JUNE 2005

There were no Commission Decisions in June

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JUNE 2005

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

Secretary of Labor, MSHA v. Wake Stone Corporation, Docket No. SE 2004-185-M. (Judge Weisberger, May 11, 2005).

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

Vernon Holden v. Ross Island Sand & Gravel Co., Docket No. WEST 2004-364-DM. (Judge Zielinski, April 28, 2005).

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 7, 2005

DAVID R. COLEMAN, employed by LODESTAR ENERGY, INC., Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
	:	Docket No. EAJ 2004-02
v.	:	Formerly KENT 2003-275
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Mine ID 15-18015 Bent Mountain

DECISION APPROVING SETTLEMENT

Before: Judge Feldman

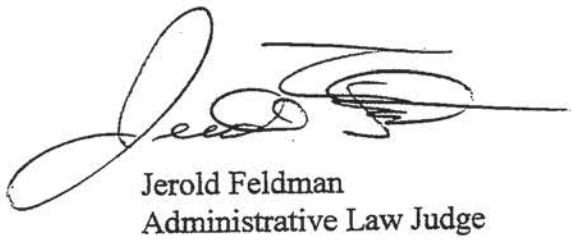
Before me is an application for the recovery of attorney's fees and incidental litigation expenses filed under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1996), on July 2, 2004, by David R. Coleman who was employed by Lodestar Energy, Inc. (Lodestar). The EAJA application followed a decision in which Coleman prevailed in the underlying 110(c) case brought by the Secretary pursuant to 30 U.S.C. § 820(c). 26 FMSHRC 485 (June 2004). Coleman's net worth does not exceed the limit for individual eligibility under EAJA. 29 C.F.R. § 2704.104(b)(4)(i). The Secretary opposed Coleman's EAJA application on substantive grounds.

Under EAJA, Coleman, as the prevailing party, is entitled to reasonable attorney's fees and expenses in connection with any proceeding, or any significant and discrete substantive portion thereof, in which the Secretary's case was not substantially justified. *Cooper v. United States R.R. Retirement Board*, 24 F.3d 1414, 1416 (D.C. Cir. 1994); 29 C.F.R. § 2704.105(a). The Secretary has the burden of demonstrating that her position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992). Substantially justified means that the Secretary was "justified to a degree that could satisfy a reasonable person" and that the Secretary had "a reasonable basis both in fact and in law" to continue to proceed with her litigation. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Determining whether the Secretary's actions were substantially justified "necessarily requires the court to examine . . . the Government's litigation position and the conduct that led to litigation. After doing so, the court must then reach a judgment independent from that of the merits phase." *FEC v. Rose*, 806F.2d 1081, 1090 (D.C. Cir. 1986).

In an *Interim Decision* issued on January 14, 2005, Coleman's EAJA was partially granted. 27 FMSHRC 104. Specifically, the *Interim Decision* determined, while the Secretary initially was substantially justified in bringing the case against Coleman, the Secretary lost her substantial justification the day before trial after a deposition revealed the testimony of her primary witness was unreliable. *Id.* at 112. Consequently, Coleman's EAJA application for attorney fees and expenses incurred on or after the commencement of the February 11, 2004, trial was granted. *Id.* at 113. The Interim Decision established a March 29, 2005, filing schedule for Proposals for Reimbursement if the parties could not reach a Joint Stipulation for Reimbursement.

After several extensions for the filing of reimbursement proposals were granted to enable the parties to engage in settlement discussions, the parties now have reached an agreement. In settlement of Coleman's EAJA application, the Secretary has agreed to pay Coleman the sum of $18,000.00 in satisfaction of all attorney's fees and other incidental expenses sought under EAJA.

I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement is appropriate and in the public interest. **WHEREFORE**, the motion for approval of settlement **IS GRANTED,** and **IT IS ORDERED** that the Secretary, within 45 days of this Order, pay David R. Coleman $18,000.00 in satisfaction of his claim under the EAJA. Upon receipt of timely payment, David R. Coleman's EAJA application **SHALL BE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

June 8, 2005

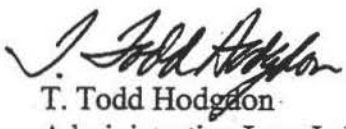
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2004-36 A.C. No. 46-08593-11714
v.	:	
BAYLOR MINING, INC., Respondent	:	Jim's Branch No. 3a

ORDER LIFTING STAY
DECISION APPROVING SETTLEMENT

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). It was stayed on May 26, 2004. The Secretary, by counsel, has filed a motion to approve a settlement agreement. The Respondent has agreed to pay the proposed penalty in full.

Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). Accordingly, the stay is **LIFTED**, the motion for approval of settlement is **GRANTED** and the Respondent is **ORDERED TO PAY** a penalty of **$60.00** within 30 days of the date of this order.



T. Todd Hodgdon
Administrative Law Judge

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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 10, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2005-65-M A.C. No. 38-00052-00000
v.	:	
KENTUCKY TENNESSEE CLAY, Respondent	:	Kentucky Tennessee Clay

DECISION APPROVING SETTLEMENT

Before: Judge Feldman

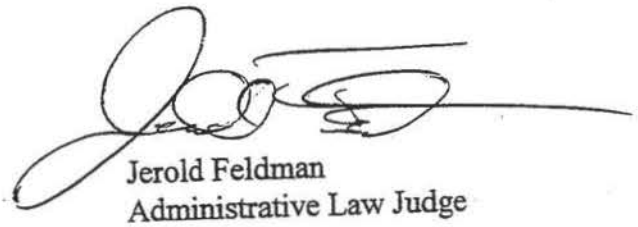
This civil penalty matter concerns a discrimination complaint filed pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (1994) (the "Act"), by Stanley Quackenbush against Kentucky Tennessee Clay (KTC). Following an evidentiary hearing, it was determined that KTC violated section 105(c) of the Act by disciplining Quackenbush immediately after Quackenbush communicated safety related complaints when he accompanied a Mine Safety and Health Administration (MSHA) Inspector during an inspection of train track conditions. *Decision*, 26 FMSHRC 913 (Dec. 2004).

In accordance with the provisions of Commission Rule 44(b), 29 C.F.R. § 2700.44(b), the Secretary was provided with a copy of the *Decision* so that she could initiate a civil penalty proceeding for the subject 105(c) violation. On January 24, 2005, the Secretary filed a petition for assessment of civil penalty under section 105(d) of the Act that has been assigned as Docket No. SE 2005-65-M. The Secretary's petition initially sought to impose a $3,000 civil penalty.

On May 27, 2005, the Secretary filed a motion to approve a settlement agreement and to dismiss this case. A reduction in civil penalty from $3,000 to $2,000 is proposed. The settlement terms include KTC's acknowledgment that its employees have a statutory right to contact MSHA to report hazardous conditions without fear of retribution.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i)

of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED,** and **IT IS ORDERED** that Kentucky Tennessee Clay pay a civil penalty of $2,000 within 30 days of this Decision, and, upon receipt of timely payment, the civil penalty matter in Docket No. SE 2005-65-M **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 2005

DAVID M. HALL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. SE 2004-61-D
v.	:	BIRM CD 2004-01
	:	
JIM WALTER RESOURCES, INC.,	:	No. 7 Mine
Respondent	:	Mine ID 01-01401
	:	

DECISION

Appearances: Gene T. Moore, Esq., and Jonathan A. Spann,[1] Esq., Law Office of Gene T. Moore, PC, Tuscaloosa, Alabama, for Complainant;
Warren B. Lightfoot, Jr., Esq., and Janell M. Ahnert, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, for Respondent.

Before: Judge Hodgdon

This case is before me on a Discrimination Complaint brought by David M. Hall against Jim Walter Resources, Inc., (JWR), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Birmingham, Alabama. For the reasons set forth below, I find that the Complainant was not discharged by JWR because he engaged in activities protected under the Act.

Background

JWR is the owner and operator of the No. 7 Mine located near Brookwood, Alabama. Coal from the underground mine is moved to a preparation plant where it is processed to take out impurities, such as rocks, sand and grit. The preparation plant has three shifts, day, evening and "owl." The day and the "owl" shifts are production shifts and the evening shift is primarily a maintenance shift. The Complainant began working for JWR in May 1998 as a Heavy Equipment Coordinator in the heavy equipment shop of the preparation plant. He was transferred to the position of Preparation Plant Maintenance Foreman on the evening shift in February 2001. He worked directly under Milford Bailey, the Coordinator, and Buddy Smith, the Plant Manager.

[1] On April 13, 2005, Mr Spann moved to withdraw as co-counsel in this matter because he had joined another law firm. The motion is **GRANTED**.

On August 22, 2003, Hall was discharged from JWR by Buddy Smith. Alleging that he was terminated for engaging in activity protected under the Act, Hall filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA), under section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on October 2, 2003.[2] On November 10, 2003, MSHA informed him that, on the basis of a review of the information gathered during its investigation, "MSHA has determined that a violation of Section 105(c) of the Act has not occurred." Hall then instituted this proceeding with the Commission, under section 105(c)(3), 30 U.S.C. § 815(c)(3), on December 4, 2003.[3]

Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he 'has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation"; (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101"; (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding"; or (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

In order to establish a *prima facie* case of discrimination under section 105(c)(1), a complaining miner must show: (1) That he engaged in protected activity; and (2) That he was the subject of adverse action which was motivated at least partially by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th

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[2] Section 105(c)(2) provides, in pertinent part, that: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

[3] Section 105(c)(3) provides, in pertinent part, that: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

Cir. 1987).

In his complaint to MSHA, Hall claimed that he was discriminated against by JWR because: "I informed my immediate supervisor that I would no longer do things that would endanger me or other employees' safety. I was harassed and intimidated for five months in what I believe was an attempt by management to make me resign. I was fired on August 22, 2003, after these months of harassment and intimidation." (Resp. Ex. U.) When he filed his complaint with the Commission, he stated:

> On August 22, 2003, I was terminated from my position of maintenance foreman at preparation plant number 7 at Jim Walter Resources located in Brookwood, Alabama, by Buddy Smith. On the final termination papers, the reason for my discharge was "poor performance."
>
> In February of 2003, Buddy Smith forced me to perform work, which I am not qualified or equipped to perform safely. . . . After performing this dangerous act out of fear of immediate termination if I refused, I advised Milford Bailey (Buddy Smith's maintenance planner at mine number 7, and also one of my bosses) that I would no longer perform work that endangered my life, or the lives of the men on my crew. After management was informed that I would no longer perform the unsafe, illegal tasks, he began treating me as an inferior and harassing me for no founded reason.
>
> * * *
>
> The events that have elapsed support the fact that I was harassed, discriminated against and ultimately terminated as a result of Buddy Smith's dislike for my refusal to perform the tasks which were in violation of stringent MSHA regulations.

(Resp. Ex. S.) The evidence adduced at the hearing does not support his claims.

Protected Activity

In February 2003, Hall was assigned to temporarily repair a leak in a pipe, located under the fourth floor of the plant, which was dripping on a decanter motor located on the first floor. (Tr. 26, 320.) He instructed Glenn Edwards, a washroom operator, to help him. The two looked for a ladder long enough to reach the area of the pipe and were unable to find one. According to Smith, Hall then called on the radio and asked why they could not wait until the next day when a replacement pipe had been fabricated. (Tr. 26.) Smith said that he responded: "No. We've got to take care of it today." (Tr. 26.) According to Edwards, who listened to the exchange over the

radio, Smith asked if the leak had been fixed. Hall responded that he had Edwards helping him and that they were looking for a ladder; Smith said: "I told you to take care of the problem." (Tr. 236.) According to Hall, Smith cut in while he was talking to Edwards on the radio and said: "No. I want you to take care of this personally." (Tr. 321, 383.)

As a result, Hall concluded that he had to repair the pipe by himself. (Tr. 321-21, 384-85.) He testified that to fix it he performed "a combination of crawl, walk, slid, and stood and climbed out to where it was and held on to it and held a rag on it, run the tape around first and put a rag on the end and taped it off and crawled back." (Tr. 322.) He admitted that after he and Edwards looked for a ladder, he did not further search for a ladder, nor did he try to get a walkboard or a means of tying himself off, before he fixed the pipe. (Tr. 392-93.) Nevertheless, Hall concluded that what he had done was unsafe, so on the Tuesday or Wednesday of the following week he told Milford Bailey that he was not going to do it anymore. He testified:

> I told Milford that I wasn't going to do that kind of crap anymore and neither were my people.
>
> Q. And what did you mean by that when you communicated –
>
> A. Well, I told him I wasn't going to crawl out and tape pipes like that anymore. I wasn't going to do anything that dangers me or my people. And he didn't have any –
>
> Q. Well, did he acknowledge that he heard you?
>
> A. Well, I'm pretty sure he heard me because he got pretty flush in the face, and he didn't go into any big speech or anything like that. But he didn't – there was no talk about it.
>
> Q. Did you get the impression he already knew about it, or did you have an impression one way or the other before you talked with him?
>
> A. Well, he knew the pipe had to be taped, and he knew that I was the one that taped it. So he knew I was – I'm pretty sure he knew I was supposed to go up there and take care of it.

(Tr. 323.) Bailey testified that: "The only thing he ever mentioned was . . . that he had no intention of putting himself or his people in unsafe work conditions again." (Tr. 201.)

In short, Hall, a supervisor, performed work that he later decided was done in an unsafe manner and told his supervisor that in the future he would not perform work in an unsafe manner or require his men to do so. This is the protected activity in which Hall claims he engaged. The

law is well settled that a miner has the right to refuse to work in conditions that he reasonably and in good faith believes to be hazardous. *See e.g. Gilbert v. Federal Mine Safety and Health Rev. Commission*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). However, here, Hall had already performed the work and there is no evidence that he ever refused to perform any work because it was unsafe. Consequently, this is not a work refusal case.

Furthermore, although there was apparently pressure on Hall, as Maintenance Foreman, to get the leak fixed, no one directed him to fix it in an unsafe manner or to fix it by himself. Hall was the one who decided to fix it alone, in an unsafe manner. Therefore, Hall's "complaint" was made in response to his own decisions and actions, not in response to something unsafe the operator required him to perform.

Finally, the complaint to Bailey was essentially innocuous. No one would disagree with it.

Thus, it is a close question whether Hall's statement to Bailey rises to the level of a safety complaint as contemplated under the Act. However, as the Commission has noted, "[t]he legislative history of the Act makes clear the intent of Congress that protected rights are to be construed expansively. *See* S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)." *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994). Accordingly, I will resolve any doubt in the Complainant's favor and conclude that he did engage in protected activity.

Adverse Action

Hall alleges that as a result of his complaint, he was harassed by Buddy Smith and then discharged. The burden is on him to show that the "harassment" and discharge were the result of his complaint. An examination of the evidence demonstrates that he has failed to meet this burden.

Clearly, the reason for Hall's "harassment" and discharge rests with Smith's intent or motivation. As it is usually difficult to discern what a person is thinking, the Commission has set out some guidelines for determining motivation. Thus, it has stated:

> We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other*

> *grounds*, 709 F.2d 86 (D.C. Cir. 1983) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id.*

Secretary on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (Sept. 1999).

Knowledge of the Protected Activity.

There is no evidence that Smith had any knowledge of Hall's complaint. Smith testified that prior to the time he terminated Hall, Hall had never made a safety complaint to him. (Tr. 130.) He further testified that he was not aware that Hall had made a complaint to Bailey until the MSHA inspector investigating Hall's discrimination complaint informed him of it in October 2003. (Tr. 17-18, 40, 130.) Hall admitted that he did not make the complaint to Smith. (Tr. 394-95.) Bailey testified that he had no part in the decision to fire Hall and that he did not learn that Hall had been discharged until after the fact. (Tr. 206, 220.) No one specifically asked him whether he informed Smith of the complaint.

Bailey testified that in response to Hall saying that he had no intention of putting himself or his people in unsafe work conditions again, he told Hall: "You're not supposed to put anybody in jeopardy out there. [Y]our job is to work safe and to see that your men work safe." (Tr. 220.) From this, I infer that Bailey did not consider Hall's statement a real complaint. It was more a general statement than a complaint and not something one would likely find significant enough to pass on to a supervisor.

Therefore, I conclude that Smith had no knowledge of Hall's complaint when he terminated him.

Animus Toward the Protected Activity.

There is no evidence that Smith or JWR exhibited hostility toward safety complaints. No one testified that any employee was treated adversely after making safety complaints. No one said that Smith, or anyone else at the preparation plant, made it clear that they did not appreciate safety complaints or that they discouraged safety complaints. Indeed, Hall testified that the men under his supervision did not hesitate to raise safety issues. (Tr. 374-75.) Accordingly, I conclude that neither Smith nor JWR demonstrated any animus toward protected activity.

Coincidence in Time Between the Activity and Adverse Action.

Hall was terminated more than six months after his safety complaint. Further, the

evidence indicates that if Smith wanted to use Hall's poor job performance as a pretext for discharging him because of his safety complaint, he had several opportunities to discharge him prior to finally doing so. In short, Hall's termination was not so close in time to his complaint that one would be led to believe that the former was the result of the latter.

Discharge Not Motivated by Complaint

There is no direct evidence that Hall was terminated because he made a safety complaint. Further, there are none of the normal circumstantial indicia present to support such a finding. Therefore, I conclude that Hall has not established that the adverse action taken against him resulted from his complaint.

JWR Motivated by Business Reasons

Furthermore, even if Hall were able to show a nexus between his complaint and his discharge, JWR has shown that it had a legitimate business reason for terminating Hall. Simply put, Hall was fired, after many warnings of his need to improve, because he failed to complete an important assignment.

The Commission has long held that when a business justification is given as the reason for an action, "[o]ur function is not to pass on the wisdom or fairness of such asserted business justifications, but rather to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). In determining whether a business justification is credible, the Commission has offered the following guidance:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained
>
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether credible justification figured into the motivation and, if it did, whether it would have led to the adverse

> action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . . then a *limited* examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to [take the adverse action].

Chacon at 3 FMSHRC 2516-17 (citations omitted).

Finally, the Commission has cautioned that:

> [T]he reference in *Chacon* to a "limited" and "restrained" examination does *not* mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intend that a judge, in carefully analyzing such defenses should not substitute his business judgment or sense of "industrial justice" for that of the operator.

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (Nov. 1982).

Contrary to the assertions in his complaints that Smith began harassing him after he complained about safety, Hall testified at the hearing that he had been constantly harassed by Smith since he started working for Smith in 1998. (Tr. 358-59, 363.) Further, Hall admitted that Smith told him in 1998 that if he did not do his job, Smith would have to replace him. (Tr. 357). Not surprisingly, what Hall called harassment, Smith called counseling. Smith testified that: "My goal was, you know, to bring Mr. Hall in and talk to him about problems that we were having and things that weren't being done the way that I thought they needed to be done. And hopefully through those counseling sessions he would conform and do the things that we asked him to do." (Tr. 82-83.)

Smith's Counseling of Hall Before the Complaint.

On July 28, 1998, Smith completed a "Record of Discussion" of an exchange he had with Hall concerning his dissatisfaction with the way Hall was performing, citing his failure to meet deadlines, his lack of initiative, his failure to communicate and his not being a team player. (Tr. 84-85, Resp. Ex. B.) In a September 14, 2000, Performance Appraisal, Smith gave Hall an overall rating of "Fair," which is defined on the form as: "Needs improvement to meet acceptable standards; performance of job requirements is inconsistent." (Tr. 92, Resp. Ex. C.) In a typed copy of "Employee Notes" pertaining to David Hall, which Smith testified he typed into his computer on the dates of the events, there are 21 incidents, covering the period January 25, 2000, through February 2, 2001, in which Smith had discussions with Hall concerning

deficiencies in his performance. (Resp. Ex. V, Tr. 86-87.)

Smith testified that because of continuing problems in the truck shop, and in an effort not to terminate him, he transferred Hall to the Preparation Plant, where he had some experience, in February 2001, to give him a second chance. (Tr. 96-97.) Smith told Hall that he would be meeting with him every two weeks to monitor his progress, and if they were not satisfied with his performance, he would be terminated; Hall realized that he was "skating on some thin ice." (Tr. 362, Resp. Ex. V.)

On January 11, 2002, Smith made out a "Record of Discussion" on Hall for leaving work when the Run of the Mine (ROM) was down. (Tr. 103, Resp. Ex. D.) Smith testified that the ROM is the conveyor belt which takes coal from underground to the stockpile at the preparation plant and that it is "a very important piece of equipment. You can't get the coal into the coal stockpile and processed into the preparation plant with this motor burned up." (Tr. 102.) Hall was counseled never to leave the mine with the ROM down, except in extraordinary circumstances. (Tr. 102, Resp. Ex. D.) His overall work performance was discussed and he was informed that this was his "absolute last opportunity . . . to perform at an acceptable level." (*Id.*)

A week after this incident, on January 18, 2002, Hall was given his first Performance Appraisal since the transfer. He again received an overall rating of "Fair." However, this appraisal was worse than the previous one, discussed above, in that out of 17 rated "Functional Skills" and "Work Qualities," Hall received a rating of "Poor," defined on the form as "[u]nsatisfactory; performance of job requirements is consistently deficient," in 10 of them. (Resp. Ex. E.) His work was next assessed on a Performance Appraisal Worksheet on June 18, 2002, in which he was given overall ratings of "4," the lowest level of "meets standard," for "Results," and "Attributes & Behaviors."[4] (Resp. Ex. F.)

Another Performance Assessment Worksheet, dated February 3, 2003, was only partially filled out. No numerical assessment was given, but among the comments were: "Too many jobs have to be done over," "[t]oo much emphasis has to be put on clean up after jobs" and "[t]here's far too many items that need improvement." (Resp. Ex. G.) Finally, there are 13 incidents, covering the period from February 20, 2001, through February 4, 2003, listed in Smith's typed notes in which he had to reprove Hall about failures to perform. (Resp. Ex. V.)

Smith's Counseling of Hall After the Complaint.

After Hall's safety complaint, there are nine more entries in Smith's typed notes recounting discussions concerning Hall's shortcomings. (Resp. Ex. V.) The most common of these have to do with Smith encouraging Hall to take a more active role in the plant maintenance and looking for things to do instead of waiting to be told what to do. (*Id.*) In addition to these entries, Smith filled out a Record of Discussion concerning Hall's failure to carry out instructions

[4] This is a different form than the Performance Appraisal.

on August 8, 2003. (Resp. Ex. I.)

Smith testified that it had been reported to him that employees being supervised by Hall were being permitted to stop work at 9:30 p.m. although the shift did not end until 10:45 p.m. (Tr. 61, 113.) As a result, he said that he counseled Hall on using his men's time completely and not allowing them to take extended breaks in the lunchroom. (Tr. 113.) Smith said that he emphasized to Hall that his crew needed to get as far ahead on the maintenance list as possible because there was a pump that needed to be rebuilt. (Tr. 113.) He telephoned Hall in the middle of the shift to reiterate his concern. (Tr. 114.)

Smith related that he decided to make a surprise visit to the plant, arriving at 9:40 p.m. (Tr. 113-14.) He discovered that of the five men Hall supervised, two were in the lunch room and two had gone home. (Tr. 114, 401, Resp. Ex. I.) Hall told Smith that the men who had gone home had said they were sick. (Tr. 114, 401, Resp. Ex. I.) When Smith asked him if it did not seem strange that the two men got sick at the same time on a Friday night, Hall replied, "I'm not a doctor." (Tr. 114, 401, Resp. Ex. I.) At the trial, Hall claimed that the two men in the lunchroom had gone there to "cool off," even though he did not know if the men had already had their lunch break or had previously taken a break. (Tr. 406-07.)

Smith discussed with Hall his dissatisfaction with Hall's lack of supervision and the fact that he had talked about this with Hall many times before and nothing had changed. (Resp. Ex. I.) He told Hall that this was his "absolute last warning" and that there had to be an immediate turn around. (Tr. 112, 115, 401, Resp. Ex. I.)

On August 15, 2003, Smith received an e-mail from the mine safety director strongly emphasizing that safety violations had to be eliminated and that supervisors were going to be held accountable. After receiving this e-mail, Smith made a mock inspection of the prep plant on August 21, 2003. (Tr. 44.) He made a list of 28 possible violations that he found. (Resp. Ex. J.) He then had a meeting with the supervisors under him, Bailey, Hall and Jerry Yates, Production Foreman on the day shift, to discuss how to eliminate the violations. (Tr. 49.) The supervisors were assigned violations to have their men correct. (Tr. 49.) Hall testified that he understood from the meeting that Smith was going to hold the supervisors responsible for the work of their crews, that the violations on the list were to be corrected so that they could pass an MSHA inspection and that he told Smith at the meeting that he understood what was expected of him. (Tr. 409-11.)

One of Hall's assignments was to clean float coal dust out of the electrical control panel cabinets in fourth floor control room. Smith had noted on his list that the "[f]loat coal dust in the panels is extremely bad." (Resp. Ex. J., Tr. 49.) Hall assigned David Bagley, an electrician, to clean the cabinets "up to MSHA standards." (Tr. 413.) Bagley cleaned out the cabinets by blowing the coal dust out with a blower. (Tr. 155.) Hall saw the cabinets after Bagley had blown them out and "thought it was acceptable at the time we quit working on it." (Tr. 413.) He wrote "ok" on the violation list to indicate that the job had been completed. (Resp. Ex. J, Tr. 414.)

Smith performed a follow-up inspection the next morning. (Tr. 62.) He testified that when he "saw the 'ok' by [the violation on the list], I expected to go up and find that the cabinets had been cleaned out and they were ready to be inspected." (Tr. 124.) However, when he checked the cabinets, he concluded "that the cabinets were not clean to the point that MSHA would not write a citation." (Tr. 58.) After he had completed his follow-up inspection, he asked Yates "to go look at the fourth floor cabinets and tell me had they been cleaned out." (Tr. 63.) He did not tell Yates why he was asking him to do that because he "wanted his honest opinion on what the cabinets looked like." (Tr. 126-27.) Yates came back and told Smith that the cabinets were "not ready for inspection. They're bad." (Tr. 127.) Yates testified that the cabinets had been blown out, but still needed to be wiped down. (Tr. 497.)

This time, Smith decided to fire Hall. He testified that he did so because, "it had only been two weeks prior to this that I had given final, absolute last warning. I mean here it is two weeks later we've got the same issue again. And, obviously, the job was not going to get done. And it was really the straw that broke the camel's back." (Tr. 131.)

In his brief, Hall has cited this incident and the August 8 incident as examples of Smith's harassment of him. I do not find this to be harassment. While Hall has an excuse for all of his shortcomings, the basic facts concerning these incidents are the same whether related by Hall or by Smith. The only difference is in their interpretation of the facts. I find that a preponderance of the evidence supports Smith's interpretation.

The other two examples of harassment Hall cites in his brief are even less noteworthy. Hall asserts that Smith cited him with failing to hold safety/plant maintenance meetings with his subordinate personnel during the months of June and August 2003. (Comp. Br. at 4.) However, the transcript cite given to support this claim, (Tr. 111-12), concerns Smith talking to Hall about being more active in plant maintenance, working off the backlog and the need for him to make an immediate turn around. It says nothing about safety meetings. While it is true that Smith chastised Hall about not holding safety meetings, that occurred in 2000, not 2003. (Tr. 358.)

Hall's final example of harassment is that Smith requested that Hall show him a doctor's excuse for a non-work related cut on his left arm that prevented him from working for two weeks in February 2003. Smith evidently could not understand how a cut on the arm prevented Hall from coming to work. (Tr. 441-43.) When Hall did return to work, Smith asked Hall to show him the injury. Hall maintains that this caused him great embarrassment. (Tr. 335-36.) While the record is silent as to the exact nature of the injury, it does not appear that Smith's concern was totally unwarranted. Clearly, Smith did not trust Hall. However, I find that this lack of trust was based on past experience and that Smith's requests were not made to harass Hall.

Finally, although I am persuaded that Smith fired Hall because of his poor performance, it makes no difference whether Smith was "counseling" Hall or "harassing" Hall. The fact is that Smith and Hall had been having problems since shortly after Hall began working for JWR in 1998. The history of their problems is long and documented. Further, there is no evidence that

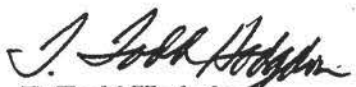
Hall's difficulties with Smith increased after his safety complaint. Thus, even if Smith's concerns with Hall's performance were totally unjustified, the evidence is overwhelming that this is the reason Hall was fired. Inasmuch as this had nothing to do with safety complaints, it does not come within the scope of section 105(c).

Conclusion

Hall has barely established that he engaged in protected activity. He has failed, however, to show that Smith knew of the protected activity when he discharged him or that any other indication of a connection between the safety complaint and the adverse action is present. Indeed, the complaint was so unobjectionable that it is easy to understand why Bailey did not relay it to Smith. Further, even if Hall had shown that Smith was aware of the complaint, it is hard to imagine that Smith would be so incensed by it that he would go out of his way to fire Hall. Finally, in addition to Hall's failure to demonstrate that his firing was the result of his complaint, JWR has conclusively shown that Hall was fired for his poor performance over a number of years.

Order

Hall has not established that he was fired for engaging in activity protected under the Act. Accordingly, his Discrimination Complaint filed against Jim Walter Resources, Inc., under section 105(c) of the Act is **DISMISSED**.



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Administrative Law Judge
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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 1, 2005

NATIONAL CEMENT COMPANY OF CALIFORNIA, INC.,	:	CONTEST PROCEEDING
Contestant	:	Docket No. WEST 2004-182-RM
	:	Citation No. 6361036; 02/09/2004
TEJON RANCH CORP.,	:	
Intervenor	:	
v.	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Lebec Cement Plant
Respondent	:	Mine ID: 04-00213

ORDER GRANTING CONTESTANT'S MOTION FOR SUMMARY DECISION AND STAY ORDER

The underlying issue in this matter is whether a private paved 4.3 mile long two-lane access road to the National Cement Company of California, Inc., ("National") Lebec Plant is a "mine" within the definition of section 3(h)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802(h)(1). The subject road is on land owned by Tejon Ranchcorp ("Tejon"). The jurisdictional issue arose after Citation No. 6361036 was issued on February 9, 2004, citing an alleged violation of the Secretary of Labor's ("the Secretary's") mandatory safety standard in 30 C.F.R. § 56.9300(a) that requires the construction of berms or guardrails on the banks of roadways where significant drop-offs exist.

On January 12, 2005, I granted the Secretary's Motion for Summary Decision concluding that the subject roadway is included within the section 3(h)(1) definition of "a mine" that includes "private ways and roads appurtenant" to a mine site. 27 FMSHRC 84. On February 2, 2005, National and Tejon, as an Intervenor, by motion, pursuant to Rule 76(a), 29 C.F.R. § 2700.76(a), sought my certification to the Commission for an interlocutory ruling on the jurisdictional question of law. 29 C.F.R. § 2700.76(a). The motion for certification for interlocutory review was granted on February 7, 2005. 27 FMSHRC 157. The Commission granted interlocutory review of the jurisdictional question. *Unpublished Order*, March 1, 2005. The Commission established March 30, 2005, as the filing date for opening briefs in the interlocutory appeal. *Unpublished Order*, March 16, 2005. The parties' briefs on appeal have

been filed timely with the Commission. Despite ongoing Commission review, on April 19, 2005, MSHA modified Citation No. 6361036 by requiring National to award a contract for and begin construction of guardrails on the subject roadway by May 27, 2005.[1]

Presently before me is National's request for an expedited hearing concerning whether the Mine Safety and Health Administration's (MSHA's) refusal to extend the abatement period during the pendency of the Commission's interlocutory review constitutes an abuse of discretion. During the course of a May 9, 2005, telephone conference with the parties, I advised that I construed National's request for expedited hearing as a motion for summary decision on the reasonableness of MSHA's action. I set May 16, 2005, as the filing date for the National's brief in support of summary decision and the Secretary's opposition. The parties' briefs were timely filed and have been considered.

For the reasons discussed below, I conclude that MSHA has abused its discretion. Accordingly, the April 19, 2005, modification of Citation No. 6361036 shall be vacated. In addition, further modification of Citation No. 6361036 shall be stayed pending the Commission's decision on interlocutory review. As detailed below, the authority for this action is contained in section 105(d) of the Mine Act that empowers the Commission to rule on the reasonableness of abatement periods fixed in a citation or modification, and to direct all other appropriate relief. 30 U.S.C. § 815(d).

Statutory Authority

National contends it has received bids for the guardrail project ranging from $566,007 to $1,136,699. The Secretary notes that she is "not unsympathetic" to National's plight that it may have considerable unnecessary expenditures if the Commission determines there is a lack of jurisdiction. *Sec'y opp.* p.8. Nevertheless, the Secretary's relies on *Energy Fuels Corp.*, 1 FMSHRC 299, 306 (May 1979), for the proposition that "[t]he 1977 [Mine] Act does not permit the Commission to stay the abatement requirements of a citation during litigation." *Sec'y opp.* p.8. The Secretary's reliance on *Energy Fuels* is misplaced.

Of course litigation concerning the validity of a citation, alone, does not stay the requirements that the alleged violative condition must be abated. However, the mine operator retains the statutory right to contest the validity of a modification, or the reasonableness of the period for abatement. In this regard, section 104(h) of the Mine Act provides:

> Any citation or order issued under this section *shall remain in effect until* modified, terminated or vacated by the Secretary . . . or *modified, terminated or vacated by the Commission or the courts* pursuant to section 105 or 106.

30 U.S.C. § 814(h). (Emphasis added).

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[1] Citation No. 6361036 was further modified on May 12, 2005, to extend the abatement date until June 27, 2005.

The vehicle that gives rise to the Commission's authority in this matter is National's May 4, 2005, Motion for Expedited Hearing of MSHA's April 12, 2005, modification that was filed pursuant to section 105(d) of the Mine Act. Section 105(d) provides, in pertinent part:

> If, within 30 days of receipt thereof, an operator . . . notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, . . . or the *reasonableness of the length of abatement time fixed in a citation or modification* thereof issued under section 104, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based on findings of fact, affirming, modifying, or *vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.* . . .

30 U.S.C. § 815(d). (Emphasis added). Clearly, a mine operator does have recourse if the length of the abatement time specified in a citation or modification is unreasonable.

The Reasonableness of the Abatement Period

The Secretary's April 19, 2005, modification raises two issues. The first issue is the general propriety of the modification. The second issue is the reasonableness of the abatement period set forth in the modification.

Although there is no provision in the Commission's Rules for amending citations, as a general proposition, the Commission has noted that modifications to citations should be liberally granted unless there is a "legally recognizable prejudice to the operator [that] would bar [an] otherwise permissible modification." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990). In this case, the Commission has acknowledged legitimate questions of law by virtue of its acceptance of interlocutory review. As conceded by the Secretary, construction of guardrails and berms *before* the Commission rules on jurisdiction effectively eviscerates National's right of appeal. Thus, National clearly is prejudiced by MSHA's modification.

However, mine operators invariably are prejudiced by termination dates that expire before contested citations are litigated. Thus, prejudice alone, does not provide a basis for vacating the April 19, 2005, modification. Rather, the focus shifts to whether MSHA's refusal to extend the abatement date during the pendency of the Commission's review is reasonable. Resolution of this issue requires an analysis of the degree of danger posed by a further delay in construction of guardrails and berms. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (November 1989).

The initial termination date in Citation No. 6361036 for abatement of the cited condition was March 20, 2004. MSHA subsequently extended the abatement date on many occasions. Specifically, the citation was modified: on March 20, 2004, to extend the termination date until June 20, 2004; on June 21, 2004, to extend the termination date until December 31, 2004; and on February 1, 2005, to extend the termination date until February 28, 2005. On each occasion the

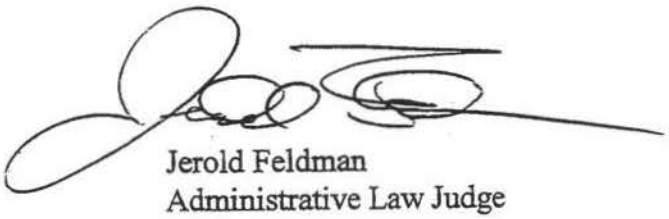
termination date was modified to provide National with additional time to obtain bids for the installation of guardrails and berms.

In addressing the reasonableness issue in cases such as this where MSHA has liberally extended the abatement date in the past, we must consider whether MSHA's refusal to grant further extensions is due to a recalcitrant mine operator, or, an abuse of MSHA's discretion. Here the Secretary does not allege that National has acted in bad faith.

Without providing details, the Secretary relies on "[a]n undetermined number of accidents [occurring on the road] , including the rollover of one heavy truck and the partial rollover of another. . ." to justify its action. *Sec'y opp.* p.3,fn.1. However, MSHA's claimed exigency for abatement is belied by its numerous extensions. Moreover, since 1966, when the subject road was paved and when the cement plant was constructed and became operational, until February 9, 2004, when the subject citation requiring guardrail construction was issued, MSHA declined to assert jurisdiction in recognition of any serious hazard. 27 FMSHRC at 87, 101. In fact, MSHA withdrew a similar citation issued in March 1992 that cited a lack of berms or guardrails. The fact that MSHA did not revisit the issue for more than ten years is further evidence that the degree of danger is insufficient to warrant MSHA's sudden overriding insistence that construction commence immediately despite interlocutory review.

Finally, while the degree of hazard posed by an absence of guardrails and berms should not be trivialized, it must be kept in perspective. The hazard is related to a loss of control by the truck operator. While such occurrences can occur at any time, they are rare. By way of illustration, a loss of control on this two lane road can result in a head-on collision. Yet, MSHA has not proposed guardrails separating oncoming traffic. In other words, although there are a multitude of potential hazards, not all hazards pose a degree of danger sufficient to interfere with due process. Certainly the degree of hazard relied upon by the Secretary in this matter does not. If, MSHA and its predecessor did not require the installation of guardrails and berms for almost 30 years, surely it can restrain itself for several months until the Commission has rendered its interlocutory decision.

According, **IT IS ORDERED** that the April 19, 2005, modification of Citation No. 6361036 and any subsequent modifications thereto **ARE VACATED. IT IS FURTHER ORDERED** further modification of Citation No. 6361036 **IS STAYED** pending the Commission's decision on interlocutory review.



Jerold Feldman
Administrative Law Judge

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June 15, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-157
Petitioner	:	A. C. No. 36-08746-26476
v.	:	
	:	Quecreek No. 1 Mine
BLACK WOLF COAL COMPANY, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-158
Petitioner	:	A. C. No. 36-08746-26477 LVY
v.	:	
	:	Quecreek No. 1 Mine
PBS COALS, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-152
Petitioner	:	A. C. No. 36-08746-26478 KQN
v.	:	
	:	Quecreek No. 1 Mine
MUSSER ENGINEERING, INC.,	:	
Respondent	:	

ORDER CONFIRMING DISCOVERY SCHEDULE
ORDER TO CONSOLIDATE
NOTICE OF HEARING

Pursuant to the parties' agreement and upon my approval, the time allotted for the completion of written discovery and depositions is extended to June 30, 2005 and August 31, 2005, respectively. Further, in accordance with Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), the "Act," these proceedings are scheduled for hearing on the merits at **9:30 a.m. on October 24, 2005, in the Somerset County Courthouse, Somerset, Pennsylvania**.

In preparation for the hearing, the parties are directed to do the following on or before **September 15, 2005**: (a) confer on the possibility of settlement and endeavor to stipulate as to all relevant matters which are not in substantial dispute; (b) endeavor to stipulate the issues of fact and law remaining for hearing, and, if unable to stipulate the issues, exchange written statements of the issues as contended by the respective parties; (c) exchange lists of exhibits, and, at the request of a party, produce exhibits for inspection and copying; (d) stipulate as to those exhibits which may be admitted into evidence without objection and as to others indicate whether the exhibit is accepted as an authentic document; and (e) exchange witness lists with a synopsis of the testimony expected of each witness.

If the proceedings have not been settled, the parties are further directed to file with the undersigned Administrative Law Judge on or before **September 15, 2005**, a written prehearing report setting forth the following: (a) lists of exhibits and witnesses together with the parties' synopsis of expected testimony; (b) any stipulations entered into; (c) the parties' complete statement of the issues; and (d) a detailed memorandum of law on any legal issue raised by a party with citation to the principal authorities relied upon. Failure to comply with any part of the prehearing order may result in sanctions against the defaulting party.

Robert J. Lesnick
Chief Administrative Law Judge

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