothes worn under his tyvek suit constituted a contamination hazard to his family. Dolan's family has never been tested for any lead-related illness. There is no objective evidence that Dolan's wife or children were exposed to lead contamination.

Dolan's blood levels were monitored for lead by F&E on several occasions. Dolan's micrograms of lead per deciliter of blood were: 10 on August 11, 1995; 6 on November 17, 1995; 17 on February 8, 1996; and 8 on April 16, 1996. These levels were below the 40/30 micrograms per deciliter of blood considered to be the threshold levels for concern by OSHA, and below the 50 microgram per deciliter of blood level that requires a worker's removal from lead abatement work.

Dolan continued to complain about the protective measures that had been implemented. He was adamant that full-face respirators should be worn by all crew members. He was also convinced that the tyvek suits did not provide adequate protection to the crew and their families.

On April 16, 1996, Whitehead and Klatt met with Dolan and approximately ten other employees to address Dolan's concerns. (*Tr. 1, 473*). During the meeting Dolan voiced his

continued concerns regarding burning lead-based paint with crew members wearing half-face respirators and tyvek suits. Whitehead testified he responded to Dolan's concerns by saying, "we were going to do like we were doing and we were going to use full-face respirators for the guy with the cutting torch." (*Tr. 1, 474*). Whitehead also told Dolan, "we were going to continue to use disposable tyvek suits." (*Tr. 1, 475*).

Although Whitehead did not respond to Dolan's personal protection complaints by changing the lead abatement work methods, at the April 16 meeting, Whitehead testified that he offered to move any employee who was not satisfied doing lead work to non-lead work at another part of the plant. Whitehead failed to explain adequately why no one accepted his offer to transfer to non-lead work. (*Tr. 1, 418-20*).

Dolan and former crew member Kenneth Tam testified that it was not uncommon for F&E to temporarily transfer workers to non-lead jobs until lead contamination blood levels were reduced. However, the transferred workers were always returned to lead abatement tasks, particularly since most of the plant, with the exception of new units, had lead-based paint. (*Tr., 106, 222-23*).

At the conclusion of the April 16 meeting, Dolan quit because he believed he was not given adequate personal protection from lead exposure, and because he was afraid that the burn holes in his tyvek suit exposed his clothes to lead contamination that could be transmitted to his family. (*Tr.1, 102-03, 125, 349*). Prior to Dolan quitting his job, no blood lead-level tests were performed on his wife or children. There has been no evidence presented concerning whether any member of Dolan's family has been adversely affected by lead exposure. (*Tr. 1, 127*).

After terminating his employment with F&E on April 16, 1996, Dolan collected unemployment insurance for several months. Dolan was hired by United Kensington Group as a construction worker on August 11, 1996. Dolan quit the following day on August 12, 1996, because of reported physical problems.

Dolan alleges he has been totally disabled and unable to work since August 14, 1996. (*Tr.2, 299*). He testified he has not looked for work since he quit his employment with United Kensington Group in August 1996. (*Tr. 1, 147-48; Tr. 2, 293, 299*). Dolan currently does household chores and his wife is employed. (*Tr. 1, 116; Tr.2, 292-3*).

Dolan is currently receiving worker's compensation. At the hearing, Dolan could not recall the dates for which compensation payments have been received. At the close of the hearing, Dolan was requested to provide the status of his payments. (Tr. 2, 296). In a letter dated April 21, 1998, Dolan's counsel indicated Dolan's worker's compensation payments were effective as of July 25, 1997. His eligibility to payments from August 15, 1996 until July 24, 1997, has not been resolved.

C. **Further Findings and Conclusions of Law**

As noted in the case law cited earlier in this decision, it is well settled that section 105(c) of the Mine Act protects a miner for refusing to perform a job assignment he reasonably and in good faith considers to be unsafe. There are three essential elements to be considered in determining whether Dolan's April 16, 1996, work refusal, stemming from his March 1996 initial complaints, is protected by the Mine Act. These elements are (1) whether Dolan had a good faith, reasonable belief that a hazard existed; (2) whether Dolan adequately communicated his concerns to F&E in March and April of 1996; and (3) whether F&E reasonably responded to Dolan's complaints in a manner that was reasonably calculated to alleviate Dolan's fears.

a. Dolan's March 1996 Good Faith, Reasonable Complaints

A complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Gilbert v. FMSHRC*, *supra*; *Sec'y of Labor o/b/o Bush v. Union Carbide Corp.*, *supra*. With respect to a miner's good faith belief that a work assignment is unsafe, the Commission has stated:

> Good faith belief simply means honest belief that a hazard exists. The basic purpose of this requirement is to remove from the Act's protection work refusals involving fraud or other forms of deception [such as] lying about the existence of an alleged hazard, deliberately causing one, or otherwise acting in bad faith . . . *Robinette*, 3 FMSHRC at 810.

It is obvious that Dolan's March 1996 complaints concerning potential exposure to lead contamination while burning lead based-paint without the benefit of a respirator or protective clothing were sincerely made and pass the "good faith" test. These complaints concerned F&E's failure to implement the lead abatement safety procedures taught to Dolan in Klatt's training class.

With regard to the reasonableness of Dolan's March 1996, complaints, even F&E admits it should have taken protective measures prior to the time of the complaints. In this regard, counsel for F&E was asked:

> Q. . . . were the employees' complaints a legitimate concern and in hindsight do you think that [F&E] should have been using respirators and protective clothing before March '96?
>
> A. I think the employees' concerns were legitimate concerns and in hindsight they should have probably been using them before they did, and the combination of complaints and Alcoa — their own monitoring showed that they needed to do it and they did it. (*Tr. 1, 374-75*).

b. The Good Faith and Reasonableness of Dolan's April 1996 Work Refusal

Dolan's April 1996 work refusal, in essence, involves an additional complaint - - that the full-face respirator and tyvek suit provided in response to his March 1996 complaint did not adequately eliminate the lead exposure hazard. While, as discussed below, I have concluded that a hazard did in fact continue to exist because burning is not an appropriate primary method of lead abatement, Dolan need not establish that a hazard actually existed to establish a *prima facie* case. Rather, The Commission has rejected a requirement that miners who have refused to work must objectively prove that the hazard complained of existed . . . [and has] adopted a 'simple requirement that the miner's honest perception be a reasonable one under the circumstances."' *Sec'y of Labor o/b/o Pratt v. Hurricane Coal Co.*, 5 FMSHRC 1529, 1533 (September 1983), *quoting Robinette*, 3 FMSHRC at 812.

F&E asserts Dolan's concern about contaminating his clothing by wearing tyvek suits was unreasonable because F&E provided "boxes" of replacement tyveks for workers when tyveks were compromised by burn holes. However, relying on replacement tyveks under these circumstances is as effective as closing the barn door after the horse has left the stable. The frequent replacement of tyvek suits that have holes, after the underlying clothing has been exposed, does not prevent contamination. Rather, consistent with the J&N environmental recommendations as well as Alcoa's safety procedures, it is clear that the use of tyvek coveralls was intended for the abrasive method of lead abatement where burning and melting of the olefin tyvek material is not an issue.

c. Whether Dolan Adequately Communicated His Complaints

A complainant may adequately communicate his complaint about a perceived danger even though he does not articulate precisely the reason or remedy for the hazardous condition or practice. Although Dolan did not express precisely that burning, regardless of whether a full-face respirator was worn, was not a safe method of lead abatement, Dolan's April 16, 1996, complaints regarding the hazards of lead exposure associated with the continued burning at the R35 tank farm were effectively communicated and warranted F&E's attention. In fact, Dolan's complaints were also communicated to F&E by Alcoa personnel. Consequently, the focus shifts to whether F&E addressed Dolan's concerns in a way that should have alleviated his fears by insisting that he continue to burn while wearing a full-face respirator and tyvek suit, or, alternatively, by offering him a transfer to non-lead work. *Gilbert*, 866 F.2d at 1441.

d. F&E's Response to Dolan's Complaint

The adequacy of F&E's response to Dolan's March 1996 complaint, rather than its conduct prior to Dolan's complaint, is the central issue to be determined. However, F&E's willingness to address Dolan's complaint, and the adequacy of its response, must be viewed in the context of F&E's conscious disregard of its own lead abatement safety procedures. As a threshold matter, it is difficult to understand F&E's failure to provide lead abatement workers

with any personal protective equipment prior to Dolan's March 1996 complaints. Significantly, no evidence was introduced by F&E to document the date, or results, of the purported air monitoring at the R35 tank farm in 1994. Even more important, no evidence was presented by F&E to account for the discrepancy between the undocumented safe air monitoring results in 1994, and the air monitoring results in March 1996, that consistently revealed airborne lead levels well beyond the maximum personal exposure limit of 50 micrograms per cubic meter of air averaged over an 8-hour period. Thus, with the exception of Whitehead's testimony that he felt "ventilation was fine" because "the trusses were up into the air," there is no documented basis for F&E's belief that personal protective equipment was unnecessary.

Moreover, even if one period of air sampling was obtained in the fall of 1994, there is no basis for reliance on only one sample period. Air sample results are influenced by many variables, such as wind velocity and direction, and whether a worker is positioned up or downwind from the airborne contaminants. Consequently, I credit the testimony of Robert Miller, the Industrial Hygienist called as an expert witness by Dolan, who stated multiple sampling periods over a period of weeks are required to accurately determine true levels of exposure. (*Tr. 2, pp.240-41*).

In arguing that it adequately responded to Dolan's concerns, F&E has made two contradictory assertions regarding the propriety of burning, rather than chipping, as a method of lead abatement. At the initial phase of this trial in April of 1997, F&E maintained that burning and chipping, provided appropriate respirators were worn, were both accepted methods of lead abatement that were equally safe. However, a method of lead abatement that creates a greater risk of contamination is not an acceptable alternative to less hazardous methods simply because respirators are worn. As Miller explained, although respirators are effective, they are not foolproof. Respirators sometimes leak because of a poor seal on the face due to a poor fit, or because of inadequate shaving or perspiration. The goal is to minimize exposure in order to minimize the need for protective equipment. (*Tr. 2, 272-73*).

F&E contends OSHA recognizes torching lead-paint as an accepted industry method of abatement. In this regard, in its initial Proposed Findings, F&E asserts:

> Nothing in the [29 C.F.R. § 1926.62] OSHA Standard prohibits the burning of lead-based paint. Quite the contrary, the Standard merely requires the appropriate protective measures be taken when "lead containing coatings" are removed by "abrasive blasting, welding, cutting and **torch burning**" (Rx. 1, p.87 and Tr. 523-24 - Testimony of Gary Klatt). (*F&E's initial fxs. at p. 6*) (*Emphasis in Original*).

Although torch burning lead-based paint during welding or cutting operations is not strictly prohibited by the cited OSHA standard, it is disingenuous to suggest that OSHA regards burning as an acceptable method of lead removal. To the contrary, Section IV, Chapter 3 of OSHA's Technical Manual, entitled *Controlling Lead Exposure in the Construction Industry*,

notes that while welding and cutting as part of construction projects may potentially involve exposure to lead, the practice of burning to remove lead-based paint in preparation for welding or torch cutting should be prohibited.[3] (*See Dolan's Reply to Respondent's Response to Order Requesting Clarification, Attachment A*).

Moreover, Jones & Neuse, F&E's environmental and engineering consultant, adopted chipping and grinding as the safest method of abatement noting that an alternative method using solvents was "rejected due to the increased health risks associated with exposure." (*Ex. R-9, p.11*). In fact, it does not appear that J&N even considered burning as a method of abatement.

Alcoa's *Handbook for Lead Activities* also rules out burning as a lead abatement method. Alcoa's Handbook specifically states the lead abatement procedure is to "reduc[e] lead exposure during welding and cutting operations by [abrasive] stripping away from the area to be cut." (*Ex. C-123, p.8; See also deposition testimony of Alcoa Industrial Hygienist Denise Richardson, Ex. C-27*).

Denise Richardson, Alcoa's Industrial Hygienist, also testified in her deposition that burning lead paint is the fastest and cheapest method of lead removal.[4] However, with the exception of constrained areas, Richardson stated that burning lead-based paint is the least desirable method of lead abatement, and that such burning is generally prohibited by Alcoa. (*Tr.2, p. 200-01; Ex. C-27*). In this regard, Richardson stated Alcoa's *Job Safety Analysis* specifies to "remove [lead-based paint] that can be removed with a needle gun or shrouder tool, and that burning is not an option. (*Tr.2, p.180, Ex. C-27*).

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[3] Although not introduced at the hearing, I take judicial notice of Chapter 3 of OSHA's Technical Manual entitled *Controlling Lead Exposure in the Construction Industry*. This publication concerns methods of reducing worker exposure to lead. A copy of Chapter 3 was provided to F&E as Attachment A to Dolan's August 27, 1997, reply to F&E's August 14, 1997, response to the July 25, 1997, Order Requesting Clarification. The Clarification Order, issued after the initial April 1997 trial phase of this proceeding, sought clarification concerning whether burning lead-based paint was an acceptable industry alternative to chipping and grinding as a method of lead abatement. F&E has relied on the OSHA Lead Standard in 29 C.F.R. § 1926.62 throughout trial and in its post-hearing findings. (*See, e.g., F&E's initial fxs., p.8; F&E's revised fxs., p.7*). Consequently, consideration of OSHA's Technical Manual regarding its recommended work practice controls for implementing the Lead Standard in ways that minimize lead exposure is relevant and poses no surprise to F&E.

[4] The parties agreed that Richardson's deposition testimony, in lieu of her actual testimony, would be admitted at the hearing. Richardson's deposition was taken by Dolan in the presence of F&E's counsel. (*Tr. 2, pp. 209-10*).

Miller, Dolan's expert witness, testified that industry handbook publications typically exclude burning as an acceptable method of lead abatement because of the high potential for contamination. (*Tr. 2, p.227*). Miller visited the R35 tank farm during discovery. Miller testified, that although the trusses contained some inaccessible areas, there were significant areas of the truss work that were accessible to roto penes and needle grinders. (*Tr. 2, p. 230*).

Finally, it is difficult to view F&E's suggestion that burning is an acceptable industry alternative to chipping and grinding as a serious proposal. The uncontroverted testimony reflects that lead abatement of a given area by burning can be accomplished in a matter of hours or days, whereas paint removal in the same area by chipping and grinding would require weeks. (*See, e.g.*, Tr. 1, 46). Why would anyone use the more timely and expensive abrasive method of abatement if burning were a safe alternative? A work practice implemented for the sake of expediency, when a less hazardous alternative is available, is exactly the type of conduct that the Mine Act seeks to deter.

In between the initial two day hearing in April of 1997 and the reconvened hearing in April of 1998, F&E has changed its position regarding the propriety of torching as a means of lead abatement. F&E now argues that burning is an acceptable method in confined areas, such as between angle iron brackets, where roto penes and other abrasive needle grinding equipment are not accessible. The trouble with F&E's latest position is the testimony does not reflect that burning at the R35 tank farm was limited to areas that were inaccessible to grinding equipment. In fact, the testimony reflects that, with the exception of tank lids, burning was the exclusive method of lead abatement on the trusses from approximately November 1994 until Dolan quit on April 16, 1996. In this regard, F&E's supervisor, Steve Whitehead, testified:

Q. You put a man in a full-face respirator and burnt the paint on the trusses. Was that because the needle gun and roto pene was (sic) not accessible to the trusses, Mr. Whitehead?

A. Yes, sir, in parts of it.

Q. That wasn't my question. Your answer was parts of it. . . . Assume parts of the trusses were not accessible to roto pene or the needle grinder, and those parts were burnt.

A. Yes, sir.

Q. Parts that were accessible to a roto pene or needle grinder, were they burnt or grinded?

A. Burnt.

Q. They were burnt?

A. Yes, sir.

Q. So. . . what is the significance of whether an area where lead-based paint removal was going to occur, what is the significance of whether or not that area was accessible to a roto pene or needle grinder, with regard to your decision as to whether to burn or chip? Did you understand the question?

A. The areas we burnt that were inaccessible, the guy would be fully dressed out. And being he was fully dressed out, we figure we had him protected for burning the other [accessible] areas while he was doing that certain area.

Q. So since he was burning an area where it was inaccessible, and since he was wearing a full-face respirator . . . you assume he had protection to burn the areas that were accessible to a needle grinder and roto pene?

A. Yes, sir.

Q. In all fairness though, the only reason they were using the full-face respirator was after the March complaint you received from Mr. Dolan and after Alcoa expressed concerns, is that correct?

A. Yes. (*Tr.2, 56-58*).

Thus, it is clear that F&E burned lead-based paint as a primary means of lead abatement, without regard to whether areas were accessible to abrasive removal. Such a practice was contrary to industry standards and maximized worker exposure to lead fumes. Darryl Blocker, a member of Dolan's crew, testified that after Dolan quit, the R35 crew continued burning while wearing tyvek suits. Only one full-face respirator was made available to the crew. (*Tr. 1, 240*).

A worker's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *Bush*, 5 FMSHRC at 998-99. Whitehead testified that F&E's response to Dolan's April 16, 1996, work refusal was "we were going to do like we were doing." (*Tr. 1, 474*). Such a response completely ignored, rather than addressed, Dolan's legitimate concerns and did not constitute a meaningful response to Dolan's complaints.

e. F&E's Offer of Reassignment

F&E argues that even if it did not adequately address Dolan's concerns, Dolan's work refusal was unwarranted because he was offered reassignment to a non-lead work job. While the sincerity of F&E's offer of reassignment as a permanent solution to Dolan's complaints is

suspect in view of F&E's disregard of its own lead abatement safety procedures, seen in its best light, such an offer thwart's the Mine Act's purpose of encouraging a safe workplace. Given F&E's adamant refusal to correct a hazardous work practice, addressing Dolan's complaint with an offer of reassignment while other potential victims continued to be exposed needlessly to high airborne lead content, trivializes the anti-discrimination provisions of section 105(c) of the Act. The intent of the Mine Act is to protect all workers exposed to serious hazards, not just those that recognize and speak out against such hazards.

Moreover, Commission precedent recognizes a protected work refusal when there is a direct nexus between performance of the refused work assignment and injury to a fellow worker. *See Sec'y of Labor o/b/o Cameron v. Consolidation Coal Company*, 7 FMSHRC 319, 324 (March 1985). Further performance of Dolan's duties by others if Dolan had accepted reassignment would have exposed the crew to an unacceptable degree of risk given F&E's lead abatement work practices.

In summary, the evidence reflects that Dolan's March 1996 complaints were reasonable and made in good faith. F&E's response of providing tyvek suits and a full-face respirator while insisting that Dolan continue burning lead-based paint, did not adequately address Dolan's concerns. Dolan's refusal of F&E's offer of reassignment, which was not a permanent solution and did not address the hazardous conditions complained of by Dolan, does not render Dolan's work refusal unreasonable. Accordingly, Bryce Dolan's discrimination complaint shall be granted.[5]

Finally, the parties have also presented testimony and exhibits concerning Dolan's alleged disability. This evidence was admitted solely for the purpose of determining the issue in this case, *i.e.*, whether the hazards perceived by Dolan were reasonable and whether Dolan's April 16, 1996, work refusal is protected activity under section 105(c) of the Mine Act. It is emphasized that issues concerning Dolan's alleged contamination during the course of his employment with F&E Erection Company, as well as his allegations of disability as a result of his F&E employment, are beyond the scope of this proceeding. Thus, nothing herein shall be construed as a substantive finding on Dolan's medical condition.

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[5] Commission Rule 44(b), 29 C.F.R. § 2700.44(b), provides:

> Immediately upon issuance of a decision by a Judge sustaining a discrimination complaint brought [by the complainant] pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3), the Judge shall notify the Secretary in writing of such determination. The Secretary shall file with the Commission a petition for assessment of civil penalty within 45 days of receipt of such notice.

Accordingly, a copy of this decision shall be provided to the Office of the Solicitor for appropriate action.

ORDER

In view of the above, Bryce Dolan's April 16, 1996, work refusal was protected by the provisions of section 105(c) of the Mine Act. Consequently Bryce Dolan's discrimination complaint **IS GRANTED**. In order to determine the appropriate relief to be awarded in this matter, **IT IS ORDERED** that:

1. Within 21 days of the date of this decision, the parties shall confer in person or by telephone for the purposes of:

(a) Stipulating to the hourly and weekly rate of pay for the purpose of computing back pay.

(b) Stipulating to the period of back pay that Dolan is entitled to. Dolan currently claims total lost wages of $49,576.50 for the period April 16, 1996, through July 25, 1997, the date he began receiving worker's compensation benefits. Dolan asserts this total represents his salary of $715.00 per 50-hour week ($143.00 per day) plus $1,600.00 in monthly bonuses (bonuses of $100.00 per month). F&E contends the appropriate period for computing back pay is April 17, 1996, the day following Dolan's work refusal, through August 14, 1996, the date Dolan claims he became disabled.

(c) Stipulating to the attorney's fees for Dolan's counsel. Dolan's counsel has provided F&E with an itemized bill for services reflecting 121 billable hours for his services, and 215.5 billable hours for the services of his Legal Assistant. The total legal fee sought is $23,745.00. The itemized bill does not state the hourly fee for counsel's services and the hourly fee of his Legal Assistant.

(d) Stipulating to any other reasonable and related economic losses or litigation costs incurred as a result of Dolan's protected work refusal. In addition to attorney's fees, Dolan has claimed litigation costs of $7,790.21, consisting of: $1,670.36 for miscellaneous expenses such as postage and copying; $550.85 for subpoenas, service and witness fees; $1,669.00 for transcript costs; and $3,900.00 for an expert witness fee.

2. If the parties are able to stipulate to the appropriate relief in this matter, they shall file with the judge, within 30 days of the date of this decision, a Proposed Order for Relief. F&E's stipulation of any matter regarding relief shall not waive or lessen its right to seek review of this decision on liability or relief.

3. If the parties are unable to stipulate to the appropriate relief, Dolan shall file with the judge, and serve on opposing counsel, within 30 days of the date of this decision, a Proposed Order for Relief. Dolan's proposed order should address the date he last looked for work, the date he claims he became disabled, and justification, including citations to pertinent case law, for his claim of back pay for a period during which he alleges he has been unable to work. Unless a component of Dolan's requested relief has been stipulated to by F&E, Dolan's request for relief should be supported by documentation, such as check stubs, worker's compensation awards, and/or bills and receipts, to support any of the losses or expenses claimed.

4. If Dolan files a Proposed Order for Relief, F&E shall have 14 days to reply. F&E should state with specificity any objections to Dolan's request for relief. In this regard, F&E should state its position regarding all elements of Dolan's claim with respect to his back pay and his claim for recovery of attorney's fees and other litigation expenses.

5. This decision shall not constitute the judge's final decision in this matter until a final Decision on Relief is entered.

Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUN 12 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 98-25-M A.C. No. 39-00670-05519
v.	:	Dakota Quartz Plant
MINERAL TECHNOLOGY CORPORATION, Respondent	:	

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Robert L. Cullum, Mineral Technology Corporation, Custer, South Dakota, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Mineral Technology Corporation ("MinTec"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petition alleges three violations of the Secretary's safety standards. A hearing was held in Rapid City, South Dakota.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Dakota Quartz Plant produces high purity quartz for the semiconductor industry. (Tr. 58-60). The plant receives raw material from two sources. Quartz ore is shipped from North Carolina, Wyoming, and the Black Hills. The plant also recycles quartz glass and fused quartz

cullet.[1] This material is shipped to the plant from all over the world. About 60 percent of the raw material processed at the plant is fused quartz cullet. MinTec grinds and purifies the raw material at the plant. The plant is very small and processes small quantities of material.

The company no longer mines quartz ore. (Tr. 59). MinTec uses a number of techniques to grind and purify the cullet, quartz glass, and quartz ore that is shipped to the plant. Part of the purification process involves screening material and passing the material through an electro-magnet to remove impurities.

Mr. Robert L. Cullum, President of MinTec, stated that he is "not certain" that the plant is subject to the jurisdiction of the Mine Act. (Tr. 4). He stated that he did not contest MSHA's jurisdiction in this proceeding. MinTec did not offer evidence on this issue except Mr. Cullum's description of the plant. The question whether the plant is subject to the jurisdiction of the Mine Act is always at issue in a proceeding before the Commission. As discussed below, I conclude that MSHA had jurisdiction to inspect the Dakota Quartz Plant at the time the citations were issued.

The starting point for an analysis of Mine Act jurisdiction is the definition of the term "coal or other mine," in section 3(h)(1). A coal or other mine is defined, in pertinent part, as "(C) lands, ... structures, facilities, equipment, machines, tools, or other property ... on the surface or underground, used in ... the work of extracting minerals from their natural deposits, ... or used in ...the milling of such minerals...." 30 U.S.C. § 802(h)(1). The Senate Committee that drafted this definition stated its intention that "what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978); *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D. C. Cir. 1984).

The issue is whether MinTec's grinding, screening, and purifying of quartz-bearing material is the "milling" of "minerals." The term "milling" is not defined in the Mine Act. The MSHA-OSHA Interagency Agreement defines "milling" as "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives." 44 *Fed. Reg.* 22827, 22829 (April 17, 1979). The Interagency Agreement goes on to provide, in pertinent part, that "milling consists of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying, ..." *Id.* It is clear that at least some of these activities occur at the Dakota Quartz Plant. In addition, it is undisputed that some of the materials that are milled at the plant are minerals extracted from the "crude crust of the earth" from their natural deposits. Thus, I find that the plant is subject to Mine Act jurisdiction for purposes of this case. If the

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[1] The term "cullet" is defined as broken or waste glass produced at a glassworks. *A Dictionary of Mining, Mineral, and Related Terms,* 289 (1968).

plant processed only cullet and quartz glass, it would not be subject to the jurisdiction of the Mine Act.

It is important to keep in mind that the Commission and the courts have uniformly held that the Mine Act is a strict liability statute. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products Co., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

A. Citation No. 4644826

On August 7, 1997, MSHA Inspector John R. King issued a section 104(a) citation alleging a violation of 30 C.F.R. § 56.12008. In the citation, the inspector alleged that the energized 220-volt line entering the No. 1 magnet in the mill was not properly bushed or adequately insulated where it passed into the magnet. The citation states that the outer jacket and the bushing had worn away, subjecting the inner insulation to possible damage. It states that such damage could potentially cause a short in the system. Inspector King determined that the violation was of a significant and substantial ("S&S") nature and that MinTec's negligence was moderate. The Secretary proposes a penalty of $178 for the alleged violation. The safety standard requires that power wires and cables be adequately insulated where they pass into electrical compartments. It further requires that, where insulated wires pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Inspector King testified that the outer jacket on the power line had pulled out of the metal frame of the electromagnetic separator and a bushing was not present in the opening. (Tr. 12; Ex. P-3). The opening in the metal frame was about an inch in diameter. He stated that the insulated wires could become damaged due to vibration. The purpose of a bushing is to keep the power wires locked into place so that they do not come loose or sustain mechanical damage. (Tr. 15). Inspector King further testified that the condition was readily visible. (Tr. 14). He believes that a bushing had been present in the past but that it had been pulled loose or had fallen out. (Tr. 17). He testified that the condition presented an electric shock hazard if bare wires became exposed as a result of the vibration. The inspector testified that the condition was adjacent to a walkway and that if an employee were to slip and fall, he could come in contact with any bare wires or nearby metal components and suffer an electric shock. (Tr. 18).

Inspector King determined that the violation was the result of MinTec's moderate negligence because he assumed "that the condition had existed for quite some time." (Tr. 19). He believes that the violation was S&S because it was reasonably likely that "a fatality could occur." (Tr. 20). He also relied on the fact that the continuity resistance testing of the grounding system had not been conducted during the past year, that there was exposed metal in the area, and that the violation was near a walkway. *Id.* The condition was terminated immediately.

The magnetic separator is in an isolated room above storage tanks. (Tr. 22). This room has only one entrance. MinTec has a company policy that no employee is to enter the room containing the magnetic separator until the electromagnet is shut down. MinTec de-energized the electromagnet when Inspector King inspected the area but he was not aware that it was the policy of the company to shut it down whenever anyone enters the area. The inspector testified that he would have reconsidered the gravity of the violation had he known about the company's policy. (Tr. 31). Mr. Cullum testified that the company instituted this policy because the room often gets very dusty when the magnetic separator is operating and the company does not want to expose its employees to the dust. (Tr. 61). He stated that there are no exceptions to this policy. He further testified that employees rarely enter the room containing the magnetic separator. (Tr. 62). He stated that he did not know how long the cited condition existed.

MinTec does not contest the fact that a bushing was not present or that the outer jacket covering the wires had pulled back. I find that the Secretary established a violation of the safety standard. MinTec contests the inspector's S&S and negligence findings. I find that, given the particular conditions present in this case, the violation was not S&S. I reach this conclusion because the violation was in an isolated location and employees are not in the area when the electrical wires are energized. It was not reasonably likely that the hazard contributed to by this violation would result in an injury, assuming continued operations. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The vibration of the machinery had not exposed any bare wires. Even if an employee entered the area while the equipment was energized, in violation of company policy, the exposure to the hazard would not be great. It is unlikely that anyone would suffer an electrical shock, given the low level of exposure. I find that the violation was moderately serious.

I find that MinTec's negligence was moderate to low. Negligence is conduct that is "inadvertent," "thoughtless," or "inattentive." *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). In this case, I credit the testimony of Inspector King that the condition had existed for some period of time. Section 56.18002 requires mine operators to examine each working place at least once a shift for "conditions which may adversely affect safety or health." MinTec's examinations should have detected this violation. The fact that employees are required to shut down the magnetic separator before entering the area is a mitigating factor. Taking into consideration the civil penalty criteria, a penalty of $50.00 is appropriate for this violation.

B. Citation No. 4644827

On August 7, 1997, Inspector King issued a section 104(a) citation alleging a violation of 30 C.F.R. § 56.12028. In the citation, the inspector alleged that the continuity and resistance of grounding systems had not been tested for a 12-month period. The citation states that the most recent test had been conducted on July 1, 1996. Inspector King determined that the violation was S&S and that MinTec's negligence was moderate. The Secretary proposes a penalty of $220 for the alleged violation. As pertinent here, the safety standard requires that continuity and resistance of grounding systems shall be tested at least annually and that a record of such tests be kept.

Inspector King testified that he asked employees at the plant for a copy of the testing records and that they could only produce the record for July 1, 1996. (Tr. 34). These employees could not remember whether the test had been made and believed that it had not. Inspector King testified that if an operator fails to conduct this test, the integrity of the grounding system remains unknown. If there is an electrical short, the grounding system is designed to return the power to its source. Because the grounding test was not performed, it is possible that a ground fault would not trip the breakers and one or more employees could be injured. (Tr. 37-39).

Inspector King determined that MinTec's negligence was moderate because it had been cited for a violation of this standard in 1991 and 1995. He determined that the violation was S&S because it is highly likely that an employee will be seriously injured if a grounding system is faulty. He testified that there have been fatal accidents at mines under similar circumstances where these tests were not performed. (Tr. 35).

Mr. Cullum stated that it is possible that the testing was done but not recorded. (Tr. 63). Don Smith, the employee who did this testing, retired from the company. Cullum testified that he asked Mr. Smith about this test and Smith thinks that he did the test but did not record it. *Id.* Mr. Cullum further stated that in the previous instances when MinTec was cited for failing to conduct the test, the test had been completed but not recorded.

I find that the Secretary established a violation of the safety standard. I also find that it is likely that the test was never completed. Failure to complete the required test can contribute to a serious safety hazard. If a fault developed in the electrical system, employees would not be protected from shock hazards. The violation is S&S because it is reasonably likely that if the test is not completed an employee will be seriously injured, assuming continued operations. The violation was caused by MinTec's moderate negligence. I reach this conclusion based in part on the testimony of Inspector King that MinTec violated this same safety standard on two occasions in the recent past. A penalty of $150 is appropriate for this violation.

C. **Citation No. 7915033**

On August 7, 1997, Inspector King issued a section 104(a) citation alleging a violation of 30 C.F.R. § 56.12030. In the citation, the inspector alleged that the energized 110-volt electrical outlet by the No. 2 magnet had the hot and ground wires reversed and the 110-volt electrical outlet in the field office by the coffee pot had the hot and neutral lines reversed. Inspector King determined that the violation was S&S and that MinTec's negligence was moderate. The Secretary proposes a penalty of $220 for the alleged violation. The safety standard provides that when a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

Inspector King testified that he used an outlet tester during his inspection to test the electrical outlets at the plant. (Tr. 47). The tester indicates whether any of the wires attached to an outlet are reversed. The violation presents a potential hazard because electricity may continue to run into the frame of any device that is plugged into the socket, even after it is turned off. A hazard is presented if there is a fault in the device being used. In such an event, an employee could suffer a serious injury. He believes that the violation is S&S. (Tr. 50). He determined that the violation was caused by MinTec's moderate negligence because the continuity and resistance test, described above, should have revealed this violation and the fact that testing for reverse polarity is easy to perform. (Tr. 51).

Mr. Cullum testified that these electrical outlets had been present in the same condition for at least 20 years. He also stated that no other MSHA inspector had tested these outlets during past inspections. (Tr. 52, 66-67). He contends that the violation is not very serious and that the company was not negligent.

I find that the Secretary established a violation. Whether the violation is S&S is a close question. On one hand, the inspector testified that this type of violation can cause a fatal injury. On the other hand, this condition had existed for 20 years in the case of the outlet by the magnet and 30 years in the case of the outlet in the field office. The coffee pot is used at the field office outlet and electric hand tools may be used in the outlet at the magnet. I find that the violation was not S&S. While it is possible that an employee could suffer an electric shock if the coffee pot or hand held tools malfunctioned, such an event was not reasonably likely in this case. The violation was moderately serious. I also find that MinTec's negligence was very low. The cited conditions had existed for a long time, had not been previously cited by MSHA, and had not caused an injury to an employee. The condition should have been revealed with a thorough continuity and resistance test. Nevertheless, MinTec was not aware of the violation and, given the length of time that the violation existed without detection by MSHA or the company, MinTec's failure to correct the cited conditions was not the result of its moderate negligence. A penalty of $50 is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that seven citations were issued at the Dakota Quartz Plant between August 1995 and August 1997. (Ex. P-8). The Dakota Quarts Plant is a small facility and MinTec is a small operator. All of the violations were rapidly abated. The penalties assessed in this decision will not have an adverse effect on MinTec's ability to continue in business. The gravity and negligence criteria are discussed separately for each violation. Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
4644826	56.12008	$50.00
4644827	56.12028	150.00
7915033	56.12030	50.00

Accordingly, the citations listed above are hereby **AFFIRMED** as modified above, and Mineral Technology Corporation is **ORDERED TO PAY** the Secretary of Labor the sum of $250.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 15 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-302
Petitioner	:	A.C. No. 15-16478-03602
v.	:	
	:	Hubb No. 5
HUBB CORPORATION,	:	
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, and Ronnie R. Russell, Conference and Litigation Representative, Mine Safety and Health Administration, Barbourville, Kentucky for the Petitioner;
Gene Smallwood, Esq., Polly & Smallwood, Whitesburg, Kentucky for the Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary") alleging that Hubb Corporation ("Hubb") violated various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations.[1] Pursuant to notice, the case was heard on March 10-11, 1998. The parties filed post hearing briefs on May 29, 1998.

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[1]/ At the hearing, Hubb agreed to pay the full assessed penalties of $2,016 for the following citations: Nos. 4483650, 4483653, 4483654, 4483657, 4483659, 4483660, and 4483705. I have reviewed the documentation concerning these citations, and find that the agreement is consistent with the Federal Mine Safety and Health Act of 1977, and is approved.

FINDINGS OF FACT AND DISCUSSION

I. Citation No. 4582462.

On November 7, 1996, Lawrence Rigney, an MSHA inspector, inspected the 005 section at Hubb's No. 5 Mine. He observed the operation of a 21 SC Joy shuttle car that is used to transport coal from the face to the dump. It is provided with two operator's seats, one inby, and the other outby. The car also has two sets of foot pedal controls, one outby, and the other inby. The tram pedal controls the speed of the car, and the brake pedal is used to stop the car.[2] In normal operations, when driving inby the operator sits in the chair facing inby and controls the shuttle car by using the outby set of foot pedals. When traveling outby, the operator sits in the seat facing outby, and controls the vehicle with the inby set of foot pedals.

According to the inspector, he observed that the outby brake and tram pedals were missing. The inspector testified that when he observed the shuttle car it was heading outby, and the operator was sitting in the inby seat facing inby, but looking over his shoulder. The inspector issued a citation, which, as amended on January 23, 1997, alleges a violation of 30 C.F.R. § 75.1725(a). Section 75.1725(a), supra, provides, as pertinent, that mobile equipment ". . . shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

In essence, according to the inspector, because the outby pedals were missing, the operator was required, when traveling outby, to face inby and look over his shoulder to see where he was going. The inspector indicated that he saw the operator with his upper torso out of the cab, which subjected him to the danger of being caught between the shuttle car and the rib, and being injured. He also indicated that an operator driving outby and looking over his shoulder would have a blind spot to his left, which could possibly cause him not to see a person in the area and possibly injure that person.

According to the inspector, it was not possible for the operator to sit facing the direction of travel, and operate the foot pedals. However, on cross-examination, it was elicited that the operator could use a hand lever to tram the shuttle car, and could reach to activate the brake to stop the car.

Danny Whitaker, Hubb's superintendent, opined that the shuttle car was maintained in safe condition and indicated that an operator can turn backwards to face the direction of travel, and still operate the foot pedals.

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[2]/ The car is also provided with an emergency brake operated by a hand lever.

In essence, it is the gravamen of the Secretary's position that the shuttle car was not in safe operating condition because, driving outby, the operator could activate the inby pedals only by sitting facing inby, and looking over his shoulder in the direction of travel, which would place him outside the protection of the cab, and expose him to various hazards. However, the inspector did not provide any detailed explanation to support his opinion that, in traveling outby, the operator would physically be unable to sit facing outby, and operate the inby foot pedals. No evidence was adduced regarding the spatial relationship between the outby seat, and the inby pedals. Although the shuttle car operator might have been subjected to various hazards when traveling outby and looking over his shoulder, no citation was issued for this practice.

In order for the Secretary to prevail under section 75.1725(a), supra, it must be established that the missing foot pedals caused the shuttle car not to be in safe operating condition. I find that, for the above reasons, the Secretary has not met her burden in this regard. Hence, I find that it has not been established that Hubb violated section 75.1725(a), supra, and accordingly Citation No. 4582462 shall be dismissed.

II. Order No. 4582535.

A. Violation of the Ventilation Plan

William R. Johnson, an MSHA inspector, testified that when he inspected the 005 Section on November 7, 1996, the deflector curtain in the No. 7 heading was 66 feet outby the deepest point of penetration. He issued a citation alleging a violation of 30 C.F.R. § 75.370(a)(1) which, in essence, requires a mine operator to develop and follow its ventilation plan. The ventilation plan in effect in November 1996, provided that the maximum distance from the end of the line curtain to the point of deepest penetration of the working face should be 40 feet. Hubb does not dispute the violation. Based on Johnson's testimony, that I found credible, I find that Hubb did violate its ventilation plan, and hence did violate section 75.370(a)(1), supra.

B. Significant and Substantial

According to Johnson, the purpose of the deflector curtain is to remove the noxious gases and respirable dust from the face. He indicated that if the curtain is not within 40 feet of the point of deepest penetration, then the noxious gases and dust produced would not be diluted at the face. According to Johnson, as he continued inby beyond the deflector curtain, at a point toward the end of the last set of rib supports, approximately 40 feet from the point of deepest penetration, he could not sense any ventilation. He opined that, since the deflector curtain was more than 25 feet outby where it should have been, and there was no ventilation at the face to dilute dust or methane, the violation should be considered significant and substantial.

He explained that his opinion was based on these factors, and also the mine's history of liberating methane,[3] and the possibility of an explosion resulting from the miner's bits creating sparks when they strike the roof. He indicated that in the event of an explosion seven miners working downwind of the deflector curtain could suffer burns. He also stated that the respirable dust not being ventilated could cause black lung disease.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981).

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

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

In, *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (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); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

3/ On cross-examination, Johnson noted that he did not find any methane present in this or any of the other eight headings on the section. He also noted that the miner in the section is provided with a methane monitor which would cut off power to the miner if methane would be present at 2 percent, which is less than the explosive range of between 5 and 15 percent. He also acknowledged that the miner has a scrubber to remove coal dust.

Hubb presented the testimony of the day shift foreman Scott Day, and Doyle Cornett, a miner's helper on the first shift. Neither of the witnesses contradicted Johnson's testimony relating to the distance of the reflector curtain to point of the deepest penetration, the lack of ventilation in the areas of the working face, the presence of ignition sources, and the mine's history of liberating methane.

Inasmuch as Johnson's testimony was not impeached or contradicted, I accept it. I find that within the framework of his testimony, it has been established that the violation was significant and substantial.

C. Unwarrantable Failure

According to Johnson, when he arrived after the start of the second shift, the section was producing coal. Johnson testified that when he first arrived on the unit ". . . the curtain was so far behind the deepest point of penetration that I detected it immediately." (Tr. 202) (Emphasis added.) He indicated that he did not have to measure it to know that the curtain was more than 40 feet from the point of deepest penetration.

Day indicated that he started the pre-shift examination approximately 7:30 a.m., on November 7. He inspected the curtain in the No. 7 heading, and it was within 40 feet of the point of deepest penetration.

According to Day, at the commencement of the shift on November 7, the face at the No. 7 heading contained gob that extended approximately 25 to 30 feet outby. He instructed the miner operator, Russell Dixon, and the miner helper, Doyle Cornett, to load the gob and then move the curtain inby. Day indicated that in removing the gob the curtain had to be moved "back from where it was hung" (Tr. 236) because "the miner would have torn it down" (Tr. 236). He said that at approximately 9:15 a.m., he inspected what they were doing, and they were loading gob.

According to Day, he was not aware that mining had commenced in the No. 7 hearing before the curtain was moved inby. Day indicated that at 4:00 p.m., on November 7, he first became aware that a citation had been issued for the placement of the curtain.

Day explained that it is mine policy to move the curtain inby along with the advance of mining, and that he tells miners at safety meetings that the curtain has to be within 40 feet of the face.

Cornett testified that on the morning of November 7, the curtain was at the edge of the gob 40 feet from the point of deepest penetration. He and Dixon removed the curtain in order to get the miner close to the rib in order to remove the gob. Cornett left the area to check curtains in other headings intending to return to replace the curtain. When he left the area, Dixon was still removing the gob. According to Cornett, when he returned, the miner was not in operation, the gob had not been removed, and the curtain had been hung within 40 feet of the face.

Based on the uncontradicted testimony of Hubb's witnesses, I find that the curtain was placed at point more than 40 feet outby the deepest penetration, sometime between 9:15 a.m. and 10:45 a.m. Hence, Hubb was in violation of the ventilation plan for less then 2 hours when cited by Johnson. However, since the curtain had been hung more than 26 feet beyond the 40 foot minimum distance from the point of deepest penetration, it is clear that it would have been obvious that Hubb was not in compliance with its ventilation plan. Accordingly, the level of its negligence was more than moderate. However, the Secretary did not rebut, impeach, or contradict Day's testimony that he told Cornett and Dixon to move the curtain inby, that he was not aware that mining had commenced and the curtain had not been moved up to its proper position, and that in safety meetings he makes his men aware that the curtain has to be within 40 feet of the deepest penetration. Within this context, I find that although Hubb was negligent to a more than moderate degree, the level of negligence did not reach aggravated conduct. Hence I conclude that it has not been established that the violation was as a result of Hubb's unwarrantable failure. (cf. *Emery Mining Corp.*, 9 FMSHRC 1997 (1987)). I find that the section 104(d)(1) order at issue should be reduced to a section 104(a) citation that is significant and substantial.

D. Penalty

I find that the violation was of a high degree of gravity in that it could have resulted in miners suffering serious burns or suffocation. For the reasons noted above, I find that the level Hubb's negligence was more than moderate. Also, taking into account Hubb's history of violations, I find a penalty of $4, 000 is appropriate.

III. Order No. 4582536.

According to Johnson, he observed two areas of loose ribs in the No. 6 entry. He described the first one as a block of coal that was loose from the rest of the rib. He said that the block was 1 foot thick, 15 feet long and 6 feet high, and was located just inby the last open crosscut. Also, Johnson observed a 1 foot thick, 12 feet long, and 4 feet wide block of coal just inby the next to the last open crosscut. He issued a section 104(d)(1) order alleging a violation of 30 C.F.R. § 75.202(a) which provides that the roof of areas where persons work or travel shall be supported or controlled to protect persons from hazards related to falls of the ribs. Hubb did not contest the fact of the violation. Based upon Johnson's testimony, I find that Hubb did violate section 75.202, supra.

Johnson opined that the violation was significant and substantial. He noted that the cited areas were loose because there were ". . . four to five inches of crack between the block of coal and the solid rib" (Tr. 303) (sic). The crack ran the length of each block. Johnson opined that it was reasonably likely that the cited rib areas would fall. According to Johnson, all miners in the unit pass through the cited areas in shuttle cars . It was Johnson's opinion that although these cars are equipped with canopies, should the cited rib areas loosen and fall, men in the cars could be injured as the sides of the cars are open. He noted that he has investigated accidents where ribs have fallen and caused fatalities.

According to Day, he "believed" that he saw the cited blocks removed by a scoop after they were cited. Day testified that the bucket on the scoop hit the cited material three or four times "[r]eal hard" (Tr. 332), and that the operator ". . . had to take the bucket and move it up and down and pull it to break it loose" (Tr. 332).

Although the cited material may not have been in imminent danger of falling, the presence of cracks, as noted by Johnson and Day, running the length of the cited blocks, as described by Johnson and not contradicted by Day, supports Days opinion that the cited blocks were loose. I therefore accept his opinion.

Neither Day nor Denny Whitaker, Hubb's superintendent, contradicted or impeached Johnson's testimony regarding the exposure of miners to the hazard contributed to by the violation at issue. Thus, within the framework of Johnson's testimony, I find that it has been established that the violation was significant and substantial. (See, *Mathies*, supra).

According to Johnson, the violation was "real obvious" when he came to the section. He said that "I saw it immediately when I walked by it" (Tr. 309). He also noted that there was evidence of rock dust in the cracks of the cited areas. He opined that if the cited area had broken loose, they would have been clean and black. Johnson concluded that the conditions should have been found on the pre-shift and on-shift examinations, but that there were no notations to this effect in the pre-shift examination book.

On cross-examination, Johnson indicated that breaks in the ribs are usually caused by overhead pressure, and this could happen suddenly. Day indicated that in his inspection of the entry prior to the start of the shift on November 7, he did not see any loose ribs outby the last open crosscut, or behind the curtain inby the No. 6 entry. According to Day, prior to 10:45 a.m., on November 7, he was not aware of any loose ribs inby or the outby the last open crosscut. Day examined the areas at issue after they were cited. He noted that they were separated from the wall by an inch or 2 inches. He testified that the separations were not present when he had made his inspections earlier that morning. He could not recall if he saw rock dust in the separations.

Whitaker indicated that prior to the issuance of the citation at issue, he was not aware of any loose ribs inby or outby the last open crosscut.

Johnson's testimony that there was rock dust in the cracks of the cited areas would appear to be some evidence that the cracks occurred prior to the time the ribs were rock dusted.[4] In this connection, I note Day's testimony that he did not order the entry at issue to be rock dusted the morning of the inspection. On the other hand, I observed Day's demeanor and found his testimony credible that, subsequent to the issuance of the instant citation, when he examined the

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[4]/ Johnson's testimony was not impeached or contradicted by Hubb. Day testified that he did not recall if he saw rock dust in the separations, and Whitaker did not specifically testify that he examined the cracks and did not see any rock dust. I therefore accept Johnson's version.

areas cited, the cracks that he observed had not been present when he had made his inspection earlier that morning. He also had testified that he did not find any loose ribs when he made his inspection earlier on the morning of November 7. In this connection I note Johnson's testimony on cross-examination that cracks and breaks in the ribs could occur suddenly due to overhead pressure. I conclude that the eyewitness testimony of the conditions in existence in the morning on November 7, that I find credible, outweighs Johnson's opinion regarding the time of the occurrence of the cited conditions. I thus conclude that it has not been established that the level of Hubb's negligence rose to aggravated conduct. I thus find that it has not been established that the violation resulted from its unwarrantable failure. (see *Emery*, supra). Hence, the order at issue should be amended to a section 104(a) citation that was significant and substantial.

I find that the violation was of a high level gravity inasmuch as it could have resulted in a fatality. I find that any negligence on Hubb's part was not more than moderate. I find that a penalty of $4,000 is appropriate.

IV. Order No. 3822739.

On November 13, 1996, MSHA Inspector Darlas Day inspected the one right section, a nonproduction section consisting of old works. He tested the air movement with an anemometer and smoke tube, and did not see any air movement or methane in any of the five headings in the fifth and fourth set of headings.[5] In the No. 4 heading of the third set of headings, he noted no air movement, but 6/10 of a percent of methane. He issued an order alleging a violation of 30 C.F.R. § 75.321(a)(1) which in essence requires that the velocity of air should be sufficient to dilute harmful gases. Hubb did not contest the violation. Based upon Day's testimony, I find that Hubb did violate section 75.321(a)(1).

According to Day, the violation was significant and substantial. He explained that although miners are normally not in the cited areas, they do go there weekly in order to examine them. He indicated that due to the buildup of methane an explosion could have occurred resulting in a fatality or serious injuries to the miners present. He noted that rocks in the bottom and top of the headings in the area could fall and cause sparks which could lead to an ignition. In this connection he noted the presence of loose rocks in the third set of headings. Further, Day indicated that since methane replaces oxygen in the air, in the absence of air movement miners could suffocate. He opined that for all the above reasons, severe injuries or an explosion were highly likely to have occurred as a result of the violative conditions.

On cross-examination Day conceded that the mine is equipped with methane detectors, that the highest methane reading that he had observed was 6/10 of a percent which is below the explosive range or between 5 to 15 percent, and that not all rocks cause sparks.

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[5]/ Each set of headings consists of five headings.

I find that the weight of the evidence establishes that there was a lack of air movement in the cited area, and methane and a source for sparks were present which could have caused an ignition. Also, given continued mining operations, miners would be present in the area performing examinations. Given this combination of factors, I find that it has been established that the violations were significant and substantial. (see, *Mathies*, supra).

According to Day, the violation was as a result of Hubb's unwarrantable failure. In this connection, he testified that "when this condition was found" (Tr. 387), Bran Whitaker, Hubb's agent who was present, told him that he knew where the problem was. Whitaker took Day to another area where a curtain was nailed to the roof and ribs, and secured to the bottom to make it air tight in order to block the air from going to the section at issue, and to send it to the No. 6 section.

Hubb's president, James Hubbard, indicated that prior to the issuance of the order at issue he did not know that a curtain had been placed to block air from going to the section at issue. Once he was informed of the issuance of the instant citation, he investigated the matter. He indicated that he ascertained that Hubb's former superintendent, Johnny Littrell, who subsequently quit, had directed that a curtain be installed ". . . to improve air movement on the working section" (Tr. 419). He also indicated that Whitaker knew that this had been done, and that he was subsequently terminated by Hubb in January 1997. Hubbard indicated that it was Hubb's policy to vent air to the old works, and that Littrell should have removed the curtain.

I find that Lettrell's actions, as superintendent at the time, are the actions of Hubb. I find therefore that since Hubb did intentionally prevent air from going to the old works, and thus caused the violation at issue, its actions reached the level of aggravated conduct. Thus, I find that the violation resulted from its unwarrantable failure. (see, *Emery*, supra).

I find that the order at issue shall be affirmed as written. I find that the level of gravity was high inasmuch as a fatality could have resulted. Similarly, the level of Hubb's negligence was high for the reasons set forth above. I find that a penalty of $5,000 is appropriate.

V. Citation Nos. 4483651, 4483652, 4483655, and 4483658.

Between close to midnight April 6, 1996, and approximately 7:30 a.m., April 7, 1996, Larry Bush, an MSHA inspector, inspected four underground power centers at Hubb's Mine No. 5. He said that the power centers were 10 to 12 feet long, 5 to 6 feet wide, and 28 to 32 inches high. They were provided with a window of clear glass, approximately 1 foot by 6 inches. A 7,200 volt cable led into the power center on one side. The other side contained reciprocals for utility plugs and provided 480 volts.

According to Bush, all four power centers had accumulations of float coal and rock dust on them. He noted that the No. 8 power center, which located the furthest inby, had float coal dust that was darker and more concentrated than the power centers Nos. 4 and 6 which were further outby.

Bush shined his cap light through the window of the power centers and saw accumulations on the interior components. He did not measure the depth of the accumulations, nor did he test the composition of the accumulations. Bush issued one citation for each of the power centers. Each citation alleges a violation of 30 C.F.R. § 75.400 which provides in essence, that "coal dust . . . and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on . . . electrical equipment therein."

On the third shift the day after the power boxes has been cited, Hubbard took photographs of each box. According to Hubbard, he removed the accumulated material from inside of each box and placed it in a separate bottle for each box with the exception of the material inside power box No. 4 which he stated was not enough to sample. Later on that week, Hubbard took the samples to Blue Diamond Laboratories. ("Blue Diamond"). The person who tested the material Hubbard had removed from the power centers was not called by Hubb to testify. However, Hubb introduced into evidence a deposition of Nancy Stidman, a supervisor at Blue Diamond, who had tested the sample, and concluded that the material was not coal, coal dust or combustible material.

In order to establish that Hubb violated section 75.400, supra, the Secretary has the burden of proving that the material in the power centers consisted of "coal dust, . . . and other combustible materials . . . ." The inspector testified that he saw float coal dust and coal dust on all the power centers, and in the interior of the power centers, with higher concentrations of float coal dust in the inby power centers. However, he did not explain with any detail the basis for his conclusion that the materials consisted of float coal dust. He did not touch nor test the materials. On the other hand, photographs taken of the interiors of the power centers one day after the citations had been issued and before any abatement had occurred, do not appear to depict any accumulations black in color. Further, the deposition of Stidman indicates that the materials that were tested were found to be not combustible.

Within the above framework, I find that since the totality of Hubb's evidence contains the basically uncorroborated hearsay deposition of Stidamn, it is insufficient to affirmatively establish that the accumulated materials were not combustible. (see, *Midcontinent Resources, Inc.*, 6 FMSHRC 1132 at 1136-1137 (1984)). However, considering the fact that the Secretary's witness did not provide a basis for his opinion, nor was it supported by testing or close examination of the material inside the power box, I find that the totality of Hubb's evidence is sufficient to rebut the Secretary's evidence. I thus conclude that the Secretary has failed to meet its burden of proving that the accumulated materials consisted of float coal dust and other combustible materials. For these reasons, I find that these citations shall be dismissed.

VI. Citation No. 4483656.

On April 7, 1996, MSHA Inspector Larry Bush inspected the 7,200 volt cable leading to the No. 7 power center. The cable consisted of an insulated outer jacket, three insulated leads, one insulated ground, and two ground leads that were not insulated, all contained under the outer

insulated jacket. Bush observed an area of the cable, approximately 2 inches long, that was broken, and torn to a width of approximately 1/8 to 1/4 inch. He indicated that only the outer jacket had been damaged. However, he was able to see one lead through the tear. He issued a citation alleging a violation of 30 C.F.R. § 75.517 which requires that cables "shall be insulated adequately and fully protected."

Hubbard examined the cable on the evening of day after it had been cited, and before the violation had been abated. He took pictures of the cable which do not appear to indicate any cut in the cable. Hubbard testified that he saw a "marred" (Tr. 527, 529) area on the cable that was about 2 inches long, but that "[b]arely"(Tr. 530) penetrated below the surface. He estimated that the penetration below the surface was approximately 1/10 of the total depth of outer jacket. Hubbard testified that no internal leads were exposed.

In evaluating the condition of the cable, I place more weight on the live testimony of eyewitnesses rather on the photographs which are not that clear. I observed Bush's demeanor and found his testimony credible regarding his observations. Also, Hubbard conceded that a cut in the outer insulation of the cable approximately 2 inches long penetrated below the surface. I thus find that it has been established that the cable was not "adequately and fully protected." (emphasis added). Accordingly, I conclude that Hubb did violate section 75.517 supra.

According to Bush, the cable is subject to pre-shift examination and weekly checks. He opined that those persons who check the cable would possibly be subject to shock and burns in contacting the not fully insulated cable. He also indicated that this condition could lead to a fire. However, since, even according to Bush's testimony the cut extended only 2 inches, and the leads under the outer insulation were fully and adequately protected, I find that it has not been established that the violation was significant and substantial. (see, *Mathies*, supra).

I find that the violation was of a moderately serious level inasmuch as it could have led to a fire or serious injuries. According to Bush, since the cable should be checked weekly and since the operator has to check it daily for hazards, any inspection of the cable should have revealed that it was not "fully protected." However, there is no evidence in the record as to when the violative condition occurred. I thus find that it has not been established that the Respondent's negligence was more moderate. I find that a penalty of $50 is appropriate for this violation.

VII. Citation Nos. 4483701 and 4483703.

On April 7, 1997, while inspecting the 005 Section, Bush observed an accumulation of oil, oil soaked oil, and coal dust on a roof drill. He said that the oil soaked coal around the blower motor was 1 to 2 inches deep, and contained lumps of coal and dust. He also observed oil that he described as clear hydraulic oil, oil soaked dust, dust black in color, lumps that looked "greasey black" (Tr. 566), and gray rock dusted material on a pump motor. He issued a citation for each of these motors. Each citation alleges a violation of section 75.400 supra.

Respondent did not impeach the credibility of the inspector's testimony. Nor did it present any testimony of any eyewitnesses to contradict or rebut Bush's testimony regarding the conditions he observed. I therefore accept his testimony and find that the conditions described by him did exist, and that accordingly Hubb did violate section 75.400, supra, as set forth in the two citations at issue.

Bush opined that both these citations were significant and substantial. He referred to the fact that oil is a source of fire, and oil soaked coal is volatile, and "extremely" hard to extinguish (Tr. 556). He also set forth various ignition sources such as electrical motors and components which he termed "common source(s) of failure" (Tr 557). He indicated that these items and the couplers and belts are friction sources should they fail. He noted that the couplers "can . . . throw sparks . . . not sparks but hot metal off when they fail" (Tr. 557). He also noted that the belts "should they stall or burn . . . heat real quick and can cause fire" (Tr. 557) (sic).

Hubb did not present any eyewitness testimony to discredit, impeach, or contradict Bush's testimony regarding the existence of these conditions. Thus, I accept his testimony and his opinions, and conclude that the violations were significant and substantial. (See, *Mathies*, supra).

Inasmuch as the violations could have resulted in a fire which could have caused serious injuries, I find that the violations were of a high level of gravity. Bush opined that the areas cited are required to be visually checked prior to the start of the shift, and that electrical equipment are to be checked weekly for hazards. He therefore opined that Hubb should have been aware of the volative conditions. Hubbard testified that in general it is Hubb's policy to clear accumulations of coal, dust, and oil prior to every shift, and that miners are so informed in meetings. He said that this policy is enforced by the mine superintendent. There is no evidence regarding how long the accumulations had existed prior to being cited. I thus find that the level of Hubb's negligence was less than moderate. I find that a penalty of $175 for each of these citations is appropriate.

VIII. Citation No. 4483704.

Bush testified that in the course of his April 7, 1997, inspection he noted that the hose on the fire suppression system on the shuttle car on the 005 section was loose. He cited Hubb alleging a violation of 30 C.F.R. § 75.1107 which, in essence, requires that fire suppression devices be installed on unattended underground equipment. Respondent did not present any witnesses to rebut, impeach or contradict Bush's testimony regarding his observations. I thus find that although the shuttle car was provided with a fire suppression system it was not installed properly because the hose was not affixed adequately as it was loose. I thus find that it has been established that Hubb did violate section 75.1107, supra.

Bush indicated that the fire suppression system is the first source of fire fighting capability in the event of a fire. He noted that the subject shuttle car had been cited for an accumulation of oil and coal dust. Hubb did not present any eyewitness testimony to impeach or contradict these observations. I thus find the violation was significant and substantial. (see, *Mathies*, supra).

Bush indicated that Hubb is required to check all equipment prior to the start-up at each shift, and examine the equipment weekly for hazards. However, there is no evidence how long a period the hose was loose prior to its being cited by Bush. I thus find that Hubb's negligence was less than moderate. I find that a penalty of $200 is appropriate.

ORDER

It is **ORDERED** that:

(1) Citation Nos. 4582462, 4483651, 4483652, 4483655, and 4483658 be **DISMISSED**;

(2) Order Nos. 4582535 and 4582536 each be **AMENDED** to a section 104(a) citation that is significant and substantial;

(3) Order No. 3822739 and Citation Nos. 4483701, 4483703, and 4483704 be **AFFIRMED** as written;

(4) Citation No. 4483656 be **AMENDED** to cite a nonsignificant and substantial violation; and

(5) Hubb pay a total penalty of $15,616 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 18 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-114
Petitioner	:	A.C. No. 46-07537-03549
v.	:	
	:	
APPALACHIAN MINING, INC.,	:	
Respondent	:	Alloy No. 1 Mine

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Petitioner;
Julia K. Shreve, Esq., Jackson & Kelly, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Appalachian Mining Inc., (Appalachian) with one violation of the standard at 30 C.F.R. § 77.1700, and seeking a civil penalty of $157.00 for the alleged violation. The general issue before me is whether Appalachian committed the violation as alleged and, if so, what is the appropriate civil penalty considering the criteria under Section 110(i) of the Act.

Citation No. 4203309 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.1700 and charges as follows:

> Ben Rucker, an employee of Austin Powder Company, doing contract blasting for Appalachian Mining Inc., was observed working in the Scrabble Creek point area of the mine, preparing a shot, and did not have any communications with other employees at this mine, nor was Mr. Rucker in sight of any other employees of the mine. The explosive truck No. 20323 being used was not equipped with two-way communications.

The cited standard, 30 C.F.R. § 77.1700, provides as follows:

> No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen.

It is undisputed that on the morning of March 5, 1997, prior to the 8:15 a.m. issuance of the citation at bar, Ben Rucker, was working in the Scrabble Creek area of the subject mine and was neither in sight, nor within hearing distance, of any employee and was without two-way communication. Rucker was an employee of Austin Powder Company, which was performing contract blasting for Appalachian

Rucker's testimony is undisputed. Rucker was a certified surface blaster and had been since August 1992. On March 5, 1997, he arrived at his work site at the Scrabble Creek area around seven or 7:30 a.m., and loaded three or four holes before the MSHA inspectors arrived. At each of these holes, he had inserted a cap into the primer, placed it into the hole, loaded the ANFO explosive and shoveled drill dust into the hole. The holes were 25 feet deep on the outside of the drill bench and 15 feet on the inside of the bench. The drill bench was muddy from the rain the night before and was flat. The holes were 6 and 3 1/4 inches in diameter with surrounding dust mounds two to eight inches high. The nearest person was a mile away.

According to Rucker, both the primer and the cap are explosive and if you drop a primer forcefully it could detonate. In addition, if a primer should become stuck in a drill hole and, if in trying to remove it, the trunk line snaps, it could also detonate. Rucker acknowledged that there are occasions when he tugs on a primer and cap to see if it is stuck in a drill hole but asserted there is a difference between gently tugging on the line and pulling it strongly, which could detonate the cap. Rucker observed that the dust piles remaining from drilling constituted a tripping hazard and the ground in this area was muddy. On this occasion he had been carrying 50 pound bags of the ANFO from the explosives truck to the holes he was loading.

According to Rucker, his next step that morning would have been to drive the truck that was at the Scrabble Creek site to another truck which had communications so he could contact his boss and ask for a warning horn. He would then have returned to the shot area, wired the shot and strung out the trunk line. His boss, Roger Mason, would then make sure the area was clear. Rucker would then blow his warning horn, wait three minutes and set off the shot.

Leo Inghram has been an MSHA inspector since 1975. He also has 30 years experience in the mining industry and certifications as a fire boss, underground blaster and mine foreman. Inghram testified that if a primer became stuck while being loaded and if you pulled the primer out of the detonator it could explode in the hole. He was also concerned with a tripping hazard on the bench with Rucker carrying 50 pound bags of ANFO.

MSHA supervisory inspector, Aubrey Castanon, is a 26-year MSHA employee. He also has seven years additional industry experience. He accompanied Inghram on this inspection. Castanon described the bench area as 15 to 20 feet wide, relatively level with several holes drilled and several loaded with trunk lines emanating from the holes. Castanon also observed three or more dust mounds in the area 8 to 10 inches high and ruts 3 to 4 inches deep. Castanon testified that loading explosives is indeed hazardous noting that the explosive cap has to be inserted in the primer correctly and that if it is done improperly and you tug on it, it could explode. He also observed that if a cap were laid beside a hole before priming and stepped on, it could accidentally go off. Castanon was also concerned about carrying 50 pound bags of ANFO in an area where you could trip or fall into a hole or trip on one of the trunk lines.

Within this framework of evidence, I find that the Secretary has established the elements of a violation of the cited standard. The hazards associated with handling explosives and carrying 50 pound bags of ANFO over the subject terrain clearly constituted hazards within the meaning of the standard. Indeed, even Roger Mason, Appalachian's superintendent at the time, acknowledged that handling explosives is hazardous. While Kenneth Purdue, manager of safety for parent company Pittston Coal Company, testified that he had heard of lab tests that purportedly demonstrated you cannot stretch the trunk line and break it, thereby causing an explosion, I give but little weight to this testimony. None of the purported laboratory studies or results were brought to hearing to be scrutinized by cross examination. In addition, in rebuttal, MSHA Supervisory Inspector Castanon, testified that there have been actual cases of "snap and shoot" detonations. He referred to a case involving ICA Explosives Company, in which an employee had backed his "Bronco" over a trunk line, severed the trunk line and detonated the explosives.

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

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> *See also Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

Considering the credible evidence presented by the Secretary in this case, I conclude that indeed, there was a reasonable likelihood that reasonably serious injuries could result or be aggravated by the inability of Mr. Rucker to have been able to communicate or contact other persons in the event of serious injuries resulting from slipping, falling, breaking a leg, or from inadvertent detonation. It is reasonably likely that such an incident would result in reasonably serious injuries. The violation was therefore "significant and substantial" and of serious gravity.

In reaching this conclusion I have not disregarded Appalachian's reference in its brief to Inghram's testimony that he did not "think that it was reasonably likely that an explosion was going to occur." However, it is apparent that Inghram's testimony in this regard was misconstrued in that this testimony was directed to the possibility of an explosion if Rucker tripped and fell with a 50 pound bag of ANFO.

I do not find however, that Appalachian is chargeable with significant negligence. While the Secretary argues that the cited truck had been without two-way communications for three or four months, it is undisputed that before this date Rucker either worked with a partner or had another truck present with proper communications available. It appears therefore, that this event was isolated and was the first occasion Rucker had been assigned to work alone without two-way communications. He was under the direct and immediate supervision of contractor, Austin Powder Company, and it cannot be inferred that Appalachian had any advance knowledge of the violation or that it reasonably could have had such knowledge under the circumstances. There is no evidence of any prior similar violations. Under these circumstances, indeed, Appalachian is chargeable with but little negligence. In assessing a civil penalty I have also considered the prior history of violations, the size of the operator, and the good faith abatement.

ORDER

Citation No. 4203309 is affirmed and Appalachian Mining Inc., is directed to pay a civil penalty of $75.00, within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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JUN 23 1998

BHP COPPER COMPANY, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 98-189-RM
v.	:	Citation No. 7922328; 3/13/98
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	San Manuel Mine ID No. 02-00151

DECISION GRANTING CONTESTANT'S MOTION FOR SUMMARY DECISION

This contest proceeding was brought by BHP Copper, Inc., ("BHP") under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the "Mine Act" or "Act"). BHP contests Citation No. 7922328, issued on March 12, 1998, alleging a violation of section 103(a) of the Mine Act. The condition or practice section of the citation states:

> The operator impeded MSHA's investigation into a March 4, 1998, fatal accident by withholding vital information requested by the MSHA accident investigation team. At a meeting at 9:00 am on March 6, 1998, between MSHA and operator representatives, the MSHA accident investigation team requested the address and telephone number of Ronald Byrd, an employee of BHP Copper and a miner at the San Manual Mine, who had been injured in the accident. Ronald Byrd was an essential witness in the accident investigation, and the MSHA accident investigation team needed to contact him for an interview. The mine operator refused to provide MSHA with this information. Operator representatives at the meeting included Ward Lucas, Safety Manager, BHP Copper; Warren Traweek, Manager Safety, Health & Security, North American Division, BHP Copper; and Mark Savit of Patton Boggs, legal counsel for BHP Copper.

Section 103(a) of the Mine Act provides, in pertinent part:

> Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines each year for the purpose of ... (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act .... For the purpose of making any inspection or investigation under this Act, the Secretary ... or any authorized representative of the Secretary ... shall have a right of entry to, upon, or through any coal or other mine.

BHP filed a motion for summary decision under 29 C.F.R. § 2700.67. BHP contends that there are no genuine issues of material fact and that it is entitled to summary decision as a matter of law. The Secretary opposes BHP's motion. She contends that there are material facts in dispute and that, on the basis of facts not in dispute, BHP is not entitled to summary decision. The Secretary also filed a cross-motion for summary decision on the fact of violation based on the undisputed facts in this case.

I. THE UNDISPUTED FACTS

These undisputed facts are taken from the affidavits submitted by the parties. In instances where there are conflicts in testimony, I accept the account submitted by the Secretary. In some instances, I summarize the conflict below.

On March 4, 1998, there was a fall of ground at the San Manual Mine that killed a miner and injured a second miner. On March 5, 1998, MSHA supervisor Richard Laufenberg and Inspector Arthur Ellis arrived at the mine to begin an investigation into the accident. The MSHA representatives conducted a physical inspection of the accident site on that date.

On March 6, 1998, the MSHA representatives interviewed a number of BHP employees and reviewed BHP documents. The MSHA representatives were unable to interview Ronald Byrd, the employee who was injured in the accident, because he was not at the mine. MSHA Inspector Laufenberg asked BHP representatives about Mr. Byrd's medical condition. BHP representatives informed MSHA that it was BHP's understanding that Mr. Byrd was being released from the hospital that day. Mr. Laufenberg asked for Mr. Byrd's address and telephone number. Mr. Savit, who was present at the mine, advised Mr. Laufenberg that BHP considered the telephone numbers and addresses of its employees to be confidential and that BHP would not provide this information. Inspector Laufenberg does not recall that anyone from BHP offered to call Mr. Byrd to obtain his consent. Warren Traweek, BHP's manager of Safety, Health, and Security, recalls that BHP made an offer to contact Mr. Byrd to determine if he would consent to BHP providing MSHA with his address and phone number. Mr. Traweek does not recall whether MSHA representatives responded to this offer.

During these discussions, BHP representatives indicated that they believed that Mr. Byrd lived in Superior, Arizona. On Saturday March 7, Inspector Laufenberg traveled to Superior to attempt to locate Mr. Byrd. Ronald Byrd was not listed in the phone book and the police department did not have any information about him. Inspector Laufenberg called Ward Lucas, the manager of safety for the San Manuel Mine, at his home to inform him that he could not locate Mr. Byrd in Superior. Lucas told Laufenberg that Byrd may be staying with relatives. Laufenberg advised Lucas that he would try calling persons listed in the phone book with the surname "Byrd," but that if he was unsuccessful, he would turn the matter over to the Solicitor's office. Laufenberg testified that Lucas replied that if he could not find Byrd to "call him back." Laufenberg testified that Lucas did not offer to find or provide the requested address and phone number. Lucas testified that when Laufenberg asked him if he had Byrd's address or phone number, he replied that he did not have that information but that he would try to get it for him. Mr. Lucas testified that he obtained this information that day, but that Inspector Laufenberg never called him back.

After the telephone conversation between Laufenberg and Lucas, the inspector called a Robert Byrd listed in the phone book. Robert Byrd was a relative of Ronald Byrd and he provided the inspector with the necessary information.

II. SUMMARY OF THE PARTIES ARGUMENTS

A. BHP

BHP states that the essential facts in this case are not in dispute and that it is ripe for decision. It argues that section 103(a) of the Mine Act does not require mine operators to provide information to MSHA unless such information is required to be kept and made available to the Secretary in the Mine Act or the Secretary's regulations. BHP contends that the Secretary requires operators to keep certain categories of records and information which must be made available to MSHA inspectors. Section 103(d) specifically grants the Secretary this authority when there are accidents at a mine. BHP argues that it was obligated under the Mine Act was to provide access to the mine site and to records and information that are required to be kept under the Mine Act or the Secretary's regulations.

In this case, MSHA demanded that BHP search its personnel records to find the information it wanted. BHP states that this type of search is beyond the warrantless search authority granted the Secretary under section 103(a). Section 103 does not authorize the nonconsensual warrantless search of files and records in a mine office.

BHP maintains that the information sought by MSHA is the private information of the employee and that it was within its right to withhold this information. BHP contends MSHA must permit the company to seek an employee's consent before disclosing private information about the employee. It believes that it could be subject to civil liability if it releases private employee information without the consent of the employee.

BHP also argues that the Secretary may not impose sanctions in this case because it did not first file a civil action under section 108 of the Mine Act. BHP contends that MSHA must obtain an injunction or other appropriate order from the District Court before it can obtain sanctions for refusal to comply with a warrantless search.

BHP contends that its refusal to provide the personal information did not impede MSHA's investigation because MSHA has multiple methods to compel production. For example, MSHA could have used the powers in section 103(b) of the Mine Act to issue a subpoena for the subject information. MSHA could also have sought this information from other sources, such as Mr. Byrd's union representatives, the United Steelworkers.

Finally, BHP notes that during an interview of a BHP employee on March 6, the employee refused to provide his address and phone number to MSHA. The MSHA representatives told the employee that it was within his right to withhold this information. BHP argues that if an employee has the right to refuse to provide this information, his employer cannot take that right away from him by providing the information without the employee's consent.

B. Secretary of Labor

The Secretary contends that material facts are in dispute which prevent summary decision in BHP's favor. She contends that BHP did not offer to provide the address and telephone number of Mr. Byrd if it were able to obtain his consent. She also disagrees with Mr. Lucas's statement that he told Inspector Laufenberg during the March 7 telephone call that he would try to find Byrd's telephone number.

The Secretary argues that the uncontested facts show that she is entitled to summary decision. The facts reveal that BHP unreasonably withheld vital information during an investigation thereby interfering with and obstructing an investigation into a fatal accident in violation of MSHA's right of entry under section 103(a). This refusal to provide information delayed MSHA's investigation by one day. This conduct effectively frustrated the investigation and denied the Secretary the full right of entry granted under section 103(a). She disagrees with BHP's position concerning its obligations to provide information during an MSHA investigation.

The Secretary argues that any "professed derivative privacy interest" in Mr. Byrd's address and phone number is outweighed by the needs of the investigation. She maintains that her "strong public policy and humanitarian interests" supersede BHP's "flimsy" concern for the privacy interests of Mr. Byrd. Because immediate recollections are the best recollections, MSHA must conduct a swift investigation. BHP should not be allowed to stand in Mr. Byrd's shoes because he had "developed a potentially adverse interest" to BHP as a result of his injuries.

The Secretary maintains that she is not required to resort to section 108 of the Mine Act before imposing a penalty for a violation of section 103(a). She contends that the Commission has long recognized this right.

III. ANALYSIS OF THE ISSUES

A motion for summary decision can be granted only if the entire record shows that "there is no genuine issue as to any material fact" and "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). I find that there are no genuine issues as to any material fact. For purposes of considering the parties' motions, I accept the facts as set forth in the declaration of MSHA Supervisor Laufenberg. I also find that BHP is entitled to summary decision as a matter of law, as set forth below.

The briefs filed by the parties make broad and sweeping arguments concerning their interpretation of the law and MSHA's policies. I confine my decision to those issues that are necessary to resolve this case. Many of the arguments made by the parties go beyond what is before me in this case.

BHP refused to provide MSHA with the name and address of Mr. Byrd without first obtaining his consent. His address and telephone number were not within the personal knowledge of the BHP officials present during the MSHA investigation. To obtain the information requested, BHP would have been required to retrieve his personnel file. Neither the Mine Act nor the Secretary's regulations require mine operations to keep a list of its employees with addresses and phone numbers or to make such information available to MSHA inspectors.

Section 103(d) requires operators to investigate accidents and to make available to the Secretary records of such accident investigations. Section 103(h) requires operators to "establish and maintain such records, and make such reports, and provide such information, as the Secretary ... may reasonably require from time to time to perform his functions under this Act." This requirement is in addition to any records that are specifically required to be kept under the Act.

The Secretary's regulations concerning accidents and records are in 30 C.F.R. Part 50. These regulations contain detailed requirements concerning the information that must be gathered by mine operators and provided to MSHA following accidents. Nothing in the regulations requires that operators provide MSHA with the addresses and telephone numbers of miners.

The broad issue is whether section 103(a) when read with section 103(h) requires mine operators to immediately provide MSHA with the names and telephone numbers of its employees without the consent of the employees, when such employees are potential witnesses to a fatal accident. In the context of this case, the issue is whether BHP impeded MSHA's

investigation of the accident in violation of section 103(a) of the Act as alleged in the citation when it refused to provide MSHA with the address and telephone number of Mr. Byrd, without first obtaining his consent. I hold that BHP did not impede MSHA's investigation by its actions and that it did not violate section 103(a).

The declaration of Mr. Laufenberg reveals that at about 1 p.m. on March 6, he asked Mr. Lucas about the status of Mr. Byrd. Mr. Lucas replied that Byrd was being released from the hospital. Mr. Laufenberg asked for his home address and telephone number. Mr. Savit told Laufenberg that BHP considered this information confidential and that the BHP would not provide this information. Laufenberg then asked for the name of the city in which Mr. Byrd lived and Lucas replied that he thought that he lived in Superior. Laufenberg does not recall Lucas or Savit offering to contact Byrd to obtain his permission to release his phone number. No BHP representatives provided Laufenberg with the address or phone number of Byrd or indicated that they had contacted Byrd to obtain his consent.

When Laufenberg was unable to make contact with Byrd in Superior, he called Lucas at home. Lucas told Laufenberg that Byrd may be staying with relatives but he did not state that he would attempt to obtain Byrd's address and phone number. Lucas simply told Laufenberg that if he could not find Byrd, he could call Lucas back.

I hold that BHP was within its right to refuse to immediately provide the information requested without obtaining Mr. Byrd's consent. The Secretary's right to inspect mines without a search warrant has been broadly construed and approved by the courts. The Secretary does not have broad authority to search an operator's business records without the operator's consent. *See e.g. Sewell Coal Co.*, 1 FMSHRC 864 (July 1979)(ALJ). In effect, MSHA Inspector Laufenberg asked BHP to search the company's personnel files to obtain the requested information. A mine operator has a legitimate right and perhaps a legal duty to protect private information contained in the personnel files of its employees. The fact that MSHA only requested information for one employee as opposed to many employees does not change the result. MSHA cannot require mine operators to immediately provide confidential information from mine employee personnel files under the warrantless inspection authority of section 103(a) in the absence of compelling circumstances. The mine operator has a right to require that the miner consent before such information is provided or to require the Secretary to follow the procedures of section 108 of the Act. The Supreme Court, in upholding warrantless searches of mines by MSHA, held that section 108(a) "provides an adequate forum for the mineowner to show that a specific search is outside the federal regulatory authority, or to seek from the district court an order accommodating any unusual privacy interest that the mineowner might have." *Donovan v. Dewey*, 452 U.S. 594, 604-05 (1981).[1]

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[1] I do not reach the issue concerning whether the Secretary is required to seek an injunction under section 108 before she can impose a penalty for a violation of section 103(a).

If Mr. Byrd were at the mine on the day of MSHA's investigation, MSHA could not require him to provide his address and telephone number and MSHA could not compel him to submit to an interview. BHP should not be required to waive Mr. Byrd's rights without legal process. I hold that BHP had the right to protect the privacy of its employees. I do not agree with the Secretary's position that this privacy right is outweighed by the "needs of the investigation" or that BHP's concerns are "flimsy." MSHA can obtain the information it needs without interfering with the rights of miners. The Secretary's authority under section 103(h) to require operators to provide "such information" as MSHA "may reasonably require" is not without limits. It was not unreasonable for BHP to refuse a request for personal information about Mr. Byrd without his consent.

It is important to understand that when Inspector Laufenberg was told that this information was confidential, he did not ask BHP to attempt to obtain Mr. Byrd's consent. Indeed, he did not bring up the issue again until he called Mr. Lucas the next day. During that conversation, Lucas told Laufenberg to call him back if he was unable to locate Byrd. The Secretary emphasizes that BHP did not obtain the consent of Mr. Byrd to release his address and telephone number. It is not the obligation of a operator to volunteer information during an MSHA accident investigation. An operator must cooperate, but it cannot be cited for the failure to voluntarily provide information. If Inspector Laufenberg formally requested BHP, orally or in writing, to obtain the consent of Mr. Byrd and BHP failed to timely respond to the request or otherwise interfered in Mr. Byrd's right to consent, there may have been a violation of section 103(a) for failure to cooperate with the investigation. That is not the case here, however, because Inspector Laufenberg did not follow up on his request.

I find that BHP's refusal to provide the information requested did not impede the investigation. The Secretary cites a number of Commission cases to support its position, but these cases do not involve a refusal to provide information personal to a miner. In *U. S. Steel Corp.*, 6 FMSHRC 1423, 1433 (June 1984), the operator would not permit MSHA to interview a foreman unless an operator attorney were present. In its decision, the Commission assumed that the operator had the right to have an attorney present. The facts reveal that when the operator requested that its attorney be present during the interview, the MSHA inspector told the mine's safety supervisor that arrangements should be made to provide an attorney as soon as possible. *Id.* The safety supervisor indicated that he would let MSHA know when an attorney would be available, but he did not propose a specific date. Two days later, the inspector returned to the mine and was informed by the safety supervisor that he had not heard back from company headquarters. The Commission affirmed the judge's finding of a violation of section 103(a) on the basis that the safety supervisor's "failure to specify a date certain when an attorney would be present, combined with the failure to produce an attorney, had the effect of unreasonably delaying the accident investigation." *Id.*

This case is distinguishable from *U.S. Steel*. Inspector Laufenberg did not ask BHP representatives to attempt to obtain the consent of Mr. Byrd to provide his address and telephone number. In addition, MSHA obtained the information it requested through other

means in about 24 hours. MSHA may have been able to get the information even more quickly through Mr. Byrd's Steelworkers representatives. BHP was not the only source for this information and, contrary to the argument of the Secretary, BHP did not "force" Inspector Laufenberg to travel to Superior. Finally, Mr. Lucas's statement to Inspector Laufenberg to call him back if Laufenberg was unable to locate Mr. Byrd shows that BHP was attempting to cooperate with MSHA. I conclude that BHP's action in not immediately providing the telephone number or address of Mr. Byrd without his consent did not have "the effect of unreasonably delaying the accident investigation." 6 FMSHRC at 1433.

IV. ORDER

For the reasons set forth above, the motion for summary decision filed by BHP Copper Company, Inc., is **GRANTED;** the Secretary's cross-motion for partial summary decision is **DENIED**; Citation No. 7922328, issued March 13, 1998, is **VACATED**; and this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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JUN 24 1998

MARVIN E. CARMICHAEL, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 93-39-D
	:	MSHA Case No. BARB CD 92-08
JIM WALTER RESOURCES, INC., Respondent	:	No. 7 Mine
	:	Mine I.D. 01-01401

DECISION ON REMAND

Before: Judge Hodgdon

On May 14, 1998, the Commission issued a decision vacating my decision[1] and remanding the case for further analysis. *Marvin E. Carmichael*, Docket No. SE 93-39-D (May 14, 1998).[2] The Commission directed that I "consider the evidence adduced in support of Carmichael's claim that he was discharged for refusing to falsify a training form."[3] Slip op. at 8. The Commission further instructed that I "address all record evidence relevant to Carmichael's claim, with appropriate credibility determinations, explaining the reasons for [my] decision." Slip op. at 8-9. Finding that Carmichael has failed to meet his burden of proof, I conclude that his case should be dismissed.

Carmichael's case consisted of 11 pages of direct examination in the transcript. (Tr. 6-17.) He called no other witnesses and presented no other evidence. He was never asked what protected activity he claimed to have engaged in, why he believed he had been suspended or whether he had been asked to falsify a training form. His counsel did not allude to such a claim in his opening statement. The only mention the Complainant made of a training form occurred as follows:

> Q. Can you tell the court what occurred to cause you to not work on this machine?

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[1] *Marvin E. Carmichael*, 19 FMSHRC 770 (April 1997).

[2] Forthcoming as *Marvin E. Carmichael*, 20 FMSHRC 479 (May 1998).

[3] Carmichael was never actually discharged. He was suspended for 5 days with intent to discharge. The suspension was subsequently reduced to a 2-day suspension after which Carmichael returned to work.

A. We were told that we were going to have to run this piece of equipment and that we were to be test [*sic*] trained by Mark Buzbee, and I told them that I had never run this piece of equipment.

I wasn't familiar with it. I was actually afraid of that piece of equipment, to operate it. Besides that, we were told we had to sign the task training paper stating that you had been task trained on that.

I asked if we could sign it under protest. They said: No, you cannot.

(Tr. 9.)

The Complainant was not questioned on cross examination about being asked to falsify a training certificate, nor did he mention it. There was no redirect examination. However, after sitting down, Carmichael retook the stand to relate an incident, date unspecified, in which he claimed that an acquaintance of his had been permitted to be task trained on a scoop under protest. No details were provided. (Tr. 30-31.) With that, the Complainant rested.

Carmichael also testified in rebuttal to the company's case. With regard to the training certificate, he testified as follows:

Q. After you met with Mr. Buzbee and before you met with Mr. Looney that day, Mr. Ken Looney, did Mr. Buzbee produce a copy of this form to you to have you sign it that you had been checked out?

A. Yes. We did participate in the training with Mr. Buzbee. The machine was not operating correctly. We did participate in that and was still asked to sign that or we were terminated by Mr. Looney.

There was nothing ever mentioned about Mr. Looney showing us the procedures of running the machinery on the section.

Q. You were asked to sign this form after you were checked out by Mr. Buzbee; is that correct?

A. Yes. I asked if we could sign it under protest before we left the section.

Q. Who did you ask that of?

A. I asked Kenny Looney and I asked the other -- I can't remember -- Bruce, whatever his name is. Bailey.

Q. Bailey?

A. Right. We were refused to sign it under protest at all.

(Tr. 89-90.)

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, 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 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 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). In this case, the Complainant has not established that he engaged in protected activity, that is, that he refused to falsify a training certificate.

Even if Carmichael's testimony were credible, he has failed to present a *prima facie* case that he engaged in protected activity by refusing to falsify a training certificate, much less prove it by a preponderance of the evidence. None of the evidence he presented mentions anything about falsifying a training certificate. The statement given on direct examination about signing the task training certificate is a true statement. After being task trained, the miner signs the task training certificate indicating that he has been task trained. The statement about signing it under protest was not elaborated upon. The testimony on rebuttal is equivocal at best. In short, Carmichael not only did not offer any evidence in support of his claim filed with MSHA, he did not even restate the claim itself at the hearing.[4]

Furthermore, the Complainant's testimony is not believable. It does not appear that in most instances he was being deliberately deceitful, but his testimony is lacking in detail, filled with gaps, failures to remember and logical inconsistencies and, thus, unreliable. For instance, he testified on cross-examination that he did not remember what a super-section was or that at

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[4] He also did not raise the contention in his brief to the Commission, instead stating that "the basis for his discrimination claim was JWR's insistence that he operate the scoop, a machine on which he had not been sufficiently trained." Slip op. at 5.

the time of the alleged discrimination he was working on a super-section. He stated concerning the events in question: "I remember some of it and some what I have read on the documents there and what I have been told by other people involved with me as to what happened to us and to me." (Tr. 19.) When asked whether the other three miners with him had filed a complaint with MSHA, he replied: "I don't know. I don't remember filing a complaint, not with MSHA. I must have. I don't remember it. I must have." (Tr. 25.) When asked whether he had been task trained on the scoop on the day he returned to work, he claimed: "I don't remember what day we went back to work. I don't remember what day we went back to work. I don't remember being task trained again. I don't know." (Tr. 26.)

In at least one instance, I find that his testimony was disingenuous. The company was operating a super-section on the No. 6 section. It had five more men and more equipment on it than a normal section. However, because no scoop operators had been assigned to the section, the roof bolters were being required to work "out of classification" by operating a scoop during periods that they were not roof bolting. Several days prior to the incident, the union had filed a grievance over this procedure. It is apparent that the four miners' refusal to be task trained on the scoop was a job action brought about by their disgruntlement at having to work out of classification. Carmichael's claim that he did not remember that the union had filed a grievance or that there was any such problem on the section, a matter that was clearly a prominent topic at the mine, is not only self-serving, in that it shielded him from having to answer any questions on the subject, but also inherently incredible.

I am also skeptical of the Complainant's professed fear of operating the scoop. I find it hard to believe that a person who had been a miner for 20 years and had, therefore, been around and worked with innumerable scoops, would be afraid of one. This skepticism is increased by the fact that he had already been task trained to operate a shuttle car, a similar type of equipment, and a roof bolter.

The Commission views Carmichael's rebuttal testimony, quoted above, as "testimony that, subsequent to accepting the oral portion of the training, he was terminated after refusing to falsify a training form." Slip op. at 7. I understood Carmichael's testimony, and that of Thrasher's, the company's witness, as well, to be that refusing to sign the form was the same thing as refusing to take the task training. Nor did I understand Carmichael to testify that he was ready and willing to accept any training offered him, but that the company only offered the "oral portion of the training" and then demanded that he sign the training certificate to show that he had been task trained. However, if that interpretation is the law of this case, then, in view of Carmichael's lack of credibility, I give the testimony no weight. Furthermore, there is no other evidence in the record to corroborate such a claim.

Sometime during the incident, at least one of the four miners requested the presence of a union safety committeeman. This request was refused. As with most aspects of this case, there is a serious lack of evidence in the record concerning this request. The union contract was not put into evidence, and Carmichael did not present any evidence concerning under what

circumstances a miner could request a safety committeeman. Therefore, there is no way of knowing whether the request was valid or not. While the request could have some tendency to support Carmichael's claim that the miners were asked to falsify training certificates, it could also have some tendency to support the company's claim that the miners were doing everything they could to avoid the training. Therefore, without more information, I conclude that the request is a neutral factor in the case.

It is unfortunate that the Complainant chose to rely solely on his admittedly faulty memory in this case. There clearly was other evidence available. The three other miners involved with him still work for the company. Carmichael stated that he still talks to one of them, Bruce Ivey, "from time to time." (Tr. 94-95.) No explanation was offered as to why none of them was called. One reason, however, might be that they do not support his claim. In view of the fact that the union, although able to reduce the suspension with intent to discharge to a 2-day suspension with loss of pay, apparently did not pursue the matter any further on the Complainant's behalf, it is entirely possible that they do not. One would expect that if a miner had suffered adverse action for refusing to falsify a training certificate, the union would be actively involved in attempting to right the wrong. The inference that no such thing occurred is made even stronger by the fact that MSHA investigated his complaint immediately after it was made, when memories were fresh, and found that a violation of section 105(c) had not occurred.

In conclusion, I find that the Complainant's insubstantial, unsupported and uncorroborated assertions made at the hearing, which require supposition as to what he meant to even associate them with his initial complaint to MSHA, have not established that he was asked to, and refused to, falsify a training certificate and was suspended as a result thereof. Consequently, he has not shown that he engaged in protected activity which entitles him to protection under the Act.

ORDER

Accordingly, the complaint of Marvin E. Carmichael against Jim Walter Resources, Inc., under section 105(c) of the Act, is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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JUN 25 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 97-125-M A. C. No. 41-03590-05523
v.	:	
	:	Rosser Pit & Plant
PAPPY'S SAND & GRAVEL , Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 97-179-M A. C. No. 41-03590-05524A
v.	:	
	:	Rosser Pit & Plant
JOHN P. REEDER, Respondent	:	

DECISION

Appearances: Thomas Paige, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for the Secretary;
Timothy A. Duffy, Esq., Burleson, Pate & Gibson, L.L.P., Dallas, Texas, for Respondents.

Before: Judge Weisberger

In these consolidated cases the Secretary of Labor (Secretary) seeks a civil penalty from Pappy's Sand & Gravel ("Pappy") for allegedly violating 30 C.F.R. §§ 56.14131(a) and 56.9300(a). The Secretary also seeks a civil penalty from John P. Reeder, under section 110(c) of the Federal Mine Safety and Health Act of 1977 (The Act), in connection with the violation of section 56.9300(a), supra. Pursuant to notice, a hearing on these matters was held in Ft. Worth, Texas, on April 7, 1998. Petitioner filed proposed findings of fact and a brief on May 18, 1998. No brief was filed by Respondents.

Findings of Fact and Discussion

I. Background

Pappy operates a 150 acre pit in Kaufman County, Texas, where it mines, processes, and sells concrete sand and rock. As part of its operation, mined material is washed by water that is then pumped to the processing plant from a pond that is approximately 1,000 feet long and 200 feet wide. A levee that runs 1,000 feet along the side of the pond, holds the water in the pond and prevents it from flooding a road located on the other side of the levee. When Pappy commenced operations at the site in 1990, trees completely covered the top of the levee preventing any travel on it. In late 1995, Pappy decided to raise the level of the levee in order for the pond to be able to hold more water. The first step was to clear all the trees from the top of the levee, and to fill holes on the levee. After this was done, work commenced on the levee to widen it from less than 10 feet to 35 feet, and raise it 1 foot so that it could be 6 feet above the pond. A berm was placed on the levee to prevent the trucks traveling on the levee from sliding off.

In the beginning of October 1996, it was decided to again raise the levee. The berm was removed because, according to John Ples Reeder, Pappy's president, it ". . . would channel the water into areas which would ruin the levee" (Tr. 78).

Around the beginning of November 1996, work commenced on raising the levee an additional foot. Dump trucks traveled on top of the levee to place soil in a pile that ran along the middle of the levee for the entire length of the levee.[1]

On November 4, 1996, Ronnie Howard, who had been hired the previous month, was driving along the levee in a Mack dump truck loaded with soil. The truck slid off the top of the levee into the pond and overturned, causing Howard to suffer a cracked rib and a collapsed lung.

On November 12, 1996, subsequent to an investigation, MSHA Inspector Omar Dale Williams, issued Pappy a section 104(d)(1) citation alleging a violation of 30 C.F.R. § 56.14131(a) which provides as follows: "[s]eat belts shall be provided and worn in haulage trucks." Williams also issued a section 104(d)(1) order alleging a violation of 30 C.F.R. § 56.9300(a) which provides that "[b]erms 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 . . . ."

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[1]/ It was contemplated that after all the soil was piled on the levee, graders were to be used to level the soil over the surface of the top of the levee, and raise it 1 foot. According to Reeder, the same amount of soil would have been required to build a berm for the length of the levee. Upon completion of the raising of the height of the levee, Pappy intended to seed the top of the levee, and trucks would no longer travel there.

MSHA also seeks a penalty from Reeder under section 110(c)[2] of the Act, in connection with the alleged violation of section 56.9300(a), *supra*.

II. Violation of Section 56.14131(a), supra.

According to Williams' investigation, Howard was not wearing a seat belt at the time of the accident on November 4. Pappy did not present any evidence to contradict or impeach the Secretary's evidence. Hence, I find that it has been established that Howard was not wearing a seat belt and that accordingly, Pappy did violate Section 56.14131(a), supra.

A. Significant and Substantial

According to Williams, the violation was significant and substantial.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981).

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

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

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[2]/ Section 110(c), supra, provides, as pertinent, that ". . . [w]henever a corporate operator violates a mandatory . . . safety standard . . . any . . . officer . . . of such corporation who knowingly authorized, ordered, or carried out such violation, . . . shall be subject to the same penalties . . . that may be imposed upon a person under subsections (a) and (b)."

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); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

The record establishes that Pappy did violate a mandatory standard. It is also clear that this violation contributed to the occurrence of an injury to the truck operator. Further, the roadway on which the dump truck at issue traveled did not have a berm, and was elevated approximately 6 feet above a pond. Also, an accident did occur resulting in serious injuries. I find that within this context, the third and fourth elements set forth in *Mathies*, supra, have been met. I thus find that it has been established that the violation was significant and substantial.

B. Unwarrantable Failure

According to Reeder, it is Pappy's policy for employees to wear seat belts. He said that in safety meetings employees are told to wear seat belts. Reeder said that if he would be informed that someone is not wearing a seat belt, he would reprimand him. He said that he was not aware that Howard had not been wearing his seat belt, and that he (Reeder) did not arrive on the site on November 4, until after the accident had occurred.

Williams testified that in three or four prior visits to the site, he spoke to various employees, and was satisfied that they had been told to wear seat belts. He also observed employees with their seat belts on.

On the other hand, Pappy had previously been cited on December 28, 1995, by MSHA Inspector Robert LeMasters, for violating section 56.14131(a), when LeMasters observed an employee operating a Mack haul truck on the site without a seat belt. Also, records of safety meetings do not indicate that Howard was present at any meeting when safety belts were discussed. Also, Reeder conceded on cross-examination that although all employees were instructed to wear seat belts, some were "hard-headed" (Tr. 69), and received an abusive reprimand. Howard was reprimanded by Reeder on two occasions for driving too fast, but had not been reprimanded for not wearing a seat belt. Within the context of this evidence, I find that it has been established that Pappy's conduct rose to the level of aggravated conduct, and hence, I find that the violation resulted from its unwarrantable failure (*See Emery Mining Corp.*, 9 FMSHRC 1997 (1987)).

C. Penalty

As discussed above, I find that the level of Pappy's negligence to have been more than moderate. I also find that the violation, having in resulted in an accident that caused serious injuries to Howard, was of a high level of gravity. I find that a violation of $5,000.00 is appropriate for this violation.

III. Violation of Section 56.9300(a), supra.

The evidence is undisputed that, when cited, the 1,000 foot long levee did not have a berm. In essence, it is Pappy's position that the levee was not a roadway and hence, was not required by section 56.9300(a), supra, to have a berm. Pappy argues that the levee was initially covered with trees, and was never used by vehicles to pass from one place to another. Pappy refers to the fact that, when cited, the trucks on the levee were delivering dirt to the site to be spread on top of the levee to increase its height, and that upon completion of this task, grass would be grown on the levee, and it would not be open to vehicular traffic.

In essence, section 56.9300(a), supra, requires berms on "roadways." That term is not defined in Title 30, supra. *Webster's Third New International Dictionary* (1986 Edition) ("*Webster's*") defines "roadway" as pertinent, as follows: " . . . **b:**ROAD; *specif.*: the part of a road over which the vehicular traffic travels." *Webster's* defines "road," as pertinent, as follows: "3(c): the part of a thoroughfare over which vehicular traffic moves . . . . " *Webster's* defines "thoroughfare,"as pertinent, as follows: "1: a way or place through which there is passing . . . ."

Since, when cited, bulldozers and dump trucks traveled over the levee while dumping dirt, I find that the levee was indeed used as a roadway. Hence, it fell within the scope of section 56.9300(a), and a berm was required. Since the levee did not have a berm, section 56.9300(a), supra, was violated.

A. Significant and Substantial

Vehicles traveled the entire length of the top of the levee, approximately 1,000 feet. The levee was 6 feet above a pond, but no berm was provided along the levee. At least one driver did not wear a seat belt. I find, within this context, that it has been established that the violation was significant and substantial. (*See Mathies*, supra.)

B. Unwarrantable Failure and Reeder's Violation of Section 110(c)

In October 1996, Pappy intentionally removed the berm that had been in place on the levee. Trucks then began to travel on the top of the levee to dump soil. As set forth above, (III, supra), a violation of section 56.9300, supra, resulted. Since the violation was caused by Pappy's intentional act, I find that the violation resulted from its unwarrantable failure. (*See Emery*, supra). For the same reasons, I find that Pappy's President, Reeder, who directed that the berm be removed, violated section 110(c), supra, in that he authorized such a violation.

C. Penalty

For the reasons set forth above, I find that the level of Pappy's negligence was more than moderate. Also, since the lack of a berm contributed to the accident wherein Howard suffered serous injuries, I find that the gravity of the violation was relatively high. I find that a penalty of $8,000.00 is appropriate. In assessing a penalty against Reeder, I make the same findings regarding gravity and negligence (*See Sunny Ridge Mining Company, Inc.*, 19 FMSHRC 254, 272 (Feb. 1997). *Sunny Ridge,* supra, further provides that in assessing a penalty against an individual under section 110(c) of the Act, the individual's income and family support obligations, the appropriateness of the penalty in light of the individual's job responsibilities, and the individual's ability to pay. These facts appear to be within the control of Reeder. However, he did not adduce any evidence regarding them. I find that he has not come forward with any evidence to mitigate a penalty based upon his ability to pay. Taking into account the factors set forth above, I find that a penalty of $600.00, is appropriate.

ORDER

It is **ORDERED** that, within 30 days of this decision, Pappy pay a total civil penalty of $13,000.00, and that John P. Reeder, pay a civil penalty of $600.00.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 26 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 98-23
Petitioner	:	A. C. No. 36-06967-03923
v.	:	
	:	Tanoma Mine
TANOMA MINING COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Troy E. Leitzel, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Tanoma Mining Company, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges four violations of the Secretary's mandatory health and safety standards and seeks a penalty of $598.00. For the reasons set forth below, I vacate three of the citations, approve a settlement agreement concerning the fourth, and assess a penalty of $75.00.

A hearing was held on March 19, 1998, in Indiana, Pennsylvania. The parties also submitted post-hearing briefs in the case.

Settled Citation

At the beginning of the hearing, the counsel for the Secretary advised that the parties had agreed to settle Citation No. 3688643. The agreement provides that the citation will be modified to delete the "significant and substantial" designation and the penalty will be reduced from $94.00 to $75.00. Based on the representations of the parties, I concluded that the settlement was appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i) and approved the agreement. (Tr. 4-5.) The provisions of the agreement will be carried out in the order at the end of this decision.

Findings of Fact

On July 14, 1997, the Tanoma Mine, an underground coal mine in Indiana County, Pennsylvania, began working ten hour shifts. With the change, Michael J. Elias, the mine's Health and Safety Manager, had to make a change in the dust sampling procedures at the mine.[1] Section 70.201(b), 30 C.F.R. § 70.201(b), requires that: "Sampling devices shall be worn or carried directly to and from the mechanized mining unit [MMU] or designated area and shall be operational portal to portal. Sampling devices shall remain operational during the entire shift or for 8 hours, whichever time is less." Elias was concerned with how to meet this requirement during a ten hour shift.

Not finding any guidance in the MSHA *Program Policy Manual*,[2] Elias next looked at the MSHA *Coal Mine Health Inspection Procedures Manual* (1989), which sets forth procedures for inspectors to follow in carrying out their duties. At paragraph 8, p. 1.6, under "Sampling Procedures" Elias found the following: "Full-shift samples shall be considered 8-hour samples unless the normal work shift is less than 8 hours. When a normal work shift is in excess of 8 hours, the samplers shall be turned off at the conclusion of 8 hours sampling, the filter cassettes, plugged or protected, and the time recorded." (Resp. Ex. 6.) From this he concluded that he should do the same thing, that is, have the miner wear the pump into the mine when he began his shift, at the conclusion of 8 hours turn off the pump, take it off of the miner and secure it, and then take the pump out of the mine at the end of the shift.

Tanoma was conducting its September-October sampling in this way on September 2, 1997, when Inspector Thomas H. Whitehair, II, informed Elias that this was not a proper method of sampling, since the regulation required that the pump be removed from the mine at the end of eight hours. Elias immediately called Ted Glusko, the supervisor at the Indiana Field Office, to ask him how other mines working extended shifts conducted sampling. Glusko said he did not know and would get back to him.

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[1] Section 70.207(a) of the Secretary's regulations, 30 C.F.R. § 70.207(a), requires that:

> Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period beginning with the bimonthly period of November 1, 1980. Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days.

[2] The manual states only that: "In cases where the designated occupation of a MMU works longer than 480 minutes or the production shift for a DA is longer than 480 minutes, arrangements shall be made to remove the sampling device from the miner at the expiration of this time period." Vol. V, Part 70, Subpart C, MSHA *Program Policy Manual* 7 (07/01/88).

Concerned that time was running out, and not having received a reply from Glusko, Elias next called Paul Bizich in the Huntingdon, Pennsylvania, District Office. Finding Bizich on vacation for a couple of days and worried that he was wasting time, he called Kevin Strickland, who used to be in Bizich's position at the MSHA District Two office, and left a voice mail message. Elias waited a day or two, decided he was not going to get an answer and then called Joe Garcia, District Manager in the MSHA District Two New Stanton office. He explained the problem to Garcia and asked what they should do. Garcia told Elias that he needed something in writing, so Elias sent him a letter on September 10, 1997.

In the letter, Elias set out "two scenarios that have been presented to me, one of which I do not feel is representative of the sampling cycle, and one which we cannot physically perform due to time restrictions in the sampling cycle." (Resp. Ex. 1.) He then stated:

> The scenario which I would like to present to you, which does not technically comply with Part 70.201(b) according to MSHA, but generates the most representative sample of the sampling entity is as follows. The sampling device would be started at the portal at the beginning of the shift, and at the end of the eighth hour or 480 minutes, the sampling device would be stopped while still at the working section or designated area. The sampling device would then be brought out to the mine portal at the end of the ten hour shift. This actually allows the sampling device to be at the sampling entity longer than normal, for whatever time it would have normally taken to travel out of the mine. This is the only scenario with which I can insure compliance with all other applicable regulations, and the local mine safety committee is in agreement with this method while we operate in this ten hour scenario.

(*Id.*) He closed by stating: "I would request that you respond to my concerns as soon as possible as we are partially into a sampling cycle presently and will need to begin sampling soon." (*Id.*)

At this same time, Elias had also been in contact with the company attorney, who in turn had called Robert Thaxton at MSHA's Arlington, Virginia, headquarters for guidance. However, by the first week in October, Elias had not received a response to his letter to Joe Garcia and believed that he had to start taking samples. He called the company attorney to find out if he had learned anything and was advised that the best way to comply was to deliver the pumps to the miners to wear. Elias then called Ted Glusko to discuss this plan with him. As a result of this discussion, Elias concluded that "it was better for me to deliver the pumps in the morning, starting two hours after the shift began and running them to the end of the shift, for a total of eight hours." (Tr. 70.)

On October 6, 1997, Inspector Lewis E. Kish went to the Tanoma Mine to inspect it. In the portal before entering the mine, he had a conversation with Elias about sampling procedures. At the hearing, he related that:

> Mike told me, he said, we might not want to use our sample because it's going to be -- I've got a lot of places to go before we get in there. I said, Mike, those pumps are supposed to go directly in and directly out. And Mike said, I'll get it in there as fast as I can. So I told him, Mike, if you don't get it in and get it out, directly in and out, then I'll be citing you. Mike said, well, I'll get it in when I get it in.

(Tr. 10.)

To deliver the pumps on October 6, Elias entered the portal at 9:00 a.m. and took the elevator to the Main A entry track. He had four dust sampling pumps, which had been turned on at 9:00 a.m., with him, for sections C-12, E-1, E-8 and Main E. He got in a battery powered mantrip and traveled down the Main A entry track to the Main C entry track where he stopped at the entry to the C-12 section. He took the C-12 pump, leaving the other pumps in the mantrip, and went to the working face of the section where he placed the pump on the miner operator.

Elias returned to his mantrip and traveled to the end of the Main C entry track onto the Main E entry track. He took the E-1 pump, leaving the other two in the mantrip, and got into the E-1 section's mantrip, which was waiting there for him, and drove into the E-1 section where he went to the working face and placed the pump on the miner operator.

Elias returned to the Main E track entry, got in his mantrip and traveled on the Main No. 2 track until he got to the area near the E-8 section switch. He then got out of his mantrip and took the E-8 pump, leaving the remaining one, to the working face where he placed it on the miner operator.

Elias then returned to the Main E track entry, got back in his mantrip and drove down the track to the Main E section. He walked the pump partially into the mining section and placed it on the miner operator. Inspector Kish was in the Main E section when Elias arrived to place the pump and noted that it was 11:27 a.m. He informed Elias that he would be citing the mine for that sample.

Inspector Kish informed Bob DeBreucq, Vice President of Operations, that he would be writing citations for the pumps that were delivered late. DeBreucq told him he should check with his superiors because the mine, through Elias, had had discussions concerning the proper way to perform the sampling. As a result, Kish called his supervisor, Ted Glusko, for advice.

Kish returned to the mine on October 7, still not having been able to contact Glusko. Finally, Glusko sent Inspector Whitehair to the mine with instructions for Kish to issue the citations. As a result, Kish issued Citation Nos. 3688641, 3688642 and 4174660 to the mine. Citation No. 3688641 alleges a violation of section 70.201(b) in that:

> The operators bimonthly respirable dust sample taken on 10-6-97 on the E8, 021 MMU, occupation 036, was not representative of the mines environment for eight hours as required in that the approved respirable dust pump was not carried directly to the E8, 021 MMU, after being started at 9:00 a.m.
>
> The certified person responsible for placing the dust pump on the person did not place the dust pump until 11:09 a.m. after placing other dust pumps in the C12 and E1 sections of the mine. The mine worked a ten hour shift starting at 7:00 a.m. and ending at 5:00 p.m.

(Govt. Ex. 1.) Citation No. 3688642 is worded identically to Citation No. 3688641, except that it deals with the 024 MMU in the Main E section and states that the pump was not delivered until 11:27 a.m. after pumps were delivered to the C-12, E-1 and E-8 sections. (Govt. Ex. 2.) Citation No. 4174660 is the same as the other two, except that it concerns the 026 MMU in the E-1 section and states that the pump was not delivered until 10:40 a.m. after a pump was delivered to the C-12 section. (Govt. Ex. 3.) With the exception of Citation No. 3688642, where Inspector Kish was present when the pump was delivered, the inspector obtained the time of delivery from Elias.

On October 10, 1997, Tanoma's attorney sent a letter to the Division of Health outlining the problems being encountered by the mine and recommending actions for MSHA to take. (Resp. Ex. 2.) He received a response to his letter, dated January 28, 1998, from Marvin W. Nichols, Jr., Administrator for Coal Mine Safety and Health. The letter stated, in part:

> We share your concern that work shifts beyond the traditional 8 hour time period may not be fully addressed by our current respirable coal mine dust sampling procedures. However, we have been informed by the Office of the Solicitor that any changes in those procedures will require rulemaking. . . .
>
> Please be assured that extended work shifts will be given serious consideration in any future rulemaking involving the mine operator sampling program. Until the standard is revised, however, mine operators will be required to comply with the current procedures for respirable coal mine dust sampling.

(Resp. Ex. 3.)

Conclusions of Law

As Mr. Nichols admitted in his response to the company, section 70.201(b) does not "fully address" work shifts beyond the standard eight hour time period. Nor has MSHA offered any guidance as to how companies working a longer shift can comply with the regulation. Accordingly, based on the specific facts of this case, I conclude that Tanoma did not have adequate notice of the requirements of the regulation with regard to sampling during a 10-hour shift.

Concerning the issue of notice afforded by a regulation, the Commission has stated:

> We fully appreciate that in order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (citations omitted). However, in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but 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 27, 1990).

This is not a case where the operator ignored the regulation. Tanoma, through Elias, was making a good faith effort to comply with it. He checked first with the MSHA *Program Policy Manual*, but all this advised was that for shifts longer then eight hours "arrangements shall be made to remove the sampling device from the miner at the expiration of" 8 hours. Significantly, it does not say anything about the pump exiting the mine at the end of 8 hours. When Elias checked the inspector's manual which provided that at the end of 8 hours the pump would be turned off and the cassette plugged or protected, he concluded, not unreasonably, that this was how the operator's sampling should be conducted.

When he was informed by Inspector Whitehair that this was not the proper way to sample, he stopped doing it that way and he tried to find out how it should be done. Inspector Whitehair apparently did not give him any guidance on how the sampling should be done. Neither did any of the many MSHA officials he contacted.

With time running out, and sampling having to be performed, the only advice that he had received was that the pumps should be carried into the mine by someone other than the wearers at 9:00 a.m. so that they could then be worn out of the mine at 5:00 p.m. He performed this function himself, traveling by the most direct route to each section. Once again, I cannot find

that his solution was unreasonable and not a good faith attempt to comply with the standard. However, after he had done it, he was informed that this method did not comply with the regulation, because of the time it took to get the pumps to the appropriate locations, and the company was cited.

In view of the fact that no one from MSHA could provide the company with any information as to how the specific requirement of the regulation could be met when operating on 10 hour shifts, it is difficult to conclude that a reasonably prudent person familiar with the mining industry would have recognized how to meet the specific requirement of the regulation. Furthermore, the company was doing more than just trying to interpret the section, it was actively seeking guidance on the issue.

For these reasons, I cannot conclude that the standard provided Tanoma with adequate notice of what it required. Consequently, I conclude that Tanoma may not be held responsible the three alleged violations of section 70.201(b) and will vacate the citations.

ORDER

Accordingly, Citation Nos. 3688641, 3688642 and 4174660 are **VACATED**; Citation No. 3688643 is **MODIFIED** by deleting the "significant and substantial" designation and is **AFFIRMED** as modified. Tanoma Mining Company is **ORDERED TO PAY** a civil penalty of **$75.00** within 30 days of the date of this decision. On receipt of payment, this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 2 6 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 98-9 A. C. No. 46-04955-03631
v.	:	
EASTERN ASSOCIATED COAL CORPORATION, Respondent	:	Docket No. WEVA 98-18 A. C. No. 46-04955-03632 Lightfoot No. 2 Mine

DECISION

Appearances: Gretchen L. McMullen, Esq., Office of the Solicitor, U.S. Dept. of Labor, Arlington, Virginia, on behalf of the Petitioner;
Caroline A. Henrich, Esq., Eastern Associated Coal Corporation, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Melick

These consolidated civil penalty proceedings are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.*, the "Act," to challenge a citation and withdrawal order issued by the Secretary of Labor to Eastern Associated Coal Corporation (Eastern). Eastern does not dispute the violations as alleged but disputes that those violations were the result of its "unwarrantable failure" to comply. Also at issue therefore, is the appropriate civil penalty to be assessed for the violations considering the criteria under Section 110(i) of the Act.

Citation No. 715188, issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 70.101 and charges as follows:

> Based on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation in mechanized mining unit 019-0 was 1.7 mg/m^3, which exceeded the applicable limit of 1.5 mg/m^3. Management shall take corrective actions to lower the respirable dust and then sample each production shift until

five valid samples are submitted and results of the analysis are processed and recorded at the Pittsburgh Respirable Dust Processing Laboratory.[1]

The cited standard, 30 C.F.R. § 70.101, provides as follows:

> When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentration), computed by dividing the percent of quartz into the number 10.

It is undisputed in this case that the applicable reduced dust standard is 1.5 mg/m^3. Neither the violation nor the related "significant and substantial" findings are in dispute. At issue is the question of whether the violation was the result of Eastern's unwarrantable failure and high negligence. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corporation*, 9 FMSHRC 1997 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "lack of reasonable care." *Id.* at 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 193-194 (February 1991). Relevant issues therefore, include such factors as the extent of a violative condition, the length of time that it

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[1] Section 104(d)(1) of the Act provides as follows:

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

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. *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994). Repeated similar violations may also be relevant to this inquiry because they indicate an operator has notice that greater efforts are necessary for compliance with the standard. *Peabody Coal Co.*, 14 FMSHRC 1258 (August 1992).

The Secretary relies in this regard primarily on the testimony of MSHA coal mine inspector Don Braenovich. The subject citation was issued by Inspector Braenovich on June 15, 1997, after the results of the bi-monthly sampling cycle (May through June 1997) for the mechanized mining unit 019 showed an average concentration of respirable dust of 1.7 mg/m^3 - - in excess of the reduced standard of 1.5 mg/m^3. The record shows that seven citations had been issued at the subject mine for respirable dust violations during the 6 ½ month period dating back to November 4, 1996. Three of those respirable dust violations occurred on the same 019 mechanized mining unit at issue herein.

Braenovich also recalled discussing the dust problem with mine officials four or five times in the year before the instant citation was issued. Don Ellis, supervisor of the corresponding MSHA field office, also recalled two formal meetings and many informal conversations with mine officials about their respirable dust problem. In addition, Mine Superintendent George Schuller acknowledged at hearing that he was aware in May and June that they had a dust problem and that they had to take extra precautions to comply with the dust regulations. Mine manager Bernie Milam further acknowledged recognition as early as October 1996 of a dust problem.

While this evidence, standing alone, would tend to support high negligence and unwarrantability findings, I find that it is significantly mitigated by Respondent's continuing good faith and reasonable efforts to achieve compliance. *See Secretary v. Westmoreland Coal Co.*, 7 FMSHRC 1338, 1342 (September 1985). Indeed, there are significant similarities between Respondent's good faith and reasonable efforts to achieve compliance in this case and the efforts by the operator in *Secretary v. Peabody Coal Company*, 18 FMSHRC 494 (April 1996), found by this Commission to be a basis to negate unwarrantability findings.

The efforts by Eastern management to correct its respirable dust problem at the subject mine included the addition of pressure pumps to increase water pressure, the replacement of 4-inch water pipes with 6-inch pipes to increase the water supply, the modification of the ventilation system from an exhaust system to a blowing system, the utilization of a dual impact scrubber on at least one of the continuous miners and the retraining of employees in dust control.

More particularly, it is undisputed that between November 1996 and June 1997, Respondent purchased three pressure pumps, two of which were installed prior to the issuance of the instant citation. These pumps were installed to insure a continual uninterrupted flow of water to the continuous miner to help keep dust from being suspended. It is also undisputed that prior to the issuance of the instant citation the 4-inch water lines were replaced with 6-inch lines.

According to Eastern Safety Supervisor Donald Pauley, this was done to increase the water supply to obtain the volume and pressure necessary for the type of water sprays they were using. Pauley testified credibly that this change enabled them to reduce the amount of dust generated.

While the MSHA inspectors testified that the increased water flow for the water sprays provided by these pressure pumps and the new and larger water lines had no bearing on reducing respirable dust, I give this testimony but little weight. The more credible testimony is provided by Safety Supervisor Pauley, and from mine superintendent George Schuller. Schuller, a graduate mining engineer, testified that there is no other reason to increase the water supply on the miner than to improve dust suppression. Indeed, in the *Peabody* case, 18 FMSHRC at pages 498-499, this Commission reversed the trial judge, in part, for failing to recognize the relationship between an increased water supply and dust control.

In any event, the critical issue herein is whether Eastern officials acted in the good faith and reasonable belief that their actions in increasing water supplies to the continuous miners would reduce dust levels - - not whether such actions did in fact reduce dust levels. Clearly, the evidence supports the conclusion that they did act in a good faith reasonable belief that their actions would reduce dust levels. Indeed, the Secretary has not shown that there would be any reason to increase the water supply other than to attempt to reduce dust levels.

It is further undisputed that Respondent, over a period of time before the instant citation, had progressively implemented changes in mine ventilation, including removing stoppings and building other stoppings with the objective of changing the ventilation system to a blowing fan system. Even Inspector Braenovich recognized that these changes would have improved the air flow and, implicitly, also improved dust control. Mine manager Benny Milam, also credibly testified that the "biggest purpose" for this ventilation change was dust control at the continuous mining units.

The Secretary nevertheless argues that these efforts were irrelevant because the actual changeover to a blowing fan system did not take place until June 14, 1997, after the May/June bi-monthly samples had been taken. The Secretary again misses the point however. Not only is it undisputed that many changes were made in the ventilation prior to the bi-monthly sampling but also, in determining mitigation, the issue is the good faith and reasonable efforts by the operator to reduce dust levels. The proposed improvement in ventilation, even though not fully implemented at the time the citation was issued, nevertheless, is therefore a mitigating factor.

It is further undisputed that Eastern had revised its dust control plan for MMU 20 to increase the air from 3,000 to 4,000 cfm. Even Inspector Braenovich conceded that this would reduce dust levels. In addition, Eastern officials were working with a vendor to purchase and install a dual intake scrubber in MMU 17 to assist in dust suppression. Finally, it is undisputed that training had been conducted at the Lightfoot No. 2 mine between November, 1996 and June 15, 1997, to improve dust suppression. This training included the review of methane and dust control plans with both hourly and salaried personnel.

In assessing Respondent's good faith and reasonableness in trying to control respirable dust, I also consider the fact that after the citation issued January 8, 1997, showing non-compliance with the dust standard by 3.9 mg/m^3, Respondent thereafter showed improvement and, while nevertheless out of compliance on the dates shown by citations on March 27, May 6 and June 15, 1997, such non-compliance was by margins of only .1 mg/m^3, .5 mg./m^3, and .2 mg/m^3, respectively. Eastern therefore, could have had reason to believe that its remedial efforts were generally showing improvement and that its continuing efforts, e.g., by fully converting to a blowing fan ventilation system, would likely succeed in controlling the dust.

Under all of the circumstances, I conclude that Eastern's remedial efforts clearly demonstrated a good faith, reasonable belief that it was taking the steps necessary to achieve compliance with the dust standard at issue, sufficient to mitigate its negligence and to negate findings of unwarrantable failure.

Order No. 7151884, issued June 24, 1997, pursuant to Section 104(d)(1) of the Act alleges a violation of the standard at 30 C.F.R. § 70.208(c) and charges as follows:

> The operator failed to submit five additional respirable dust samples on the 817-0 belt designated area within the required fifteen days. The operator was notified May 22, 1997, that five valid samples were required to be done. As of today, no samples have been submitted or received at the Pittsburgh Respirable Dust Processing Laboratory.

The cited standard, 30 C.F.R. § 70.208(c), provides as follows:

> Upon notification from MSHA that any respirable dust sample taken from a designated area to meet the requirements of Paragraphs (a) or (b) of this section exceeds the applicable standard in Section 70.100 (respirable dust standards) or Section 70.101 (respirable dust standard when quartz is present), the operator shall take five valid respirable dust samples from that designated area within 15 calendar days. The operator shall begin such sampling on the first day in which there is a production shift following the day of the receipt of notification.

There is no dispute that the requisite dust samples were not submitted as required and there is no dispute that the violation existed as charged. The issue is whether the violation was the result of Eastern's high negligence and unwarrantable failure to comply. In this regard, safety supervisor Donald Pauley testified that Eastern maintained notebooks containing all of the dust mailers but that in this case, for unknown reasons, the mailer was filed in the wrong notebook. This error was not discovered until the violation was charged. According to Pauley, mailers had never before been misfiled. While Inspector Braenovich was apparently skeptical of this version of events, Pauley's testimony is not directly disputed.

The Secretary nevertheless argues that Respondent was highly negligent because it had been cited once previously, on January 7, 1997, for failing to submit additional samples. One previous violation of this nature, particularly without knowledge of the underlying facts and their similarity, *vel non*, with the instant case, is not sufficient to establish high negligence or

unwarrantable failure. The Secretary also argues that Inspector Braenovich had verbally warned company personnel about submitting samples late in May 1997, and that Steve Richards, the company official responsible for submitting the samples, had previously submitted samples at the last minute. The Secretary has failed however, to establish a rational connection between prior lawful and timely submissions of dust samples, even though submitted at the last minute, and the facts of instant case that would warrant findings of unwarrantability.

Under the circumstances, I find that the Secretary has failed to sustain her burden of proving that the violation was the result of unwarrantable failure or high negligence. Order No. 7151884 must accordingly be modified to a citation issued pursuant to Section 104(a) of the Act.

In assessing civil penalties in these cases, I have considered the high gravity of the violation charged in Citation No. 7151881, the low gravity of the violation charged in Citation No. 7151884, and that these violations were the result of moderate to low negligence. I have also evaluated the operator's prior history (Gov. Exh. 3, 4 and 12) and other record evidence in light of the criteria under Section 110(i) of the Act.

ORDER

Citation No. 7151881 is hereby MODIFIED to a citation issued under Section 104(a) of the Act and Eastern Associated Coal Corporation is directed to pay a civil penalty of $500.00, for the violation charged therein within 30 days of the date of this decision. Order No. 7151884 is hereby MODIFIED to a citation under Section 104(a) of the Act and Eastern Associated Coal Corporation is directed to pay a civil penalty of $100.00, for the violation charged therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 29 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-49
Petitioner	:	A.C. No. 02-01047-03529
v.	:	
	:	Docket No. WEST 97-172
BLACK MESA PIPELINE, INC.,	:	A.C. No. 02-01047-03531
Respondent	:	
	:	Kayenta Preparation Plant

DECISION

Appearances: Margaret A. Miller, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for the Petitioner;
Gregory J. Leisse, Esq., Phoenix, Arizona, for the Respondent.

Before: Judge Bulluck

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration ("MSHA"), against Black Mesa Pipeline, Incorporated ("Black Mesa"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions seek civil penalties for alleged violations of sections 77.103, 30 U.S.C. § 77.103; 77.502, 30 U.S.C. § 77.502; and 77.800-2, 30 U.S.C. § 77.800-2, in the amounts of $1,500.00, $2,500.00 and $200.00, respectively.

A hearing was held in Denver, Colorado. The parties' post-hearing briefs are of record. For the reasons set forth below, Citation No. 3850060 shall be VACATED, and Citation Nos. 4366052 and 4366053 shall be AFFIRMED.

I. Stipulations

The parties stipulated to the following facts:

1. The Black Mesa Pipeline, Incorporated, is engaged in mining and selling of coal in the United States, preparation and transport of coal, and its mining operations affect interstate commerce.

2. The Black Mesa Pipeline, Incorporated, is the owner and operator of the Black Mesa Pipeline Preparation Plant, MSHA I.D. No. 02-101047.

3. The Black Mesa Pipeline, Incorporated, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

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

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

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

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

8. A certified copy of the MSHA assessed violation history accurately reflects the history of the mine.

II. Factual Background

Black Mesa Pipeline Preparation Plant ("prep plant"), located near Kayenta, Arizona, is the sole contractor that provides transportation of coal mined at the Black Mesa Coal Mine, owned by Peabody Western Coal Corporation, to an electrical power plant (Tr. 134). The coal from the nearby mine is pressed to a very fine, "powder chocolate-like" consistency, mixed with water, then piped to a power plant some 200 miles away, where it is extracted from the water for use (Tr. 30). The prep plant employs 36 workers, and operates two production shifts and one graveyard shift for equipment maintenance (Tr. 32). Equipment at the prep plant includes very large pump stations, crushing mills, belts, a variety of motors ranging from 110 volts to high-voltage of 4160 volts, and other high-voltage equipment such as breakers, control circuits, disconnects, cables, and safety equipment (Tr. 30-31). [1]

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[1]MSHA categorizes electrical voltage as follows:

low-voltage ranges from 1 to 660;
medium-voltage ranges from 661 to 1,000; and
high-voltage is anything over 1,000 (Tr. 29).

On June 25, 1996, MSHA electrical inspector Peter Saint, assigned to the Trinidad, Colorado office, conducted his first electrical inspection (CBA) of the prep plant (Tr. 32, 34). At that time, Inspector Saint had been employed by MSHA for less than two years, but had 20 years of mining experience and had held electrical qualifications for approximately 13 years in surface and underground low/medium- and high-voltage electricity, and was qualified to perform high-voltage energized work, as well (Tr. 23-28).

During the course of this inspection, Inspector Saint requested access to the record book of monthly examinations on the high-voltage electrical equipment ("high-voltage book") (Tr. 34). He was presented with a spiral notebook containing entries which indicated that the examinations on high-voltage equipment were being performed by electricians only qualified in low/medium- voltage (Tr. 34-35). The inspector also observed a high-voltage (4160 volts) motor being "changed out" by one of the prep plant's electricians (Tr. 51, 58-60). The inspector's review of the qualifications of the prep plant's seven electricians revealed that all held surface low/medium-voltage green cards (Tr. 32, 36-37; Gov't Ex. 6). In subsequent conversations with prep plant electricians and officials, including Gilbert Castillo, Andy Mikesell and Lowell Hinkins, Inspector Saint learned that the prep plant's electricians had been performing all electrical work on the property, including high-voltage work, and that this arrangement had been going on for some 18 years (Tr. 51-52, 64-65, 76). Respecting several 4160-volt switchgears located on the premises, Inspector Saint was told that the electricians "rack out" the units and ship them to a contractor who performs checks and maintenance on them (Tr. 52-55; see Gov't Ex. 7). They related their belief to the inspector that they were qualified to perform the work, since they had passed five tests required by MSHA, and they did not work on high-voltage energized circuits/lines (Tr. 64-66, 76). Inspector Saint discussed with the miners that MSHA requires them to maintain a high-voltage book that is approved by the Secretary--hardbound with fixed sequential pages that cannot be altered--and that only high-voltage qualified electricians are authorized to perform the examinations and maintenance, and sign the book (Tr. 50-51, 55-56). After two telephone discussions with his electrical supervisor in Denver, Donald Gibson, Inspector Saint advised Black Mesa that it could either use outside contractors to perform the high-voltage work at the prep plant, or qualify its electricians under MSHA testing (Tr. 75-77, 359-360, 362-364, 368-369). The inspector related several upcoming test dates to Black Mesa officials and informed them that he would be returning to the prep plant in approximately three months, in an effort to afford the electricians ample opportunity to study and pass the test (Tr. 77-80). In keeping with his inclination to give the prep plant time to qualify its electricians in high-voltage, Inspector Saint only issued Citation No. 3849999 for violation of section 77.800-2, failure to maintain a high-voltage record book of monthly examinations, repairs, and adjustments on the 4160-volt circuit breakers and their auxiliary devices (Tr. 32-33, 78, 81; Gov't Ex. 5). Black Mesa did not contest this citation and paid the penalty in full (Tr. 33).

Inspector Saint returned to the prep plant on September 12, 1996, to conduct a spot (CAA) inspection (Tr. 82, 86). Respecting abatement of the citation June 25th citation, the inspector was told by Gilbert Castillo that Black Mesa did not know where to obtain the required book, and that none of the prep plant's electricians had been high-voltage qualified

(Tr. 83). Electing not to issue a "failure to abate" citation, Inspector Saint extended the termination due date to September 17, 1996, and Citation No. 3849999 was subsequently terminated on that date. However, on September 12th Inspector Saint issued 104(a) Citation No. 3850060, alleging a violation of section 77.103, which described the condition as follows:

> The mine has not provided a [sic] individual that is certified for high voltage at the Kayenta Preparation Plant. This condition does not provide for a person to do high voltage required checks, or repairs/maintenance on high voltage equipment

(Tr. 85; Gov't Ex. 1). On the second day of the inspection, Inspector Saint met with Castillo, Mikesell, Hinkins and the union representative, discussed MSHA requirements for the high-voltage book and examination and maintenance of high-voltage equipment, and was made aware that Black Mesa intended to seek adjudication of the electrical qualifications issue (Tr. 87-88, 97-98). A teleconference ensued, initiated by Inspector Saint, between the prep plant officials and several MSHA electrical supervisors in Denver and Price, Utah, during which MSHA reiterated that the electricians would have to obtain high-voltage qualifications in order to perform the high- voltage electrical work at the prep plant (Tr. 111-113). As a follow-up to this discussion, Don Gibson sent a "test packet" to Black Mesa, containing information about the examination and the dates that it would be administered (Tr. 368-369; Gov't Ex. 12).

Inspector Saint returned to the prep plant on September 17, 1996, and terminated the citation issued on June 25th for not maintaining a high-voltage book, as well as the citation issued for not having a high-voltage qualified electrician to perform the high-voltage electrical work at the prep plant (Tr. 113-116). In order to abate the latter citation, the prep plant enlisted the services of a high-voltage qualified electrician from the nearby Black Mesa Coal Mine to perform the monthly high-voltage examinations (Tr. 113-114).

On January 9, 1997, Inspector Saint made an electrical inspection (CBA) of the prep plant, accompanied by Castillo and the union representative (Tr. 117-119). A review of the high-voltage book by the inspector indicated that Castillo, still surface low/medium-voltage qualified, had been performing the monthly visual examinations of high-voltage equipment and signing the entries (Tr. 119-120). A review of the qualification cards of the electricians at the prep plant indicated that they remained qualified in surface low/medium-voltage only (Tr. 122-123). Consequently, Inspector Saint issued 104(d)(1) (unwarrantable failure) Citation No. 4366052, alleging a violation of section 77.502, describing the condition as follows:

> Electric equipment was not being frequently examined, tested, and properly maintained by a qualified person to assure safe operation at the Black Mesa Pipeline Preparation Plant. High voltage (4160 volts) motors and circuit breakers are located within the coal preparation plant. Management has failed to provide a qualified person as defined in Part 77.103 Subpart I to conduct the required examination. A 104(a) citation # 3850060 was issued on 9/12/96 to management for not providing a qualified person to conduct high voltage electrical examination.

A conversation was held between management, miners' rep, and management from MSHA. A determination was made that a qualified person is required to conduct examination of high voltage electrical equipment. The last check on high voltage equipment was done for the month of 9/96. No examination [sic] were done by a person qualified to make high voltage checks defined in Part 77.103 Subpart I for the months of 10/96, 11/96, 12/96. The management stated that they did not intend to use a contractor qualified in high voltage to make the required examinations

(Gov't Ex. 2). Inspector Saint also issued 104(a) non-significant and substantial Citation No. 4366053, alleging a significant and substantial violation of section 77. 800-2, describing the condition as follows:

The operator could not provide a written record of each test, examination, repair, or adjustment of all circuit breakers protecting high voltage circuits. This preparation plant uses high voltage power to assist in the operation of the plant facility. This same type of violation was issued 6/25/96. A conversation was conducted with the following management and miners representation on the importance and required [sic] by 77.802-2. Also mine management discussed the requirement of 77.502 with Mr. Don Gibson electrical supervisor in the Denver district office, Jim Kirk-electrical coal mine inspector supervisor located in Price, UT, and Larry W. Ramey, coal mine inspector supervisor located in Trinidad, CO, after the issuance of the violation of 77.800-2 issued 6/25/96

(Gov't Ex. 3). These two citations were also abated by use of a "loaner" high-voltage qualified electrician from the Black Mesa Coal Mine and were terminated on January 10, 1997 (Tr. 132-133).

Ultimately, on March 4, 1997, prep plant electricians Castillo, Strohmeyer and Begay passed the MSHA high-voltage examination and became underground/surface high-voltage qualified (Tr. 335, 530-531, 543-544; Gov't Ex. 16).

III. Findings of Fact and Conclusions of Law

A. Citation No. 3850060

1. Fact of Violation

This citation charges a violation of 30 C.F.R. §77.103, which provides in pertinent part:

(a) Except as provided in paragraph (f) of this section, an individual is a qualified person within the meaning of Subparts F, G, H, I, and J of this Part 77 to perform electrical work (other than work on energized surface high-voltage lines) if:

* * * *

(3) He has at least 1 year experience, prior to the date of the application required by paragraph (c) of this section, in performing electrical work underground in a coal mine, in the surface work areas of an underground coal mine, in a surface coal mine, in a noncoal mine, in the mine equipment manufacturing industry, or in any other industry using or manufacturing similar equipment, and he attains a satisfactory grade on each of a series of five written tests approved by the Secretary as prescribed in paragraph (b) of this section.

(b) The series of five written tests approved by the Secretary shall include the following categories:

(1) Direct current theory and application;
(2) Alternating current theory and application;
(3) Electric equipment and circuits;
(4) Permissibility of electric equipment; and,
(5) Requirements of Subparts F through J and S of this Part 77.

(c) In order to take the series of five written tests approved by the Secretary, an individual shall apply to the District Manager and shall certify that he meets the requirements of paragraph (a)(3) of this section. The tests will be administered in the Coal Mine Safety and Health Districts at regular intervals, or as demand requires.

(d) A score of at least 80 percent on each of the five written tests will be deemed to be a satisfactory grade. Recognition shall be given to practical experience in that 1 percentage point shall be added to an individual's score in each test for each additional year of experience beyond the 1 year requirement specified in paragraph (a)(3) of this section; however, in no case shall an individual be given more than 5 percentage points for such practical experience.

* * * *

(g) An individual qualified in accordance with this section shall, in order to retain qualification, certify annually to the District Manager, that he has satisfactorily completed a coal mine electrical retraining program approved by the Secretary.

This regulation defines the term "qualified person" as it is used in other electrical standards in Part 77, and sets forth alternative methods by which electricians may become qualified by MSHA to perform electrical work in surface mines.

The Secretary essentially argues a violation of the regulation because the prep plant's electricians worked on the plant's high-voltage equipment, despite the fact that they had not taken the high-voltage examination, were not carrying high-voltage cards, and had not undergone

annual retraining in high-voltage electricity (Sec. Br. at 15). [2] Furthermore, the Secretary defends her bifurcated system of testing under section 77.103(b)(3), i.e., a series of written tests for low/medium-voltage qualification, and a separate, additional written test for high-voltage qualification (totaling 5 written tests), as a reasonable interpretation of the regulation and permissible exercise of her duty to qualify electricians under the Act (Sec. Br. at 10-13).

Black Mesa maintains that the citation is unenforceable, by arguing that the Secretary has made substantive changes to section 77.103 by instituting a bifurcated testing system that is inconsistent with the wording of the regulation, without publishing those changes for notice and comment under the Administrative Procedure Act (Resp. Br. at 8-15).

Section 77.103 is definitional in nature and prescribes the manner in which the Secretary qualifies electricians under the Act. The only affirmative duties on the operator, by implication, are to employ electricians to work in the mines that are qualified to perform electrical work by one of the three means delineated, and that their qualifications be maintained through annual retraining. Neither literal reading, nor interpretation of the language requires an operator to employ a high-voltage qualified electrician at its mine. Because there is no such affirmative duty on the part of Black Mesa, as set forth in section 77.103, I cannot find that it has violated the regulation. Accordingly, Citation No. 3850060 is VACATED. However, inasmuch as an analysis of the remaining two citations requires interpretation of "qualified person," as that term is defined in section 77.103, respecting the duties authorized by the levels of electrical qualification, section 77.103 will be discussed more fully below.

B. Citation No. 4366052

1. Fact of Violation

This citation charges an unwarrantable violation of 30 C.F.R. §77.502, which provides as follows:

> §77-502 Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

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[2] MSHA electrical qualification cards issued under section 77.103 are as follows:

underground low/medium-voltage is orange;
surface low/medium-voltage is green; and
underground/surface high-voltage is white (Tr. 426-427, 434-435).

§77-502-1 A qualified person within the meaning of §77.502 is an individual who meets the requirements of §77.103.

§77.502-2 The examinations and tests required under the provision of this §77.502 shall be conducted at least monthly.

In resolving the question of whether Black Mesa was properly cited for violating section 77.502, it is necessary to obtain a definition of "qualified person" from the wording of section 77.103. If the language is clear, the regulation's terms must be enforced as written. *Island Creek Coal Co.* 20 FMSHRC 14,18 (January 1998). If the language is ambiguous, courts have deferred to the Secretary's interpretation of the regulation. *Id.* at 18-19, citing *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). The Commission's review requires a determination of whether the Secretary's interpretation is reasonable. *Id.* at 19, citing *Energy West* at 463, citing *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989). Despite a permissible interpretation, the Secretary cannot prevail unless constitutionally-based due process has been accorded to the operator, through fair notice of the conduct prohibited or required. *General Electric Company v. E.P.A.*, 53 F.3d 1324, 1328-29 (D.C.Cir. 1995); *Island Creek* at 24. The Commission applies an objective test in determining whether the operator has been afforded fair notice, i.e., "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." *Island Creek* at 24, citing *Ideal Cement* Co., 12 FMSHRC 2409, 2416 (November 1990).

Section 77.103 defines "qualified person," as the term is used in Subparts F (Electrical Equipment-General), G (Trailing Cables), H (Grounding), I (Surface High-Voltage Distribution), And J (Low- and Medium-Voltage Alternating Current Circuits) of Part 77, by prescribing the manner in which an individual becomes qualified to perform electrical work in surface mines (other than work on energized surface high-voltage lines). Of the three alternative courses that may be pursued to become qualified, the one applicable to this case is cited at section 77.103(a)(3), i. e., possessing at least one year of electrical experience in a coal mine or related area, and performing satisfactorily on a series of five written tests approved by the Secretary. The wording of the regulation makes no distinction between levels of qualification and the parameters of electrical work that are authorized thereunder, nor is it inclusive of the subject categories that must be covered by the five written tests. To that extent, I find the wording of the regulation ambiguous.

The dispute between the parties arises out of differing interpretations as to the duties authorized by low/medium-voltage electrical qualification. I do not find, however, as Black Mesa contends, that the Secretary has made substantive changes to the regulation. The Secretary was given reasonable discretion in determining the means of qualifying electricians to work in the mines, by the authority to approve and administer the tests, which subject matter need not be limited to the five categories set forth in the regulation. Based on a determination that the

inherent properties and consequences of exposure to high-voltage electricity are far more dangerous and destructive than low/medium-voltage (Tr. 74, 89, 90-96, 108-111, 237-243, 249-250), the Secretary has separated the series of four written tests for low/medium-voltage qualification from the one written high-voltage test (Tr. 484-486). Applicants for electrical qualification are put on notice that successful scoring on the low/medium-voltage test is a prerequisite to taking the high-voltage exam, by cover letter accompanying the application, which includes the following information:

> A person may become qualified to perform electrical work in three categories: underground low and medium voltage, surface low and medium voltage, and high voltage (surface and underground). An applicant will be required to satisfactorily complete the requirements for either the surface or underground low and medium voltage qualification prior to being allowed to become qualified to perform electrical work on high-voltage circuits and equipment (emphasis added)

(Govt. Ex. 12; see also Resp. Ex. 4 (Ex. B); Tr. 311-313). Moreover, an applicant is required to indicate which of the three levels of qualification for which he is applying, and if the level is high-voltage, that he has a current surface or underground low/medium-voltage qualification card (Gov. Exs. 17, 18, 19; Tr. 473-474). I find that the Secretary's bifurcated testing program of qualifying electricians reflects a reasonable interpretation of her authority under section 77.103, that this interpretation is consistent with the Act's underlying purpose of promoting the health and safety of miners, and that operators and applicants are duly notified of the separation between low/medium- and high-voltage testing and qualification, and what functions the qualification levels permit. Accordingly, I find that a reasonably prudent person would have recognized that only electricians possessing underground/surface high-voltage qualifications are permitted to work on surface high-voltage electrical circuits and equipment.

In this regard, the record clearly establishes that, at no time were the electricians at the prep plant confused or misinformed as to their electrical qualifications, and at all times prior to applying for and passing the high-voltage test, Black Mesa knew that its electricians all held surface low/medium-voltage qualification cards (Tr. 497-498, 522-523, 542-543; Govt Exs. 6, 16; Resp. Ex. 2).

Plant Manager Andrew Mikesell stated Black Mesa's consistently held position that its prep plant electricians were authorized to maintain the plant's high-voltage equipment, by testifying as follows:

> From the very start, we have maintained that our electricians were qualified under 77.103. MSHA had issued them a green card which allowed them to work on all electrical circuits that were not energized. The law specifically says that they are qualified to work on all subparts...(f) through (j) if they are not energized. And that has always been our--we've always maintained that. Our electricians do not work on energized circuits.

* * * *

> We have considered 77.104 applied to energized high-voltage. And we never worked on energized high-voltage, so we've always felt that by passing the five-part test, our electricians were qualified for all the work they were doing

(Tr. 498-499; see also 64-66, 154-155, 512-513, 516-519, 551-552, 556-557). Section 77.104, to which Black Mesa makes reference, requires the following:

> An individual is a qualified person within the meaning of §77.704 of this part for the purpose of repairing energized surface high-voltage lines only if he has at least 2 years experience in electrical maintenance, and at least 2 years experience in the repair of energized high-voltage lines located on poles or structures.

Section 77.104 is narrow in scope, pertaining to highly specialized work on energized surface high-voltage lines located on poles and structures, requires two years apprenticeship, and is very closely regulated (Tr. 232, 306-308). Because mine operators currently use contractors for construction and maintenance of power lines and substations, it is uncommon for a mine to employ an electrician holding this qualification (Tr. 269-270). The standard relates to high voltage lines, rather than circuits and equipment. The wording implies that high-voltage qualified electricians without specialized training can work on de-energized high-voltage lines. Section 77.103, however, pertains to circuits and equipment (Tr. 308). The language of section 77.104 does not make reasonable an interpretation that section 77.103 permits all levels of qualified electricians to work on all levels of de-energized equipment and circuits. To construe section 77.103 in this manner would render the varying properties of electrical voltage categories and the qualification levels obtained through MSHA testing meaningless. "Qualified person," as defined by this standard, only becomes meaningful when correlated with electrical voltage categories, and because inadequate maintenance of high-voltage electrical equipment/circuits may subsequently jeopardize the safety of other miners when energized, for purposes of this decision, it is immaterial whether the equipment/circuit is de-energized when the electrician works on it.

Inasmuch as the evidence indicates that the high-voltage motors and switchgear at the prep plant were being examined, tested and maintained by electricians not qualified to perform these functions, I find that Black Mesa has violated section 77.502. Accordingly, Citation No. 4366052 is AFFIRMED.

2. Significant and Substantial

Citation No. 5366052, as originally issued by Inspector Saint on January 1, 1997, designated the violation of section 77.502 "significant and substantial" ("S&S"), due to Black Mesa's "unwarrantable failure" to adhere to the standard (Gov't Ex. 2). Pursuant to a health and safety conference held on February 7, 1997, MSHA Conference and Litigation Representative Ned Zamarripa modified the 104(d) citation to a 104(a), non-S&S citation (Resp. Ex. 1). On

May 22, 1997, on advice from the Secretary's representative, Margaret Miller, Inspector Saint nullified Ned Zamarripa's modification, by modifying the citation back to a 104(d), S&S citation (Gov't Ex. 2; Tr. 199-209). The citation also alleges that the violation was caused by Black Mesa's high negligence. The Secretary, through Attorney Miller, proposed a penalty of $2,500.00, as opposed to MSHA's original proposal of $150.00.

Section 104(d) of the Act designates a violation S&S when it 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." 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 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 forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum:* 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,* 861 F.2d 99, 103-104 (5th Cir. 1998), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1998). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998).

Inspector Saint testified that the prep plant only used a "loaner" high-voltage electrician to abate the citation previously written on September 12th for violation of section 77.103, and surface low/medium-voltage qualified electrician, Gilbert Castillo, had been making the monthly examinations of the high-voltage equipment and signing the high-voltage book (Tr. 123-125). He explained that he had characterized the violation of section 77.502 S&S because electricians, unqualified to perform the work that they had been undertaking on the plant's high-voltage equipment, were creating a dangerous condition not only for themselves, but for others working around them (Tr. 99). He further opined that he believed the mine to be lucky that a fatality or permanently disabling accident had not occurred already, but that it was likely to happen sooner or later, if the practice continued (Tr. 130).

Based on the cumulative testimony regarding the bridging capabilities and destructive, unforgiving peculiarities of high-voltage electricity, and the potential danger of even the slightest mistake or unclean work-habit, I find that the violation created a discrete safety hazard. Based on the lack of training specific to the intricacies of work on high-voltage electrical equipment, I find that there was a reasonable likelihood of serious injury, including death, to an unqualified electrician servicing high-voltage electrical equipment, or to others working around or coming

into contact with the equipment. In so finding, I have considered the evidence that the prep plant had been utilizing low/medium-voltage qualified electricians to maintain its high-voltage electrical equipment for a number of years, but am persuaded that the danger is ever present and lack of current training in high-voltage electricity amounted to an accident waiting to happen. Accordingly, I find that the violation was S&S.

3. Unwarrantable Failure

Inspector Saint testified that he attributed the violation to Black Mesa's "unwarrantable failure" to comply with section 77.502 because "with all the conversations with Mr. Gibson, myself, I felt that we went way beyond, and I felt personally I went way beyond trying to bring this to a close without blowing it out of proportion. I felt that they were not trying to meet or work with me anymore. At this time, I believed that they knew better or should have known, by past conversations and they elected not to" (Tr. 125).

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

I am persuaded that Black Mesa held a reasonable, good faith belief, although erroneous, that as long as its electricians worked on de-energized electrical equipment and circuits, the voltage level was immaterial. I reach the conclusion that this belief was reasonable, despite a finding that Black Mesa understood its electricians to be surface low-medium qualified only, based, in part, on evidence that Black Mesa had previously made this "de-energized equipment argument" to other MSHA inspectors, who had apparently been confused also as to the definition of "qualified person" under section 77.103, and, therefore, had failed to require that the prep plant's electricians become high-voltage qualified (Tr. 513, 536-537, 542-543, 557). Therefore, I do not find that the Secretary has proven that the violation was the result of Black Mesa's unwarrantable failure.

4. Penalty

While the Secretary has proposed a civil penalty of $2,500.00 (originally specially assessed at $150.00), the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. §820(j). *See Sellersbueg Co.*, 5 FMSHRC 287, 291-292 (March 1993), *aff'd* 763 F.2d 1147 (7th Cir. 1984). While Citation No. 3849999 was not contested, it was the precursor to the instant citations and its history provides some indication that the penalty proposed by the Secretary was based on an assessment by Inspector Saint and Attorney Miller that Black Mesa was not "working with" the inspector and would be seeking an interpretation of section 77.103 through "the court" (See Tr. 85-86, 88, 97-98, 104-108, 208-209). I find that the Secretary has sought to punish Black

Mesa through the imposition of higher penalties (the penalty proposed in vacated Citation No. 3850060 was modified from $50.00 to $1,500.00). Failure to cooperate is not a valid basis to conclude that a violation is more hazardous or that its occurrence is attributable to a higher degree of negligence, warranting an elevation in penalty. A more appropriate course for MSHA to have followed back in September 1996, upon the initial determination that Black Mesa had no intention of obtaining high-voltage qualification for its electricians, may have been issuance of a 104(b) order for failure to abate the June 25th citation. It appears from the evidence, however, that Inspector Saint was not of the opinion that the danger posed by the lack of high-voltage qualified electricians was particularly grave or immediate, since he was still of a mind to give Black Mesa considerable additional time to take the high-voltage test, and the citation that he subsequently issued under section 77.103 was characterized neither S&S nor unwarrantable.

Black Mesa employs 36 individuals over three shifts and is, therefore, a small operator. Because no violation history has been available since the mine changed hands in August 1996, its history of previous violations is construed in the light most favorable to the operator (See Gov't Br. at 28). As stipulated, the proposed civil penalty will not affect Black Mesa's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violation and the negligence of Black Mesa in causing it. I find the gravity of the violation to be serious, since the potential for grave injuries to miners, including high likelihood of death caused by high-voltage electrocution, is well-documented by the record. Considering that Inspector Saint failed to identify with specificity any unsafe practice of the electricians in examining, testing or servicing the high-voltage equipment, I ascribe moderate negligence to Black Mesa (Tr. 546, 561; see Resp. Ex. 1). While the citation was abated within the time-frame given, I find that it was not abated in good faith, based on evidence that the prep plant borrowed a high-voltage qualified electrician to abate the citation only, and thereafter returned to having it's low/medium-qualified electricians maintain the high-voltage equipment. Therefore, having considered Black Mesa's small size, insignificant history of violations, ability to stay in business, seriousness of the violation, failure to abate in good faith and moderate negligence, I find that a penalty of $400.00 is appropriate for this violation.

C. Citation No. 4366053

1. Fact of Violation

This citation charges a non-S&S violation of 30 C.F.R. §77.800-2, a standard promulgated under Subpart I of Part 77-Surface High-Voltage Distribution. Section 77.800-2 provides as follows:

> The operator shall maintain a written record of each test, examination, repair, or adjustment of all circuit breakers protecting high-voltage circuits. Such record shall be kept in a book approved by the Secretary.

The Secretary points out that this is the second violation of section 77.800-2 issued by Inspector Saint, the first having been issued on June 25, 1996, as discussed previously. To abate the former citation, Black Mesa had put into use a book approved by the Secretary, but according to Inspector Saint, while the required monthly visual inspections of the stationary high-voltage equipment were being conducted, they were not being conducted and recorded by a high-voltage qualified electrician (Tr. 210-215). For the reason as previously discussed, that the scope of electrical work authorized by MSHA qualification levels corresponds to the electrical voltage categories, the Secretary has proven a violation of the standard. Accordingly, Citation No. 5366052 is AFFIRMED.

2. Penalty

Addressing the six penalty criteria set forth in section 110(i), as discussed above, Black Mesa is a small operator, was cited approximately six months earlier for the same violation but otherwise has an insignificant history of prior violations, and the parties have stipulated that the proposed penalty of $200.00 will not affect Black Mesa's ability to continue in business. Respecting consideration of the gravity criteria, I find improper maintenance of the high-voltage book to be far less egregious than unqualified electricians working on high-voltage equipment and, therefore, find that the violation is not serious. Because Black Mesa had been made aware of the requirements of the standard, and failed to abate the citation in good faith for the same reasons discussed above, I ascribe moderate negligence to Black Mesa. Accordingly, having considered Black Mesa's small size, insignificant history of violations, ability to stay in business, non-serious nature of violation, failure to abate in good faith and moderate degree of negligence, I find that a civil penalty of $100.00 is appropriate.

ORDER

Accordingly, Citation No. 3850060 is **VACATED**, Citation Nos. 4366052 and 4366053 are **AFFIRMED**, and Black Mesa is **ORDERED TO PAY** civil penalties of **$500.00** within 30 days of the date of this decision. Upon receipt of payment, these cases are **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 30 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 98-30-M A. C. No. 41-03941-05501
v.	:	
LONGVIEW SAND & EXCAVATING COMPANY, Respondent	:	Longview Sand & Excavating Company

DECISION

Appearances: Stephen Irving, Esq., Margaret Cranford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Terry Bailey, Esq., Bailey & Bailey, Carthage, Texas, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalties filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petition seeks to impose a total civil penalty of $439.00 for two alleged violations of the Secretary's mandatory safety standards in 30 C.F.R. Part 56 of the regulations that govern surface non-metal mines. The alleged violations concern a damaged windshield on a front-end loader and the respondent's failure to use a life jacket when accessing a sand dredge.

These matters were heard on May 28, 1998, in Longview, Texas. The parties stipulated that Longview Sand & Excavating Company is a mine operator subject to the jurisdiction of the Act. (Tr. 10).

At the hearing, the parties were advised that I would defer my ruling on these citations pending post-hearing briefs, or, issue a bench decision if the parties waived their rights to file post-hearing briefs. The parties waived the filing of briefs. (Tr. 110-11). Accordingly, this decision formalizes the bench decision issued with respect to the two citations. The bench decision vacated the citation concerning the damaged windshield, and affirmed the significant and substantial (S&S) citation concerning the failure to wear a life-jacket. A $150.00 civil penalty was assessed for the affirmed citation.

I. Pertinent Case Law and Penalty Criteria

The bench decision applied the Commission's standards with respect to what constitutes an S&S violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In determining if it is reasonably likely that a cited condition will result in serious injury, it is not necessary to show that miners were exposed directly to the resultant hazard at the time of the inspection. Rather, the Commission has stated:

> [T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood of injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. *Halfway Incorporated*, 8 FMSHRC 8, 12 (January 1986).

The bench decision also applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil penalties:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

II. Findings of Fact

Jon Jacks is the sole proprietor of Longview Sand & Excavating Company located in Longview, Texas. Jacks has no employees. Jacks testified that he dredges sand from a small pond several times each month. The pond is approximately seven to eight feet deep and the pond's dimensions were estimated to be 40 feet by 40 feet. The dredge is approximately 17 feet long. The frequency of Jacks' dredging varies depending on his customers' need for sand. The dredge can be accessed by row boat. However, at the time of the inspection, the row boat was partially submerged because of a storm. There is a rope that extends from the dredge to the shore that also serves as a means of access by pulling the dredge to shore. The sand is stockpiled on shore and loaded into customer trucks with a Komatsu W90-3 front-end loader.

MSHA Inspector Robert R. Lemasters conducted an initial inspection of Jacks' sand dredging facility on April 30, 1997. Lemasters issued a citation for Jacks' failure to obtain a mine I.D. number because Jacks had failed to notify MSHA of his mining activities. The citation issued for Jacks' failure to register as a mine operator is not in issue in this proceeding.

a. Citation No. 7853165

During the course of his inspection, Lemasters inspected the Komatsu front-end loader. The front-end loader travels short distances from the stockpile to customer trucks at an average speed of approximately five miles per hour. (Tr. 80). The loader's steering wheel is located in the center of the dashboard. Lemasters observed the windshield had a star-burst type radiating crack approximately 12 inches in length located to the left of the steering wheel. He observed the damaged windshield from the ground and he also observed the crack from the cab of the vehicle when he climbed aboard to check for seatbelts.

On cross examination Lemasters stated he did not take photographs of the cracked windshield. In describing his recollection, he stated "I believe it was to the lower left, if my memory serves me." (Tr. 37-8).

Jacks testified that the windshield was damaged when it was struck by a hose that broke loose from the front of the loader. Jacks testified that the crack was in the lower left of the windshield and that it did nor obstruct his vision when he operated the loader from the normal operator's position in the center of the operator's compartment.

As a result of Lemasters observations, Lemasters issued Citation No. 7853165 citing an alleged non-S&S violation of the mandatory safety standard in section 56.14103(b), 30 C.F.R. § 56.14103(b). Lemasters considered the violation to be non-S&S because the front-end loader was operated at a slow speed. Lemasters established May 2, 1997, as the date for abating the citation. Section 56.14103(b) states:

If damaged windows **obscure visibility necessary for safe operation**, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment. (Emphasis added).

b. Citation No. 7853166

Jacks was not dredging at the time of Lemasters' April 30, 1997, inspection. Lemasters noted that although dredging operations were conducted on a regular basis, there was no evidence that life jackets had ever been used. Consequently Lemasters issued Citation No. 7853166 for an alleged violation of the mandatory safety standard in section 56.15020, 30 C.F.R. § 56.15020. Section 56.15020 provides, "[l]ife jackets or belts shall be worn where there is danger from falling into water."

To abate the citation Lemasters informed Jacks that he would have to keep a life jacket on the premises. Lemasters set May 1, 1997, as the abatement date. Lemasters testified that Jacks responded that he had a life jacket at home that he used for fishing, and that he would bring it out to the pond.

Jacks, on the other hand, testified that he brought a life jacket from home to work whenever he used the dredge. However, Jacks admitted that he never told Lemasters at the time of the inspection that he used a life jacket while on the dredge. Jacks testified he failed to inform Lemasters that he used a life jacket because Lemasters never specifically asked him if he used one.

Lemasters returned to the facility on June 10, 1997, to ensure that the citations were abated. However, the cracked windshield was not replaced, and Jacks still did not have a life jacket on the premises. As a consequence of Jacks' inaction, on June 10, 1997, Lemasters issued 104(b) Order Nos. 4453237 and 4453238 for Jacks' failure to timely abate the citations previously issued on April 30, 1997.[1] Order No. 4453237 was terminated after Jacks removed the windshield with a sledge hammer. To terminate Order No. 4453238, Lemasters remained on the premises until Jacks returned from a local store where he had purchased a life jacket.

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[1] When a violative condition is not corrected timely, Section 104(b) of the Act, 30 U.S.C. § 814(b), authorizes the Secretary to issue an order requiring the withdrawal of all mine personnel until appropriate remedial measures are taken.

III. Bench Decision

a. Citation No. 7853165

As a threshold matter, the Secretary has the burden of proving that a violation of a mandatory safety standard has occurred. *Southern Ohio Coal Co.*, 14 FMSHRC 1781, 1785 (November 1992) (citations omitted). Citation No. 7853165 cites an alleged violation of section 56.14103(b). This regulatory provision is violated only if damaged windshields "obscure visibility for safe operation." Thus, a damaged windshield, in and of itself, is not a violation of the standard. It is only a violation if the damage obscures the visibility needed for safe operation.

The issue of safe operation must be viewed in the context of the nature of the vehicle in question. While a damaged windshield on a haulage truck used to drive on elevated winding roads in a quarry may constitute a violation of section 56.14103(b), the same damage on the windshield of a front-end loader driven over short distances at speeds of approximately five miles per hour may not interfere with safe operation of the loader. Thus, the issue is, did the damage to the windshield obscure vision to the extent that the front-end loader could not be operated safely?

As noted, the Secretary bears the burden of proof. There are no photographs of the cracked windshield. Inspector Lemasters candidly testified that his description of the size and location of the crack in the windshield was accurate "if his memory served him right." His observations occurred more than one year ago.

Jon Jacks testified that the crack was smaller than the crack recalled by Lemasters, and that it was located lower in the windshield than the location described by Lemasters. Jon Jacks' testimony with respect to the size and location of the damage was corroborated by his father, J. R. Jacks, Jr.; who was sequestered during this proceeding.

In weighing the evidence, I must consider the disputed testimony, the lack of photographic evidence, the nature of the operation of the subject vehicle over short distances at very slow speeds, and, the fact that even Lemasters did not consider the hazard caused by the damaged windshield to be S&S in nature. Consequently, I conclude the Secretary has not shown, by a preponderance of the evidence, that the damaged windshield sufficiently obscured vision so as to interfere with the safe operation of the front-end loader. Accordingly, Citation No. 7853165 and related 104(b) Order No. 4453237 shall be vacated.

b. Citation No. 7853166

While it is true, as argued by the respondent, that Section 56.15020 does not explicitly require an operator to keep life jackets on mine property, this mandatory standard does require life jackets to be worn when there is a danger of falling in water. An operator's failure to keep life jackets readily available for use by personnel who are exposed to the hazard of drowning creates a rebuttable presumption that life jackets are not worn when required.

It is well settled that a citation may be issued for violations detected by an MSHA inspector even after the violations have ceased to exist. *See, e.g., Emerald Mines Corp.*, 9 FMSHRC 1590 (September 1987), aff'd., 863 F.2d 51 (D.C. Cir. 1988). Thus, contrary to the arguments advanced by the respondent, Lemasters did not have to observe Jacks in the act of dredging without wearing a life jacket in order to properly cite Jacks for a violation of section 56.15020.

Here, Lemasters concluded, in essence, that Jacks' failure to have a life jacket available for use was circumstantial evidence that Jacks did not wear a life jacket when accessing the dredge. In view of this circumstantial evidence, the burden of proof shifts to Jacks to demonstrate that he had, in fact, worn a life jacket while dredging.

Significantly, even Jacks admits that, during Lemasters' April 30, 1997, inspection, he never contended that he had worn a life jacket while dredging. Jacks' only reference to a life jacket concerned the one he purportedly had at home that he used for fishing. Jacks' explanation at the hearing that he did not inform Lemasters that he routinely wore a life jacket on the dredge because Lemasters never asked him is not credible. Moreover, Jacks assertion that he had in the past brought his life jacket from home to the dredge is belied by the fact that he did not have a life jacket on the premises during Lemasters' June 10, 1997, abatement inspection. His purchase of a life jacket at a local Wal-Mart to abate the citation is further evidence of his lack of credibility concerning his alleged routine use of a life jacket.

In the final analysis, Jacks' assertion that he should escape liability because he left his life jacket home on April 30, 1997, and again on June 10, 1997, is nothing more than the time worn "I left my homework home" excuse. It doesn't work. Accordingly, the Secretary has shown, by a preponderance of the evidence, that Jacks did not wear a life jacket while dredging in violation of the mandatory safety standard in section 56.15020.

A violation is properly designated as S&S if there is a reasonable likelihood that the hazard contributed to by the violation will result in an event in which there is a serious injury or death. It is the contribution of the violation to the cause and effect of the hazard, i.e., drowning, that must be significant and substantial. *Secretary of Labor v. Jim Walters Resources, Inc.*, 111 F.3d 913, 917-18 (D.C. Cir. 1997). Lemasters testified that the dredge had no railings and that there was debris and grease on the deck of the dredge. Thus, the Secretary has shown that

Jacks' failure to wear a life jacket, given continued dredging operations, significantly and substantially increased his exposure to the hazard of drowning. Consequently, the violation of section 56.15020 was appropriately characterized as S&S.

The Secretary has proposed a civil penalty of $292.00 for this violation. Applying the penalty criteria in section 110(i) of the Act, I note the violation was serious in gravity and attributable to a moderate degree of negligence on the part of Jacks. However, the evidence reflects a mitigating factor in that the respondent is a very small operator that conducts his business as a sole proprietorship with no employees. Although there is no history of violations because the subject citations were issued during the initial MSHA inspection, the fact that only one S&S violation was observed is also a mitigating factor. Although Jacks did not rapidly abate the cited violations, his failure to do so is attributable to his lack of familiarity with MSHA's abatement procedures given the fact that this was his first MSHA inspection. Affording Jacks the benefit of the doubt that he will be more cooperative in abating any future safety violations that may be detected, I am assessing a civil penalty of $150.00 for Citation No. 7853166 and related 104(b) Order No. 4453238. A civil penalty of $150.00 will not effect Jacks' ability to remain in business.

ORDER

ACCORDINGLY, Citation No. 7853165 and related 104(b) Order No. 4453237 **IS VACATED. IT IS ORDERED** that the respondent **SHALL PAY** a civil penalty of $150.00 in satisfaction of Citation No. 7853166 and related 104(b) Order No. 4453238. Payment of the civil penalty shall be made to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of payment this docket proceeding **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON D.C. 20006-3868

June 19, 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 98-98
Petitioner	:	A. C. No. 11-02846-03767
	:	
v.	:	
COAL MINERS INCORPORATED,	:	Eagle Valley Mine
Respondent	:	

DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlement for the four violations in this case. A reduction in the penalties from $21,000 to $12,600 is proposed.

Order No. 4264660 was issued for a violation of 30 C.F.R. § 75.400 because coal, coal dust and float coal dust accumulated extensively along the belt line. A reduction in the penalty from $6,000 to $3,600 is proposed. Citation No. 4265291 was issued for a violation of 30 C.F.R. § 75.512 because an adequate electrical exam was not performed on the No. 9 scoop. A reduction in the penalty from $4,000 to $2,400 is proposed. Order No. 4265292 was issued for a violation of 30 C.F.R. § 75.512 because an adequate electrical exam was not conducted on the continuous haulage system. A reduction in the penalty from $6,000 to $3,600 is proposed. Order No. 4265301was issued for a violation of 30 C.F.R. § 75.362(b) because an adequate examination of the belt line was not conducted on the second and third shift. Coal and coal dust accumulations were present along the entire length of the belt line and were not in the examination book. A reduction in the penalty from $5,000 to $3,000 is proposed.

The one citation and three orders which were issued under section 104 (d)(1) of the Act, designate the alleged violations as significant and substantial and charge that they are the result of the operator's unwarrantable failure.

In her motion the Solicitor sets forth the tonnage of the mine and the operator which indicate that the mine is large and the operator is small to medium. The history of prior

violations given by the Solicitor is consistent with an average history. Finally, the Solicitor advises that imposition of a penalty will not affect the operator's ability to continue in business.

Permanently disabling or fatal illness or injury was rated as highly likely in all the violations. The settlement motion states that gravity is unchanged and remains as issued. Negligence was rated as high in all the violations and here too, the motion states that negligence is unchanged and remains as written.

The Solicitor attempts to justify the recommended settlement by stating "A reduction is warranted in this case in recognition of Respondent's good faith efforts in abating the cited conditions within the time granted by the MSHA inspector. Further, the Respondent is strongly committed to enforcing compliance more strenuously in the future."

I cannot approve the settlement motion. The Solicitor is reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, 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 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

The fact that in this case high gravity and high negligence remain as issued militates against any reduction, much less one of 40% as is sought here. The criteria relating to size, prior history of violations and ability to continue in business, set forth above, do not support reduction. In addition, the representation of good faith abatement does not warrant the large reductions suggested by the Solicitor. Indeed, the Solicitor does not allege that the operator made any unusual efforts to achieve abatement, but states only that abatement was accomplished within the time allowed. So too, the bare assertion that the operator is committed to more strenuous enforcement, without more, cannot support the recommended assessments. I have previously approved a substantial reduction where the representation of stronger future enforcement was accompanied by downward revisions in the levels of gravity and negligence. Florida Crushed Stone Company, Docket No. SE 98-23-M, Unpublished (May 20, 1998). I have also approved a reduction where, unlike this case, the operator's commitment to future enforcement was described in detail. MCC Incorporated, Docket No. LAKE 98-44-M, Unpublished (March 27, 1998).

If this recommended settlement were allowed, the Solicitor would be able to obtain large reductions by merely stating the operator would enforce the Act more strongly in the future. Settlements must be based on more than a few pro forma throwaway lines.

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED**.

It is further **ORDERED** that within 30 days of the date of this order the Solicitor submit appropriate information to support her settlement motion. Otherwise, this case will be set for hearing.

Paul Merlin
Chief Administrative Law Judge

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