

**THERE WERE NO COMMISSION DECISIONS OR ORDERS**

**ADMINISTRATIVE LAW JUDGE DECISIONS**

05-13-2003	Secretary of Labor on behalf of Charles Scott Howard v. Panther Mining, LLC, et al.	KENT 2003-245-D	Pg. 266
	<i>This decision was listed in the May 2003 volume, but inadvertently omitted.</i>		
06-12-2003	Peabody Western Coal Company.	WEST 2001-201-R	Pg. 293
06-17-2003	Washington County Aggregates	CENT 2003-15-M	Pg. 306
06-25-2003	Hazel Olson v. Arch Mineral Company/ Thunder Basin Coal Company	WEST 2002-443-D	Pg. 319
06-27-2003	Vandalia Resources, Inc.	WEVA 2002-145-R	Pg. 335



## **JUNE 2003**

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

Secretary of Labor, MSHA v. U.S. Steel Mining Company, Docket No. SE 2002-126. (Judge Melick, April 30, 2003)

Secretary of Labor on behalf of Mark Gray v. North Star Mining, Inc., and Jim Brummett, Docket No. KENT 2001-23-D. (Judge Bulluck, April 29, 2003)

No cases were filed in which Review was denied during the month of June



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

May 13, 2003

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on behalf of	:	
CHARLES SCOTT HOWARD,	:	Docket No. KENT 2003-245-D
Complainant	:	BARB CD 2003-07
v.	:	
	:	Mine ID 15-18198
PANTHER MINING, LLC, CAVE SPUR	:	No. 1 Mine
MINING, LLC, and BLACK	:	
MOUNTAIN RESOURCES, LLC,	:	
Respondent	:	

**DECISION APPROVING SETTLEMENT**  
**ORDER FOR TEMPORARY REINSTATEMENT**

Appearances: J. Phillip Giannikas, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, on behalf of the Secretary of Labor;  
Stephen A. Sanders, Esq., Appalachian Citizens Law Center, Inc., Prestonsburg, Kentucky, on behalf of the Complainant;  
Stephen M. Hodges, Esq., Abingdon, Virginia, on behalf of the Respondents.

Before: Judge Melick

At hearings on May 7, 2003, the parties negotiated a settlement agreement, and based on that agreement, a bench decision was issued ordering "economic reinstatement" of the Complainant, Mr. Charles Scott Howard, recognizing that Mr. Howard had obtained other employment but at a lower rate of pay. The bench decision provides as follows with only non-substantive corrections:

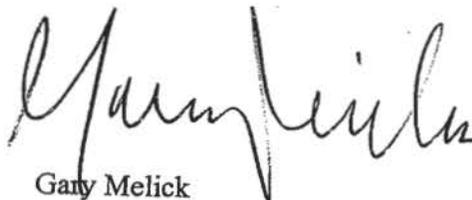
JUDGE MELICK: Back on the record. Just for the record, counsel have been negotiating and the parties have come to an agreement with respect to temporary reinstatement. I will issue a bench order of temporary reinstatement to implement the parties' agreement.

That order will be, first of all in light of Mr. Howard's current employment with another company, the Respondents will pay, effective tomorrow, May 8<sup>th</sup>, to Mr. Howard the difference between his average weekly pay for his last four weeks of employment at Cave Spur Mining, LLC, and the amounts he is earning based on his average weekly pay at his current job, and that the checks in payment will be mailed to Mr. Howard's regular address. This payment shall continue until the final order is issued in the discrimination case on the merits.

As an adjunct to this agreement the parties have agreed to expedite the trial on the merits of the discrimination case. The complaint in that case will be filed by the Secretary within two weeks from today's date; and the Respondents have agreed to file an answer to that complaint within one week of their receipt of the complaint. The trial on the merits will commence on Wednesday, June 18<sup>th</sup>, and, if necessary, continue into June 19<sup>th</sup> of this year.

One other thing, the parties have agreed to proceed with depositions with the objective of completing these depositions seven days before the hearing scheduled in this matter.

That decision and order is hereby now confirmed pursuant to Commission Rule 69, 29 C.F.R. § 2700.69.



Gary Melick  
Administrative Law Judge

Distribution: (By Facsimile and Certified Mail)

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ADMINISTRATIVE LAW JUDGE DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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June 12, 2003

PEABODY WESTERN COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2001-201-R
	:	Citation No. 7633896; 1/03/2001
v.	:	
	:	Docket No. WEST 2001-202-R
	:	Order No. 7633897; 1/03/2001
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2001-203-R
ADMINISTRATION, (MSHA),	:	Order No. 7633898; 1/03/2001
Respondent	:	
	:	Kayenta Mine
	:	Mine ID 02-01195
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-98
Petitioner	:	A.C. No. 02-01195-03614
	:	
v.	:	
	:	Kayenta Mine
PEABODY WESTERN COAL COMPANY,	:	
Respondent	:	

**DECISION**

Appearances: Isabella M. Del Santo, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the Secretary of Labor;  
Karen L. Johnston, Esq., Jackson Kelly, PPLC, Denver, Colorado, for Peabody Western Coal Company.

Before: Judge Manning

These cases are before me on notices of contest filed by Peabody Western Coal Company ("Peabody") and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Peabody, 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"). A hearing was held in Flagstaff, Arizona. The parties presented testimony and documentary evidence and filed post-hearing briefs.

## I. SUMMARY OF THE EVIDENCE, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Peabody operates the Kayenta Mine, an open pit coal mine in Navajo County, Arizona. The mine relies on five electrical substations to provide power to the mine. A trunk line from each substation carries electricity from that substation to draglines and other electrical machinery. Substations have to be relocated from time to time as the pit expands. In the winter of 2000, Peabody was setting up a substation in a new location to serve the expanding pit. (Tr. 85, 202). This C-5 substation contained a transformer to reduce the power coming in on overhead power lines at 69,000 volts (69 kv) to 23,000 volts (23 kv). A trunk line for the C-5 substation would carry the 23 kv power to draglines. On December 12, 2000, the electrical crew was completing the work to get this trunk line into operation. The electrical crew was made up of Marlin Gorman, Arlo Ketchum, and Myron Gorman. The electrical manager at the mine was Vern Hongeva.

Near the beginning of the shift, Marlin Gorman and his son Myron Gorman went to the C-5 substation to lock it out.<sup>1</sup> The trunk line was lying on the ground because it was not connected to the substation. There is a large lever on the side of the substation near a door. The lever was in the down position, which means that the 23 kv circuit was open. (Tr. 22-23). If the lever were moved up, the circuit would be closed. The lever was labeled in that manner. (Ex. C-8). They locked this lever in the down, open, position and put a tag on it. They also locked the load door on the substation so nobody could attach the trunk line. The crew performed some work on the isolator, which was at the other end of the trunk line. (Tr. 25; Ex. S-2). The cables to the draglines would eventually be attached to the circuit at this isolator when the C-5 substation was put into use.

A little later, the Gormans drove back to the C-5 substation to put power on the trunk line to see if the isolator was working correctly. The Gormans unlocked the gate to the chain link fence surrounding the substation and removed the locks on the substation. Gorman, a first class electrician, put on his hot gloves so he could attach the three phase trunk line to the three connectors ("cable couplers") behind the load door of the substation. After he put on his gloves, he looked through the window on the load door. The lever on the outside of the substation controls three knife blade switches inside the substation. The switches are immediately inside the load door and the window is there so that electricians can look at these knife blade switches. Gorman noticed that the knife blades were closed. (Tr. 26). That meant that the blades were engaged and were able to pass current. An open circuit is a de-energized circuit while a closed circuit is energized. Knife blade switches are used as a safety precaution so that there will be a "visual disconnect" that an electrician can observe to assure himself that

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<sup>1</sup> Myron Gorman testified at the hearing, but Marlin Gorman did not. To avoid confusion, I refer to Myron Gorman in this decision as "Gorman" and I refer to Marlin Gorman as "Marlin."

the circuit is not energized before he opens the load door to connect the trunk line. (Tr. 28). The three cable couplers for the trunk line were inside the load door below the knife blade switches. By looking at the knife blades through the window on the load door, Gorman knew that the cable couplers inside the door might be energized, even though the lever to the right of the door indicated that the circuit was open.<sup>2</sup>

Mr. Gorman tried to fix the problem by pushing the lever on the side of the substation up and down. (Tr. 29). He hoped that by doing so, the knife blades would disengage and open the circuit. The lever apparently controls the knife blades through a chain attached to sprockets, but the mechanism obviously was not working because Gorman could not get the blades to disengage. One of the Gormans called the electrical manager, Mr. Hongeva, who arrived at the substation shortly thereafter. After Gorman described what had happened, Mr. Hongeva attempted to fix the problem. First, he made sure that the circuit breakers for this 23 kv circuit were open. The lights on the control panel for the substation were green, which indicated that the circuit breakers were open. He also checked a meter that indicated that the ground monitor protection system was working. (Tr. 166, Ex. C-6). Hongeva asked the men to again try to get the knife blades to open by operating the lever. The blades did not open. Hongeva believed that the blades were stuck. Hongeva suggested that they open the load door and loosen the plexiglass shield inside the door a little so that he could insert a grounding stick to try to disengage the knife blades. (Tr. 36). Each knife blade was about a foot long. (Tr. 37).

As Hongeva was considering how to open the blades, Gorman asked him whether the knife blades on the other side of the substation should be opened first. These knife blades control the 69 kv coming into the substation from the overhead lines. Opening the 69 kv blades would ensure that the entire substation was de-energized. Gorman testified that Hongeva did not respond to this question and, as a consequence, the 69 kv knife blades were not opened. (Tr. 35). Gorman believed that it was not a good practice to rely on the circuit breakers to confirm that it was safe to use the grounding stick to open the 23 kv blades. (Tr. 39). A grounding stick, sometimes called a hot stick, is used to bleed off any residual power in a circuit after it has been de-energized. Gorman testified that as Hongeva was getting the grounding stick, he again suggested that the 69 kv blades should be opened. (Tr. 43). Gorman testified that Hongeva replied that it was not necessary. Hongeva testified that he told Gorman that the knife blade switches were not "hot" because the breaker was open. (Tr. 173-74).

Hongeva first used the grounding stick to discharge any residual energy on the three cable couplers. (Tr. 69, 170). He then inserted the grounding stick through the crack in the loosened plexiglass shield. He was able to open one of the knife blade switches. Hongeva

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<sup>2</sup> The lever also controls a locking device on the load door. When the lever is in the closed position, the load door cannot be opened. This locking mechanism was working correctly. (Tr. 32).

testified that there was no indication that the blade was energized. (Tr. 171). Gorman testified that when Hongeva opened this switch, he saw a small, tennis ball-sized ball of fire. (Tr. 44). He further testified that Marlin said, "Hey, that has power on it" and that Hongeva replied, "No, we just grounded it out." *Id.* Hongeva testified that Marlin told him that he saw a spark and that he replied that it was just a "capacitive discharge." (Tr. 171).

At this point, they closed the load door again and tried moving the lever on the outside of the substation up and down to try to open the other two blades. The blades moved but they did not pop out into the open position. (Tr. 44-45). They reopened the load door and Hongeva tried to use the grounding stick to open the other two blades. Gorman was standing on the ground behind Marlin and Hongeva, so he could not see exactly what was happening. (Tr. 45-46). Marlin and Hongeva were on the pad for the substation. Gorman testified that he heard a loud noise and the sound of arcing current. (Tr. 46). Gorman started backing up and told Marlin to get off the pad. They both went out the gate and Hongeva followed shortly thereafter. Gorman testified that he saw a large ball of fire come out of the area where the blades were. (Tr. 47-48). Everyone exited the area in case the substation exploded or caught on fire. Gorman testified that he could hear electrical parts flying through the air. (Tr. 49-50). Nobody was injured as a result of these events.

Hongeva testified that there was an arc, which he described as a phase-to-ground arc. (Tr. 172, 179). He dropped the grounding stick and stepped away from the substation. (Tr. 184). He never saw the arc, but he heard it. (Tr. 185). Hongeva testified that he "couldn't believe what had happened." *Id.* He thought that maybe there was a problem with the breakers. He stated that he never feared for his safety because he was protected by the plexiglass shield.

When the men returned to the substation, they used fire extinguishers to put out residual fires. After he believed it was safe, Gorman walked around to a different side of the substation so that he could enter the substation through a doorway to put out any fires inside. Gorman opened and locked out the 69 kv knife blades before he entered the substation. Once inside, Gorman saw that the three 23 kv wires traveled from the transformer directly to the knife blade switches without first going through the circuit breakers. (Tr. 51,182; Ex. S-4). He immediately called out to Hongeva in order to show him. The circuit breakers had been installed between the knife blades and the cable couplers rather than between the transformer and the knife blade switches. As a consequence, the knife blades had actually been energized that morning despite the fact that the circuit breakers were open. If the knife blade switches on the 69 kv side of the substation had been opened, as suggested by Gorman, the 23 kv knife blades would not have been energized.

Hongeva testified that he had never seen a substation wired like the C-5 substation. (Tr. 186). All other substations that he is familiar with are wired so that the electricity flows through the circuit breakers before entering the knife blade switches. (Tr. 186; Ex. S-3). After this incident, he checked all of the other substations at the mine and confirmed that none

of the others were wired like the C-5. HONGEVA investigated the history of this substation to try to understand why it was not wired correctly. The C-5 substation arrived at the mine in 1985. At some point after it arrived and before HONGEVA transferred to the Kayenta Mine, the breakers and blade switches were changed out. The original breakers and blade switches were part of "one whole unit." (Tr. 190). HONGEVA believes that when this single unit was replaced with separate breakers and knife switches, the wiring was not modified to account for this change. (Tr. 190-91). HONGEVA was not the electrical manager when this change was made.

The Department of Labor's Mine Safety and Health Administration ("MSHA") received an anonymous complaint that there had been an electrical arc and fireball at the C-5 substation. MSHA Inspector John Hancock was sent to the mine to investigate this complaint. At the conclusion of his investigation, Hancock issued a citation and two orders under section 104(d)(1) of the Mine Act.

The inspector testified that it is bad electrical practice to rely on circuit breakers to determine whether a circuit is energized because breakers do not provide a visual disconnect. (Tr. 89, 93). He also stated that it was hazardous to use the grounding stick to try to open the blades because there is a cable at the opposite end of the grounding stick that is attached directly to the grounding medium of the substation. (Tr. 96). If someone touches a live component with the grounding stick, an immediate phase to ground fault would be created. Arcing and a "big bang" would result. (Tr. 96). Hancock testified that, based on the observations of Gorman, all three phases "became involved in the fault" and "that's when the fireball grew and came out of the load door." (Tr. 96-97).

**A. Citation No. 7633896.**

Inspector Hancock issued Citation No. 7633896 under section 104(d)(1) of the Mine Act alleging a violation of section 77.500 of the Secretary's safety standards. The body of the citation states as follows:

The 69 kv high voltage power was not de-energized at the C-5 substation before work was performed. The electrical manager thought that he dropped the 23 kv high voltage power by tripping the circuit breaker. When he used a hot stick to pull loose the stuck blades of the 23 kv disconnects he made a phase to ground condition that caused an arc and a fireball. The power conductors came from the transformer to the top of the disconnects instead of to the line side of the circuit breaker. The disconnects were destroyed and there was smoke discoloration in the 23 kv side of the substation.

The inspector determined that the gravity was serious, that the violation was of a significant and substantial nature (“S&S”), and that the negligence was high. The safety standard provides that “[p]ower circuits and electrical equipment shall be de-energized before work is done on such circuits and equipment, except when necessary for troubleshooting or testing.” The Secretary proposes a penalty of \$5,000 for this violation.

Peabody argues that because “no electrical work was being performed at the time the incident occurred, the standard does not apply and citation should be vacated.” (P. Br. 6). Peabody contends that Hongeva was troubleshooting at the time of the incident and that no electrical work had yet been performed. Peabody believes that troubleshooting is “the act of determining what is the cause of the problem [and that] electrical work occurs once the cause of the problem is determined.” (P. Br. 5-6). Hongeva was using the grounding stick to try to figure out why the blades were sticking. Everyone at the hearing agreed that Hongeva did not know why the blades were sticking. He did not authorize the hourly employees to begin working on the problem because he did not yet know what the problem was. Only bargaining unit employees can perform work at the mine under the union contract. Thus, it believes that Hongeva was troubleshooting, not working.

The Secretary argues that once Hongeva loosened the plexiglass shield in front of the knife blades, any troubleshooting ended. Hongeva was working to get the blades to disengage. She points to her Program Policy Manual for guidance, which provides that “‘troubleshooting or testing,’ for the purpose of this section would include the work of locating an electrical problem in the electric circuits on an energized machine, but would not include the actual repair with the machine energized.” (V MSHA, U. S. Dep’t of Labor, *Program Policy Manual*, Part 77.500 (1993) (“PPM”). The Secretary argues that Hongeva had located the electrical problem and was attempting to repair it when he inserted the grounding stick behind the plexiglass shield.

I resolve this issue on a more fundamental basis by considering the unambiguous wording of the safety standard taken as a whole. The safety standard does not provide that circuits can remain energized whenever troubleshooting or testing is being performed. Rather, it requires that circuits and electrical equipment be de-energized “except when *necessary* for troubleshooting and testing.” There are many situations that arise when it is necessary that the power be on when equipment or circuits are being tested or when troubleshooting is being performed. Under the facts in this case, however, there was absolutely no reason for the knife blades to be energized when Hongeva was using the grounding stick to disengage the blades. Indeed, Hongeva thought that the blades *were* de-energized when he inserted the grounding stick and it is clear that he would have had Gorman open and lock out the 69 kv knife blade switch had he known that the 23 kv blades were hot. Nobody disputes the fact that power should not be applied to knife blade switches when someone is trying to disengage them with a grounding stick. The troubleshoot exception clearly does not apply when an electrician thinks that a circuit is de-energized as he is performing his “troubleshooting” tasks when, unknown to him, the circuit is actually energized. It especially would not apply in situations,

such as this one, where the electrician would not have performed the alleged troubleshooting had he known that the circuit was energized. Peabody's argument that the Secretary failed to establish a violation because Hongeva was engaged in troubleshooting is illogical and I reject it.

I also find that Hongeva was working on the circuit, rather than troubleshooting, when he used the grounding stick to try to disengage the knife blades. He knew that the blades were not disengaging within the switch because of a mechanical problem. Either the mechanism that connects the exterior lever to the blades was not functioning properly or there was a problem with the blades themselves.<sup>3</sup> In any event, inserting a grounding stick through the crack in the plexiglass to dislodge the blades would not reveal the cause of the problem. In order to determine why the blades did not open when the lever on the substation was in the down position, someone would have to examine the entire mechanical actuating system for the 23 kv blades. Hongeva was actually trying to repair the blades on a temporary basis so that his crew could permanently repair or replace the knife blade switches, the mechanism that actuates the blades, or both. Hongeva was not troubleshooting because he was not performing "the work of locating an electrical problem in the electric circuits." *Id.* I find that the Secretary established a violation of section 77.500.

Peabody argues that the Secretary failed to meet her burden of proving that the violation was S&S. Hongeva was standing several feet from the opening in the plexiglass shield. Although Hancock testified that an electrical arc produces great heat, Hongeva testified that he did not feel any heat from the arc. (Tr. 193). Gorman also testified that he felt no heat. (Tr. 72). As a consequence, it was not reasonably likely that the Gormans or Hongeva were exposed to a hazard that would contribute to a serious injury. Peabody points to the photographic and physical evidence that the arc did not produce much heat. (Ex. S-9; Tr. 137). Paint did not blister and the rubber gasket around the load door did not melt. Peabody argues that Gorman's testimony about a large ball of fire should not be credited. Hongeva testified that he merely stepped back a few feet from the substation. Peabody states that, if there had been a ball of fire that flew 20 feet through the air as Gorman alleged, there would have been more damage to the substation.

The Secretary contends that it is reasonably likely that a "serious injury could occur from the violative condition of working on energized high voltage equipment." (S. Br. 10). She relies on the testimony of Hancock, an MSHA electrical inspector and certified electrician. He reviewed statistics that showed that since 1986, "there have been 56 incidents of electrical injuries in the surface metal/nonmetal industry of which 24 were caused by the failure to de-energize electrical circuits." *Id.* Hancock emphasized the danger of working near energized high voltage equipment. He believes that the initial arcing warned the men to

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<sup>3</sup> In *Royal Cement Co., Inc.*, 23 FMSHRC 764 (July 2001) (ALJ), a knife blade switch did not open in much the same manner as in the instant case. In that instance, MSHA determined that the blade failed to open because of an accumulation of dust and dirt in the switch itself.

get out of the area before the phase-to-phase event that created the fireball. The Secretary also relies on the testimony of Gorman about the explosion, the ball of fire, and a bolt of lightning at the top of the substation. Peabody had removed most of the damaged electrical equipment so the remaining physical evidence should not be relied upon.

I find that the Secretary established that the violation was S&S. An S&S 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 . . . 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.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The violation clearly contributed to a discrete safety hazard. The issue is whether there was a reasonable likelihood that the hazard contributed to would result in an injury. The citation was issued because Peabody employees were working on power circuits that had not been de-energized. Such work can most definitely contribute to a serious injury. Whether the events of December 12, 2000, created a huge fireball is not determinative. The evidence establishes that someone could have been seriously injured, or killed, when HONGEVA tried to open the energized blade switches with the grounding stick, especially since he thought they had been de-energized. When an electrician unknowingly works on an energized power circuit the results can be lethal. See e.g. *Royal Cement Co., Inc.*, 23 FMSHRC at 766-67. It was reasonably likely that the hazard contributed to by the violation would have resulted in an injury of a reasonably serious nature.

Peabody also argues that the Secretary did not present sufficient evidence to support a finding that the violation was the result of its unwarrantable failure to comply with the safety standard. The evidence shows that HONGEVA did not know that the 23 kv line was energized when he touched the grounding stick to the blades nor could he have reasonably known, given the steps he took to de-energize the circuit. He did not know that the substation was wired differently and the fact that Hancock testified that it was “bad electrical practice” to rely on the circuit breakers to de-energize the circuit is “not sufficient to sustain a finding of unwarrantable failure conduct.” (P. Br. 11).

The Secretary contends that HONGEVA's actions and lack of knowledge concerning the electrical systems at the mine amounts to a reckless disregard for safety. HONGEVA, the electrical manager, lacked basic knowledge of the wiring in the C-5 substation and he disregarded good electrical practices by relying on the breakers to de-energize the circuit. HONGEVA became the electrical manager in 1998-99, yet he had never been inside the substation and had never reviewed the schematic. Thus, his reliance on the circuit breakers was not based on first-hand knowledge. Finally, HONGEVA failed to heed the suggestion of a first class electrician on his crew that the 69 kv line coming into the substation should be de-energized. This failure was especially egregious after there was an electrical discharge when HONGEVA was able to open one of the knife blades with the grounding stick.

I find that the Secretary established that the violation was the result of Peabody's unwarrantable failure to comply with section 77.500. Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

It is important to keep in mind that it is Peabody that is being charged with the unwarrantable failure violation here, not HONGEVA, so the issue is whether Peabody unwarrantably failed to comply with the standard. At some point in the past, Peabody incorrectly wired the C-5 substation and did not advise its electrical employees that the circuit breakers did not protect the knife blade switches on the substation. This situation created a serious hazard that could have resulted in a fatality and Peabody's failure to prevent or correct it was grossly negligent. Peabody was not required under MSHA's electrical standards to regularly inspect the inside of the substation, but it could have easily inspected it at a time when the substation was being moved.

The hazard created by the violation of section 77.500 was extremely serious. Gorman suggested an easy method to eliminate the hazard: open the 69 kv switch to de-energize the transformer. Gorman made this suggestion twice. HONGEVA told him not to open the 69 kv blades because the 23 kv side of the transformer was not hot. (Tr. 210). Gorman knew that relying on the circuit breakers was not a good practice because one or more of the phases in the breakers could also be stuck and the lights and meters on the controls might not register the problem. (Tr. 39). Inspector Hancock testified that it is poor electrical practice to rely on circuit breakers to ensure that a high voltage circuit is de-energized because a circuit breaker does not provide visible proof that the circuit is dead. (Tr. 89, 93). HONGEVA admitted that relying on breakers to ensure that the 23 kv line was de-energized when the 69 kv visible disconnect blades were closed was not a good electrical practice. (Tr. 211).

"The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding." *Midwest Materials Co.*, 19 FMSHRC 30, 34 (Jan. 1997) (citations omitted). Although no employee was injured as the events played out in this

instance, the condition could have seriously injured or killed someone. When evaluating whether a violation was the result of an operator's unwarrantable failure to comply with the standard, the Commission has also considered whether the violation took place in the presence of a foreman. *Id.* at 35. A foreman is held to a higher standard of care. *Id.* In this case, not only did the violation occur in the presence of Peabody's top electrical manager, but he is the individual who committed the violation. Moreover, he committed the violation in the face of suggestions from one of his first class electricians that the 69 kv switch be opened, which would have eliminated the hazard and prevented the violation. I find that the violation was the result of aggravated conduct constituting more than ordinary negligence. Although the violation was not intentional, it displayed a serious lack of reasonable care. The Secretary established that the violation of 77.500 was caused by Peabody's unwarrantable failure to comply with that standard.

**B. Order No. 7633897**

The Secretary moved to vacate this citation at the commencement of the hearing. (Tr. 5). For good cause shown, the motion is granted.

**C. Order No. 7633898.**

Inspector Hancock issued Order No. 7633898 under section 104(d)(1) of the Mine Act alleging a violation of section 77.501 of the Secretary's safety standards. The body of the citation states as follows:

The 69 kv high voltage power was not de-energized, locked, and suitably tagged before work was performed on the 23 kv disconnects. The power conductors came from the transformer to the top of the 23 kv disconnects. The electrical manager stated that he thought he dropped the 23 kv power by tripping the circuit breaker.

The inspector determined that the gravity was serious, that the violation was of a significant and substantial nature, and that the negligence was high. The safety standard provides, in part, that "[d]isconnecting devices shall be locked out and suitably tagged by the persons who perform [electrical] work. . . ." The Secretary proposes a penalty of \$7,000 for this violation.

Peabody argues that this standard is also limited to situations where electrical work is being performed. It maintains that "when this standard is taken in context with other standards, the regulations draw a distinction between performing electrical work and troubleshooting." (P. Br. 6). Peabody relies on the *PPM* which states, in relation to this standard, electrical work includes "the design, installation, maintenance, or repair of electric equipment or circuits." (*PPM* at Part 77.501). Peabody contends that Hongoeva was not designing, installing, maintaining, or repairing electric equipment or circuits.

The Secretary maintains that Hongeva was performing work at the time of the incident. She relies, in part, on her Program Policy Manual and Commission precedent. She quotes from language in the *PPM* that defines “electrical work” to include “work performed inside electrical substations or other areas in proximity to exposed energized electrical parts, work performed inside transformers . . . or other enclosures of electric equipment and circuits. . . .” *Id.* The Secretary argues that the evidence establishes that “Hongeva was performing electrical work and his intent was to repair the disconnect blades.” (S. Br. 16).

I find that the Secretary established a violation of section 77.501. Peabody failed to lock out and tag out the disconnecting devices. The applicable disconnecting devices that were required to be locked out were the 69 kv knife blades. Under this standard, if work were being performed on the 23 kv trunk line after it was energized, Peabody could have complied with the standard by locking out the 23 kv knife blade switches. In this instance, however, Peabody was working on these 23 kv knife blades at the time of the violation, so Peabody was required to lock out and tag out the 69 kv knife blades. For the reasons set forth above, I find that Hongeva was performing “electrical work” when he used the grounding stick to try to dislodge the knife blades. The general “troubleshooting” exception is designed to allow an electrician to *knowingly* work on a live circuit in certain circumstances. Peabody’s “troubleshooting” arguments are illogical. There is no dispute that the 69 kv knife blade switches were not locked out as required and I conclude that a violation of 77.501 has been established.

Failing to lock out and tag out the circuit clearly contributed to a discrete safety hazard. The citation was issued because Peabody had not locked out the power circuit that Hongeva was working on. This violation, while similar to the violation of section 77.500, is a distinct violation. Failure to lock out and tag out a circuit creates a serious risk of electrocution or serious injury. Hongeva could have been seriously injured, or killed, when he used the grounding stick to open the 23 kv blade switches on a circuit that had not been locked out. It was reasonably likely that the hazard contributed to by the violation would have resulted in an injury of a reasonably serious nature.

For the reasons set forth with respect to the violation of section 77.500, I find that the Secretary established that the violation of 77.501 was the result of Peabody’s unwarrantable failure to comply with the standard. The violation was committed by Peabody management over the objection of an hourly employee.<sup>4</sup> It is clear that Gorman believed that the circuit should be locked out at the 69 kv knife blades. (Tr. 77). Gorman wanted to comply with the

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<sup>4</sup> Gorman was asked why he did not just lock out and tag out the 69 kv circuit without getting Hongeva’s approval. He was a first class electrician who clearly had the authority and responsibility to lock out electrical circuits. Gorman testified that when he is working with electrical management, he places “a lot of trust” in them and believes that they are paid to “know [the] equipment.” (Tr. 54, 62). Gorman followed Hongeva’s instruction because “he’s the one that’s in charge.” (Tr. 77).

safety standard but mine management did not want him to do so. Peabody's violation of section 77.501 demonstrated a serious lack of reasonable care that was greater than ordinary negligence.

## II. APPROPRIATE CIVIL PENALTIES

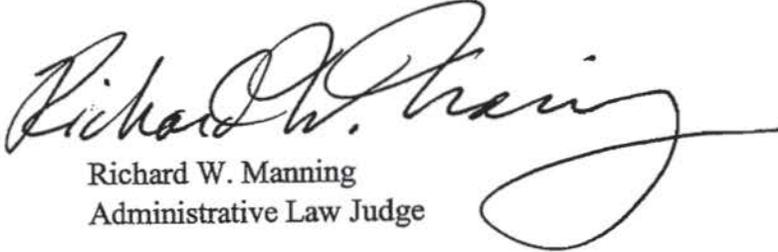
Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The record shows that Peabody has a history of 170 paid violations at the Kayenta Mine during the 24 months preceding January 2, 2001. (Ex. S-1). Peabody is a rather large coal mine operator. All of the violations were abated in good faith. As discussed above, the violations were very serious and Peabody's negligence with respect to the violations was high. The penalties assessed in this decision will not have an adverse effect on Peabody's ability to continue in business. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

## 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:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
7933896	77.500	\$7,000.00
7933897	77.502	Vacated
7933898	77.501	\$8,000.00
	TOTAL PENALTY	\$15,000.00

Order No. 7933897 is **VACATED** and WEST 2001-202-R is **DISMISSED**. Peabody's contests of Citation No. 7933896 and Order No. 7933898 are **DENIED** and the citation and order are **AFFIRMED** as written by Inspector Hancock. WEST 2001-201-R and WEST 2001-203-R are **DISMISSED**. Peabody Western Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$15,000.00 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  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

June 17, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2003-15-M
Petitioner	:	A. C. No. 23-02077-05511
	:	
v.	:	Docket No. CENT 2002-315-M
	:	A. C. No. 23-02077-05510
WASHINGTON COUNTY AGGREGATES,	:	
Respondent	:	Washington County Aggregates

**DECISION**

Appearances: Ann N. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of Petitioner;  
Kelly C. Silvey, Washington County Aggregates, Potosi, Missouri, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege that Washington County Aggregates (“WCA”) is liable for eleven violations of mandatory safety and health standards applicable to surface metal and nonmetal mines. A hearing was held in St. Louis, Missouri. At the commencement of the hearing, the Secretary modified one of the citations and Respondent agreed to pay a reduced penalty for that violation. Respondent also withdrew its notices of contest as to three of the remaining citations. The Secretary proposes civil penalties totaling \$2,671.00 for the seven alleged violations remaining at issue. For the reasons set forth below, I find that WCA committed six of the alleged violations and impose civil penalties totaling \$1,025.00.

**Findings of Fact - Conclusions of Law**

Washington County Aggregates is a small limestone mine owned by a partnership that acquired it in October of 2000. The operation, located near Potosi, Missouri, consists of a single bench mine, with a crusher, conveyors, screens, a scalehouse and a maintenance area. Approximately five persons are employed at the site. In April 2002, Lawrence D. Sherrill, an inspector employed by MSHA for over six years, conducted an inspection of WCA’s mine. He determined that there were violations of health and safety standards and issued citations and

orders, eleven of which were contested in these actions.

As noted above, the parties agreed to settle four of the citations. The citations remaining at issue will be discussed in the order that evidence was presented at the hearing.

#### Citation/Order No. 6212148

Citation/Order No. 6212148 was issued by Sherrill on April 10, 2002, and alleges a violation of 30 C.F.R. § 56.14101(a)(1) which requires that: "Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." The conditions he observed were noted on the citation as:

The service brakes on the Caterpillar 966B (serial # 75A3959 B) would not stop and hold the loader on a grade it travels. The service brakes were tested on the declined roadway just north of the chat pile. The loader rolled freely forward with the transmission in neutral and the service brakes fully applied. The loader was in operation loading customer trucks from various stockpiles at the mine property. This condition created the hazard of the equipment operator not being able to stop the loader. An oral 107(a) imminent danger order was issued to Steve Silvey, co-owner, at 1114 hours this date.

Sherrill concluded that it was highly likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one person was affected and that the operator's negligence was high. The imminent danger order directed that the haul truck not be used until the service brakes were operational. The Secretary proposes a specially assessed civil penalty of \$2,200.00 for this violation.

#### The Violation

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

Sherrill observed the loader being used to load customer trucks from a stockpile of material referred to as "chat." He approached the driver, James Benson, inquired about the brakes, and was told that they were "shot" or "weak." Benson stated that he had told Andy Pittman, the foreman, about the problem numerous times. Pittman had operated the loader on the previous shift. There was a grade adjacent to the stockpile that led up to a storage area. Sherrill estimated the grade to be 7-8% and typical of the grades on other ramps in the work area.

Benson stated that he traversed that grade with the loader a couple of times each day. At Sherrill's instruction, the loader was driven to the top of the grade, turned around, and started down at a slow speed. As the 36,000 pound loader proceeded down the grade, the transmission was placed in neutral and the service brakes were applied. The loader did not stop or slow appreciably. It proceeded at a steady rate down the grade until it reached a nearly level area at the bottom, where it stopped.

Sherrill issued an oral imminent danger order, directing that the loader not be used until the defective brakes were repaired. While he wrote the order/citation on his laptop computer, one of WCA's partners asked if the brakes could be adjusted, and Sherrill replied in the affirmative. The brake adjustment was made during the approximately fifteen minutes that elapsed while the order was written. The loader was then tested on the same grade. The brakes worked effectively, and the citation/order was terminated.

Kelly Silvey, WCA's representative, is one of its owners. He investigated the alleged violation after receiving the special assessment, and conceded that the loader's brakes were not adjusted properly and that the foreman was told that they needed adjustment prior to the shift commencing. Tr. 141, 145. However, he contends that the test was conducted on a grade considerably steeper than those upon which the loader normally is operated, and that the results of the test were mischaracterized so as to inflate the gravity of the violation.

Silvey measured the grade using a tape measure and a level and found that the initial forty feet of the grade declined at a rate of eighteen inches in one hundred inches, i.e., 18%, about twice as steep as other ramps the loader would encounter. Tr. 149. He also testified that the area at the top of the grade was used only to store extra screens and that the loader did not normally traverse the test grade. Tr. 150-54, 160-61. He attributed the driver's representation to the contrary to an ongoing dispute between the driver and the foreman. Tr. 142, 162-63. I found Silvey to be a very credible witness who candidly admitted several facts adverse to WCA.

Sherrill similarly impressed me as an excellent inspector and a credible witness. He was very thorough in preparing for and conducting the inspection and previous inspections of the facility. I find that the grade upon which the loader was tested was not normally traversed by the loader. However, I credit Sherrill's assessment that the test grade was generally typical of the grades of other ramps on the property that would have been used by the loader. While the initial portion, measured by Silvey, was somewhat steeper than the grade on the other ramps, the loader was tested with the bucket empty and the brakes were unable to stop it until it reached an essentially level area. Therefore, I find that the regulation was violated.

### Significant and Substantial

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated

S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. 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 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

Sherrill described several scenarios in which an injury could occur because of the defective brakes. The loader was built in 1963. Because of its age, it was not required to have a seat belt, and did not have one. In the event of a collision, the driver could be thrown into the windshield or steering wheel, or possibly ejected from the cab. Of course, the inability of the loader to stop quickly also created a hazard for other vehicles and/or pedestrians it might encounter in the loading area or while traveling from work-site to work-site.

WCA argues that Sherrill's description of the test result, that the loader "rolled freely forward," was misleading and overstated the defective condition. The point has merit. While the brakes did not bring the loader to a stop on the grade, the test grade was substantial and the brakes were able to prevent the 36,000 pound machine from accelerating. Obviously, the brakes were supplying some stopping power, which appears to have been adequate for normal loading operations. Prior to the test, Sherrill had observed the loader for about ten minutes as it was used to load customer trucks. Tr. 23. Two trucks were loaded, each requiring three bucket loads. Tr. 38. The loader performed six cycles that included stopping to maneuver and stopping at the trucks to dump the loads. Sherrill did not observe any problems or difficulties with the operation of the loader, including its ability to slow and stop, as needed. Tr. 42. The violation was abated promptly with a simple adjustment of the brakes.

In evaluating the risk of injury in other situations, the Commission has emphasized that the vagaries of human conduct cannot be ignored. *See, e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). While I disagree with Sherrill's assessment that the probability of injury was "highly likely," I find that there was a reasonable likelihood that the hazard contributed to by the violation would result in a serious injury. The brakes were "weak," and there was a reasonable possibility of a collision that would result in a serious injury to the equipment operator. The Secretary has carried her burden on this issue. I find that the violation was significant and substantial. I also affirm the imminent danger order.<sup>1</sup>

### Negligence

Sherrill evaluated the operator's negligence as "high" based upon Benson's statement that he had told Pittman numerous times that the brakes were not working properly. Silvey acknowledged that Pittman had been told that the brakes needed adjustment at the beginning of the shift. Silvey had operated the loader approximately one week before the inspection. He found that the brakes performed adequately, but felt that they would not have held the loader on the steep portion of the test grade. Tr. 144. At the time of the inspection, the loader's service brakes were in need of adjustment and they should have been repaired prior to the loader being put into operation. However, the brakes did supply some stopping power, which apparently was at least marginally adequate for normal operations, a conclusion that was partially confirmed by Sherrill's observations. Under the circumstances, I find that the operator's negligence in deferring the brake adjustment is more properly categorized as moderate.

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<sup>1</sup> An imminent danger order need not be based upon a violation of a mandatory standard or a condition that poses an immediate danger. It is sufficient that the condition could reasonably be expected to cause serious physical harm if normal mining operations were permitted to proceed before the dangerous condition is eliminated. *Cyprus Empire Corp.*, 12 FMSHRC 911, 918-19 (May 1990).

## Citation No. 6212149

Citation No. 6212149 alleges a violation of 30 C.F.R. § 56.14107(a), which requires that moving machine parts that can cause injury “shall be guarded to protect persons from contacting” them. The conditions noted on the citation were:

There were no guards to prevent persons from contacting the pinch points and moving machine parts of the v-belt drive system on the Caterpillar 966B front end loader. There was no guard on either side of the engine compartment. The pinch point was located approximately 5' 6" above ground level on both sides of the loader. This condition created the hazard of an employee contacting the moving machine parts. This loader was in operation loading customer trucks from various stockpiles at the mine.

Sherrill concluded that it was unlikely that the violation would result in a permanently disabling injury, that the violation was not significant and substantial, that one person was affected and that the violation was due to the operator’s moderate negligence. A civil penalty of \$55.00 is proposed.

## The Violation

In construing an analogous standard<sup>2</sup> in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission stated:

We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners’ behavior cannot ignore the vagaries of human conduct. *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-[case ]basis.

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<sup>2</sup> 30 C.F.R. § 77.400

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

*Thompson* involved citations issued for failure to guard cooling fan blades, air compressor belts and pulleys in the engine compartments of two Euclid R-50 dump trucks. The Commission affirmed the decision of an ALJ finding violations of the standard based on the possibility that a miner might come into contact with the exposed moving machine parts while examining or working on the engines while they were idling. While the possibility of such contact was determined to be “minimal,” it satisfied the “reasonably possible” test.

I similarly find that, while the possibility of contact and injury presented by the unguarded v-belt/pulley assembly was minimal, contact and injury was reasonably possible within the meaning of *Thompson*. There is no question that the v-belt/pulley assembly was accessible to a miner or mechanic standing near the engine compartment of the loader. The loader driver could contact the v-belt/pulley with a hand or clothing while exploring some problem with the engine. A mechanic examining the engine while idling, even though trained to work in such conditions, could also inadvertently contact the unguarded v-belt/pulley resulting in injury.

Respondent’s failure to guard the v-belt pulley violated the standard. I concur with the inspector’s determinations that the possibility of injury was unlikely, that one person was affected and that the violation was a result of the operator’s moderate negligence.

WCA contends that the loader had been inspected previously by MSHA and that the subject condition had not been cited, thereby raising the issue of whether it had received fair notice of the interpretation of the standard urged by the Secretary here. See *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694 (July 2002); *Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan. 1998); *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). The only prior inspection of the mine while under WCA’s ownership was conducted by Sherrill in June 2001. He inspected front-end loaders and recorded the serial numbers of the equipment that he inspected. He had no record of inspecting the loader in question. Tr. 73-74, 77-78. Silvey testified that the loader, in the same condition, was on the site in June 2001, but could not say for sure that it was in operation at the time of the inspection. Tr. 167. I find that the loader was not inspected by Sherrill in June 2001. The loader was most likely inspected while the mine was operating under previous ownership. However, side panel guards may have been in place at that time. There were holes in the frame of the loader which could have been used for such guards, and they simply may not have been replaced at some point in time. Tr. 74, 165-67. WCA failed to establish that this particular condition had been tacitly approved by MSHA inspectors in the past. Therefore, its fair notice defense must be rejected. I also note several other ALJ decisions finding violations of guarding standards based upon the failure to install guards on moving machine parts in the engine compartments of vehicles that were manufactured without such guards. See *Nelson Bros. Quarries, Inc.*, 21 FMSHRC 1100, 1102-03 (Oct. 1999) (ALJ); *Riverton Corp.*, 16 FMSHRC 2082 (Oct. 1994) (ALJ); *Power Operating Co.*, 16 FMSHRC 591, 595 (May 1994) (ALJ).

## Citation No. 6212150

Citation No. 6212150 alleges a violation of 30 C.F.R. § 56.4402, which requires that flammable liquids “shall be kept in safety cans labeled to indicate the contents.” The conditions noted on the citation were:

Flammable liquid was being stored in a plastic container in the bed of the Chevrolet maintenance truck. Approximately 4 gallons of gasoline was in the 5 gallon container. The practice of storing flammable liquids in containers other than safety cans created a fire and explosion hazard. Combustible materials and ignition sources, including a welder and cutting torch set, were also in the bed of the truck. This truck is used as needed as transportation and in performing various maintenance duties at the mine.

Sherrill concluded that it was reasonably likely that the violation would result in an injury involving lost work days or restricted duty, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator’s moderate negligence. A civil penalty of \$196.00 is proposed.

## The Violation

The container in the bed of the truck, a picture of which was introduced into evidence,<sup>3</sup> was a plastic gas can typical of those used by most homeowners for the storage of gasoline for lawnmowers and similar pieces of equipment. It bore a label identifying the contents as gasoline and warning of its dangerous nature. The label also indicated that the container complied with standard specifications used by “Underwriters Laboratories, Inc,” and developed by nationally recognized groups, “ANSI/ASTM.” It did not, however, meet the requirements of the regulation. The term “safety can” is defined elsewhere in the regulations as “[a] container of not over five gallons capacity that is designed to safely relieve internal pressure when exposed to heat and has a spring-closing lid and spout cover.” 30 C.F.R. § 56.4000. It is unclear whether the plastic container was designed to safely relieve pressure when exposed to heat. It clearly did not have a spring-closing lid. Therefore, the regulation was violated.

## Significant and Substantial

The violation contributed to a hazard, a potential fire, which could result in a serious injury. Sherrill determined that the violation was significant and substantial because of “readily available ignition sources” in and near the bed of the truck. Tr. 83. The truck was equipped with a cutting torch and welder and there were hand tools and other metal objects in the truck bed. In the event of a fire, he concluded that a miner fighting the fire might suffer burns or an injury from a fall. Tr. 83-84. However, he verified that the can was in good condition, and that there

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<sup>3</sup> Ex. P-5.

was no spillage or gasoline vapor in the vicinity of the can. Tr. 91. Sherrill conceded that it was unlikely that the metal objects in the bed of the truck would cause a spark capable of igniting any gasoline that escaped from the can. Tr. 95. He also confirmed Silvey's testimony that the cutting torch and welder would be used some distance from the truck bed. Tr. 91, 170.

I find that the possibility of a fire resulting from use of the plastic gasoline can was remote. The truck was owned by Pittman and was used only occasionally to perform maintenance tasks. Obviously, such tasks would be performed outdoors and a fire alone would not pose a particularly serious threat of injury to any miner. While it is possible that a miner engaged in fighting such a fire could suffer a serious injury, I find the possibility of injury from use of the non-conforming gasoline can to be too remote to justify classifying the violation as significant and substantial.

#### Citation No. 6212152

Citation No. 6212152 alleges a violation of 30 C.F.R. § 56.14107(a), which requires the guarding of moving machine parts that can cause injury. The conditions noted on the citation were:

There was no guard to prevent persons from contacting the pinch point and moving machine parts of the alternator v-belt drive system on the plant generator. The pinch point of the v-belt was located 4' 6" above the adjacent walkway on both sides of the generator. This condition created entanglement hazards. An employee accesses this area to start and stop the generator when the plant operates.

Sherrill concluded that it was unlikely that the violation would result in a permanently disabling injury, that the violation was not significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. A civil penalty of \$55.00 is proposed.

#### The Violation

The v-belt pulley in question is depicted in exhibit P-9. Sherrill did not take into consideration the probability of an injury occurring as a result of the condition, in determining whether it violated the standard. Tr. 102. He did, however, consider the probability of injury in evaluating the gravity of the violation. Sherrill's assessment of the likelihood of injury was based upon his belief that a WCA employee entered and exited the trailer at the beginning of the day to start the generator and again at the end of the day to turn it off, thereby passing by the running generator twice a day. The employee could be injured if he tripped or fell and encountered the pinch point. Tr. 97-99. Silvey testified, however, that employees seldom passed through the trailer to access the generator's control room because there was a more direct route through a different entrance. Tr. 153. He also questioned whether an employee could encounter

the pinch point, which was four and one-half feet above the wooden floor and about two and one-half feet beyond and slightly below metal tubing that was immediately above the muffler/exhaust piping. Tr. 172, 177; ex. P-9. There is no evidence that there were any tripping hazards on the trailer's walkways. According to Silvey, it is extremely unlikely that a miner would come into contact with the v-belt pinch point in the course of WCA's normal operations.

I accept Silvey's credible testimony and find that the probability of contact and injury was not "reasonably possible" within the meaning of *Thompson*. The condition cited did not violate the regulation, and the citation will be dismissed.

#### Citation Nos. 6212156, 6212157 and 6212158

Citation Nos. 6212156, 6212157 and 6212158 allege violations of 30 C.F.R. § 62.120, which requires that: "If during any work shift a miner's noise exposure equals or exceeds the action level the mine operator must enroll the miner in a hearing conservation program that complies with § 62.150 of this part." The conditions noted on the citations were that miners operating two front-end loaders and the crushing plant were exposed to noise levels exceeding the action level and that they had not been enrolled in a hearing conservation program meeting the requirements specified in the regulations.

Sherrill concluded that it was unlikely that the violations would result in a permanently disabling injury, that they were not significant and substantial, that one person was affected by each violation and that they were due to the operator's moderate negligence. A civil penalty of \$55.00 is proposed for each violation.

#### The Violations

Substantial amendments to the regulations governing exposure to occupational noise were promulgated in 1999, and became effective on September 13, 2000. *See* 30 C.F.R. Part 62, Occupational Noise Exposure, 64 FR 49630, Sept. 13, 1999. Mine operators must monitor miners' exposure to noise and, where necessary, take steps to assure that no harmful effects result from noise exposure. Noise exposure is measured by use of a dosimeter worn by a miner during his entire shift. The dosimeter records and provides a digital readout of a time-weighted average of noise to which the miner was exposed. If the 8-hour time weighted average ("TWA<sub>8</sub>") sound level is 85 decibels or higher, the "action level," the miner must be enrolled in a hearing conservation program which must include monitoring, provision and use of hearing protection, audiometric testing, training and recordkeeping. 30 C.F.R. § 62.150. Substantial additional steps are required if a miner is exposed to noise levels beyond the TWA<sub>8</sub> "permissible exposure level" of 90 decibels. *Id.* § 62.130.

On April 11, 2002, Sherrill outfitted three miners with dosimeters, the operator of the #3 Caterpillar 988 front-end loader, the operator of the Caterpillar 966B front-end loader and the crusher plant operator. The meters measured the miners' exposure to noise over their entire shift

and indicated that their exposure exceeded the TWA<sub>8</sub> action level of 85 decibels. While they were wearing effective hearing protection, which was encouraged and mandated by the operator, none had been enrolled in a hearing conservation program meeting the requirements of the regulations.

WCA does not contest the fact that the miners were exposed to noise in excess of the action level. Nor does it contend that they had been enrolled in a noise conservation program, as required by the regulation. In addition to noting that miners were supplied with and required to wear excellent hearing protection devices, Silvey explained that the mine had been acquired in October 2000, and that materials that had been sent by MSHA announcing and explaining the newly promulgated noise regulations had not been preserved by the previous owner. The new owners were simply not aware of the regulations. According to Silvey, they had obtained a copy of the 2000 edition of the Code of Federal Regulations, but did not believe that the new noise regulations were included.

It is apparent that WCA provided excellent hearing protection to its employees and considered itself compliant with safety and health standards it believed applied to its operations. However, WCA was not in compliance with the regulations governing occupational noise exposure that became effective on September 13, 2000. WCA cannot rely on ignorance of the regulations as a defense to the alleged violations. As Sherrill pointed out, the regulations were readily available from a number of sources. They were also contained in the 2000 edition of Title 30, of the Code of Federal Regulations, which Silvey acknowledged having.

The regulation was violated as to each of the three miners who were exposed to noise levels beyond the action level and were not enrolled in an appropriate hearing conservation program. I agree with Sherrill's determinations that the violations were unlikely to result in a permanent injury, that the violations were not significant and substantial, that one person was affected by each violation and that the violations were the result of the operator's moderate negligence.

#### The Appropriate Civil Penalties

WCA had operated the mine for less than two years at the time of the inspection. One previous inspection, in June 2001, had resulted in the issuance of nine citations, all of which were determined to be single penalty assessments, with the exception of one significant and substantial violation. Respondent does not contend that imposition of the proposed penalties would threaten its ability to remain in business, and it is not disputed that Respondent demonstrated good faith in achieving compliance with the regulations. Respondent is a small operator with a very small controlling entity. The gravity and negligence assessments with respect to each violation are discussed above.

Citation/Order No. 6212148 is affirmed as a significant and substantial violation. However, the probability of injury and negligence of the operator were lower than alleged. The Secretary proposes a penalty of \$2,200.00, based upon a special assessment. Upon consideration of the factors itemized in section 110(i) of the Act, I impose a penalty of \$750.00.

Citation No. 6212149 is affirmed in all respects. A civil penalty of \$55.00 is proposed by the Secretary. I impose a penalty in the amount of \$55.00, upon consideration of the factors enumerated in section 110(i) of the Act.

Citation No. 6212150 is affirmed. However, the violation is found not to be significant and substantial. Rather, the violation is found to be unlikely to result in an injury. A civil penalty of \$196.00 is proposed by the Secretary. I impose a penalty in the amount of \$55.00, upon consideration of the factors enumerated in section 110(i) of the Act.

Citation Nos. 6212156, 6212157 and 6212158 are affirmed in all respects. The Secretary proposes a penalty of \$55.00 for each violation. Upon consideration of the factors itemized in section 110(i) of the Act, I impose a penalty of \$55.00 for each violation.

#### The Settlement

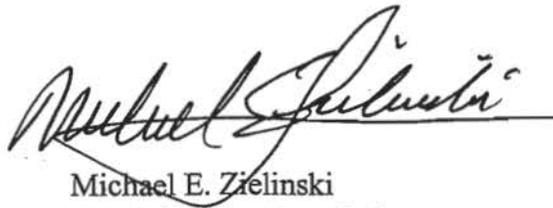
At the commencement of the hearing, the parties announced that they had negotiated a resolution of four of the citations and, by motion, sought approval of the settlement agreement. The Secretary agreed to modify Citation No. 6212154 to specify that an injury was unlikely to occur, and that the violation was not significant and substantial. It is proposed that the penalty for that violation be reduced from \$196.00 to \$55.00. Respondent withdrew its notice of contest as to Citation Nos. 6212151, 6212153, 6212155 and 6212154, as amended. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

#### **ORDER**

As to the citations that the parties have agreed to settle, Citation Nos. 6212151, 6212153, 6212154 and 6212155, the motion to approve settlement is **GRANTED**, and Respondent is directed to pay a civil penalty of \$220.00 within 45 days.

Citation No. 6212152 is hereby **VACATED**, and the petition as to it is **DISMISSED**.

Citation Nos. 6212149, 6212156, 6212157 and 6212158 are **AFFIRMED**, and Citation Nos. 6212148 and 6212150 are **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of \$1,025.00 within 45 days.

A handwritten signature in black ink, appearing to read "Michael E. Zielinski", written over a horizontal line.

Michael E. Zielinski  
Administrative Law Judge

Distribution: (Certified Mail)

Ann N. Noble, Esq, Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550

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/mh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

June 25, 2003

HAZEL OLSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-443-D
	:	DENV CD 2001-23
	:	
v.	:	Mine I.D. 48-00977
	:	
ARCH MINERAL COMPANY	:	Black Thunder Mine
THUNDER BASIN COAL CO., LLC,	:	
Respondent	:	

**DECISION**

Appearances: Margaret A. Miller, Esq., Boulder, Colorado, for Complainant;  
Laura E. Beverage, Esq., Jackson Kelly, PPLC, Denver, Colorado,  
for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Hazel Olson against Thunder Basin Coal Company, a division of Arch Mineral Company (“Thunder Basin”), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the “Mine Act”). Ms. Olson alleges that Thunder Basin terminated her from her temporary position at the Black Thunder Mine after management discovered that she had filed safety complaints with Department of Labor’s Mine Safety and Health Administration (“MSHA”) when she was employed by another mine operator and after she complained to Thunder Basin’s safety director about conditions in the pit. An evidentiary hearing was held in Gillette, Wyoming.

**I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT**

Thunder Basin operates the Black Thunder Mine, an open pit coal mine, in Campbell County, Wyoming. In August 2001, Thunder Basin employed about 575 individuals. The mine covered about 600 acres and had six active pits. Although Thunder Basin employs its own miners, it also obtains workers through a temporary employment agency. When a position needs to be filled, Jack Kasper, the human resources manager, hires and replaces temporary employees through Adecco, a large world-wide employment agency. (Tr. 236). Adecco screens the applicants and sends one individual for each open position. Ms. Olson

started working at the Black Thunder Mine on August 27, 2001 as an employee of Adecco. She was not on Thunder Basin's payroll but was a temporary contract worker who was paid on an hourly basis by Adecco. She was terminated from her temporary position by Thunder Basin on August 28, 2001.

Ms. Olson previously worked as a miner at the Jacobs Ranch Mine for almost 20 years. (Tr. 16-17). That mine was initially owned by Kerr-McGee but was subsequently bought by Kennecott Energy. Jacobs Ranch is also in Campbell County, Wyoming. At Jacobs Ranch, Olson started out as a laborer but eventually became a truck driver. She drove large, off-road haul trucks and other heavy equipment. Olson was terminated from her employment at Jacobs Ranch on December 4, 1999. Ms. Olson filed a discrimination complaint against Jacobs Ranch Coal Company on February 16, 2001, as a result of her December 4, 1999, termination. When the Secretary determined that Jacobs Ranch did not discriminate against her, she brought an action on her own behalf. By order dated January 14, 2003, I dismissed Olson's complaint of discrimination because it was not timely filed. 25 FMSHRC 9 (Jan. 2003).<sup>1</sup>

Ms. Olson applied for work at several temporary employment agencies. Olson went to these employment agencies because she believed that it was the best way to get back into the mining industry as a heavy equipment operator. (Tr. 18). At Adecco, Olson worked with Christina Gilbert, who is the Gillette office supervisor and account representative.<sup>2</sup> (Tr. 152). Gilbert referred Olson to a temporary position with Washington Group International, a contractor that was removing top soil at the Black Thunder Mine. Olson took the position driving 100-ton Caterpillar trucks. That position lasted about one month. Olson received another referral from Adecco, but she did not take it because she would have had to start the next work day. Ms. Olson's husband has paralysis on his left side as a result of a stroke and Olson has to make arrangements for his care when she is working.

Ms. Gilbert called Olson about a Thunder Basin truck driver position in August 2001. Olson told Gilbert that she was interested. Olson testified that Gilbert told her that although the Thunder Basin job was temporary, it did not have a specific end date. (Tr. 24, 28). Olson referred to the position as a "long-term temporary" job. *Id.* Gilbert testified that the position had no time limit and that it could have lasted only a week or lasted a long period of time. (Tr. 160). Kasper testified that, in any event, it is Thunder Basin's policy to terminate temporary employees after one year of employment. (Tr. 263-64). It was Olson's understanding that Thunder Basin frequently hires a skilled "long-term temporary" worker when it is looking for a permanent employee with the same skills. (Tr. 25). Olson passed the required drug test and reported for work at 6:30 a.m. on Monday, August 27, 2001, at the

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<sup>1</sup> The Commission did not grant Olson's petition for discretionary review. The case is currently pending before the United States Court of Appeals for the Tenth Circuit, Case No. 03-9528.

<sup>2</sup> The other witnesses and the parties often referred to Ms. Gilbert by her maiden name, Chrissi Edwards.

Black Thunder Mine. Olson lives east of Newcastle, Wyoming, near the South Dakota border. It took her about one hour and ten minutes to drive the 73 miles to the mine, which is east of Wright, Wyoming, along Wyoming Route 450. (Tr. 29).

When Olson arrived at the mine office she was a little early because the shift starts at 7 a.m. Kasper talked to her for a moment while she was waiting. Olson testified that when she told Kasper that she had worked at the Jacobs Ranch Mine for about 19 years, he seemed a little surprised.

(Tr. 30). When she was asked why she had left Jacobs Ranch, she told him that “they kind of asked me to leave.” *Id.* Kasper testified that when he asked Olson why she left, she said that her leaving Jacobs Ranch was “kind of a mutual agreement.” (Tr. 239). Kasper testified that he did not contact anyone at Jacobs Ranch about Olson. *Id.* He found her demeanor that morning to be curt and cold, so he offered her coffee and left her alone until the start of the shift. *Id.*

James “Marty” Martens, the safety director at the mine, had her attend safety training with five other people who had reported to work for the first time that day. (Tr. 36; Ex. C-1). Some of these trainees were temporary employees and others were new permanent Thunder Basin employees. (Tr. 32-33). This training consisted of lectures, a review of the company’s safety handbook, and videos. Olson testified that Martens told her that after the trainees took a tour of the mine, she probably would be assigned to ride with a truck driver in the afternoon and, “depending on what that driver said,” she might get to drive a truck later that day or the next day. (Tr. 37-38).

The group went on a lengthy tour of the mine in the late morning. Olson sat in the front seat of the van during the tour and talked to Martens. She was the only trainee who would be operating heavy equipment in the pit so she asked a lot of questions about the work site and safety in the pit. (Tr. 41-42). At one point when the van bounced through a rough spot in the roadway, she asked him if the mine had a blade because the “the roads feel like downtown Bagdad ten years ago.”

(Tr. 43). As they entered the pit where Olson would be working she saw the highwall for the first time. Olson testified that the highwall was “really tall.” (Tr. 44). At that point, Olson testified that she said:

Gosh, look at that highwall, Marty. Look at the water running out of it. Do you guys have any major sloughs, do you guys have any highwall failures?

*Id.* Olson testified that Martens replied that there had been highwall failures at this particular pit and that a shovel was buried not too long ago. *Id.* She also testified that Martens told her that “some of the older hands call this Death Valley.” (Tr. 45). Olson testified that she would not have felt “very comfortable” working near this highwall because the bench on which the haul trucks travel was narrow and the trucks had to “run right at the toe of this sheer wall.”

(Tr. 47). Olson did not tell Martens or anyone else at Thunder Basin that she did not want to work around that highwall. (Tr. 101-02).

During the final part of this tour, Olson switched places with someone at the back of the van who was getting motion sickness. She sat next to Jim Lewis, who was being hired as a permanent Thunder Basin employee. Olson started talking to Lewis who told her that he was on the C crew. Olson did not know what crew she was assigned, so after the tour she went to the payroll office to find out her crew assignment. She talked to Penny Spidle, the pit operations clerk, who told her that she was on the A crew. Lewis had suggested that Olson try to get on the C crew so that they could commute together from Newcastle. (Tr. 55, 198). According to Olson, she asked Ms. Spidle if there were any openings in the C crew because she knew someone on the C crew who drives by her house on the way to work. (Tr. 58). Olson testified that she was told that there were no openings for drivers on the C crew. Olson testified that in response she said, "okay," and then asked if she could have the names of people on the A crew who live in Newcastle. She was told that the company did not have such a list. Olson testified that she told Ms. Spidle that "I'll be able to find somebody that I can car pool with on the A crew." (Tr. 59). Ms. Olson testified that her demeanor was normal and that she was not rude or demanding. (Tr. 59-60). Olson testified that Spidle had a sarcastic tone when talking to her.

Ms. Spidle testified that Olson was insistent that she be assigned to the C crew. (Tr. 224). Spidle felt that Olson did not want to be on her assigned crew. (Tr. 225). According to Spidle, Olson suggested that someone from the C crew be transferred to the A crew so she could go on the C crew. (Tr. 228-29). Olson denies that she ever made this suggestion. (Tr. 111).

When her lunch break was over, Olson returned to the training room. Nobody else was there and she looked at the work schedule that she had been given. It showed that the A crew worked nights that week.<sup>3</sup> Olson went back to Spidle to ask when she should report to work the next day. Spidle told her that she did not know but "surely they don't want you coming out on nights." (Tr. 61). Spidle told Olson that she would find out and let her know. Soon after Olson returned to the training room, Tom Skinner of the safety department came in. When she asked him the same question, he went to get Frank Meyers, a shifter for the truck crew.<sup>4</sup> Olson told Meyers that she used to drive trucks at Jacobs Ranch. Olson asked Meyers whether she should report to work for the day shift or night shift the next day. Olson also asked Meyers, "When am I going to go out and drive?" (Tr. 65). Olson testified that he responded by saying that Thunder Basin has to "make sure you are trained" and that the company "can't just take your word for it." (Tr. 65). Meyers asked her what kind of trucks she had driven at Jacobs Ranch and after she answered, he left to talk to Spidle. A little later

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<sup>3</sup> The three crews rotate shifts on an established schedule.

<sup>4</sup> A "shifter" is a front line supervisor.

Skinner returned to the safety room and told her that she should plan on working day shift the remainder of the week for training. (Tr. 64-65). Olson spent the rest of the shift on August 27 watching safety and truck videos. Olson testified that she was “puzzled” by Skinner’s statement because she thought she would be riding in trucks that afternoon. (Tr. 67). Before her tour of the pit, Olson had signed MSHA’s certificate of training which showed that she had completed experienced miner training. (Tr. 69; Ex. C-4).

Spidle stated that Olson came back into the payroll office sometime that afternoon and said that she was finished with her training and was ready to go on a truck. (Tr. 226). Spidle directed her to Meyers, who happened to be in the office. Spidle overheard Meyers tell Olson that she had to first complete her training before she could get into a truck and that the trainer would decide when that would occur.<sup>5</sup> (Tr. 227). Spidle testified that Olson came across as a “very self-confident, self-assured person.” *Id.*

On Tuesday, August 28, 2001, Olson got into her son’s truck to go to work. She testified that she left for work at about 5:20 a.m. (Tr. 95). She did not take her Tahoe because it was easier for her husband to get into that vehicle. About five miles from home, before she traveled through Newcastle, she got a flat tire. (Tr. 71). She jacked up the truck and took off the flat tire before she discovered that the spare tire on the truck was also flat. Olson testified that she did not have her cell phone with her so she walked across the countryside to her house. When she got home, she called Mr. Martens at the Black Thunder Mine. She testified that she made this call at about 7:45 a.m. (Tr. 76; Ex. C-5). After she explained what had happened, he transferred her to Mr. Kasper. She told Kasper that it would take her about an hour and fifteen minutes to get to the mine. Kasper responded that he had already called Adecco to get a replacement for her. (Tr. 75). Olson responded by saying that she would make up the time by staying late that day. Olson testified that Kasper then told her “No, the day is screwed up anyway” and that she “wasn’t really satisfied being on that A crew anyway.” *Id.* Olson responded that she did not have any problem with the A crew and that she only asked for the C crew because she knew someone on that crew who lived nearby. Kasper told her that Adecco was already sending someone else out to drive trucks on the A crew. (Tr. 76, 91).

Kasper testified that Olson called him about the flat tire at about 10:00 a.m. on August 28, not at 7:45 a.m. (Tr. 248). He denied that he talked to Olson any earlier that day. (Tr. 249). He testified that Olson asked if she should come in that day or wait until August 29 to return to work. (Tr. 248). Kasper told her that he had already requested a replacement from Adecco. He testified that he had called Adecco at about 9:30 a.m. (Tr. 258). Kasper testified that he told Olson that she was not happy with her crew assignment and that she was late for

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<sup>5</sup> At the hearing, witnesses testified about participating in or overhearing conversations. In several instances, the testimony conflicts as to where these conversations took place or as to who initiated these conversations. I attribute these conflicts to the fading of memories and I do not draw any inferences from these conflicts.

work. *Id.* He testified that he has replaced other temporary workers because they failed to report off, failed to show up for work, and for behavior problems. (Tr. 251, 276).

Spidle testified that on the morning of August 28, Martens came to her and told her that the temporary employee had not shown up for work that day. (Tr. 228). It is Spidle's responsibility to "keep the crews up" and to get a replacement if someone is not there. *Id.* She called Kasper at about 7:30 a.m. to advise him that the temporary employee did not show up for work that day. (Tr. 229). She also told Kasper that Olson had tried to change crews on her first day at work. She told Kasper that "maybe she was unhappy that she didn't get that crew and didn't come back." *Id.*

Kasper testified that at about 7:20 a.m. on August 28, 2001, Martens asked him where the temporary employee was. (Tr. 244). Kasper replied that he did not know, but that he would try to find out. When he asked Ms. Spidle about Olson, she replied that she did not know. Spidle also told Kasper that Olson wanted to change crews and that when she was told that she had to stay on her assigned crew, "she was very persistent and negative." (Tr. 245). Kasper talked to Martens again. Martens told Kasper that he felt that Olson had a negative attitude about her crew assignment and that "she was not going to accept it." (Tr. 245-46). Kasper also talked to Meyers who told Kasper that Olson "felt that she had all the training she needed and she wanted to go to work." (Tr. 247). Meyers told Kasper that when he told her that she had not completed her training, Olson responded by saying that with her 18 years of experience she did not need any more training. *Id.* Based on these conversations, Kasper concluded that Olson "was going to be a problem employee, and that she was not wanting to accept directions from her supervisor." *Id.* Kasper testified that he based this conclusion on the information he obtained from Spidle and Martens concerning her persistent demand that she be transferred to the C crew and the fact that she did not seem to want to complete the company's training program. Kasper testified that Martens did not speak to him about Olson's comments during her mine tour. (Tr. 255). Kasper also testified that he was not aware that Olson had raised any safety concerns on August 27, 2001, or that she had previously filed complaints under sections 105(c) and 103 of the Mine Act against Jacobs Ranch Coal Company. (Tr. 250).

Kasper keeps a record in his computer of all temporary employees who work at the mine. (Tr. 251-52, 261; Ex. C-6). This exhibit states that Ms. Olson's employment at the Black Thunder Mine ended on August 28, 2001, because she was "late and expressed a bad attitude about the crew she was assigned." (Tr. 90-91; Ex. C-6).

A new temporary haul truck driver is typically in classroom training about three days. (Tr. 237-38, 254, 265). It would be rare for someone to be put into a truck the first day at work. (Tr. 253). After the classroom training is completed, the trainee rides in a truck with an experienced driver and then the trainee drives the truck with the experienced driver in the passenger seat. The trainee is not assigned her own truck until the trainer is comfortable that

she can handle the haul truck. (Tr. 238). All training is conducted on the day shift. The A crew worked the night shift the week of August 27, 2001.

Thunder Basin fills open permanent positions by posting them for ten days. (Tr. 240, 252-53). A temporary employee must bid on the job to be considered for the position. Thunder Basin often hires temporary employees to fill open positions. (Ex. C-6). Temporary positions are not for any specific term. On August 27, 2001, Thunder Basin needed a temporary haul truck driver on the A crew, but there was no opening for a haul truck driver on the C crew. (Tr. 241).

After Olson was told that she had been replaced at the mine by someone else, she called Judy Peters of MSHA. Peters is a senior special investigator in Denver. She told Peters that she believes she was replaced because she complained about the highwall. On Wednesday, August 29, 2001, Olson had another phone conversation with Peters about the highwall. During this call, Peters asked her a lot of questions about the condition of the highwall on August 27. Olson subsequently learned that a portion of the highwall that she complained about failed on August 29. (Tr. 84; Exs. C-2 & C-3).

Olson had talked to Ms. Peters before August 27, 2001. Olson was familiar with Ms. Peters because Olson had filed four section 105(c) discrimination complaints against Jacobs Ranch. Olson's most recent conversation with her occurred after Adecco told Olson about the Thunder Basin opening. Olson told Peters that she was concerned whether it "was really a true job offer or if it was just a setup, somebody trying to set me up." (Tr. 109). She was concerned that she "would go out there and then have 15, 20 people lie about me. . . ." *Id.* She based her concern on the fact that it has happened in the past, "people lying about me and making me look like a liar." *Id.* Peters told her to take the position and keep a positive attitude.

## **II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW**

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4<sup>th</sup> Cir. 1987).

### **A. Protected Activity**

Olson engaged in protected activity on several occasions. On August 8, 1994, she filed a complaint under section 103(g) of the Mine Act at the Jacobs Ranch Mine. 25 FMSHRC 9. She also filed four section 105(c) complaints at Jacobs Ranch, one dated October 5, 1994, one dated May 25, 1995, one dated June 4, 1999, and another dated February 16, 2001. In addition, Ms. Olson complained or at least commented about safety conditions at the Black Thunder Mine during her tour on August 27, 2001. In her complaint of discrimination in this case, Olson merely states "I feel I have been discriminated against because of 103s & 105s in the past and safety complaints." I construe her complaint to include all of the complaints discussed above. I find that Olson established that she engaged in protected activity.

### **B. Adverse action**

In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). 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 toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

## 1. Summary of the Parties' Arguments

Olson contends that after the mine tour, Skinner and Martens went into the mine office for about 30 minutes and everything changed for her from that point on. Olson argues that Martens, who was not called to testify, concluded that Olson had complained about safety conditions too much during the tour. As a consequence, she was not trained by an experienced truck driver that afternoon but was told to watch videos. Although Thunder Basin's witnesses stressed the fact that she kept asking to be transferred to the C crew, it was the fact that she complained about the conditions in the pit that drove Thunder Basin to begin treating her differently after lunch. She points to the fact that none of the other new employees watched videos that afternoon and that Martens never came back to see her after the tour.

Olson characterizes Kasper's concern about her tardiness on August 28 and her request to change crews as a pretext for firing her for protected activity. Her version of the facts is supported by her telephone bill which shows that she called the mine at 7:46 a.m. that morning. (Ex. C-5). Her telephone bill also supports her conversations with Ms. Peters. Thus, it is clear that Kasper talked to Olson at 7:46 a.m. and then subsequently talked to Ms. Gilbert at Adecco.

Olson also relies on Ex. C-6 which shows that the mine hired Travis Elliot as a temporary haul truck driver on September 1, 2001, for the C shift. Mr. Elliot was in that position for a full year, a position that Olson would have had if she had not complained about safety.

Thunder Basin argues that Olson was memorable in the minds of the people who met her that first day at work because of the way she came across. Olson was concerned that she was being set up and that is the attitude she carried with her to work on August 27. At best Olson was very aggressive in demanding that she be transferred to the C shift and in insisting that she did not need any more training. It was rather arrogant and unusual for a temporary employee to make such demands on her first day of work.

Thunder Basin also maintains that there was no change in the company's attitude toward Olson in the afternoon of August 27. New employees do not ride in or drive trucks on the first day of work. Skinner, her trainer, was new at the job, so any uncertainty he might have displayed was a result of his inexperience, not any hesitation toward Olson as a temporary haul truck driver. Thunder Basin provides new truck drivers with more extensive training than MSHA requires.

When Olson talked about the highwall at the mine, Martens' demeanor was not hostile. In fact, he noted that some employees call the area "Death Valley." When she complained about the condition of the roadways, Martens merely grinned. There was no showing of hostility to her comments. In addition, Kasper credibly testified that he did not call the Jacobs

Ranch mine when he learned that she had worked there. He had no knowledge of her prior safety complaints.

There can be no dispute that Olson did not show up for work on August 28. Whether she called the mine at 7:46 a.m. or 10:00 a.m. is not crucial. Until she called, management assumed that Olson did not show up because she was dissatisfied with her crew assignment. Thunder Basin had already told Ms. Gilbert to select another driver when Olson called. There is nothing in the record to link Olson's safety complaints with management's decision to hire another temporary driver.

## 2. Analysis of the Case

The resolution of this case depends entirely on an examination of the evidence and an analysis of the motivation of management. As stated above, "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Chacon*, 3 FMSHRC at 2510. I discuss below the key facts upon which I base my conclusion that Thunder Basin did not discriminate against Hazel Olson.

### a. Change in Attitude Toward Olson - August 27, 2001

One of the key elements in Olson's case is that management's attitude about her changed in the afternoon of August 27 once the company learned about her protected activities. Olson maintains that I should infer, from indirect or circumstantial evidence, that Thunder Basin's hostile reaction to her safety activities was a contributing factor in her termination on August 28. The safety activities include Olson's complaints about the conditions in the mine during her tour and her previous safety complaints at Jacobs Ranch. A change in the company's treatment of Ms. Olson that afternoon would help support her contention that her termination was motivated, at least in part, by her protected activity.

Olson testified that Martens indicated during her training on the morning of August 17 that she would probably be going out in a truck that first day of work. Olson testified that he told the man who would be delivering propane to the mine that after the tour "you'll probably be done for the day." (Tr. 37). She testified that Martens told the woman who was being hired to work in the lab that she would be done after the mine tour. (Tr. 37). Olson testified that Martens then told her: "after lunch . . . I would probably be put on a truck with . . . another driver out there and I would ride around with that driver. . . ." *Id.* During the tour, Olson testified that she kept asking questions like, "how am I going to know which pit to go to?" and "how am I going to know where [the] crushers are at?" (Tr. 40). Olson testified that in response, Martens said that he would show her where everything is during the tour. Consequently, Olson had a strong impression that she would be in a truck later that very afternoon.

During the tour, Olson made numerous comments about the conditions in the mine. In addition to her comments about the highwall and the roadways, she asked questions about safety procedures. During her morning training session she was taught to obey all traffic signals at the mine. During the mine tour, Martens told her that if the project manager just sees you waiting at a red light, “he’ll motion for you to come on through even when . . . the light’s red.” (Tr. 42). She raised concerns about this practice to Martens. At another point on the tour, Olson saw a sign that prohibited entry to an area near a dragline. She raised concerns when the project manager’s vehicle ignored the sign. (Tr. 54).

Olson testified that when the tour concluded, Martens and Skinner went into the mine office. Olson maintains that from that point on, she was treated differently than she was treated before the tour. (Tr. 66). Olson said that she was “really puzzled” when Skinner told her that she would be in training all week. (Tr. 67). Olson testified as follows:

[B]efore we went on the tour . . . it was like Marty [Martens] . . . had the day planned . . . like they had a place for me. After the pit tour and after lunch it was like they didn’t know what to do with me.

*Id.* Olson watched truck videos with Skinner for the remainder of her shift. She contends that this change was a direct result of the safety concerns she raised with Martens. Olson also believes that someone may have called the Jacobs Ranch Mine and learned that she was a safety advocate.

Olson’s belief that the company changed its attitude toward her that afternoon is somewhat irrational because it is based solely on her mistaken belief that Martens virtually guaranteed that she would be in a truck that day. Martens did not testify at the hearing, but Olson stated that Martens told her that she would “probably” be able to ride in a truck that afternoon.<sup>6</sup> There are many reasons why she may not have ridden in a truck that afternoon. There may have been a scheduling problem, for example. The company may have planned to let her ride in a truck as soon as there was a qualified truck-trainer available. Kasper testified that a new truck driver is usually given at least three days of classroom training before she is taken out in a truck. The scheduling of classroom training and on-the-job training by a truck driver may vary depending on the resources available. Skinner was the “operations trainer” who provides classroom training to new miners like Olson. (Tr. 242-43). He was a new

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<sup>6</sup> Olson argues that Martens was “conspicuously absent” at the hearing. (Tr. 282). I draw no inference from the fact that Thunder Basin did not call him to testify. *See Eagle Energy, Inc.*, 23 FMSHRC 1107, 1119-20 (Oct. 2001). Both parties listed him as a witness in their prehearing submissions. He apparently still works at the mine, but he is no longer in the safety department. Although his testimony may have been helpful, I am crediting Olson’s testimony as to what he told her.

employee in the safety department and may have been proceeding at a slower pace than Martens anticipated. In addition, Meyers told Olson that the company has to make sure that she is trained so it cannot take her “word for it.” (Tr. 65). Given that the haul trucks that she would be driving are extremely large, off-road vehicles, the company’s caution is self-evident. Olson was being paid whether she rode in a haul truck or continued her training.

Olson also testified that Martens joked with her about her comments. Martens told her that experienced miners often call the area near the highwall “Death Valley.” When she complained about the condition of the roadways, he grinned at her. (Tr. 43-44). There is no evidence that Martens was hostile or angry about her comments.

Although it is possible that Martens discussed Olson’s safety activities with upper management during the lunch break, nothing in the record suggests that she was required to watch safety and training videos rather than ride in a truck because of her protected activities. Watching videos about work-related matters cannot be considered to be an adverse action. There is no indication that this training was a preliminary step towards dismissal or other discipline.

I conclude that Olson failed to establish that she was treated differently by mine management after she returned from the mine tour. She was the only person coming on board that week, as either a temporary worker or permanent employee, who would be operating heavy equipment in the pit. As a consequence, her training was more extensive than the other five individuals.<sup>7</sup> Although Olson believed that she was ready to drive a truck, the company wanted her to continue her training. I cannot infer that this alleged delay in allowing Olson to ride in a truck reflected a change in the company’s attitude toward Olson or that her protected activities contributed to this alleged delay.

b. Failure to Report to Work on Time - August 28, 2001

There is no dispute that Olson did not show up for work on time at the Thunder Basin Mine on August 28, 2001. Olson claimed that she called the mine as quickly as she could. Her telephone records show that a call was made to the mine from her house at 7:46 a.m. that morning, about 45 minutes after the start of her shift. Kasper, who is now retired, testified that he remembers getting a call from her at about 10:00 a.m. These events occurred about 20 months before the hearing in this case. Memories about precise times are more likely to fade than memories of the sequence of events or the personalities of the people involved. I credit the testimony of Ms. Olson that she called the mine at about 7:45 a.m. This time is consistent

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<sup>7</sup> Lewis, who attended the morning training session and tour but did not watch videos in the afternoon, was hired by Thunder Basin as a blaster. He had worked for Adecco as a blaster at the mine for some time and was continuing the same work as a full-time employee. Thus, Thunder Basin was fully familiar with his experience and qualifications for the job.

with her phone bill and with her rendition of the events that morning. She testified that she left her home at about 5:20 a.m., drove about five miles, and then had a flat. She jacked up the truck before she realized that the spare was also flat. She walked home and called the mine soon thereafter. Assuming that these events occurred as she described them, she would have arrived back home long before 10:00 a.m.

Although I credit Olson's testimony as to the time of the call, I credit Kasper that he called Gilbert to get a replacement before Olson called the mine that morning. Gilbert could not remember when Kasper called her to obtain another haul truck driver, but he may have called early. (Tr. 165). She remembers that Kasper told her that Olson had not shown up for work that morning. *Id.* Olson testified that Kasper told her during her call that he had already talked to Gilbert about getting a new driver. (Tr. 75). Kasper talked to a number of people at the mine before he called Gilbert that morning. He talked to Spidle who told him that Olson had tried to change crews the first day of work and that she was unhappy that she was not reassigned to the C crew. Spidle also told Kasper that Olson was rather persistent in her request for a crew change and that her attitude was negative. Kasper testified that Martens told him that Olson was unhappy with her crew assignment and believed that she might not accept her assignment. Based on these conversations, Kasper concluded that Olson would be a difficult person to supervise. Because Olson had not reported to work by 7:00 a.m., he called Adecco to obtain another haul truck driver.

Kasper testified that he was never told that Olson had made comments about safety in the pit during her tour. He also stated that he did not know that she had filed safety and discrimination complaints when she worked for Jacobs Ranch. I credit his testimony in this respect.

I conclude that Thunder Basin's termination of Olson was not motivated in any part by her protected activities. I reach this conclusion based on the above analysis, after consideration of the factors set forth in *Chacon*. It is clear that Thunder Basin had knowledge of the safety concerns Olson raised on the tour of the pit. There is no evidence that it had knowledge of her previous MSHA complaints. There is no evidence that Thunder Basin demonstrated any hostility or animus toward her protected activity. As stated above, I find that Olson was not treated any differently on the afternoon of August 27 than she had been before the pit tour. There was a coincidence in time between the protected activity and the adverse action. Olson did not establish disparate treatment. Olson had only worked at the mine one day, expressed dissatisfaction with her crew assignment, and did not report to work on time the following day.

### c. Mixed Motive Analysis

Because several Thunder Basin employees discussed their negative impression of Olson with Kasper before he called Adecco to get a new truck driver, it is possible that her safety complaints contributed to their negative impression and that Kasper, therefore,

unwittingly considered her protected activity. As a consequence, I have chosen to also apply a mixed motive analysis to the facts in this case. If a mine operator cannot establish that the protected activity played no part in its decision to terminate the complainant, it may nevertheless defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. In a mixed-motive case:

It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in unprotected activity alone and that he *would* have disciplined him in any event.

*Pasula*, 2 FMSHRC at 2800 (emphasis in original). An operator can try to establish this defense "by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

Kasper, acting for Thunder Basin, considered two events that were not protected when he decided to replace Olson with a different temporary haul truck driver. First and foremost was the fact that she did not show up at work on August 28, 2001, her second day at the job. Olson called the mine at 7:46 a.m. that morning to advise management that she would not be arriving at the mine until about 9:00 a.m. because she had a flat tire on the way to work. As stated above, I find that Kasper had already called Ms. Gilbert to get a new truck driver when Olson called the mine.

In addition, Olson expressed dissatisfaction with her crew assignment on the first day at work. Although Olson testified that she was simply making inquiries, Spidle interpreted her actions differently. (Tr. 225). Spidle testified that Olson told her that she did not want to be on the C crew. *Id.* By the end of the day, Spidle had a mostly "negative impression" of Olson because of her persistent requests. (Tr. 225-26). Spidle said that temporary employees are usually less demanding on their first day at work. When Spidle learned that Olson did not report for work on August 28, she told Kasper that Olson might not have returned to the mine because she was unhappy with her crew assignment. (Tr. 229). Kasper considered Spidle's assessment when he decided to call Adecco for a new driver. Thus, when Kasper called Adecco, he believed that Olson might have already quit. Olson's persistent request that she be assigned to a different crew is not protected.

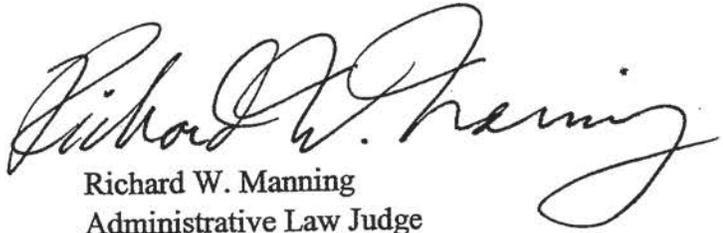
Olson argues that Kasper's decision to terminate Olson because she was late one morning violated the company's personnel policies. Olson maintains that the company was looking for any excuse to get rid of her because of her protected activity. In making this argument, Olson relies on company practices as evidenced by the employee handbook. (Ex. C-7). A Thunder Basin employee is required to call in at least an hour in advance if she is going to be late for work. (Tr. 204-05). If a company employee is late for work without providing any advance notice, she is given a "step." *Id.* Although the details of the company's progressive discipline policy are not in the record, it is clear that a non-probationary Thunder Basin employee without any prior disciplinary problems would not ordinarily be terminated for arriving late to work because of a flat tire so long as she called the mine as quickly as she could. Olson, however, was not a Thunder Basin employee. Thunder Basin did not violate its employment policies and practices when it replaced Olson with another Adecco driver because these practices and policies do not apply to temporary employees.<sup>8</sup>

Two additional factors that are often considered by the Commission when analyzing mixed-motive cases are a miner's unsatisfactory past work record and prior warnings to the miner. Olson obviously did not have a "work record" at Thunder Basin because she had only worked one day. She had not been given any "prior warnings." I find that Kasper would have taken the same steps with respect to Ms. Olson on August 28 if she had not engaged in any protected activity.

In conclusion, I find that Olson engaged in protected activity but that Thunder Basin terminated her from her temporary employment with Adecco solely for her unprotected activities. In addition, I find that, if Thunder Basin did consider her protected activities when it let her go, it was also motivated by her unprotected activities and it would have terminated her for the unprotected activities alone.

### III. ORDER

For the reasons set forth above, the discrimination complaint filed by Hazel Olson against Arch Mineral Company's Thunder Basin Coal Company, LLC, under section 105(c) of the Mine Act is **DISMISSED**.

  
Richard W. Manning  
Administrative Law Judge

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<sup>8</sup> I reject Olson's arguments regarding her belief that Travis Elliot was hired to replace her because her belief is too speculative and it is not supported by credible facts.

Distribution:

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

June 27, 2003

VANDALIA RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2002-145-R
v.	:	Order No. 4642757; 8/7/2002
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, MSHA	:	Alloy/4 Mile Surface Mine
Respondent	:	Mine ID 46-07537

**DECISION**

Appearances: David J. Hardy, Esq., Spilman Thomas & Battle, PLLC, Charleston, West Virginia, for Contestant;  
Francine A. Serafin, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Hodgdon

This case is before me on a Notice of Contest brought by Vandalia Resources, Inc., against the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company challenges the issuance to it of Order No. 4642757, an “imminent danger” order. A hearing was held in Charleston, West Virginia. For the reasons set forth below, I vacate the order and dismiss the case.

**Background**

Vandalia Resources operates a surface coal mine in Fayette County, West Virginia, known as the Alloy/Four Mile Surface Mine. On August 7, 2002, MSHA Inspector Sherman Slaughter and his supervisor, Harold Owens, went to the mine to observe a highwall operation. The inspectors had to travel through the surface mine to get to the highwall. They completed their examination of the highwall and left the area in their car at 3:25 p.m.

While the inspectors were driving back across the mine property, they passed an area where reclamation work was being performed. They pulled off of the road to observe the operation. Inspector Slaughter got out of the car to get a better look. He saw a bulldozer that

appeared to be sliding on the slope. The inspector then reached into his car for his camera and told Owens to “look at that dozer sliding on the slope.” (Tr. 21.) The two inspectors talked about the situation a minute and then Slaughter took a picture of the scene. By the time he took the picture, the bulldozer had reached the bottom of the slope and was heading toward the up ramp.

Slaughter got back into the car and began driving around the access road through the hollow to get to the other side to stop the work. As they arrived at the reclamation site, Slaughter saw a second bulldozer start down the slope, slide “sideways some,” and then straighten out and proceed the rest of the way down the hill. (Tr. 21.) The inspectors got out of car and the two bulldozer operators came over to them.

Slaughter had decided to issue an “imminent danger” order when he observed the first bulldozer. When the operators got to the inspectors, Slaughter told one of the operators, Mikel Neal, that he was sliding coming down the hill and did not have full control of the bulldozer. Neal disagreed. He then told the other operator, Edward Hamon, the same thing. Hamon also did not agree with Slaughter’s assessment. Slaughter then told them he was issuing an “imminent danger” order and that they could not continue to work that way.

The “imminent danger” order, Order No. 4642757, was issued at 3:35 p.m. It alleges a violation of section 107(a) of the Act, 30 U.S.C. § 817(a), because:

Two bull bulldozers were observed pushing material down a steep reclaim slope (approx. 1.56/1) in pit 180 of the mine. One bulldozer, a D10N with a ripper, would lose traction and slide straight down the slope on areas of the slope and the other bulldozer, a D10R bobtail, would lose traction and slide sideways on areas of the slope. The bulldozer operators did not have full control of the machines in that they would slide as they worked the slope. It was determined that the type of bulldozers and the slope conditions (steep and loose materials) made it reasonable to expect the bulldozers to slide out of control (on the steep slope) and result in serious injury. An imminent danger exists.

(Govt. Ex. 4.) No citation or order was issued for a violation of any of the Secretary’s mandatory safety or health standards.

#### **Findings of Fact and Conclusions of Law**

Section 107(a) of the Act provides that:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of

the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative . . . determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

Section 3(j) of the Act, 30 U.S.C. § 802(j), defines an “imminent danger” as “the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.”

In interpreting this definition, the Commission has stated that “an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), quoting *Eastern Associated Coal Corp. v. Interior Bd. Of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974) (emphasis omitted) (*R&P*). The Commission has elaborated that “[t]o support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.” *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (October 1991).

An inspector’s finding of an imminent danger must be supported “unless there is evidence that he has abused his discretion or authority.” *R&P*, 11 FMSHRC at 2164, quoting *Old Ben Coal Corp. v. Interior Bd. Of Mine Op. App.*, 523 F.2d 25, 31 (7th Cir. 1975) (emphasis omitted). “An inspector abuses his discretion, making a decision that is not in accordance with law, if he orders the immediate withdrawal of miners in circumstances where there is not an imminent threat to safety.” *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 858-59 (June 1996) (citation omitted).

In determining whether he has abused his discretion, an inspector “is granted wide discretion because he must act quickly to remove miners from a situation he believes is hazardous.” *Id.* at 859. In assessing an inspector’s exercise of his discretion, the focus is on “whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported the issuance of the imminent danger order.” *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (August 1992).

Based on the evidence in this case, I am constrained to conclude that the inspectors did not make a reasonable investigation of the facts, that no imminent danger existed and, thus, that they abused their discretion. With regard to their investigation, the inspectors were initially too far away from the bulldozers to accurately observe their operation, did not observe either bulldozer make a complete run down the slope and did not discuss the operations with the

bulldozer operators or their foreman. Furthermore, too little time elapsed for the inspectors to make a reasonable investigation of the facts. Indeed, a reasonable investigation would have revealed that there was no imminent danger.

The inspectors were at least 200 yards from the slope when they observed the bulldozer from their car. (Tr. 265.) Actually, looking at the picture taken by Inspector Slaughter, (Govt. Ex. 1), it appears that 200 yards is a conservative estimate. From this distance, Inspector Slaughter concluded that Hamon's bulldozer was sliding straight down the hill because "[t]he way the sun was hitting the tracks, I could see the grouser (phonetic) of the cleats, the tracks themselves. I could tell that they weren't moving, they were stationary." (Tr. 26-27.)

Assuming that he could see that well, the inspector still could not observe the slope of the hill, the actions of the operator, the type of material the bulldozer was operating in or precisely how the bulldozer was performing. Yet based on this one observation, Inspector Slaughter decided to issue an imminent danger order. As he said, "When I seen [*sic*] the first bulldozer, saw him sliding, I knew that that was [im]minent then . . . . As we were going around, I was talking to my supervisor and I told him we'd have to issue an order for this, we have to get them to stop." (Tr. 30-31.)

Moreover, at the time Inspector Slaughter made his decision, he had only seen one bulldozer come part way down the slope. The first bulldozer was already coming down the slope when he first observed it and it is clear from the picture, which shows the second bulldozer going across the top of the slope, that the second bulldozer had not yet started down the slope when the inspectors began driving around the access road and through the hollow to get to the slope. Either while they were driving or right after they arrived, the inspectors saw the second bulldozer slide "sideways some" and then straighten back up as it came down the slope. (Tr. 21.) However, it appears that rather than sliding sideways, the bulldozer actually "fishtailed" to the left.<sup>1</sup> Nevertheless, even if Inspector Slaughter had not decided to issue an imminent danger order until after observing the second bulldozer, the issuance of the order would have been premature.

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<sup>1</sup> Slaughter would not use the term "fishtail," but testified as follows on cross-examination:

Q. What he told me was that — and he'll testify here today is that it fishtailed a little to the left, and then he compensated and straightened up; is that what you saw?

A. I saw him slide to the left and straighten it up. That's right.

It would have been premature because when the inspectors arrived at the slope, they did not discuss the situation with the inspectors. Instead, Inspector Slaughter confronted the operators with his conclusions that they were “sliding coming down the slope” and “you don’t have full control of your bulldozer.” (Tr. 31-32.) When the operators stated that, even though the bulldozer may have been sliding, they still had full control, the inspector did not pursue the matter further, but announced that he was issuing an imminent danger order.

Again, had the inspector not already decided to issue the order, he still had not conducted a sufficient investigation at this point. He did not know how much experience each operator had operating a bulldozer, the mechanical condition of the bulldozers, how long they had been operating on the slope, what problems, if any, they had experienced while operating on the slope, or the basis for their claims that they believed themselves to be in control of the bulldozers. In addition, no discussion was had with the foreman who directed the grooming of the slope.<sup>2</sup>

Ultimately, I find it significant on the issue of whether the inspectors made a reasonable investigation of the facts, that only ten minutes elapsed from the time the inspectors completed their inspection of the highwall until they issued the imminent danger order. (Tr. 58.) In that time, the inspectors left the highwall pit area, drove for some time until they observed the reclaiming operation [Inspector Slaughter would not estimate how long that took (Tr. 57)], stopped the car, got out of the car, observed the first bulldozer, had a discussion for “a minute” with each other, got a camera out of the car, took a picture, got back in the car, drove to the slope area, got out of the car, talked to the operators and issued the citation. While this certainly was enough time to indicate to the inspectors that the situation needed further investigation, it was not enough time to complete the investigation.

If instead of issuing an imminent danger order, the inspectors had conducted a more thorough investigation, they may well have concluded, as I do, that an imminent danger did not exist. Prior to becoming authorized representatives of the Secretary, Inspector Slaughter had only nine months experience as a surface miner and Inspector Owens had none. (Tr. 54, 121.) In addition, neither Inspector Slaughter nor Inspector Owens had ever operated the types of bulldozers involved in the reclaiming project, although Inspector Slaughter had apparently operated some types of bulldozers during his short surface mining career.

On the other hand, Hamon has 21 years experience as a surface miner and had been operating bulldozers for five years. (Tr. 140-41.) Neal has been a surface miner for 25 years, almost all of it operating bulldozers. (Tr. 187.) Both were considered to be skilled operators and Neal was the most experienced reclamation employee the company had. (Tr. 217, 255.) Additionally, Harold Arbaugh, the foreman, had almost 30 years experience as a surface miner, 24 years of it as a certified mine foreman, and has operated the types of bulldozers at issue here. (Tr. 215.)

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<sup>2</sup> Inspector Owens testified: “We discussed the situation with the equipment operators and the mine foreman who came up there later after we issued the order.” (Tr. 112.)

Inspector Slaughter testified that he believed the situation involved an imminent danger because: “When I seen [*sic*] these bulldozers slide, I knew that they could hit a rock and if they hit a rock . . . it could cause the bulldozer to go sideways and if it did, it could roll off the embankment when it’s steep. It won’t just roll — it will roll all the way to the bottom and I suspected it would be a fatal injury.” (Tr. 46.) None of the company’s witnesses disagreed with the inspector’s assertion that if a bulldozer got completely sideways on the slope, there was a danger that it could roll over. They did disagree, however, that that was a danger in their work reclaiming the slope.

Hamon testified that the work he was performing was routine, that he felt safe, that he had operated on steeper slopes, that in the six hours he had been working he had encountered only one rock, that he had control of the bulldozer at all times, that he never felt that he was in danger of a rollover, and that if had felt that he was not safe, he would have stopped working. (Tr. 143, 145, 147-48, 151-53.) Neal testified that he had been up and down the site between 40 and 50 times with no problems before the inspectors arrived, that he had operated on steeper slopes, that he had rolled a bulldozer once before, knew how dangerous it was, but at no time did he feel in danger of a rollover or that the work was unsafe and that he felt in control of the bulldozer at all times. (Tr. 194, 196-97, 208-09, 212.) Arbaugh testified that the slope was not steep enough for the bulldozers to turn sideways and rollover. (Tr. 231.)

Neal and Arbaugh also testified that it is not unusual for bulldozers to slide on occasion, but that does not mean that the operator cannot control it. (Tr. 194, 226.) Hamon and Neal stated that if a bulldozer does start to slide there are a number of ways to stop it, among them cross-steering, using the blade as a brake or using a combination of the blade and the brakes. (Tr. 156, 181, 195, 203.)

Lastly, the slope of the hill was not as steep as the inspectors believed it to be. The inspectors measured the slope with an Abney level and determined that it was 1.56:1, or a 64 percent grade. However, the company had the slope surveyed by its engineers, who then drew a profile of the slope. (Cont. Ex. 1.) It shows that while one section of the slope was 1.56:1, it varied from 1.26:1 (79 percent grade) at the very top to 2.21:1 (45 percent grade) and that average of the slope was 1.68:1 (60 percent grade).

In determining that there was not an imminent danger, I accept the testimony of the experienced operators and foreman over the conjecture of the inspectors. Their testimony is bolstered by the evidence that when the company determines that a slope is too steep for its employees to operate on, it hires specialists to reclaim it. (Tr. 250-51, 277.) This demonstrates that the company takes the slope into consideration before assigning employees to work on it.

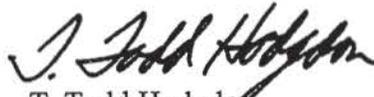
### **Conclusion**

The inspectors did not conduct of reasonable investigation of the facts and circumstances in this case. Instead of taking the time to observe the operation close at hand to see how the

bulldozers were actually operating, and interviewing the operators, they chose to issue an imminent danger order based on a distant view of one bulldozer coming down the slope. In fact, had the situation been further investigated, the conclusion that there was no imminent danger would have been reached. Consequently, I conclude that the inspectors abused their discretion in issuing the imminent danger order in this case.

**Order**

Accordingly, it is **ORDERED** that Order No. 4642757 is **VACATED** and this proceeding is **DISMISSED**.

  
T. Todd Hodgdon  
Administrative Law Judge

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