July 1981

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

JULY

The following cases were Directed for Review during the month of July:

Secretary of Labor for Michael Dunmire and James Estle v. Northern Coal Company, WEST 80-313-D, WEST 80-367-D; (Judge Morris, May 27, 1981).

Secretary of Labor v. American Materials Corporation, LAKE 79-9-M; (Judge Cook, June 12, 1981).

Secretary of Labor v. Mettiki Coal Corporation, YORK 80-140; (Judge Cook, Interlocutory Review of 7/2/81 Order).

Review was Denied in the following cases during the month of July:

Secretary of Labor v. Union Carbide Corporation, WEST 80-401-M; (Judge Boltz, June 10, 1981).

Secretary of Labor v. Bradford Coal Company, Inc., Fuel Fabricators, Inc., PENN 80-267; (Judge Kennedy, June 18, 1981).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 6, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VINC 79-118-PM
HALQUIST STONE COMPANY, INC.	:	

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979), and raises the same legal questions that were before us in Waukesha Lime and Stone Company, Inc., Docket No. 79-66-PM (July 6, 1981). Our decision in Waukesha resolves this question in the Secretary's favor. Accordingly, we affirm the judge's finding of a violation and his assessment of a $700 penalty. 1/

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

1/ We reject Halquist's assertion that it did not prevent the inspector from continuing his inspection. Substantial evidence supports the judge's contrary finding.

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1730 K STREET NW, 6TH FLOOR
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July 6, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VINC 79-66-PM
WAUKESHA LIME AND STONE COMPANY, INC.	:	

DECISION

This case involves questions concerning nonconsensual inspections without a search warrant under section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The facts are undisputed. On July 10, 1978, Mine Safety and Health Administration (MSHA) Inspector Brey tried to make a routine inspection of the Waukesha Lime and Stone Company, Inc., a limestone quarry. The visit in question followed an April inspection during which Brey had issued citations for 25 alleged safety violations. Before the inspector finished his previous inspection, the operator abated 21 of those violations. Four, however, remained unabated as of the July 10 attempted inspection. On that date, the operator's president, Douglas Dewey, told Brey that he would no longer be allowed to inspect the premises without a search warrant. Brey then issued a citation alleging a violation of section 103(a) for the refusal to permit the inspection. 1/

Thereafter, the Secretary filed a petition for assessment of a civil penalty. Waukesha contested the alleged violation of section 103(a), and the matter was set for hearing. 2/ It was undisputed that

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1/ Section 103(a) provides in pertinent part:

> Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines ... In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided ... [and the authorized representative] shall have a right of entry to, upon, or through any ... mine.

2/ Before the hearing, the Secretary filed a separate action in federal district court pursuant to section 108(a)(1) of the Mine Act, seeking injunctive relief and requiring Waukesha to permit entry to MSHA inspectors. Section 108(a)(1) provides:

> The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent __

(footnote continued)

Brey was denied entry. Waukesha contended, however, that its stone quarry is not a "mine", subject to the Act, that section 103(a) does not permit nonconsensual inspections without a search warrant, that if it does, such warrantless inspections violate the Fourth Amendment, and that in any event the refusal to permit federal inspection of a stone quarry does not constitute a violation of the Mine Act for which a civil penalty may be imposed. In his decision, the administrative law judge held against Waukesha on each of its contentions, and assessed a $1,000 penalty. We granted Waukesha's petition for discretionary review. The company makes the same arguments before us.

After oral argument and while the case was pending for decision, the federal district court in the section 108(a)(1) action (see note 2, supra) dismissed the Secretary's complaint for injunctive relief, holding that to the extent the Act permitted nonconsensual warrantless inspections, it violated the Fourth Amendment. Marshall v. Dewey, 493 F. Supp. 963 (D. Wis. 1980). The Secretary then filed a direct appeal with the Supreme Court, which noted probable jurisdiction, sub. nom., Donovan v. Dewey, 49 U.S.L.W. 3531 (U.S. January 26, 1981), ____ U.S. ____ (1981). We stayed further action in this case pending the Supreme Court's decision. (Order of March 16, 1981).

On June 17, 1981, the Supreme Court decided the Waukesha case before it. Donovan v. Dewey, 49 U.S.L.W. 4748 (U.S. June 17, 1981) (No. 80-901), ____ U.S. ____ (1981). The Court held that the Mine Act provides for nonconsensual warrantless inspections and that such inspections do not violate the Fourth Amendment. Resolution of those issues leaves before us the question of whether the refusal to permit an inspection is a violation of the Act for which a penalty must be imposed. 3/ We hold that it is and thus affirm the judge's decision.

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fn. 2/ cont'd

> (A) violates or fails or refuses to comply with any order or decision issued under this Act,
>
> (B) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this Act,
>
> (C) refuses to admit such representatives to the coal or other mine,
>
> (D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine....

3/ We reject Waukesha's contention that its stone quarry is not a "mine" subject to the Act. The definition of "mine" in section 3(h) of the 1977 Mine Act is virtually identical, in pertinent part, with section 2(b) of the Federal Metal and Non-Metallic Mine Safety Act of 1966. The legislative history of the 1966 Metal Act clearly indicated that stone quarries were mines. S. Rep. 1296, 89th Cong., 2nd Sess. (1966), reprinted in 1966 U.S. Code Cong. and Adm. News at 2851. The legislative history of the 1977 Mine Act establishes that Congress intended a very broad interpretation of "mine."

(footnote continued)

Section 110(a) of the Act provides:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

Waukesha contends, however, that refusal of entry does not constitute a violation of a provision of the Act, because although section 103(a) authorizes certain inspections, it does not require an operator to "perform any act or refrain from performing any act." It also asserts that, in any event, the Secretary's exclusive remedy under the circumstances is an injunction under section 108(a)(1), not a civil penalty under section 110. We are not persuaded by Waukesha's arguments.

First, notwithstanding the absence of express statutory language, it is illogical to assume that Congress intended to mandate inspections and a right of entry for the Secretary's authorized representative pursuant to section 103(a), without also viewing the operator's denial of entry as a dereliction of its duty under the Act. Section 110(a) of the Act, mandates assessment of a civil penalty where an operator violates a mandatory health or safety standard "or ... any other provision of this Act." Therefore, on its face, section 110(a) requires the imposition of a penalty for the violation here of section 103(a), a "provision of the Act." Any other interpretation would result in our treating denial of entry violations differently than all other violations which subject the operator to penalties under section 110(a). Second, we reject the contention that a section 108(a)(1) injunction is the Secretary's sole remedy if an operator denies entry to his authorized representative. Rather, dual remedies exist: an administrative remedy under sections 104 and 110(a), and a civil injunctive remedy under section 108(a)(1). We believe that if Congress had intended injunctive relief to be the exclusive remedy, it would have stated so unequivocally. We conclude, therefore, that refusal to permit an inspection violates the Act and requires the imposition of a penalty under section 110(a).

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fn. 3/ cont'd
S. Rep. 95-181, 95th Cong., 1st Sess., 14 (1977), reprinted in Subcommittee on Labor, Committee on Human Resources, U.S. Senate, 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 (1978) at 602. We do not believe that Congress could possibly have intended to restrict coverage under the 1977 Mine Act to less than that covered by the 1966 Metal Act and 1969 Coal Act. Quite the contrary.

For the foregoing reasons, the decision of the administrative law judge is affirmed.

Richard V. Backley, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 23, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
On behalf of: BOBBY GOOSLIN	:	
v.	:	Docket No. KENT 80-145-D
KENTUCKY CARBON CORPORATION	:	

DECISION

This case involves the temporary reinstatement of a discharged miner under section 105(c)(2) of the 1977 Mine Act, 30 U.S.C. §815(c)(2) (Supp. III 1979). 1/ The broad legal question presented here is whether

1/ Section 105(c)(2) provides:

> Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph. [Emphasis added.]

an operator is afforded due process of law by the hearing on a Commission judge's order of temporary reinstatement that is provided for by Commission Rule 44(a). Rule 44(a) implements the temporary reinstatement provisions of section 105(c)(2) of the Mine Act. It provides:

> Contents of application; procedure; hearing. An application for reinstatement shall state the Secretary's finding that the complaint of discrimination, discharge or interference was not frivolously brought and the basis for his finding. The application shall be immediately examined, and, unless it is determined from the face of the application that the Secretary's finding was arbitrarily or capriciously made, an order of temporary reinstatement shall be immediately issued. The order shall be effective upon issuance. If the person against whom relief is sought requests a hearing on the order, a Judge shall, within 5 days after the request is filed, hold a hearing to determine whether the Secretary's finding was arbitrarily or capriciously made. The Judge may then dissolve, modify or continue the order.

For the reasons that appear below, we hold that Rule 44(a), insofar as it establishes an "arbitrary or capricious" standard of review at the temporary reinstatement hearing, does not satisfy the minimum requirements of the Constitution's Fifth Amendment due process clause.

The facts of the case are as follows. Bobby Gooslin was employed as a miner by Kentucky Carbon Corporation. On October 2, 1979, Kentucky Carbon suspended Gooslin, with intent to discharge, allegedly for causing an unauthorized work stoppage at the mine. 2/ He was discharged soon thereafter. Following his discharge, Gooslin filed a discrimination complaint with the Mine Safety and Health Administration (MSHA). On January 18, 1980, after MSHA had conducted an initial investigation of Gooslin's complaint, the Secretary filed an application for temporary reinstatement with the Commission. In the application, the Secretary stated that MSHA's preliminary investigation into the merits of the discharged miner's complaint disclosed, among other things, the following:

> 6. On Saturday morning, September 29, 1979, several miners returning from work informed ... Gooslin that ... the roof, in several specific areas of the mine, including the main line, was in a dangerous condition, that they were fearful of working under the roof in its existing condition, and that they wanted a safety inspection to be made before their scheduled return to work on Sunday evening, third shift, September 30, 1979.

2/ In a letter to Gooslin, dated October 2, 1979, Kentucky Carbon stated:

> The Company has concluded that your actions on September 30, 1979 were the efficient cause of an unauthorized work stoppage and clearly establish you as a primary contributor in the instigation of a work stoppage in violation of the Agreement.
>
> For this offense, you are hereby suspended with intent to discharge effective immediately.

(Res. Exh. R-3).

7. Thereafter ... Gooslin made several attempts to secure an MSHA inspection. However, Mr. Gooslin was unsuccessful and did not inspect the ... mine....

8. On or about September 30, 1979, unable to secure an MSHA inspection, ... Gooslin sought assistance from the UMWA District 30 Safety Inspector, James Boyd. Mr. Boyd ... agreed to meet... Gooslin at the mine prior to the commencement of the third shift that evening, Sunday, September 30, 1979.

9. ... Gooslin called [Kentucky Carbon's] Superintendent William Meade, and informed Mr. Meade that he had requested an MSHA inspection and that he wished to make a safety inspection at the ... mine later that evening prior to the commencement of the third shift. Mr. Meade initially agreed, then called ... Gooslin back and advised that the inspection would not be permitted.

10. Notwithstanding Mr. Meade's refusal to inspect, ... Gooslin proceeded to the mine to keep the previously scheduled meeting with Mr. Boyd. Upon Mr. Gooslin's arrival at the mine, [Kentucky Carbon's] Mine Foreman James Christian informed Mr. Gooslin that an inspection of the mine would not be permitted at that time.

11. Thereafter, ... Gooslin advised the miners, who had begun to assemble on the mine property in preparation for the commencement of the shift, that a safety inspection had been refused.... Gooslin left the mine property at approximately 11:15 p.m. September 30, 1979.

12. Thereafter, approximately 1 hour later, the miners decided to not work.

13. Gooslin asserts that he at no time, encouraged, suggested, or in any way caused the resulting work stoppage that occurred ... on October 1, 1979.

14. On October 2, 1979, [Kentucky Carbon] discharged ... Gooslin.

15. ... Gooslin asserts that he was lawfully discharging his duty as President of the local, as safety committeeman, and as a miner in seeking to inspect the mine and the claimed dangerous roof conditions.

On the basis of MSHA's preliminary investigation, the Secretary concluded that Gooslin's complaint was "not frivolously brought". Cf. Rule 44(a). Accordingly, the Secretary requested that the Commission order Kentucky Carbon to temporarily reinstate the discharged miner.

On January 22, 1980, the Commission's Chief Admistrative Law Judge granted the relief requested by the Secretary and issued an order of temporary reinstatement. In the reinstatement order, the Chief Judge

stated, "[i]t does not appear from the face of the application that the Secretary's finding was arbitrarily or capriciously made." 3/ Kentucky Carbon then requested a hearing on the temporary reinstatement order as provided for by Rule 44(a), and a hearing was held on January 30, 1980 before the Chief Judge. 4/ At the reinstatement hearing, Kentucky Carbon attempted to prove that Gooslin was lawfully discharged and that, therefore, his complaint to the Secretary was frivolously brought. The Chief Judge, however, refused to receive testimony on that issue, stating:

> I think you are getting into the merits of the discharge which are not before me. Was or was not Mr. Gooslin discharged in violation of section 105(c) of the Act is not an issue before me in this hearing. No complaint has been filed. The issue of whether the complaint was frivolously brought is an issue peculiarly before the Secretary.
>
> The Commission's role in this proceeding is totally to determine whether the Secretary's finding was arbitrary and capricious, a very limited role. I am not prepared to hear evidence on the question either of whether Mr. Gooslin was discharged in violation of section 105(c) or whether the complaint Mr. Gooslin made to the Secretary was or was not frivolous.
>
> My issue is a very limited one as I set out in the Notice of Hearing, namely was the Secretary's finding arbitrarily or capriciously made? ... The Commission's rules provide for this kind of hearing on an expedited basis, but the issue is a very limited one.

(Tr. 56-57).

On January 31, 1980, the Chief Judge issued an order affirming his earlier order of temporary reinstatement on the ground that Kentucky Carbon had failed to establish that the Secretary acted "arbitrarily or capriciously" in determining that Gooslin's complaint was not frivolously brought. From the January 31st order of temporary reinstatement, Kentucky

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3/ Rule 44(a) requires that the Secretary's application for temporary reinstatement contain a finding that the miner's complaint was "not frivolously brought".

4/ Rule 44(a) states that "[i]f the person against whom relief is sought requests a hearing on the order, a Judge shall, within 5 days after the request is filed, hold a hearing to determine whether the Secretary's finding was arbitrarily or capriciously made."

Carbon sought Commission review. On March 10, 1980, we granted Kentucky Carbon's petition and directed review of the order of temporary reinstatement. 5/

On review, Kentucky Carbon argues that the "arbitrary or capricious" scope of the Rule 44(a) temporary reinstatement hearing is so narrowly drawn as to deny it due process of law. We agree. 6/ Although the Chief Judge correctly applied existing Rule 44(a) in limiting the scope of the temporary reinstatement hearing to the question of whether the Secretary acted "arbitrarily or capriciously", our re-examination of that rule convinces us that the "arbitrary or capricious" standard, as it relates to the temporary reinstatement hearing, does not comport with the minimum requirements of the due process clause.

The due process clause contemplates more than is currently provided the operator by Rule 44(a). Due process contemplates fundamental fairness. 7/ As the Supreme Court stated in Boddie v. Connecticut, 401 U.S. 371 (1971):

> What the Constitution does require is 'an opportunity ... granted at a meaningful time and in a meaningful manner,' ... 'for [a] hearing appropriate to the nature of the case,' ... [401 U.S. at 378; Court's emphasis; citations omitted.]

See also, e.g., Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

5/ In our direction for review, we stated that the reinstatement order was to remain in effect pending our decision. We also stated that we were not suspending proceedings on the discrimination complaint that the Secretary had filed on behalf of Gooslin. In that complaint, filed with the Commission on February 8, 1980, the Secretary alleged that Kentucky Carbon had discharged Gooslin in violation of section 105(c)(1) of the Mine Act. Section 105(c)(1) in part provides that "[n]o person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner...." The Secretary's discrimination complaint was based upon the same set of facts that prompted the Secretary to seek the interim remedy of temporary reinstatement in this case.

6/ Kentucky Carbon's petition for review also raises issues involving the contents of the Secretary's application for temporary reinstatement and the informant's privilege contained in Commission Rule 59. However, because of our disposition of this case, we need not address those issues here.

7/ In Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), Justice Frankfurter, in a concurring opinion, described due process as:

> Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. [341 U.S. at 162-163.]

Because of the narrow and restrictive scope of the "arbitrary or capricious" standard of review, we believe that the Rule 44(a) temporary reinstatement hearing procedure falls short of providing the operator with elemental fairness. Rule 44(a) does not provide the operator with a sufficient opportunity to show that an order of temporary reinstatement should not be continued. Accordingly, we hold that the hearing provided by Rule 44(a) does not comport with due process.

Because Kentucky Carbon was denied due process, we therefore, vacate the January 31, 1980 order of temporary reinstatement. Subsequent events, however, render it unnecessary to remand the case for further proceedings on the temporary reinstatement application. On March 18, 1981, a Commission judge decided the merits of the Secretary's discrimination complaint (see n. 5) in favor of Gooslin and ordered Kentucky Carbon to reinstate him permanently to his former position with full seniority rights. 8/ Kentucky Carbon did not seek review of that decision. Thus, there is no continued need for the interim relief of temporary reinstatement. 9/

Accordingly, the January 31, 1980 order of temporary reinstatement is vacated.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

8/ The judge's decision is reported at 3 FMSHRC 640 (1981).

9/ Because there is no need to remand, we do not, in this decision, delineate what procedures are required to satisfy due process. Rather, we believe that rule-making, presently underway, is the better vehicle for restructuring the scope of the Rule 44(a) temporary reinstatement hearing.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 28, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 79-365-M
v.	:	
SALT LAKE COUNTY ROAD DEPARTMENT	:	

DECISION

This case involves a civil penalty proceeding under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The issue is whether a proposal for penalty should be dismissed because of its late filing under Commission Rule 27. For the reasons below, we conclude that dismissal is not warranted in this case.

On March 27, 1979, Salt Lake County Road Department was cited for a violation of 30 CFR §56.14-1. 1/ The Secretary proposed a penalty of $60 and Salt Lake timely filed a notice of contest on August 28, 1979. The Secretary filed a proposal for a civil penalty on December 10, 1979, which was accompanied by an instanter motion to accept late filing of the penalty proposal. Under Commission Rule 27, the Secretary should have filed the penalty proposal on or before October 12, 1979. 2/ In addition, under Commission Rule 9, if the Secretary desired an extension, such a motion should have been filed on or before October 7, 1979. 3/ The Secretary's instanter motion stated that lack of clerical personnel and a high volume of cases caused the delay in filing. 4/

1/ 56.14-1. Mandatory. 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, shall be guarded.

2/ Rule 27, 29 CFR §2700.27, states in pertinent part:

> (a) When to file. Within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

3/ Rule 9, 29 CFR §2700.9, states:

> Extension of Time. The time for filing or serving any document may be extended for good cause shown. A request for an extension of time shall be filed 5 days before the expiration of the time allowed for the filing or serving of the document.

4/ The proposal for penalty in this case is a simple two-page pleading consisting mainly of five short paragraphs.

On January 11, 1980, Salt Lake filed an answer and a motion for a summary decision. Salt Lake predicated its summary decision motion, in part, on the argument that dismissal was required because the proposal for penalty was filed late. At the hearing held on July 23, 1980, the parties read into the record a settlement agreement stipulating to the violation and payment of the proposed $60 penalty subject to determination of the legal issues raised by the respondent in its motion for summary decision. Tr. 3-5. On November 25, 1980, the administrative law judge issued a decision in which he accepted the Secretary's late filing, found a violation, and assessed a $60 penalty. 2 FMSHRC 3409. 5/

Under section 105(a), an operator has 30 days from the receipt of the initial notification of a proposed penalty assessment in which to notify the Secretary that he plans to contest the assessment. Section 105(d) requires that if a timely notice of contest is filed, "the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing...." (Emphasis added.) In turn, Commission Rule 27 provides that "[w]ithin 45 days of receipt of a timely notice of contest ..., the Secretary shall file a proposal for a penalty with the Commission." In essence, Rule 27 implements the meaning of "immediately" in section 105(d).

We think that it is clear from the text of section 105(d) that the purpose of that section is to provide for prompt and efficient enforcement. The requirement of prompt penalty proposal puts teeth into the Mine Act's penalty structure. The section incidentally promotes "fair play" by protecting operators from stale claims. This focus on effective enforcement rather than on creating a period of limitations is reflected in relevant legislative history cited by the judge. Although that passage in the report of the Senate committee that largely drafted the Mine Act deals with the initial notification of an operator of a proposed penalty assessment, it bespeaks the overriding concern with enforcement:

> To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding. [6/]

5/ Our grant of Salt Lake's petition for discretionary review limited review to the issue of whether the penalty proposal should be dismissed due to its late filing. There were two additional issues, originally raised in Salt Lake's summary decision motion, concerning which we did not grant review: 1) whether the pit in question is under the jurisdiction of the Mine Act; and 2) whether the inspection was conducted lawfully because the inspector did not have a warrant.

6/ S. Rep. No. 95-181, 95th Cong., 1st Sess. 34 (1977), reprinted in Senate Subcommittee on Labor, Comm. on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 622 (1978).

Commission Rule 27 must be interpreted consistently with section 105(d), since Rule 27 implements that section. Accordingly, the Secretary is not free to ignore the time constraints in Rule 27 for any mere caprice, as that would frustrate the enforcement purposes of section 105(d) and, in some cases, deny fair play to operators.

In view of the foregoing, what consequences should ensue if the Secretary does not comply with Rule 27? Since the purpose of Rule 27 is to effectuate the Act's substantive penalty scheme, not to create a "statute" of limitations, as Salt Lake contends, we cannot view the term "immediately" in section 105(d), or the time limit set in Rule 27, as procedural "strait jackets." Situations will inevitably arise where strict compliance by the Secretary does not prove possible. Nonsuiting the Secretary in such situations presents quite a different situation from defaulting the tardy private litigant. The drastic course of dismissing a penalty proposal would short circuit the penalty assessment process and, hence, a major aspect of the Mine Act's enforcement scheme.

We do not mean to intimate that insuring procedural fairness is not an important concern under the Mine Act. However, effectuation of the Mine Act's substantive scheme, in furtherance of the public interest, is more crucial. Accordingly, considerations of procedural fairness to operators must be balanced against the severe impact of dismissal of the penalty proposed upon the substantive scheme of the statute and, hence, the public interest itself. See, e.g., Alumbaugh Coal Corp. v. NLRB, 635 F.2d 1380, 1384 (8th Cir. 1980). In order to help strike a proper balance and to insure that the Secretary does not ignore section 105(d)'s injunction to act "immediately," we hold that if the Secretary does seek permission to file late, he must predicate his request upon adequate cause. Cf. Valley Camp Coal Co., 1 FMSHRC 791, 792 (1979) (excusing the late filing of an operator's answer for "adequate cause"). Such a requirement will guard against cases of abuse and also comports with analogous leeway extended to private litigants before the Commission. Valley Camp Coal Co., supra. Nevertheless, cases may arise where procedural justice dictates dismissal. While the requirement of showing adequate cause for a filing delay may guard against administrative abuse, a stale penalty proposal may substantially hinder the preparation and presentation of an operator's case. Therefore, we also hold that an operator may object to a late penalty proposal on the grounds of prejudice. We note that in his brief filed herein, the Secretary agrees with this general proposition. Br. 3-4. Allowing such an objection comports with the basic principle of administrative law that substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice. See Alumbaugh Coal Corp. v. NLRB, 635 F.2d at 1383-1384 (and cases cited); Jensen Construction Co. v. OSHRC, 597 F.2d 246, 247-248 (10th Cir. 1979); Todd Shipyard Corp. v. Secretary of Labor, 566 F.2d 1327, 1329-1330 (9th Cir. 1977); Ralph Foster & Sons, 3 FMSHRC 1181 (1981). 7/

7/ Salt Lake's objection (Br. 3) that we are not free to read a prejudice requirement into Rule 27 because the Rule is silent on prejudice lacks merit. As the authorities cited in the accompanying text

(footnote cont'd)

In light of the foregoing general principles, we turn to the specific issues in this case: did the Secretary show adequate cause for the delay and did the delay prejudice Salt Lake?

The Secretary's reason for delay, an extraordinarily high caseload and lack of clerical personnel, might be deemed an improper excuse for filing a simple, two-page pleading two months late. As Salt Lake points out, almost any law office in the country can claim the same "cause" as an excuse to evade every time limit in the various rules of civil procedure. However, the Secretary is engaged in voluminous national litigation and mistakes can happen. We believe that the Secretary minimally satisfied the adequate cause standard in this case. This is not to say that we will tolerate a practice of filing relatively uncomplicated pleadings late. Therefore, we cannot too strongly urge the Secretary to comply with Commission Rule 27, to the end that the enforcement goals embodied in section 105(d) be realized. See Arch Mineral Corp., 2 FMSHRC 277 (1980). 8/

Furthermore, we agree with the judge (2 FMSHRC 3412) that Salt Lake has shown no prejudice. Indeed, in its brief filed herein, Salt Lake makes no effort to demonstrate prejudice. Salt Lake certainly had notice of the citation and had filed its notice of contest. Salt Lake merely seizes upon a procedural irregularity to justify the drastic remedy of dismissal.

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fn. 7 continued
demonstrate, agencies have discretion to interpret their procedural rules in light of well-established principles of administrative law, which, in effect, are read in pari materia with the rules. Salt Lake's attempt to treat Rule 27 as a statute of limitations or "statute of creation" (Br. 5-7) is also misplaced. As we have concluded, section 105(d) is not a statute of limitations and, therefore, the implementing 45-day time-limit in Rule 27 is not an administrative "statute" of limitations either; rather it is a procedural rule designed to give specific and concrete form to section 105(d)'s injunction for "immediate" action in order to effectuate the Mine Act's penalty system. For this reason, the numerous statute of limitations cases cited by Salt Lake are inapposite. These cases involved genuine statutes of limitations enacted by Congress expressly to protect parties from defending against stale claims.

8/ Complicating this case is the fact that the Secretary did not request an extension of time under Rule 9. Instead, the Secretary used an instanter motion, as the period for filing a request for an extension of time had lapsed. The use of an instanter motion could become temptation to abuse and, absent extraordinary circumstances, the Secretary is also admonished to proceed by timely extension motion when extra time is legitimately needed.

In sum, for the reasons stated above, we affirm the judge's acceptance of the Secretary's late-filed penalty proposal and his refusal to dismiss the proceeding due to the late filing. Therefore, the judge's finding of violation and assessment of penalty are affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 1 1981

JONES & LAUGHLIN STEEL CORPORATION Contestant	:	Contest of Citation and Order
v.	:	Docket No. PENN 81-96-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Vesta No. 5 Mine
UNITED MINE WORKERS OF AMERICA, Intervenor	:	

DECISION

Appearances: Henry McC. Ingram, Esq., Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, Pittsburgh, Pennsylvania and J. R. Haggerty, Esq., Jones & Laughlin Steel Corporation; R. Henry Moore, Esq., and Thomas C. Reed, Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, Pittsburgh, Pennsylvania on the Briefs for Contestant.
Lawrence W. Moon, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia; Thomas A. Mascolino, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia on the Briefs for Respondent.
Kurt Kobelt, Esq., United Mine Workers of America, Washington, D.C. on the Brief for Intervenor.

Before: Judge James A. Laurenson

This proceeding was filed by Jones & Laughlin Steel Corporation (hereinafter "J & L") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (hereinafter "the Act") to contest the validity of a citation and order issued by the Secretary of Labor, Mine Safety and Health Administration (hereinafter "MSHA"). Citation No. 1046974, issued on February 17, 1981, pursuant to section 104(d)(1) of the Act, alleged a violation of the mandatory safety standard at 30 C.F.R. § 75.303. Order No. 1046866, issued on February 19, 1981, alleged a violation of the same standard and was issued pursuant to section 104(d)(1) of the Act. The violation charged in both documents was the failure of J & L to conduct a preshift examination of coal-carrying conveyor belts.

J & L's Motion to Expedite the proceeding was granted and a hearing was held in Pittsburgh, Pennsylvania on April 1, 1981. Inspection Supervisor Eugene Beck and Supervisory Mining Engineer Alex O'Rourke testified for MSHA. J & L's witnesses were its employees as follows: Stephen J. Hajdu, assistant safety inspector; Daniel L. Ashcraft, manager of mines; and George Pizoli, manager of mines.

On May 5, 1981, the United Mine Workers of America (hereinafter "UMWA") moved for leave to intervene in this proceeding. The motion was granted and the UMWA filed a brief. J & L and MSHA also filed briefs.

ISSUE

Whether J & L violated the Act or regulations as charged by MSHA.

APPLICABLE LAW

30 C.F.R. § 75.303 provides, in pertinent part, as follows:

> (a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun.

30 C.F.R. § 75.2(g) contains the following definitions: "(3) 'Working section' means all areas of the coal mine from the loading point of the section to and including the working faces. (4) 'Active workings' means any place in a coal mine where miners are normally required to work or travel."

STIPULATIONS

J & L and MSHA stipulated the following:

1. J & L is engaged in mining and selling bituminous coal in the United States, and its mining operations affect interstate commerce.

2. J & L is the owner and operator of the Vesta No. 5 Mine, MSHA ID No. 3600962.

3. The Vesta No. 5 Mine is subject to the Act, and the jurisdiction of the Mine Safety and Health Administration.

4. Operator's Exhibit O-1 is a copy of the map of the underground workings of the Vesta No. 5 Mine, and depicts the A, B and C conveyor belt flights of 44 face, as that area of the mine existed on February 17, 1981, and the 1 face A and B belt haulage flights as that area existed on February 19, 1981, and Exhibit O-1 is admitted into evidence in this proceeding.

5. Operator's Exhibit O-2 is a collective exhibit, comprised of copies of portions of the fireboss book for the Vesta No. 5 Mine, in which certified persons employed by J & L recorded reports of examinations for hazardous conditions, including those conducted pursuant to 30 C.F.R. section 75.303, on February 17, 1981 and February 19, 1981, in the areas of the Vesta No. 5 Mine referred to in Citation No. 1046974 and Order No. 1046866, and Exhibit O-2 is admitted into evidence in this proceeding.

6. J & L made an examination of the nature specified in 30 C.F.R. § 75.303 of the area referred to in Citation No. 1046974 during the midnight shift (shift beginning at 12:01 a.m.) on February 17, 1981, except that such examination was not made during the last three hours of the shift.

7. J & L made an examination of the nature specified in 30 C.F.R. § 75.303 of the area referred to in Citation No. 1046974 on the daylight shift (shift beginning at 8:00 o'clock a.m.) on February 17, 1981, except that no such examination was made within the three hours preceding the beginning of the shift, or before men entered and began to work in the area referred to in the citation, on such shift.

8. J & L made an examination of the nature specified in 30 C.F.R. § 75.303 of the area referred to in Order No. 1046866, during the midnight shift on February 19, 1981, except that such examination was not made during the last three hours of the shift.

9. J & L made an examination of the nature specified in 30 C.F.R. § 75.303 of the area referred to in Order No. 1046866 on the daylight shift on February 19, 1981, except that no such examination was made within the three hours preceding the beginning of the shift, or before men entered and began to work in the area referred to in the order, on such shift.

10. The belt conveyors referred to in the citation and order are used by J & L to carry coal, and men are not transported on such belt conveyors.

11. J & L was producing coal on the shifts on which the citation and order were issued.

12. At the time the citation was issued, the belt conveyors referred to therein were in good condition, and no hazards were observed.

13. At the time the order was issued, the belt conveyors referred to therein were in good condition, except for two citations that were issued by Inspector Calvert for alleged violations.

14. There was no inspection of the entire mine between February 17, 1981 and February 19, 1981.

15. MSHA's Coal Mine Inspection Manual, March 1978, contains a policy for inspection under 30 C.F.R. § 75.303, which provides: "The examination of belt conveyors on which men are not transported shall be started without delay after each coal producing shift has begun."

16. There exists in the Vesta No. 5 Mine approximately 18 miles of active conveyor belts.

SUMMARY OF THE EVIDENCE

The facts underlying the contested citation and order are not in dispute. On February 17, 1981, an MSHA inspector issued Citation No. 1046974 pursuant to section 104(d)(1) of the Act. The citation alleged that a significant and substantial violation of 30 C.F.R. § 75.303 had occurred and that the alleged violation was caused by the unwarrantable failure of J & L to comply with the mandatory standard. The condition or practice was described as follows:

> Evidence indicated that A, B, and C conveyor belt flights of 44 Face had not been preshift examined for the day shift. An entry was not in the mine examiner's report or at the date board along the belt flights indicating that an examination was made before workmen of the day shift entered the area along each belt flight.

On February 19, 1981, another MSHA inspector issued Order of Withdrawal No. 1046866, pursuant to section 104(d)(1) of the Act, for a condition he observed in the 1 Face A and B belt haulage flights of the Vesta No. 5 Mine. The order alleged that a significant and substantial violation of 30 C.F.R. § 75.303 had occurred and that the alleged violation was caused by the unwarrantable failure of the operator to comply with the mandatory standard. The condition or practice was described as follows:

> Evidence indicated that a preshift examination was not made of the 1 Face A and B belt haulage flights where persons were observed working the day shift, an entry was not in the mine examiner's book or at the date boards along the belt haulage.

The order referred to the citation as being the underlying initial action.

The relevant facts leading to the citation and order are the same. In both instances, the involved areas were coal-carrying conveyor belts which were not used to transport miners. In both cases the conveyor belts had been examined by J & L during the preceding shift but not within 3 hours of the commencement of the shift on which the citation and order were issued. In other words, J & L did not conduct a preshift examination of the coal-carrying conveyor belts. At the time the citation and order were issued, miners were working along the conveyor belts.

MSHA and the UMWA contend that the regulation in controversy requires J & L to conduct a preshift examination of the coal-carrying conveyor belts. J & L asserts that the regulation does not require a preshift examination of the belts.

At hearing, MSHA's policy concerning its interpretation of the regulation leading to the controversy was stated by its employees: Eugene Beck, Inspection Supervisor, and Alex O'Rourke, Supervisory Mining Engineer. Mr. Beck stated,

> "[B]elt lines . . . where coal is being hauled, carried, no persons along that belt line, must be examined during, after the shift is started, and if there was men working or assigned to be working anyplace in them areas, along that belt line, it had to be pre-shifted within 3 hours preceding the beginning of the shift." (Tr. 40).

Mr. O'Rourke stated that no preshift examination of conveyor belts was required under this regulation "where men were not required, were planned to be working in that area during that shift." (Tr. 82). Mr. O'Rourke went on to state that the requirements of the regulation concerning a preshift examination and an examination during the shift could be merged into a single examination following the initial preshift examination. (Tr. 83). MSHA's witnesses conceded that the Coal Mine Inspection Manual (hereinafter "the Manual") states that the examination of conveyor belts on which men are not transported shall be started without delay after each coal producing shift has begun. The Manual says nothing about a preshift examination of such belts.

On February 14, 1980, MSHA issued a citation to the same mine for the same violation. That citation alleged a failure to conduct a preshift examination of coal-carrying conveyor belts where men were normally required to work or travel in the area (Ex. C-1). J & L did not contest that citation.

In December, 1980, and January, 1981, discussions took place between MSHA supervisory personnel and J & L management. During these discussions, MSHA told J & L that a preshift examination of certain coal-carrying conveyor belts was required. J & L disputed that interpretation of the regulation. MSHA suggested that J & L file a petition to modify the application of the mandatory standard pursuant to section 101(c) of the Act. J & L elected not to file such a petition because it believed that such filing would concede MSHA's interpretation of the regulation.

Inspection Supervisor Beck testified that, in his opinion, the hazards surrounding conveyor belts were at least twice as great at the end of the shift as they were at the beginning of the shift. He identified such hazards as accumulations of float coal, hot rollers, and roof problems. Supervisory Mining Engineer O'Rourke testified that although he was familiar with MSHA's policy concerning the preshift examination requirement of coal-carrying conveyor belts, he could not say what the actual practice has been by inspectors except that he had seen other citations in MSHA District 2 for the same violation alleged here. He could not be specific as to the number of such citations.

Stephen Hajdu, J & L's assistant safety inspector for this mine, testified that after the February 14, 1980 citation and before the citation contested here, it was J & L's practice to conduct a preshift examination of coal carrying conveyor belts "where you normally have men regularly employed in those areas, or has to work normally in those areas." (Tr. 106). He was unable to state whether the men working along the conveyor belts on February 19, 1981, were regularly assigned to that area. He conceded that, "anytime during any shift there is possibly a man or two somewhere along the belt lines." (Tr. 95).

Daniel Ashcraft, manager of mines for J & L, testified that the Vesta No. 5 Mine is not under his jurisdiction. He testified that in his 33 years of coal mine employment he had never heard of a citation being issued for failure to conduct a preshift examination of coal-carrying conveyor belts. He admitted, however, that if he knew that miners were going to be assigned for a specific job along such belts, "that area was preshifted at that time." (Tr. 116).

George Pizoli, J & L's manager of mines, testified that the Vesta No. 5 Mine has been under his jurisdiction since October 1, 1980. He testified that during the 6 years, prior to October 1, 1980 as an employee with other coal mine operators, all coal-carrying conveyor belts had been examined only during the shift and no citations had ever been issued. After the issuance of the order herein, he increased the number of preshift examiners at this mine from 13 to 20 to achieve compliance. Additionally, he directed his employees to conduct a preshift examination of all 18 miles of coal-carrying conveyor belts at this mine because "it is reasonable to assume that you are going to have to dispatch people to any portion of that belt line at any time . . . ." (Tr. 130-31).

DISCUSSION

Contentions of the Parties

J & L asserts that the language of 30 C.F.R. § 75.303 clearly does not require belt conveyors, not used to transport miners, to be examined within 3 hours prior to the start of the shift. It further contends that the principles of statutory construction and the legislative history of the Act establish that it was not the intent of Congress to require such belt conveyors to be examined prior to the commencement of the shift.

At the hearing, MSHA's supervisors testified that the requirement of a preshift examination of coal-carrying conveyor belts applies only to such belts where men are required or assigned to work during that shift. However, MSHA argues that the coal-carrying conveyor belts herein are "active workings" of the mine and, hence, must be examined within 3 hours preceding the beginning of each shift. MSHA further asserts that the additional provision of the regulation, requiring that such belts be examined after the shift has begun, does not require more than one examination per shift because, after the initial preshift examination, the examination during the shift and the preshift exam for the next shift can be merged. MSHA's brief sets forth its position as follows:

> It is completely within the Secretary's interpretation for J&L to inspect, during the preshift exam, only those areas of the conveyor belt entries where men are to work or travel, such as the areas of the belt drive units, leaving the remaining areas of the belt entries to be covered during the shift (Tr. 144-145). In the alternative, as MSHA witnesses testified, J&L can delay the required onshift exam until the end of a shift, accomplishing it within three hours of the succeeding shift, and thereby qualify that one examination to satisfy both the preshift and onshift examination requirements of 30 CFR § 75.303. This example, of course, assumes that the "two for one" exam will be sufficiently broad and thorough. MSHA accepts such an examination and does not deem it to be violative of MSHA policy.

MSHA Brief at 10-11.

The UMWA agrees with MSHA that coal-carrying conveyor belts are "active workings" of the mine and must be examined within 3 hours preceding the beginning of each shift. However, the UMWA contends that because all coal-carrying conveyor belts constitute "active workings" of the mine, all such belts must be subjected to preshift examination whether or not men are assigned to work in the area. The UMWA also asserts that the regulation requires two separate examinations applicable to each shift: A preshift examination and an examination during the shift. The UMWA contends that these examinations may not be merged into a single examination.

Construction of 30 C.F.R. § 75.303

The language of the regulation in controversy, 30 C.F.R. § 75.303, is the same as section 303(d)(1) of the Act. The principles of statutory construction apply. The cardinal principle of statutory construction was stated by the U.S. Supreme Court as follows: "the meaning of a statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470, 485 (1917). The application of this principle to the regulation here must be based upon an analysis of the first three sentences of the regulation.

The first sentence of the regulation provides that the operator must perform a preshift examination of "the active workings of a coal mine." At the hearing, J & L did not contend that the belts in question were not active workings. However, in its brief it states: "It is arguable that the belt conveyors here are not part of the active workings." J & L Brief at 9.

30 C.F.R. § 75.2(g)(4) and section 318(g)(4) of the Act provide as follows: "'Active workings' means any place in a coal mine where miners are normally required to work or travel." The term, "active workings," has been broadly construed by the Interior Board of Mine Operation Appeals (hereinafter "The Board") and the Federal Mine Safety and Health Review Commission (hereinafter "the Commission"). In Mid-Continent Coal and Coke Co., 1 IBMA 250, 257 (1972) the Board held that even though only one miner was required to regularly inspect an entry containing a high-voltage cable, that was enough to constitute an "active working." In Kaiser Steel Corp., 3 IBMA 489, 510 (1974) the Board held that an air return which was inspected twice a day and rock dusted twice a week constituted an "active working" of the mine. In Secretary of Labor v. Old Ben Coal Company, 3 FMSHRC 608, 609 (1981) the Commission noted the two previously cited decisions of the Board and stated, "the cited area was required to be inspected at least once a week, was traveled as an escape route, and was rock-dusted periodically. We find that these uses meet the work and travel requirements of an active working under the standard." Although all the above cases decided by the Board and Commission involved 30 C.F.R. § 75.400, no reason exists for applying a different definition of "active working" to 30 C.F.R § 75.303. Even J & L concedes that the conveyor belts in question must be examined during each shift and that, at the time of the issuance of the citation and order, miners were assigned to work in the areas of the conveyor belts. I find that the conveyor belts in the cited areas constitute "active workings" of the coal mine. Hence, the first sentence of the regulation appears to require that they be examined "within 3 hours immediately preceding the beginning of any shift."

Turning to the second sentence of the regulation, it specifies that the "examiner shall examine every working section . . . seals and doors . . . the roof, face, and rib conditions in such working sections; examine active roadways, travelways, and belt conveyors on which men are carried . . . ." 30 C.F.R. § 75.2(g)(3) and section 318(g)(3) of the Act provides as follows: "'Working section' means all areas of the coal mine from the loading point

of the section to and including the working faces." The "loading point" referred to in the above definition is the point at which coal is placed onto the conveyor belt. Thus, the conveyor belts in the cited areas here are not within the definition of "working section" as that term is used in the second sentence of the regulation. J & L asserts that "the areas of the active workings to be examined prior to the shift are only those areas of the working section outlined in the second sentence of the regulation." J & L Brief at 9. Although MSHA asserts that "statutes must be read in such a way as to give all parts meaning," and that the first sentence is "inclusive and paramount, and the sentences which follow [are] illustrative but not exceptive," MSHA Brief at 19 and 16, it does not comment further on the second sentence of the regulation. The UMWA commented on the construction of the second sentence of the regulation as follows:

> [T]he reference to "working section" in the second sentence should be construed liberally, and harmoniously with the first sentence as a means of ensuing [sic] that the pre-shift examination requirement is applied to working sections, as well as to active roadways, travelways and belt conveyors on which men are carried, due to the particular severity of the hazards associated with these areas . . . [and] . . . the first two sentences define and elaborate the pre-shift examination . . . .

UMWA brief at 9 and 12. Upon considering all the arguments, suffice it to say that the areas which are required to be examined within 3 hours before the beginning of any shift in the second sentence of the regulation do not include all "active workings" of the mine which are included in the first sentence of the regulation.

Following the first two sentences of the regulation, which describe the areas of a coal mine required to be examined prior to the beginning of a shift, the third sentence states, " belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun." J & L argues that, "the third sentence of the standard specifically exempts such belt conveyors from examination prior to the shift by authorizing examination to occur during the shift." J & L Brief at 10. MSHA contends that the third sentence is not an exception to the first sentence but rather calls for an examination during the shift which can be delayed "until the end of a shift, accomplishing it within 3 hours of the succeeding shift, and thereby qualify that one examination to satisfy both the preshift and onshift examination requirements of 30 C.F.R. § 75.303." MSHA Brief at 11. Thus, MSHA concludes that the third sentence requires an examination of coal-carrying conveyor belts after the beginning of the shift in addition to the examination specified in the first sentence. The UMWA's position concerning the first sentence is as follows: "The on-shift inspection of the coal carrying belts required by the third sentence of 30 C.F.R. 75.303 was not intended to be a restriction on the general pre-shift inspection provisions established in the first sentence. Rather, it was intended to promote mine safety by requiring that a separate and additional inspection be performed on coal carrying belts." UMWA Brief at 13-14.

I have considered the contentions of all the parties that the language of the regulation is plain and does not need interpretation. However, I note that the purportedly "plain" language relating to the examination of coal carrying conveyor belts has been construed by these parties in three different ways as follows: (1) J & L - only an examination after the shift has begun; (2) MSHA - a preshift examination only of belts where men are assigned or planned to work or travel and an examination of all coal-carrying conveyor belts after the shift has begun, but if the latter examination is conducted during the last 3 hours of the shift, one such examination will satisfy both requirements of the regulation; and (3) UMWA - all coal-carrying belts must be examined before each shift and examined again after the start of the shift and such examinations may not be merged.

The first sentence of the regulation, as defined and interpreted by the Board and the Commission, purports to require a preshift examination of the areas cited here. The second sentence purports to specify a more narrow area of the mine to be preshifted including, inter alia, working sections and belt conveyors on which men are carried. Obviously, all areas identified in the second sentence are included within the definition of "active workings" in the first sentence. MSHA contends that the second and third sentences are "illustrative but not exceptive." J & L claims that the second and third sentences create "an exception to the requirement of examination prior to the shift." J & L Brief at 11. If the first sentence requires the preshift examination of all conveyor belts, what is the purpose of the second sentence which requires preshift examination of only conveyor belts on which men are carried? I find that the language used in the three sentences of this regulation is not plain or unambiguous. Therefore, the legislative history of the Act must be examined to determine the intent of Congress in enacting this law.

Legislative History

An examination of the legislative history leading to the enactment of the provision in controversy begins with the Federal Coal Mine Safety Act of 1952, P.L. 532, 82d. Cong. Ch. 877, 2d Sess. (1952) (hereinafter "1952 Coal Act"). The parties agree that the 1952 Coal Act did not require a preshift examination of any conveyor belts.

In 1969, the Senate and House of Representatives passed different bills concerning the duty to examine conveyor belts. The House Bill, HR 13950, section 303(d)(1), added the following: (1) a specific requirement in the second sentence that required a preshift examination of all belt conveyors on which men are carried; and (2) the third sentence which provided that conveyors on which coal is carried shall be examined after each coal-producing shift has begun. The House Report concerning this provision is silent. Legislative History of the Federal Mine Health and Safety Act of 1969 (Public Law 91-173 (August 1975) (hereinafter "Legislative History") at 1031, et seq. The Senate Bill, S. 2917, added the phrase "and all belt conveyors" to the second sentence which specified areas of a coal mine subject to preshift examination. The Senate Report concerning this change is as follows:

This section sets forth requirements that the operator must follow for preshift examinations. The provisions are similar to the 1952 act provisions, except that they apply to all underground coal mines and except for four additional requirements. These are: (1) An anemometer or other acceptable device capable of measuring the velocity of an air current is required, (2) an examination of belt conveyors is required, (3) the preshift examination is to be made 3 hours prior to a coal-producing shift instead of 4 hours, and (4) the inspector may require that the preshift examination include examinations for hazards and standards violations not specified in the section. No miner may enter the underground portion of a mine until the preshift examination is completed, the examiner's report is transmitted to the surface and actually recorded, and until hazardous conditions or standards violations are corrected.

The reason for these changes are:

1. The preshift examiner cannot possibly determine the velocity of an air current without a device capable of measuring the velocity;

2. Many mine fires occur along belt conveyors as a result of defective electric wiring, overheated bearings, and friction; therefore, an examination of the belt conveyors is necessary; and

3. The hour for beginning of the preshift examination was changed to insure an examination as near as possible to the beginning of the shift. Changes occur so rapidly in the mines that it is imperative the examinations be made as near as possible to the time the workmen enter the mine. The 3-hour time was recommended as far back as 1944; and

4. A careful preshift examination may disclose hazards other than those caused by lack of proper ventilation and thereby prevent loss of life and injury.

Legislative History at 183.

In essence, the House-Senate Conference Committee adopted the House version and the Conference Report states as follows:

Subsection (d) sets forth requirements that the operator must follow for preshift examinations. These provisions are similar to the 1952 act provisions, except that they apply to all underground coal mines before all shifts, not just production shifts, and except for several additional requirements including (1) an anemometer or other acceptable device

> capable of measuring the velocity of an air current is required, (2) an examination of belt conveyors on which men are carried before each shift, (3) an examination of coal carrying belt conveyors after each shift begins, (4) a preshift examination 3 hours prior to a shift instead of 4 hours, and (5) an examination of such other hazards and violations of standards, as an inspector may require. No miner may enter the underground portion of a mine until the preshift examination is completed, the examiner's report is transmitted to the surface and actually recorded, and until hazardous conditions or standards violations are corrected.

Legislative History at 1610. (Emphasis supplied.)

Curiously, the House-Senate Conference Committee changed the language of the first sentence of this section. In both the House and Senate versions, that sentence provided that "before any workmen in such shift enter the underground areas of the mine, certified persons designated by the operator of the mine shall examine a definite underground area of the mine." (Emphasis supplied). The Conference Committee changed the term "underground areas" and "definite underground area of the mine" to "active workings." The Conference Committee Report is silent about this change.

The issue is whether Congress intended to include coal-carrying conveyor belts within the area designated for preshift examination. I conclude that it did not. The 1952 Coal Act did not require a preshift examination of any conveyor belts. The Senate version of the 1969 Act clearly and specifically required preshift examination of all conveyor belts. I find that the House version required a preshift examination of conveyor belts on which men were carried and an examination of coal carrying conveyors belts after the shift began. I find that the House-Senate Conference Committee, by rejecting the Senate version requiring a preshift examination of all conveyor belts, indicated a Congressional intent to limit the preshift examination of conveyor belts to those belts on which men are carried. This principle of statutory construction has been articulated as follows:

> That Congress adopted the House version of the bill, specifically rejecting the Senate's conflicting version, is of course an extremely significant factor in determining what was Congress' intention with respect to the matters in issue. See, e.g., First Nat'l Bank of Logan, Utah v. Walker Bank, 385 U.S. 252, 258, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966).

Pan American World Airways, Inc. v. C.A.B., 380 F.2d 770, 781 (6th Cir. 1967), aff'd sub nom, World Airways, Inc. v. Pan American World Airways, Inc., 391 U.S. 461 (1968). Moreover, the position of MSHA and the UMWA in this matter would require that the Commission find that Congress intended a result that it expressly declined to enact. See Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-200 (1974). Although I am mindful that mine safety laws are remedial legislation which should be construed broadly to effectuate

their purpose, it appears beyond question from the legislative history supra, that Congress intended to require a preshift examination only of conveyor belts on which men are carried and an examination of coal-carrying conveyor belts after the shift has begun.

The general language of the first sentence of this regulation requiring preshift examination of all "active workings" of the coal mine is insufficient to require a preshift examination of coal carrying conveyor belts in light of the specific language of the second and third sentences. If the first sentence were construed to require preshift examination of coal-carrying conveyor belts, the second sentence requiring a preshift examination of "belt conveyors on which men are carried," would be redundant and superfluous. It must be presumed that Congress did not use superfluous words. I find that the broad interpretation applied to the term "active workings" pursuant to 30 C.F.R. § 75.400 by the Board and Commission is limited by the clear Congressional intent that coal-carrying conveyor belts only to be examined after the shift has begun.

MSHA asserts that, since it is the agency charged with execution of this law, its interpretation should be followed. I find that MSHA has failed to establish that it has had any consistent or coherent construction of the section in controversy. Although this law has been in effect for almost 12 years, MSHA is unable to cite any written policy or procedure requiring a preshift examination of coal-carrying conveyor belts. Last year, Judge Merlin invalidated MSHA's policy of requiring the examination of coal-carrying conveyor belts without delay after the start of a production shift. Judge Merlin stated, "indeed there is no time requirement at all except that the examination occur during the shift. If the Secretary wished to require an immediate inspection within a specified time after the start of a shift, the regulation could have so provided." Consolidation Coal Co., 2 FMSHRC 1809, 1817 (July 11, 1980). MSHA did not petition the Commission for review of that decision. Nevertheless, as evidenced by the testimony in this case, MSHA has not changed its policy contained in the Manual. The Manual still purports to require that examination of coal-carrying conveyor belts be conducted without delay after the commencement of the shift. MSHA's failure to articulate a policy concerning the examination of coal-carrying conveyor belts lead an inspector to issue citations to U.S. Steel Corporation on February 2, 1981 and March 2, 1981, alleging a violation of 30 C.F.R. § 75.303 in that the examination of the coal-carrying conveyor belts was not made without delay after the coal producing shift had begun. U.S. Steel Corporation, Docket No. WEVA 81-263-R, etc., 3 FMSHRC 1228 (May 6, 1981). MSHA vacated those citations on March 4, 1981 and March 9, 1981, respectively. At a hearing on the contest of those citations, counsel for MSHA stated:

> I think there is no question that we feel that the operator here did conduct an adequate preshift examination of the coal-carrying belts which was performed 3 hours before the beginning of the shift. A West Virginia law requires preshift examinations of coal-carrying belts 3 hours before the start of the shift and the operator is complying with

that. So, in view of that, we now feel that the operator is meeting the requirements of 30 C.F.R. § 75.303 if he examines the belts at some time during the shift and if that examination is completed. (Emphasis supplied.)

U.S. Steel Corporation, supra, at 1233.

Judge Stewart stated in that case,

> MSHA acknowledged that if the conveyor were preshifted within 3 hours of the start of the shift, the requirement to examine the belt immediately after the start of the shift would in effect require two examinations within 3 hours and that such a requirement might be harsh. MSHA stated that because of the 40 miles of belts, there would be people walking belts all day long because as soon as they finished their preshift examination they would have to start their onshift examination. MSHA conceded that the language on its face does not require the operator to begin his onshift examination immediately upon the start of the shift and that it was his option to conduct the onshift examination along with the State-required preshift examination. Ibid.

In U.S. Steel, supra, footnote 6 at 1232, MSHA further stated:

> Instructions in, the Coal Mine Inspection Manual, which indicates a different enforcement policy with regard to 30 C.F.R. § 75.303, are not current. In fact, MSHA's enforcement policy with regard to 30 C.F.R. § 75.303 is currently under review and once completed, new enforcement guidelines will be published and enforced.

In conclusion, I find that MSHA has failed to establish that it has any construction of this regulation. Hence, there is no obligation on the Commission or courts to follow MSHA's interpretation of the regulation in this matter.

It should also be noted that the first sentence of this regulation specifically permits MSHA to require preshift examination of "any other underground area of the mine designated by the Secretary or his authorized representative." Hence, MSHA has broad authority to promulgate a regulation requiring the preshift examination of coal-carrying conveyor belts. Perhaps MSHA's review of enforcement policy covering this regulation will lead to such a regulation. In the meantime, I conclude that MSHA has failed to establish a requirement of a preshift examination of coal-carrying conveyor belts. Therefore, the citation and order contested herein are vacated. Since the citation and order are vacated, I do not reach the other issues raised by J & L, to wit: (1) whether the violations were "significant and substantial"; (2) whether the violations were the result of an "unwarrantable failure to comply with the mandatory standard"; and (3) whether MSHA failed to comply with the Administrative Procedure Act.

ORDER

IT IS ORDERED that Citation No. 1046974 and Order No. 1046866 are VACATED and J & L's contest of the citation and order is SUSTAINED.

James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUL 7 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ASARCO, INCORPORATED, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-124-M MSHA CASE NO. 05-00516-05010 DOCKET NO. WEST 79-125-M MSHA CASE NO. 05-00516-05011 DOCKET NO. WEST 79-126-M MSHA CASE NO. 05-00516-05012 DOCKET NO. WEST 79-207-M MSHA CASE NO. 05-00516-05013 DOCKET NO. WEST 79-310-M MSHA CASE NO. 05-00516-05014 DOCKET NO. WEST 81-12-M MSHA CASE NO. 05-00516-05022 DOCKET NO. WEST 81-13-M MSHA CASE NO. 05-00516-05023 MINE: Leadville Mine

ORDER CORRECTING DECISION

The following Citation nos. and the corresponding penalty were inadvertently omitted from the final decision issued June 30, 1981. They should be added to those listed in the decision.

DOCKET NO. WEST 79-124-M

Citation No.	Penalty
333383	$122.00
333384	122.00

The total penalty amount should therefore be $3,549.00.

DOCKET NO. WEST 79-125-M

Citation No.	Penalty
333886	$ 90.00
333888	160.00

The total penalty amount should therefore be $2,649.00.

Concerning Docket No. WEST 81-12-M the last figure of $44.00 in the penalty column should be omitted. The total penalty amount should be $1,619.00.

SO ORDERED.

John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 7 1981

UNITED MINE WORKERS OF AMERICA, LOCAL UNION 6003, DISTRICT 29,	Complainant	Complaint for Compensation Docket No. WEVA 80-664-C
v.		
ROYAL COAL COMPANY and COWIN AND COMPANY, INC.,	Respondents	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding Docket No. WEVA 81-34 A.C. No. 46-03294-03019
v.		Claremont Cleaning Plant
ROYAL COAL COMPANY,	Respondent	

DECISION

Appearances: James Swart, Esq., Beckley, West Virginia, for Complainant, United Mine Workers of America;
Robert S. Stubbs, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Respondents.
Catherine Oliver, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner, Secretary of Labor;

Before: Judge Melick

On June 5, 1980, an inspector for the Mine Safety and Health Administration (MSHA) issued a combined order of withdrawal and citation to the Royal Coal Company (Royal) for the face area of an underground slope being sunk by employees of an independent contractor, Cowin and Company, Inc. (Cowin), at Royal's Claremont Cleaning Plant. The order of withdrawal was based upon the inspector's finding of an imminent danger under section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the

"Act." 1/ The citation was issued under the provisions of section 104(a) of the Act. 2/ The order and citation alleged a violation of Royal's slope construction plan under the mandatory standard at 30 C.F.R. § 77.1900-1. Neither the order nor the citation were contested under the provisions of section 107(e)(1) and 104(a) of the Act, respectively. Local Union 6003, District 29 of the United Mine Workers of America (UMWA), thereafter filed a complaint under section 111 of the Act against Royal and Cowin for compensation to miners idled by the order. That complaint was timely answered. On November 26, 1980, MSHA filed a proposal for assessment of civil penalty against Royal for the cited violation of the mandatory standard and Royal thereafter answered timely under the provisions of section 105(d) of the Act. The complaint for compensation and the civil penalty proceeding were thereafter consolidated under Commission Rule 12, 29 C.F.R. § 2700.12, and hearings in the consolidated cases were held in Charleston, West Virginia, commencing February 2, 1981.

The general issues before me are: (1) whether Royal failed to comply with the mandatory standard cited in the order and citation at bar, and, if so, the appropriate civil penalty to be paid for the violation; and (2) the amount of compensation due to the miners idled by the order in question.

Royal and Cowin concede that the imminent danger order issued in this case on June 5, 1980, and terminated on June 18, 1980, was not contested under section 107(e)(1) of the Act and that it therefore had become final. Moreover, within the framework of the first part of section 111 of the

1/ Section 107(a) of the Act reads as follows:

"If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110."

2/ Section 104(a) of the Act reads in part as follows:

"If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated."

Act, 3/ Royal and Cowin concede that the miners idled on the shift in which the order was issued are entitled to full compensation for the balance of that shift at their regular rate of pay and that the miners idled on the next working shift are entitled to 4 hours' compensation at their regular rate of pay. The dispute over compensation here at issue concerns the second part of section 111. That part reads as follows:

> If a coal or other mine or area of such mine is closed by an order issued under * * * section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for 1 week, whichever is the lesser.

Motions by UMWA for Summary Decision

In motions for summary decision filed before and during hearing, the UMWA argued that the section 107(a) order and the section 104(a) citation became final upon the Respondents' failure to contest them under the provisions of sections 107(e)(1) and 105(d) of the Act, respectively. It further maintained that since the issues that could have been litigated in a contest of this order and citation incorporated all of the essential issues to be decided in a section 111 compensation proceeding those issues could not now be relitigated (presumably under the doctrines of res judicata and collateral estoppel). The UMWA argued that section 111 therefore mandated a summary decision, without the necessity of a hearing, that compensation be paid to the idled miners for a full week. The UMWA argued, alternatively, that even if the issue of whether the operator failed to comply with a mandatory standard survived the finality of the order and citation, once the Judge made a determination (in ruling on Respondents' motion for summary decision discussed, infra), that the order at bar properly alleged a failure to comply with the mandatory health or safety standard there were no further factual determinations to be made and a summary decision should in any event be rendered without a hearing. In other words,

3/ Section 111 of the Act provides in relevant part as follows:
"If a coal or other mine or area of such mine is closed by an order issued under * * * section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than 4 hours of such shift."

the UMWA argues that since the order was "issued" for an alleged violation of a mandatory standard there was then no need for a hearing to determine whether or not there was, as a matter of fact, any violation of the mandatory standard.

Both Cowin and Royal admit that the section 107(a) imminent danger order had become final and do not seek review of the order. They argue, however, that the essential question under section 111 of whether that order was issued for a "failure of the operator to comply with any mandatory health or safety standards" nevertheless survived the finality of the order. The UMWA counters this argument by claiming that the issue under section 111 of whether the operator failed to comply with a mandatory standard is identical to an essential issue that could have been litigated in a contest of the validity of the section 104(a) citation. The UMWA argument continues that since the Respondents failed to contest that citation within 30 days of its issuance under section 105(d), that citation and the issues that could have been raised in a contest of that citation became final and were not subject to relitigation (again presumbably under the doctrines of res judicata and collateral estoppel) in the compensation case before me.

The UMWA arguments fail, however, on several grounds. Even assuming, arguendo, that the failure to timely contest the 104(a) citation could serve to bar the subsequent litigation in a section 111 compensation case of an issue that might properly have been determined in that proceeding, it is undisputed that in this case the 104(a) citation was in fact timely challenged under the provisions of section 105(a) of the Act, i.e., within 30 days of notification to the operator of a proposed civil penalty. It is immaterial that the operator did not also contest the citation within 30 days of its receipt under the provisions of section 105(d) of the Act. In either case, the validity of the citation is properly at issue. Energy Fuels Corporation v. Secretary, 1 FMSHRC 299 (1979). Moreover, since the issue of whether the operator has "failed to comply with any mandatory health or safety standard," is not a necessary issue to the determination of the validity of a section 107(a) imminent danger withdrawal order, footnote 1, supra, it is apparent that there has in fact been no prior determination of that issue.

In any event, I conclude that the litigation in this compensation case of the issue of whether the operator has "failed to comply with any mandatory health or safety standard" would not be barred by the doctrines of res judicata or collateral estoppel even if both the 107(a) order and the 104(a) citation had become final for failing to timely contest them under applicable procedural or jurisdictional rules. Under res judicata, only a final judgment on the merits bars further claims by the parties or their privies on the same cause of action. Allen v. McCurry, 445 U.S. 958 (1980). A judgment on the merits is one based on the legal rights and liabilities of the parties as distinguished from mere matters of practice, procedure, jurisdiction or form. Fairmont Aluminum Company v. Commissioner, 222 F.2d 622 (4th Cir. 1955), cert. den., 350 U.S. 838, reh. den., 352 U.S.

913. Similarly, collateral estoppel bars relitigation only of issues actually decided in prior litigation. Montana v. United States, 440 U.S. 147 (1979). Since there had not been in any case a prior judgment on the merits of the order and citation at bar, the issues that could have been raised in previous litigation of those documents are not barred from consideration in this compensation case under section 111.

In addition, in enacting section 111 of the Act, Congress provided specific guarantees that compensation may be awarded only "after all interested parties are given an opportunity for a public hearing." In order to comport with these statutory requirements, it is clear that that opportunity for a public hearing must be renewed after the claim for compensation is filed when the finality of the order and the question of whether that order was issued for a failure of the operator to comply with a mandatory standard has not been previously determined or when one of the respondents in the compensation case has not previously had such an opportunity. In all other cases, the opportunity for a hearing must nevertheless be granted at least insofar as other issues in the compensation claim remain unresolved. In order for that right to a public hearing to have any meaning, it is also clear that all material issues may be litigated at that hearing including the issue of whether, as a factual matter, the order was issued for a failure to comply with a mandatory standard.

Under Commission Rule 64(b), a summary decision may be granted "only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.64(b). Since genuine issues of material fact remained for determination in the compensation proceeding under section 111, the UMWA motions for summary decision were, and are, properly denied.

Motions by Respondents for Summary Decision and Dismissal

In motions for summary decision and dismissal filed by the Respondents, it was argued that the citation incorporated in the order at bar should have been dismissed because it failed to charge any specific violation. Respondents argued, alternatively, that even if a violation of the slope plan was properly set forth, the slope plan itself was too ambiguous to be enforceable.

The mandatory standard here cited, to wit, 30 C.F.R. § 77.1900-1, requires that the operator adopt and comply with a slope- or shaft-sinking plan approved by the MSHA Coal Mine Health and Safety District Manager. It is here alleged that the operator failed in two ways to comply with its approved slope plan. The first violation is alleged as follows:

> The slope face has entered a caved area of an abandoned coal mine and the ribs (sides) of the slope are loose and overhanging. The slope roof is broken and unconsolidated shale and resin-grouted rods (6 feet long) are sole means of

support. This is not an adequate system due to the conditions encountered.

The second violation is alleged as follows:

> The width of the slope was 18 feet instead of the required 10; however, the exact width could not be determined due to area being caved on both sides.

In a bench decision, the motions were denied as to the first allegation but granted as to the second. I found in that decision that the latter allegations indeed did not relate to any requirement of the slope plan that was in effect at the time of the purported violation and accordingly that the citation did not charge any violation in this regard. The slope plan as initially approved by MSHA on October 3, 1979, included a series of engineering drawings depicting the development of the slope tunnel. The width of the tunnel is variously shown to be 9-1/2 and 10 feet. As part of that approved plan, however, Royal also had submitted the following exclusion:

> The possibility of intersecting an abandoned mine exists at the 2,000-foot level; however, data is incomplete on the mine and as soon as it is formulated, the plans of penetration will be submitted. The plan will be submitted for approval and approval received before the slope reaches the 2,030-foot level.

I conclude from that language that the operator's plan as approved by MSHA on October 3, was not intended by either party to govern the area of intersection with the suspected abandoned mine at the 2,000-foot level. I find that in approving the plan as submitted on October 1, 1979, MSHA agreed to that specific exclusion. 4/ According to the evidence before me, no subsequent modification to the slope plan regarding the width of the slope was ever made. Thus there was no requirement in effect on the date of the violation alleged herein that the slope widths not exceed 10 feet upon intersecting the abandoned mine. Accordingly, I cannot find that the first part of the order at bar was issued for any failure of the operator to have complied with the cited mandatory standard. The bench decision granting a corresponding partial summary decision is therefore reaffirmed. The citation is also correspondingly vacated in part.

However, inasmuch as subsequent modifications to the slope plan applicable to the slope intersection with the abandoned mine were submitted and

4/ This conclusion is further supported in that neither party could reasonably have expected that a 10-foot slope could have been maintained through the abandoned mine. While there may very well have been a violation for Royal to have proceeded without an approved plan in this regard beyond the 2,030-foot level, no such violation has been charged here. The question of whether such a violation occurred is therefore not before me.

approved with respect to roof control, I find that there was indeed a specific roof control standard existing at the time of the alleged violation. The original slope plan as approved by MSHA on October 3, 1979, provided as follows: "In the event broken roof is encountered straps, wire mesh, rolled steel sets, liner plate and grout or shot crete will be used to support the roof and ribs." A slope plan modification was later submitted by the Respondents on May 9, 1980, to govern procedures to be followed in sinking the slope through the abandoned mine workings. That modification, approved by MSHA on May 13, 1980, included the following provisions: "Our contractor plans to continue his normal support pattern. However, they have available on site steel liner plates and steel ribs which can be used if support conditions warrant." Another modification was submitted on May 30, 1980, and approved by MSHA on June 2, 1980. That modification included the following language: "In areas where rock conditions dictate, a 10 GA. Armco tunnel liner plate will be used and will be encased with grout to form a solid support structure."

In spite of these acknowledged provisions of the slope plan, Respondents nevertheless contend that they did not receive the requisite notice of the alleged violation. Although the legal basis for their motion has not been articulated, it is clear that notices of violations charged under the Act and its implementing regulations must comport with constitutional, statutory and regulatory requirements. Ultimately, the notice must meet the fundamental requirements of due process of law under the Fifth Amendment to the United States Constitution. Constitutional due process does not, however, require any specific form or content for pleadings as long as the parties are given adequate notice. S. S. Kresge Company v. NLRB, 416 F.2d 1225 (6th Cir. 1969); NLRB v. United Aircraft Corp., 490 F.2d 1105 (2nd Cir. 1973). Section 104(a) of the Act requires that "each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." Additional general requirements for notice are set forth in the Federal Mine Safety and Health Review Commission Rules of Procedure, 29 C.F.R. § 2700.53, which are virtually identical to provisions of the Administrative Procedure Act. 5 U.S.C. § 554(b). 5/

I observe that in meeting the statutory requirements for notice, it is not necessary to describe the nature of the violation in any particular format so long as it is described with "particularity." The description must, however, afford notice sufficient to enable the operator to be properly advised so that corrections may be made to insure safety and to allow adequate preparations for any potential hearing on the matter. MSHA v. Jim

5/ Commission Rule 29 C.F.R. § 2700.53 reads as follows:
"Except in expedited proceedings, written notice of the time, place, nature of the hearing, the legal authority under which the hearing is to be held, and the matters of fact and law asserted shall be given to all parties at least 20 days before the date set for hearing."

Walter Resources, Inc., and Cowin and Co., 1 FMSHRC 1827 (1979). The Respondents here have not claimed any difficulty in being able to identify and thereby abate the allegedly violative condition. Nor have they shown that they were deprived of notice sufficient to enable them to defend at hearing. Accordingly, I find no basis for their claims of insufficient notice and their motions in that regard are therefore denied.

Respondents also argue, in the alternative, that even assuming they received adequate notice of the alleged violation, the relevant provisions of the slope plan were nevertheless too ambiguous to be enforceable. Inasmuch as the slope plan at issue was drafted by the operator and the language used in the plan was, accordingly, selected by the operator, I find this claim to be somewhat inconsistent. In any event, under the circumstances of this case, I find that the operator had actual knowledge that the roof here cited was indeed in such a condition that it warranted the use of the special roof control measures called for in its own slope plan. In this regard, Respondents have conceded that they indeed had advanced into the old mine at least 12 to 15 feet and that they had continued to "muck out" loose coal and rock from that area even though the left rib showed signs of caving. Indeed, Cowin's general superintendent, Edward Stamper, essentially admitted that the roof conditions he found when he arrived at the face were in fact so dangerous that he ordered the miners to stop work and withdraw from the area. Stamper later admitted that the rock conditions were so bad in this area that even a 10-gauge Armco tunnel liner plate was insufficient for roof control. Under these circumstances, I am convinced that management knew that roof bolting was not providing adequate roof support. Where there is actual knowledge that a cited practice is hazardous and a violation of the cited standard, the problem of fair notice does not exist. Cape and Vineyard Division of New Bedford Gas & Light Co. v. OSHRC, 512 F.2d 1148 at 1152 (1st Cir. 1975).

Under the circumstances, Respondents' motions for summary decision and dismissal are denied as to the alleged violation of its slope plan concerning roof control.

The Alleged Roof Control Violation

For the reasons that follow, I conclude that the requirements in the slope plan for roof control where the slope construction entered the abandoned mine workings, were indeed violated. In this regard, I accept the credible testimony of MSHA inspector Birkie Allen which, in many essential respects, is undisputed. Allen testified that on June 5, 1980, he was asked to inspect the slope construction project. Arriving at the working face, he saw conditions which led him to immediately issue an imminent danger order. Slope construction had progressed about 20 feet into the abandoned mine and the face was actually in a caved area. The roof was badly broken at the face and the adjacent ribs were loose and overhanging. There was a particularly dangerous area of about 15 feet in which the only roof support was from resin-grouted rods. The ribs were so "soft" in this area that the "mucker" operator was removing the coal without the necessity of blasting. When Allen arrived, men were continuing to work beneath the dangerous roof installing

roof bolts and "mucking" in the area. Allen suspected that the abandoned mine had been entered on the previous 4 to 12 shift because of the amount of work that had progressed into the intersection. The "mucker" operator corroborated those suspicions and conceded that they had indeed intersected the mine on the previous evening shift. According to Allen, the rib and roof conditions presented an extreme hazard to the six men working in the area because of the complete lack of support from the ribs. He pointed out that while the roof bolting provided a solid beam for the roof, without accompanying vertical support from solid ribs, the roof would only fall as a larger slab. Allen testified that Edward Stamper, Cowin's general superintendent, agreed at the time that an imminent danger indeed existed.

It was Allen's opinion that the operator was chargeable with gross negligence because the men continued to work in this obviously dangerous area without proper roof support. He pointed out that a proper preshift examination which was required to have been made 90 minutes before the beginning of the shift, should have alerted the operator to those conditions. A steel plate liner was subsequently erected in the cited area and the citation and order were abated on June 18, 1980.

Cowin's general superintendent, Edward Stamper, corroborated Allen's testimony in essential respects. He admitted that the slope had in fact entered the old mine workings early in the morning of the 5th during the "owl" shift and that work continued 12 to 15 feet into the intersection by the time he arrived. When he arrived at the face, he found the conditions so bad that he ordered the men to stop work and withdraw from the area. He based this decision on the fact that the left rib showed signs of caving on the top left side. He admitted that no one should have been working in the old works, yet the "mucker" operator, as well as others, had been indeed working in this area. Significantly, Stamper also conceded that the rock conditions were so bad in the intersection that even a 10-gauge Armco tunnel liner was not sufficient for roof support.

Under these circumstances, I have no difficulty in concluding that the provisions of the slope plan, requiring more than roof bolting where roof conditions dictate, were violated. Since this condition constitutes a violation of the mandatory standard, the citation is accordingly affirmed. It also follows that since the operator did fail to comply with the cited mandatory standard, the withdrawal order was also issued at least in part for that noncompliance. Under the circumstances, all of the miners who were idled as a result of that order must be fully compensated by the operator for their lost time at their regular rate of pay for the lesser of 1 week or their actual lost time. Since the miners here were actually idled by the order from June 5 to June 18 they are entitled to pay for the time idled for 1 week or 7 calendar days.

Amount of Compensation

The purpose of section 111 is to provide limited compensation solely for regular pay lost because of the issuance of an order designated in that

section. UMWA v. Eastern Associated Coal Corporation, 3 FMSHRC 1175 (1981). The miners are entitled to compensation only if they are actually "idled by" such an order. It is not a source of independent pay or damages. UMWA, supra at p. 1176. Accordingly, miners continuing to perform work for the cited operator have not been "idled" by the withdrawal order and are not entitled to additional or duplicate compensation for such work that occurs during the authorized 1-week period. See UMWA v. Youngstown Mines Corporation, 1 FMSHRC 990 (1979). Similarly, the miners are not entitled to compensation for being "idled" on a Saturday and/or Sunday falling within that 1 week, 7-day, calendar period if indeed they did not customarily work on Saturdays and/or Sundays and there is no evidence to suggest that they would have worked on either or both of those days but for the issuance of the withdrawal order.

Respondents contend that the amount of compensation paid should also be offset by any unemployment compensation received by the idled miners. In N.L.R.B. v. Gullet Gin Company, Inc., 340 U.S. 361, 364 (1951), the Supreme Court upheld the N.L.R.B. decision refusing to deduct unemployment compensation benefits from an award of back pay. The Court concluded that since no consideration had been given, nor should have been given, to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received. The Court followed an earlier decision in which it held that state unemployment compensation benefits were not "earnings" to be deducted from back pay. See N.L.R.B. v. Marshall Field & Company, 318 U.S. 253, 255 (1943). Several Commission judges have followed this rationale in denying an unemployment compensation benefit offset from back pay awards under section 110(a) of the Federal Coal Mine Health and Safety Act of 1969 and section 105(c) of the 1977 Act, respectively. Wilson and Rummel v. Laurel Shaft Construction Company, Inc., 2 FMSHRC 2623 (1980), Bradley v. Belva Coal Company, 3 FMSHRC 921 (1981), and Neal v. W. B. Coal Company, 3 FMSHRC 443 (1981). The same rationale applies as well to compensation awards under section 111 of the Act. Accordingly, I conclude that unemployment compensation benefits are not "earnings" to be deducted from an award of compensatory back pay under section 111 of the Act.

The UMWA claims that the miners are entitled to 12-percent interest on the compensation owed. I find, however, that in accordance with the Commission decision in Peabody Coal Company v. Secretary et al., 1 FMSHRC 1785 (1979), they are entitled to interest at the rate of 6 percent per annum from the date the lost wages would ordinarily have been paid to the date the compensation is actually paid.

Attorney's Fees

The UMWA also requests an award of attorney's fees incurred in obtaining compensation in this case. There is no authority for the award of attorney's fees in compensation cases under section 111 of the Act. The general rule is that the right to recover such costs does not exist except by virtue of statutory authority. Aleyeska Pipeline Service Company v. The Wilderness

Society et al., 421 U.S. 420 (1975). The exception to that general rule for a prevailing plaintiff who acts as a "private attorney general" vindicating important statutory rights of all citizens, is inapplicable to the case at bar. Accordingly, the request herein for attorney's fees must be denied. Accord, Local Union No. 5899, UMWA v. Tansy Beth Mining Company, 2 FMSHRC 466 (1981).

Penalty

In determining the amount of a civil penalty assessment, section 110(i) requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) the effect on the operator's ability to continue in business, (4) whether the operator was negligent, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

The Royal Coal Company is small in size but appears to have a rather significant history of violations. There were 207 paid violations attributed to Royal over the 2-year period prior to the issuance of the citation at bar. I find that Royal was negligent in failing to maintain proper control of the slope construction even though the immediate control of the work was under the direction of Cowin, an independent contractor. It was Royal that submitted the slope construction plan for MSHA's approval and the evidence shows that Cowin officials maintained close contact with Royal's engineering staff, particularly with respect to the area of intersection with the abandoned mine. I also find that the hazard presented by the inadequately supported roof and ribs was serious and indeed presented an imminent danger of serious injuries and death to the several miners working in that area. There is no disagreement that abatement was appropriately made and that the imposition of any penalty would not affect the operator's ability to continue in business. Within this framework, and considering that I am also finding Royal liable for significant compensation in the associated case, I find that a penalty of $500 is appropriate.

ORDER

Docket No. WEVA 80-664-C

Respondents are hereby ORDERED to pay to the miners designated below, within 30 days of the date of this decision, the designated amounts 6/ plus interest at the rate of 6 percent per annum from the date the wages would ordinarily have been paid to the date they are actually paid:

6/ These amounts were derived from UMWA Exhibit No. 1, the accuracy of which was stipulated at hearing. I observe that June 7, 1980, was a Saturday and June 8, a Sunday. It was also proffered at hearing, without disagreement, that the miners had worked 1 day during this 7-day period, presumably June 9 on the day and evening shifts and June 10 on the "owl" shift.

DAY SHIFT

Employee	Hourly Rate	6/5	6/6	6/10	6/11	6/12	Total
Powell Lane	$10.73	$42.92	$85.84	$0.00	$85.84	$42.92	$257.52
Delbert Harper	10.17	40.68	81.36	30.51	81.36	40.68	274.59
Ralph Blevins	10.17	40.68	81.36	30.51	81.36	40.68	274.59
Jackie Lane	10.17	40.68	81.36	30.51	81.36	40.68	274.59
Nick Wuchevich, Jr.	10.73	37.56	85.84	26.83	85.84	42.92	236.07

EVENING SHIFT

Terry Gilkerson	$10.71	$85.68	$85.68	$85.68	$85.68		$342.72
George Kessler	10.71	85.68	85.68	85.68	85.68		342.72
Carlos Bailey	10.37	82.96	82.96	82.96	82.96		331.84
Robert Hodge	10.37	82.96	82.96	82.96	82.96		331.84
Charles Ellis	10.37	82.96	82.96	82.96	82.96		331.84
James Butterworth	10.37	82.96	82.96	82.96	82.96		331.84
Johnny Daniels	10.37	82.96	82.96	82.96	82.96		331.84

"OWL" SHIFT

		6/6	6/9	6/11	6/12		
James Cabe	$10.81	$86.48	$86.48	$86.48	$86.48		$345.92
Harry Miller	10.81	86.48	86.48	86.48	86.48		345.92
Jackie Miller	10.47	83.76	83.76	83.76	83.76		335.04
Okey Tolliver	10.47	83.76	83.76	83.76	83.76		335.04
Don McMillion	10.47	83.76	83.76	83.76	83.76		335.04
Ken Pishner	10.47	83.76	83.76	83.76	83.76		335.04
						Total	$5,704.00

Docket No. WEVA 81-34

Royal Coal Company is hereby ORDERED to pay a civil penalty of $500 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 8 1981

GERALD D. BOONE,	:	Complaint of Discharge,
Complainant	:	Discrimination, or Interference
v.	:	
	:	Docket No. WEVA 80-532-D
REBEL COAL COMPANY,	:	
Respondent	:	Rebel Coal No. 2 Mine

DECISION

Appearances: Daniel F. Hedges, Esq., Appalachian Research and Defense Fund, Inc., Charleston, West Virginia, for Complainant; Frederick W. Adkins, Esq., Cline, McAfee and Adkins, Norton, Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the complaint filed by Gerald D. Boone under the provisions of section 105(c)(3) of the Federal Mine Health and Safety Act of 1977, 30 U.S.C. § 801 et seq., the "Act" alleging that Mr. Boone was discharged by the Rebel Coal Company (Rebel) in violation of section 105(c)(1) of the Act. 1/ More specifically, Mr. Boone alleges that he was unlawfully discharged because he refused to comply with an order to drive a haulage truck he claimed was in a hazardous condition. An evidentiary hearing was held on Boone's complaint in Abingdon, Virginia, commencing April 28, 1981.

Section 105(c)(1) of the Act provides in part as follows:

> No person shall discharge * * * or cause to be discharged * * * any miner * * * in any coal * * * mine subject to this Act * * * because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this Act.

1/ While the complaint herein alleges that it was filed pursuant to section 105(c)(2) of the Act, it was obviously intended to have been filed under the provisions of section 105(c)(3) of the Act in light of the fact that the Mine Safety and Health Administration (MSHA) had previously made a determination that no violation of section 105(c) had occurred. I find this oversight to be inconsequential.

Mr. Boone can establish a prima facie violation of this section of the Act if he proves by a preponderance of the evidence that he has engaged in a protected activity and that his discharge was motivated in any part by that protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980). The refusal of a miner to perform work where he has a good faith, reasonable belief that such work is hazardous is a protected activity within the purview of this section. Pasula, supra; Secretary ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Since there is no dispute in this case that Boone was discharged for refusing to drive the haulage truck, the principal question to be decided is whether that refusal was a protected activity under section 105(c)(1). In resolving that question, it will also be necessary to determine whether, at the time he refused to drive that truck, he entertained a good faith reasonable belief that it would have been hazardous to perform such work. Robinette, supra.

According to Boone, he had been working as a truck driver at the Rebel Coal No. 2 Strip Mine for about a year before his discharge. On May 28, 1980, he reported for work shortly before his 3 p.m. shift. During a routine pre-shift inspection of his assigned vehicle, the No. 5 Caterpillar haulage truck, he found that the seat shock absorber and tension springs were broken and that he was unable to adjust the seat tension. He complained about this to the second shift superintendent John Lockhart, but Lockhart told him to drive the truck anyway. Boone then did in fact drive one load about a quarter mile up a hill and return. On that part of the trip that was on a poorly maintained secondary road, Boone hit his head on the cab roof and hit his legs on the steering wheel as he bounced in the seat. When he returned, he again complained to Lockhart warning him that because of the defect he could not keep the truck under control. Lockhart again instructed Boone to drive it but agreed to have a mechanic also look at it. Later, around 3:30 p.m., mechanic Leo Browning inspected the seat. Fifteen minutes later, Browning called to the repair shop for a replacement shock. There was none in the shop so the original shock was rewelded in place. Boone later tested the seat but still refused to drive the truck claiming that the seat had not been fixed. He alleges that he then requested Lockhart to ask the mine safety committeeman, Ron Chambers, to also check the seat.

Boone related the hazards he perceived in driving the truck with the seat in the condition described. The driver could lose control if his head hit the cab roof and could drive off the road. It is undisputed that there was no berm on one side of a steep section of that road where a 20-foot drop-off existed. On the other side of the road, the berm was only 2 or 3 feet high and the wheels of the truck were about 5 feet in diameter.

Mine Safety and Health Administration (MSHA) inspector Jefferson Adkins examined the subject truck on June 2, 1980, after receiving a section 103(g)(1) complaint. 2/ Adkins concluded that the seat shock absorber on

2/ Under section 103(g)(1) of the Act, MSHA is required to make an inspection pursuant to a complaint filed by a miner's representative.

the truck was indeed defective and that no adjustment could be made in the seat tension. He watched as truck driver Loss Godfrey drove the vehicle in a test. Godfrey bounced in the seat about a foot and had to drive with his legs spread apart. Godfrey showed Adkins the bruises on his upper thigh which he claimed had been caused by his legs being jammed into the steering wheel. Concluding that a dangerous condition existed which could result in the loss of vehicle control, Adkins "red tagged" the truck and issued an order withdrawing it from service until repairs could be made. The condition was abated after the shock was replaced and on June 4, the withdrawal order was removed.

By agreement of the parties, a transcript of the testimony of Loss Godfrey taken from proceedings before the West Virginia Coal Mine Safety Board of Appeals was admitted into evidence in lieu of Mr. Godfrey's appearance. Godfrey there testified that on Tuesday the 27th (presumably of May 1980), he was driving the subject truck on the 7 to 3 day shift. According to Godfrey, the seat kept bouncing him, forcing his legs against the steering wheel. Eventually, he raised his left leg onto the dashboard for relief. On the following Wednesday or Thursday, the seat was even worse. It was not working at all. He complained to his supervisor, Burt Wilson, that his back was hurting from the defective seat and that he was unable to drive with the steering wheel hitting his legs. Godfrey nevertheless continued to drive it. The following Friday morning, Godfrey heard that Boone had been fired for refusing to drive the truck. He claimed that upon hearing this he decided he would not refuse to drive for fear that he would be fired too. He testified that his bruised legs continued to hit the wheel and his head continued to hit the cab roof. There was only a 4- to 5-inch clearance from the top of his head to the cab ceiling and the seat was bouncing him about a foot. The truck had still not been repaired by the following Monday and Godfrey too finally refused to drive it.

John Lockhart, assistant mine superintendent, testified that on May 28 Boone did indeed complain about the seat. He assigned Boone to other work while a mechanic checked the seat. The shock absorber bracket was rewelded. He conceded that Boone thereafter checked the seat by bouncing in it and refused to test drive the truck claiming that the seat had not been improved. Lockhart had Terry Phillips, the equipment superintendent, and Leo Browning, a mechanic, also check the seat. According to Lockhart, neither complained of any problems, although no one actually drove the truck. After consulting with Mine Superintendent McGaffey, Lockhart presented Boone with an ultimatum to drive the truck or be fired. Boone continued his refusal and Lockhart fired him.

Equipment superintendent Terry Phillips testified that he checked the seat after Browning had welded the bracket. The seat was "way out of adjustment," and although it had no "bounce," it was "okay" to Phillips. He also testified that he had overheard Browning call on the radio to the supply shop for a new shock absorber but was uncertain when this call was made.

Mine superintendent Terry McGaffey testified that he also checked the seat after the bracket had been rewelded. He found it to be in an acceptable

condition. He also asked Boone to test drive the truck but Boone refused. He ordered Boone dismissed for that refusal.

Within the framework of this evidence, I find that Mr. Boone has indeed established by a preponderance of the evidence that he engaged in a protected activity by refusing to drive the No. 5 Caterpillar haulage truck. In this regard, I accept Boone's credible and amply corroborated testimony regarding the nature of the hazard as it existed on May 28. I find that indeed there was then a defect in the shock absorber causing the seat to bounce the driver excessively. Under the circumstances, I find that the driver could strike his head on the cab roof or his feet could leave the control pedals and he could thereby lose control of the vehicle. If he should lose control, there was a clear and present danger of the vehicle driving off the roadway and overturning thereby resulting in fatal injuries. Boone's testimony in this regard is amply corroborated by the testimony of Loss Godfrey and of the two MSHA inspectors. While the MSHA inspection occurred 5 days after Boone's initial complaint and discharge on May 28, it is conceded that no alterations had been made to the seat during the interim. Both inspectors saw Loss Godfrey bouncing excessively in the seat as he drove the truck and considered the condition hazardous. Inspector Adkins accordingly "red tagged" the truck and ordered it removed from service until repairs could be made. Indeed, Boone's testimony is even corroborated by the operator's own witnesses. Equipment Superintendent Phillips admitted that the mechanic had requested a new shock absorber to replace the one Boone complained of. It is also undisputed that since a replacement was not available, the bracket had been rewelded. Finally, Phillips admitted that even after that rewelding, the seat was not normal. With Boone's testimony, credible in itself, so thoroughly corroborated, I can accord but little weight to the self-serving unsupported conclusions of Lockhart and McGaffey that they saw nothing wrong with the seat and that it posed no safety hazard whatsoever.

Rebel argues, alternatively, that even if, as a matter of fact, there was a hazard, Boone did not articulate to them the precise nature of any particular hazard and that such an articulation is a prerequisite under section 105(c)(1). I find no such requirement, however, in the language of the Act. In any event, I note that while Boone may not have articulated to mine management all of the safety hazards described at hearing, it is clear that he described the deficiency in the seat with sufficient clarity so that management was placed on notice of the potential safety hazards. Indeed, Mine Superintendent Lockhart conceded that Boone told him that he was bouncing in the seat to such an extent that his head was striking the cab ceiling. That he failed to recognize, or refused to recognize, the obvious safety hazard under the circumstances is immaterial.

Rebel also argues that Boone failed to request the mine safety committeeman to examine the alleged defect in accordance with the collective bargaining agreement and that that failure is fatal to his complaint. The parties disagree as to whether Boone actually did make such a request. In any event, the Commission has made it clear in the Pasula decision, that such provisions in

the collective bargaining agreement have no binding effect in a complaint under section 105(c)(1) of the Act. Thus, even assuming, arguendo, that Boone did not request the safety chairman to look at the alleged hazardous condition, that does not, in itself, bar relief under section 105(c)(1). This contention does, however, raise a question as to whether Boone then entertained a good faith reasonable belief of the hazardous nature of the condition. In addition to Boone's own credible testimony, the reasonableness of his belief is supported by the evidence that after his initial complaint about the seat condition, the operator's mechanic, Leo Browning, had requested a new shock absorber and, after finding that none was available, had merely rewelded the old shock bracket. This evidence is further buttressed by the testimony of truck driver Godfrey and of the MSHA inspectors who found the seat condition so hazardous that they ordered the truck withdrawn from service.

Rebel also suggests that Boone may have been acting vindictively and in bad faith because he had earlier that morning received a warning about a previous unexcused absence. Both parties admit, however, that although Boone could have then been properly discharged because of his unexcused absences, he was not. Under these circumstances, I find it more reasonable to conclude that Boone would, if anything, have been grateful to the operator for having retained him and not vindictive for having merely been warned about his unexcused absence. Within this framework, I conclude that Boone did indeed entertain a good faith reasonable belief of the hazardous nature of the condition. Robinette, supra. I find it therefore unnecessary to determine whether or not he actually requested that the safety chairman examine that condition.

Rebel next contends that the decision of the West Virginia Coal Mine Safety Board of Appeals denying Boone's discrimination complaint filed under West Virginia law and the decision of an arbitrator denying Boone's grievance under the collective bargaining agreement should be given great, if not controlling, weight herein. Under Pasula, the weight to be given arbitral findings is to be controlled by several factors including the congruence of the statutory or contractual provisions governing those proceedings and the provisions of the Federal law, the degree of procedural fairness in the other forums, the adequacy of the record of those proceedings, and the special competence of the particular decision maker. I find these criteria to be also relevant in determining the weight to be accorded the decision of the West Virginia Coal Mine Safety Board of Appeals' decision. Bradley v. Belva Coal Company, 3 FMSHRC 921, petition for review granted May 1981. Applying these criteria to the Board decision, I find that I cannot give it any weight. I have before me only the final summary decision of the Board itself. The reasoning of the Board in support of its decision and the transcript of those proceedings have not been made available. Moreover, Rebel has failed to cite even the statutory authority or criteria under which that decision was made. 3/ Finally, even assuming that

3/ Presumably, the State proceedings were brought under section 22-1-21 of the West Virginia Code. The provisions of that section, set forth below in

the Pasula criteria had been met, since the Board decision has not yet become final but is currently under appellate review, I could not in any event fairly give any weight to that decision.

For similar reasons, I can give no weight to the arbitrator's decision. It is clear that his decision hinged upon a finding that Boone had failed to follow procedures outlined in the collective bargaining agreement to first contact the safety committeeman before refusing to perform the claimed hazardous work. There is no such requirement in the Act and proceedings under the Act are not controlled by any collective bargaining agreement. Pasula, supra. Thus, while the arbitrator's decision may very well have been correct under that agreement, it is of no import to the case before me. The arbitrator's decision in Pasula was rejected by the Commission under essentially the same factual setting. See Pasula at p. 2796.

Under all the circumstances, I conclude that Boone was indeed engaging in an activity protected under section 105(c)(1) in refusing to operate the No. 5 Caterpillar truck on May 28, 1980. Since Boone was admittedly discharged solely for his refusal to operate the truck, it follows that his discharge was solely motivated by his protected activity. I therefore find that Boone was discharged in violation of section 105(c)(1) of the Act.

ORDER

The parties are directed to consult and seek to stipulate as to the specific damages resulting from the discharge of Gerald D. Boone found unlawful in these proceedings and to report to me in writing on or before July 30, 1981, the results of such consultations.

Gary Melick
Administrative Law Judge

fn. 3 (continued)
relevant part, are not congruent with those of section 105(c), particularly as the Federal law has been interpreted in Pasula. Since the criteria for finding unlawful discrimination under the State law is much more limited in scope, and the statute does not on its face cover the factual situation presented in this case, the decision of the State Board denying Boone's claim of discrimination under that law should be entitled to no weight in this case.

"(a) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that he believes or knows that such miner or representative (1) has notified the Director [of the West Virginia Department of Mines]; his authorized representative, or an operator, directly or indirectly, of any alleged violation or danger, (2) has filed, instituted or caused to be filed or instituted any proceeding under this law, or (3) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this law. No miner or representative shall be discharged or in any other way discriminated against or caused to be discriminated against because a miner or representative has done (1), (2) or (3) above."

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 10, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VINC 79-154-PM A.C. No. 20-00044-05001
v.	:	
CEMENT DIVISION, NATIONAL GYPSUM COMPANY, Respondent	:	Alpena Stone Quarry and Mill

DECISION ON REMAND

Appearances: William B. Moran, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Anthony J. Thompson, Esq., and Charles E. Sliter, Esq., Hamel, Park, McCabe and Saunders, Washington, D.C. for Respondent

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

On April 7, 1981, the Commission remanded this case for a determination as to which of the violations found to have occurred were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. The determination that the violations occurred and the amount of the penalties assessed are no longer issues in this proceeding.

Commission review was not sought concerning my findings on citations No. 288721 and 288722. Consequently, these are not before me on remand.

Following remand, both parties have filed briefs setting forth their positions on the issues of fact and law. [1/] Based on their arguments and on my review of the record, I make the following decision.

[1/] The United Mine Workers of America sought party status on May 6, 1981. I denied the motion to intervene. On review, my order was affirmed by the Commission. Leave to file an amicus brief was granted by the Commission, but Counsel for the UMWA stated she did not wish to file such a brief.

ISSUES

The issues with respect to each citation are whether the inspector found it to be significant and substantial, and whether the evidence supports his findings.

The Secretary concedes that citations No. 288294, 288295, 288298, and 288567 are not significant and substantial violations, under the Commission standard. Based on the inspector's testimony, I agree and so find.

COMMISSION STANDARD

The Commission laid down the following test to determine whether a violation is "significant and substantial": "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature." 3 FMSHRC at 825. The Commission criticized the "mechanical approach" followed by MSHA and stated that "the inspector's independent judgment" in making significant and substantial findings "should not be circumvented." Findings that a violation is significant and substantial are important in that they may result in withdrawal orders under section 104(d) because of an operator's unwarrantable failure to comply, or under section 104(e) if they are part of a pattern of violations.

The Commission's test has two aspects: the probability of resulting injury, and the seriousness of resulting injury. The Commission gave special weight to the judgment of the Inspector.

CITATION 288296

This citation charged that an electrical junction box was not covered by a plate, in violation of 30 CFR 56.12-32. The injury which might result is electrical shock to an employee coming in contact with the box. This is an injury of a reasonably serious nature. However, the box was located at the end of a walkway and, according to the inspector's statement, the occurrence of an injury was improbable because the only employees who would be in the area were maintenance and repair personnel who would de-energize the equipment before working on it. Therefore, I find there was not a reasonable likelihood that an injury would occur, and despite my previous finding that the violation was serious, I now conclude that it was not significant and substantial.

CITATION 288297

This citation was issued because of spillage of limestone up to 24 inches deep on an elevated walkway in violation of 30 CFR 56.11-1. Should an employee trip on the spillage, he could fall over a low railing to the ground, 30 or 40 feet below. This obviously would cause an injury of a reasonably serious nature. Though the walkway was infrequently used, it was a walkway and there was a reasonable likelihood that the hazard would result in injury to an employee using the walkway. The walkway was out of doors and the elements added to the likelihood of injury. The violation was significant and substantial.

CITATION 288826

This citation charges a violation of 30 CFR 56.12-34 in failing to provide a guard for a light bulb located over a table saw in the carpenter's shop. The likelihood of an injury was slight, and any injury occurring would not be reasonably serious. Therefore, the violation was not significant and substantial.

CITATION 288566

This citation was issued for an accumulation of debris on a walkway next to a conveyor belt in violation of 30 CFR 56.11-1. This violation is similar to the one described in Citation No. 288297. The difference is that the walkway here is about 10 feet off the ground. I find that there is a reasonable likelihood that the hazard (a fall) would result in injury of a reasonably serious nature. The violation was significant and substantial.

CITATION 288827

This citation was issued because valves on oxygen and acetelyne tanks were left open while the tanks were not in use in violation of 30 CFR 56.4-33. There were sources of ignition in the area which could result in an explosion and serious injury. Whether the evidence shows a reasonable likelihood of an explosion is more difficult. The inspector's statement indicates that the probability of an explosion was slight unless a hose began to leak or the tanks were upset. No leaks were found. On the other hand, the inspector testified that leaving the valves open when not in use was a dangerous practice, and that an accident was not unlikely. I conclude on the basis of the entire record that there was a reasonable likelihood that a serious injury would result from the violation. Therefore, the violation was significant and substantial.

ORDER

The parties did not challenge my penalty assessments in my decision of December 26, 1979. Therefore, if the penalties ordered paid in that decision have not been paid, they are ordered paid immediately.

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

Anthony J. Thompson, Esq. and Charles E. Sliter, Esq., Counsel for Cement Division, National Gypsum Company, Hamel, Park, McCabe & Saunders, 1776 F Street, N.W., Washington, DC 20006

William B. Moran, Trial Attorney, and Thomas A. Mascolino, Counsel, Trial Litigation, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 10 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. KENT 80-312
	:	A.C. No. 15-07082-03030
v.	:	
	:	Docket No. KENT 80-313
LESLIE COAL MINING COMPANY, Respondent	:	A.C. No. 15-07082-03032
	:	Leslie Mine

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
John M. Stephens, Esq., Stephens, Combs and Page, Pikeville, Kentucky, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 810 et seq., the "Act," alleging violations of health and safety regulations. The general issue is whether Respondent has violated the cited regulations and, if so, the appropriate civil penalties to be assessed. An evidentiary hearing was held in Prestonburg, Kentucky, on March 17, 1981. At that hearing, the parties filed a motion to settle all but one of the citations in these cases, which, with the exception of one citation, was approved. The latter citation was vacated and an evidentiary hearing was held as to the remaining citation. Evidence was submitted at hearing under section 110(i) of the Act regarding the criteria for determining the amount of penalty. This evidence was considered in reaching the penalty amounts approved herein.

Contested Citation: Docket No. KENT 80-313

Citation No. 724330, as amended at hearing, purports to charge a violation of the mandatory standard at 30 C.F.R. § 77.205(d). That standard provides as follows: "Regularly used travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable." More specifically, the

citation alleges as follows: "A safe means of access was not maintained where the employees are required to travel from the parking lot to the bathhouse in that ice from paper thick to approximately three inches in depth was present along the walkway." 1/

There is no dispute that when MSHA inspector Billy Tackett issued this citation on March 4, 1980, at 9:30 a.m., there was indeed some ice or "frozen moisture" as characterized by the operator, in the travelway leading from the mine parking lot to the bathhouse. It is not questioned that the miners regularly traveled this route. Tackett estimated that 99 percent of the parking lot itself was also covered with this substance. This too is not disputed by the operator. Tackett admitted, however, that he never determined how long these conditions had existed nor when the area had last been cleaned up. Tackett could not even state when it had last snowed and could only guess how long the ice had been there. He estimated that the ice could have been removed in 3 or 4 hours and he actually gave the operator 4 and 1/2 hours to complete the removal.

According to the stipulated testimony of mine official Bill Wooten, it had snowed the day before the citation was issued and that snow had been cleared off the parking lot by a front-end loader. Admittedly, however, a residue of frozen moisture remained at the time the citation was issued.

Within this framework of evidence, it is apparent that indeed there was "frozen moisture" (ice) on the employee parking lot and travelway to the employee bathhouse. The issue to be resolved then is whether that substance had been cleared "as soon as practicable." In order to make a determination of whether the operator failed to clear the ice here at issue within that time frame necessarily requires knowledge of when that ice first existed. No unambiguous evidence has been presented to establish that fact and therefore MSHA has not established an essential element of proof that the standard at 30 C.F.R. § 77.205(d) has been violated. Accordingly, the citation is vacated.

Motion for Approval of Settlement

A. Docket No. KENT 80-312

Proposals for penalties were first submitted in this case for five citations. At hearing, it was represented by MSHA that Citation No. 9927173 had been erroneously included in its petition inasmuch as that citation had been

1/ I observe that the citation, as amended, failed to allege that the cited travelway was not sanded, salted, or cleared of snow and ice "as soon as practicable"--an essential allegation to establishing a violation of section 77.205(d). The operator did not claim that it was prejudiced in this regard, however, and such a technical defect under the circumstances is not sufficient to warrant dismissal. Secretary v. Ralph Foster and Sons, 3 FMSHRC (May 12, 1981).

previously vacated. Accordingly, the citation is withdrawn from the case and dismissed.

Citation Nos. 9927138 and 9927211 allege violations of the standard at 30 C.F.R. § 70.250. That standard sets forth the time periods within which respirable dust samples must be taken from individual miners. Inasmuch as these citations alleged only that the respirable dust samples had not been received by the MSHA office, it is apparent that they did not properly charge a violation of the standard cited. MSHA conceded, moreover, that its evidence would not support the violations alleged. Accordingly, counsel for MSHA moved to vacate the citations. Under the circumstances, I approve the motion and vacate those citations.

Citation No. 713638 alleges a violation of the standard at 30 C.F.R. § 75.400. That standard provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein." While MSHA moved for approval of a 50-percent reduction in the initially proposed penalty of $130, it conceded that it had no evidence to support a finding that the cited materials were indeed "combustible." Those allegedly "combustible" materials consisted of soda pop cans, empty hydraulic fluid cans, and apparently some sandwich wrappers the exact nature and quantity of which no one could recall. Under the circumstances, I find insufficient evidence that "combustible materials" were "permitted to accumulate" in active workings of the mine. Within the framework of the Commission decision in Secretary v. Co-Op Mining Company, 2 FMSHRC 3475 (1980), I cannot accept the proposed settlement. Since MSHA conceded that it could not produce this critical evidence even at hearing, I vacate the citation.

Citation No. 717362 alleges a violation of the standard at 30 C.F.R. § 70.100(b). The parties propose a settlement for $60 as initially assessed. It is undisputed that the respirable dust concentration was in fact greater than allowed by the cited standard in effect at the time the citation was issued. The sampling revealed a concentration of 2.1 milligrams of respirable dust per cubic meter of air, whereas the standard then required that exposure be limited to 2.0 milligrams of respirable dust per cubic meter of air. The operator had no history of this type of violation and had no means of obtaining and testing dust samples on its own. Under the circumstances, I find that the proposed settlement is appropriate.

B. Docket No. KENT 80-313

Citation No. 724334 alleges a violation of the standard at 30 C.F.R. § 75.1003(c). That standard requires that trolley wires and trolley feeder wires be guarded adequately at mantrip stations. The parties propose a reduction in penalty from $98 to $49 because the hazard was in actuality not as serious as first thought. The subject trolley wire was on the far side of the mantrip against the rib in an area in which miners would not ordinarily

be exposed. In addition, it was subsequently determined that the plastic insulation that ordinarily guarded the trolley wire had shrunk because of the unusually cold weather at the time, thereby causing the cited exposure. Since the wire was only from 5 and 1/2 to 6 feet above floor level and could have caused death by electrocution upon contact, there was indeed a potential serious hazard. Under the circumstances, I find that the proposed settlement is appropriate.

ORDER

Docket No. KENT 80-312

Citation Nos. 9927173, 9927138, 9927211, and 713638 are VACATED. The Leslie Coal Mining Company is ORDERED to pay a penalty of $60 within 30 days of the date of this decision for the violation under Citation No. 717362.

Docket No. KENT 80-313

Citation No. 724330 is VACATED. The Leslie Coal Mining Company is ORDERED to pay a penalty of $49 within 30 days of the date of this decision for the violation under Citation No. 724334.

Gary Melick
Administrative Law Judge

Distribution:

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John M. Stephens, Esq., Stephens, Combs and Page, P.O. Drawer 31, Pikeville, KY 41501 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 13 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. KENT 80-330
	:	Assessment Control No. 15-10872-03011
v.	:	
	:	No. 8 Mine
SOUTH EAST COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; James W. Craft, Esq., Polly, Craft, Asher & Smallwood, Whitesburg, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 12, 1981, a hearing in the above-entitled proceeding was held on May 7, 1981, in Prestonsburg, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 98-105):

> This hearing involves a Proposal for Assessment of Civil Penalty filed on September 8, 1980, in Docket No. KENT 80-330 by the Secretary of Labor seeking to have a civil penalty assessed for an alleged violation of 30 C.F.R. § 75.1701 by South East Coal Company.
>
> In a civil penalty proceeding, the issues are whether a violation of a mandatory health or safety standard occurred and, if so, what penalty should be assessed, based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.
>
> I shall make some findings of fact on which my decision will be based.
>
> 1. On June 19, 1980, Inspector Cecil Davis went to the No. 8 Mine of South East Coal Company and made an inspection of the mine, during which he wrote Citation No. 720883, alleging a violation of section 75.1701. His citation stated that "two places have been advanced to within about 60 feet of an abandoned inaccessible area of an adjacent mine in the 001-0 underground working section and test boreholes were not being drilled."
>
> Citation No. 720883 was terminated by a subsequent action sheet issued on June 20, 1980, which stated that test boreholes were being drilled in advance of the working section on the 001 section to insure that the continuous-mining machine did not cut into abandoned areas unexpectedly. That termination sheet was written by a different inspector from the one who wrote the citation.

2. At the hearing, Exhibit A was introduced. It is a map of the No. 8 Mine as well as a map that shows the Smith-Elkhorn Mine which was adjacent to the No. 8 Mine. The testimony of the inspector showed that several months prior to June 19, when Citation No. 720883 was written, the No. 8 Mine had cut into the Smith-Elkhorn Mine in what is referred to in this case as the first right section, and also in the second right section.

3. The testimony of Mr. Holbrook, who was the foreman on the night shift in the No. 8 Mine, indicated that boreholes had been drilled before the company penetrated the Smith-Elkhorn Mine which is adjacent to the No. 8 Mine. At the time those boreholes were drilled, some water was encountered 18 inches from the roof, and a pump was installed and the water was pumped out of the Smith-Elkhorn Mine through the boreholes, and the water then was pumped farther to the outside of the mine. After the water was cleared out, and other tests were made to make sure that it was safe to do so, the company mined into the Smith-Elkhorn, the adjacent mine, and through those holes did inspections. Those holes, as I recall, were 10 feet by 5 feet in size. Respondent thereafter treated the Smith-Elkhorn Mine as a part of its No. 8 Mine, and began to ventilate it, and Mr. Holbrook made trips clear around behind and to the side of the first right and second right sections where the original places had been cut through into the Smith-Elkhorn Mine.

Mr. Holbrook testified that he went to the place toward which they began to cut a room and inspected the adjacent mine, which had been made a part of the No. 8 Mine, at least twice a week, for hazardous conditions, and he states that no hazardous conditions existed, either in the form of methane or lack of oxygen or water.

4. The situation which prevailed on June 19, 1980, when Inspector Davis wrote Citation No. 720883 was that respondent's men were advancing two rooms to the left of the second right section, and it was the opinion of respondent's management at that time that they were advancing toward a part of their own mine which, under section 75.1701 would be considered "abandoned areas" in the mine, meaning the No. 8 Mine. Therefore, it was their contention that they were entitled to advance to within 50 feet of the abandoned portion under the first part of section 75.1701 before they had to drill test boreholes.

5. The inspector, in his testimony, stated that he believed the company had violated section 75.1701 because they were "within 200 feet of any other abandoned areas of the mine which cannot be inspected and which may contain dangerous accumulations of water or gas." That is a portion of section 75.1701. When it was pointed out to the inspector that the testimony indicated that the room which had been advanced was not an "other abandoned area", but was really in the No. 8 Mine, the inspector said that if respondent had not violated that provision, then he would say that respondent had violated the next provision in section 75.1701 which is, "or within 200 feet of any workings of an adjacent mine."

I believe that those are the basic facts which the testimony and the exhibits show. The problem then becomes whether the facts support a finding that a violation of section 75.1701 existed. That section reads as follows:

> "Whenever any working place approaches within 50 feet of abandoned areas in the mine as shown by surveys made and certified by a registered engineer or surveyor, or within 200 feet of any other abandoned areas of the mine which cannot be inspected and which may contain dangerous accumulations of water or gas, or within 200 feet of any workings of an adjacent mine, a borehole or boreholes shall be drilled to a distance of at least 20 feet in advance of the working face of such working place and shall be continually maintained to a distance of at least 10 feet in advance of the advancing working face."

There are other provisions in that section but they have to do with the manner in which boreholes will be made, and not with whether there is a necessity that they be drilled.

It so happens that the testimony shows that the inspector who wrote Citation No. 720883 relied on a certified map to determine that the company was cutting to within 60 feet of "an abandoned inaccessible area", as he referred to it in his citation, so that the first part of the section has been satisfied in that the company was relying on certified maps and the inspector was relying on certified maps for the purpose of determining how close they were to an abandoned area in the mine. The testimony in this case shows that if a company does cut into an abandoned mine, which it did in this case, and makes that abandoned mine a part of its own mine by commencing a ventilation system in the abandoned mine and also by making inspections in the adjacent mine, then it is considered to be the company's mine that is then being actively worked. Therefore, it would seem that respondent was correct in arguing that at the time the inspector wrote Citation No. 720883, the company was entitled to cut to within 50 feet of the abandoned area before it had to drill boreholes.

The inspector's belief that the company had violated the second portion of section 75.1701 was based on language in his citation to the effect that the company was within "60 feet of an abandoned inaccessible area of an adjacent mine". The testimony in this case shows that the company was not within 60 feet of "an abandoned inaccessible area of an adjacent mine". The inspector showed, by his more precise evaluation of Exhibit A in this case, which was made after there had been further mining and which was not available to him at the time he wrote the citation, that the place to which they had progressed at the time he wrote the citation was actually 100 feet from the mine which he referred to as abandoned and inaccessible.

The inspector, of course, was without the testimony of Mr. Holbrook in this case because Mr. Holbrook testified in this case that the area toward which they were mining was not abandoned and inaccessible in the sense that those terms are used in section 75.1701 because that area was being ventilated and was being inspected by Mr. Holbrook at least twice a week. So, it was not inaccessible, and it is not abandoned in the sense that that term is used in section 75.1701.

The other provision of section 75.1701 which is at issue here would be whether respondent had progressed to within 200 feet of any workings of an adjacent mine, and the facts in this case show that that portion of the section doesn't apply either because this was not, on June 19, 1980, an adjacent mine, because it had already been incorporated as part of the No. 8 Mine at that time, insofar as respondent was concerned.

Therefore, I find on the facts in this case that no violation of section 75.1701 was proven.

Now, I am aware that the Commission has said in many cases that the regulations are to be interpreted in the manner which will be the most likely to prevent accidents and injuries and the Commission has very recently so ruled in Secretary of Labor v. Ideal Industries, Cement Division. 3 FMSHRC 843 (1981). In that case, the Commission interpreted a section so as to require a company to correct equipment before it is even put in an area where it might be used, if it's defective in any way, even if the equipment has not been used at the time that it is examined by an inspector. The Commission said in that case that the primary goal of the Act is to prevent accidents; that an interpretation should be given to any regulations which would bring about safety and advance safety in the mines.

The interpretation that I place on this section is not as strict an interpretation as the inspector gave it, but I believe that the facts in this case support my finding because the inspector did not have in his possession the facts which have been introduced in this case. When the inspector wrote Citation 720883, he did think that the company was progressing toward an abandoned inaccessible area when, in fact, that was not the case. The area toward which the company was advancing had been inspected, and was known not to have any hazardous conditions in it, and the company was relying on certified maps and the foreman who testified here today said that he had made the determination that he was not within 50 feet of the abandoned area, if it can be called that, and therefore, that he did not feel that he had to drill boreholes. The testimony in this case shows that he was, in fact, not within 50 feet of the other area, and therefore there simply are not facts in this case to support a requirement that boreholes should have been drilled under the second two provisions of section 75.1701.

After I received the transcript in this proceeding, I was reminded that counsel for the Secretary had taken the position at the hearing that he did not wish to file a posthearing brief and that he would "just stand on the testimony that has been provided to the judge" (Tr. 95). If the Secretary should decide to file a petition for discretionary review, section 113(d)(2)(A)(iii) of the Act provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." The Secretary's position before me was so broad that he could argue anything before the Commission and contend that I had had an opportunity to pass upon it. My bench decision did not discuss the unusual circumstances under which Citation No. 720883 was issued. If a petition for discretionary review should be filed, the Commission may well wish that I had explained my decision in light of some of the arguments which could be raised before the Commission.

The circumstances leading up to the writing of Citation No. 720883 began with an incident which occurred on or about June 18, 1980, when the men working on the 001 Section of respondent's No. 8 Mine on the night shift (4 p.m.-to-midnight) refused to work unless boreholes were drilled in advance of the place where they were working (Tr. 80; 87). The section foreman, Mr. Charles Holbrook, who testified for respondent in this proceeding, refused to drill boreholes because he had concluded from an examination of certified maps that he had not advanced to within 50 feet of an abandoned area (Tr. 86). He had also personally inspected the abandoned area toward which they were advancing and knew that it did not contain any dangerous accumulations of gas or water or air devoid of oxygen (Tr. 74-76; 85). Nevertheless, someone reported the matter to MSHA (Tr. 90) and an inspector named Carlos Smith came to the mine on the night of June 18, 1980 (Tr. 68; 79-80; 85). After inspecting the mine, Inspector Smith advised Mr. Holbrook and other personnel at the mine that they could make one more cut of coal in each room before they were close enough to the so-called abandoned area to require the drilling of boreholes (Tr. 82-83; 89-90).

Inspector Smith reported to his supervisor, Mr. Charles Miller, that he had examined the mine to determine whether a violation of section 75.1701 had occurred (Tr. 21). Mr. Miller wanted to follow up on Inspector Smith's report. Therefore, Mr. Miller and Inspector Cecil Davis, the inspector who wrote Citation No. 720883 here involved, drove to respondent's No. 8 Mine during the day shift on June 19, 1980 (Tr. 29). They examined the 001 Section. Then they reviewed respondent's certified maps showing the rooms being advanced and the so-called abandoned areas in the Smith-Elkhorn Mine, which had been integrated at that time with the No. 8 Mine, and Inspector Davis wrote Citation No. 720883 alleging that a violation of section 75.1701 had occurred because respondent was within 60 feet of an adjacent mine (Tr. 9-11; 22; 25; 34; 66).

The record also shows that some person or persons have filed a discrimination case against respondent under section 105(c) of the Act because of some of the events which occurred about June 18, 1980, when the men on Mr. Holbrook's night shift refused to work because boreholes were not being drilled (Tr. 91-93).

Additional matters mentioned by Inspector Davis include his statement that if he had seen anyone walking around in the Smith-Elkhorn Mine, which had been merged with the No. 8 Mine, he would have issued an imminent-danger order because, in his opinion, the roof had not been supported at the point where a person would have to enter the Smith-Elkhorn Mine from the No. 8 Mine (Tr. 28). Also, although respondent's map (Exhibit A) in this proceeding shows that respondent is ventilating the Smith-Elkhorn Mine now that it has become a part of its No. 8 Mine, the inspector took the position that respondent may not be properly ventilating the Smith-Elkhorn Mine and that citations, not before me in this case, have been written with respect to respondent's alleged failure to get MSHA's approval for the way respondent is ventilating the Smith-Elkhorn Mine and for the failure to install roof bolts in the first and second right sections where the Smith-Elkhorn Mine was first penetrated about February of 1980 (Tr. 42-43; 45; 55; 60; 62-63; 65).

The fact that the miners on the second shift refused to work because boreholes were not being drilled, the fact that respondent may not have been ventilating the Smith-Elkhorn Mine properly, and the fact that respondent may not have installed roof bolts at the points where the first and second right sections penetrated the Smith-Elkhorn Mine all trouble me with respect to whether Mr. Holbrook should have gone into the Smith-Elkhorn Mine and whether the Smith-Elkhorn Mine was being ventilated properly on June 19, 1980, when Citation No. 720883 was written. On the other hand, the inspector told me that the alleged issues as to respondent's roof bolting and ventilation of the Smith-Elkhorn Mine were not before me and that he did not think that I had to consider those matters in determining whether there was a violation of section 75.1701 (Tr. 45; 55).

Anyone who reads the first sentence of section 75.1701, quoted in my bench decision, will see that the requirement for the drilling of boreholes becomes increasingly necessary, depending upon the amount of information one possesses with respect to the "abandoned areas" toward which one is advancing. If one has certified maps showing the location of the abandoned areas, he is entitled, under the first part of section 75.1701, to advance within 50 feet of the "abandoned areas" before he has to begin drilling boreholes. The next step in the requirements of section 75.1701 refers to "other abandoned areas", meaning those which are not shown on certified maps. If one advances toward abandoned areas not shown on certified maps, he must start drilling boreholes when he is within 200 feet of such areas because he has less knowledge as to their exact location than he has when certified maps are available showing the location of such abandoned areas.

In my bench decision, I referred to "abandoned areas" as that term is used in section 75.1701. That reference was based on the definition of "abandoned areas" given in section 75.2(h) which states that "'[a]bandoned areas' means sections, panels, and other areas that are not ventilated and examined in the manner required for working places under Subpart D of this Part 75." In my bench decision, I indicated that it was doubtful if the area toward which the rooms were bing driven constituted "abandoned areas" because they had been made a part of respondent's No. 8 Mine and were being ventilated and inspected. The question of whether respondent was ventilating and inspecting the Smith-Elkhorn Mine sufficiently to eliminate the Smith-Elkhorn Mine from the category of "abandoned areas" was not considered to be important in my bench decision because section 75.1701 does not require an operator to drill boreholes when approaching admittedly "abandoned areas", as defined in section 75.2(h), until an operator is within 50 feet of those abandoned areas as shown on certified maps.

It should be noted that the inspector conceded several times in his testimony that respondent had made the Smith-Elkhorn Mine a part of its No. 8 Mine (Tr. 23-24; 36; 57-58; 63). The inspector cannot state that the Smith-Elkhorn Mine is a part of respondent's No. 8 Mine and simultaneously argue that the Smith-Elkhorn Mine is an "adjacent mine" for the purpose of claiming that respondent had violated section 75.1701 by advancing to "within 200 feet of any workings of an adjacent mine" (Tr. 48).

In short, while I am concerned about the probable hazards which might have been associated with respondent's making the Smith-Elkhorn Mine a part

of its No. 8 Mine, I do not think that I can ignore the fact that the "abandoned areas" were shown on "surveys made and certified by a registered engineer" (Tr. 25). Since the "abandoned areas" toward which respondent was advancing were shown on a certified mine map, I cannot find that respondent was in error in relying on its certified maps and maintaining that it was entitled to approach within 50 feet of the "abandoned areas" before it began to drill boreholes. As to the inspector's claim that respondent's management didn't really know where the Smith-Elkhorn Mine was located (Tr. 59), the record shows that respondent's vice-president was the superintendent of the Smith-Elkhorn Mine when it was developed (Tr. 76; 97) and that Inspector Davis was told by respondent that the engineer who prepared the map for the Smith-Elkhorn Mine was the same engineer who prepared respondent's map (Tr. 62).

For the foregoing reasons, I believe that my bench decision reached the proper result when all of the evidence in this proceeding is considered. Therefore, my bench decision is affirmed.

WHEREFORE, it is ordered:

The Proposal for Assessment of Civil Penalty filed on September 8, 1980, in Docket No. KENT 80-330 is dismissed because no violation of section 75.1701, as alleged in Citation No. 720883 dated June 19, 1980, was proven.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 13 1981

LLOYD BRAZELL, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. KENT 81-46-D
ISLAND CREEK COAL COMPANY, Respondent	:	Hamilton No. 1 Mine

DECISION

Appearances: Jerry W. Nall, Esq., Owensboro, Kentucky, for Complainant; William R. Whitledge, Esq., Logan, Morton & Whitledge, Madisonville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 26, 1981, a hearing in the above-entitled proceeding was held on April 14 and 15, 1981, in Madisonville, Kentucky, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 553-591):

> This proceeding involves a complaint of discharge, discrimination, or interference filed on December 5, 1980, in Docket No. KENT 81-46-D by complainant, Lloyd Brazell, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, alleging that respondent, Island Creek Coal Company, discharged Brazell in violation of Section 105(c)(1) of the Act because he had notified respondent's management of dangers relative to safety violations in the coal mine where complainant was employed.
>
> I shall make some findings of fact on which my decision will be based, and these will be given in enumerated paragraphs.
>
> 1. Lloyd Brazell, the complainant in this proceeding, was born on November 5, 1924, and is 56 years old. He has a wife and a son and daughter who are 29 and 34 years old, respectively. Mr. Brazell began working for Island Creek on June 15, 1970, at Island Creek's Hamilton No. 1 North Mine. He began as a member of the union and performed various types of work until December 6, 1974, when he was promoted to a management position. He first supervised a working section, then became what he called an assistant mine foreman on the 4 p.m.-to-12 midnight shift. Finally, he was a belt foreman on the 12 midnight-to-8 a.m. shift.
>
> 2. On Friday, May 30, 1980, Brazell was asked to see James Jennings, the superintendent of Hamilton No. 1 North Mine. Brazell

was told that he was being laid off because Jennings had been ordered to "cut the fat." Jennings stated that he did not like to play God but he had to reduce personnel. Brazell was laid off, effective that day, and the period of termination was indefinite.

3. Brazell filed on August 5, 1980, a discrimination complaint with the Mine Safety and Health Administration. That complaint is Exhibit A in this proceeding. On the last page of the complaint, Brazell suggests 7 occurrences which contributed to Brazell's termination. Brazell received a letter from MSHA dated November 10, 1980, stating that MSHA had concluded, on the basis of its investigation of his complaint, that no violation of section 105(c) had occurred.

4. Brazell testified at the hearing that he had been laid off for the reasons given in his complaint filed with MSHA, and for other matters in addition to those mentioned in his MSHA complaint.

5. Item A in Brazell's complaint, or Exhibit A, is that known employees were cutting grounds out of trailing cables. Brazell maintained a watchful eye on the personnel in the mine and eventually concluded that an employee named Barkley was cutting out the grounds. One day Brazell found all men on his section gathered around a splice in the trailing cable to the coal drill. The coal drill wouldn't operate because of a malfunction of the cable from which ground wires had been cut. Brazell had the defective splice removed from the cable. Brazell wanted to show the splice to Jim Scott, the mine foreman, so he asked a qualified man named O'Leary to take charge of the section while Brazell took the splice to Scott. Scott was upset with Brazell for bringing the splice to him at that time. So, Brazell went to show the splice to the mine superintendent, Jim Jennings, who threatened to have Brazell's license revoked for leaving the section. After Brazell's shift ended that day, Brazell was called to the office where management advised Brazell that he had violated an Island Creek rule to the effect that section foremen are not permitted to go outby the belt tailpiece during their working shifts. Brazell had never heard of that rule before. In Jennings' testimony, he stated that he did not threaten to revoke Brazell's license, but that he did tell Brazell that he should not have left his section to bring the splice outside, and that if Brazell insisted on leaving to take the splice to MSHA before his shift was over, that he would be discharged. Jennings made it clear in his testimony that he had no objection to Brazell taking the splice to MSHA provided he did not do it during his working shift while leaving his crew of men unsupervised. It was Jennings' contention that Brazell did not inform Jennings that he had left O'Leary in charge of his section at the time he left with the splice.

6. Brazell never did report to management that he believed Barkley was responsible for cutting grounds out of cables. One reason for Brazell's failure to report Barkley to management was that Barkley's father-in-law is a management official. Brazell said the incident regarding cutting of ground wires out of trailing cables occurred about 4 years prior to Brazell's termination.

7. Item B in Brazell's complaint, or Exhibit A, states that Island Creek should eliminate from its payroll the outlaw miners who were creating hazards and causing injuries and death at Hamilton No. 1 Mine. Brazell defined outlaw miners as miners who won't produce coal and who don't want others to produce. The primary offender named as an outlaw miner was C. P. Parrish who was a loading-machine operator. Parrish wouldn't run the loader along the ribs to clean up loose coal and gave reasons, such as curtains being in the way, for not cleaning up the coal. Parrish was eventually killed by another miner named Buddy Higdon who was operating the loading machine and caught Parrish between the rib and the loader and crushed him to death. That incident occurred about 5 years prior to Brazell's termination.

8. Item C in Brazell's complaint, or Exhibit A, is that some miners engaged in deliberate acts which created phony accidents and destroyed equipment. Brazell gave two examples of such activities, one occurring about 5-1/2 years before Brazell's termination and the other one occurring about 1-1/2 years later. The first incident was that Brazell was asked to supervise the No. 5 Unit because it had not been running coal very well. Brazell discovered a man named Coffman was deliberately causing tram motors to cease working. A total of 13 motors were ruined before that practice was stopped. The second incident also involved Coffman. This time Coffman deliberately ran a loading machine under an overhang so that the materials would cover the loading machine. Two young shuttle car operators were alarmed by the fabricated roof fall and Coffman made it appear that Brazell was at fault. Brazell filled out an accident report at the end of the shift and told Coffman to go to the hospital for a physical examination. Brazell does not claim that he explained to management that the roof fall was deliberately contrived by Coffman. Jennings, in his testimony, stated that he had not been told about any phony accidents that had been caused in the mine and that an accident report should indicate the fact that there was a contrived accident, if that, in fact, was the cause of the accident.

9. Item D in the MSHA complaint, or Exhibit A, is a suggestion that fire-bossing irregularities occurred over a long period of time and that they were condoned by management. Brazell explained the fire-boss irregularities by stating that a UMWA fire boss named Dan Brown was a safety committeeman who was able to bargain for things with management. Brazell said Brown wasn't preshifting on Sunday when he was supposed to preshift and that Brown didn't check 43 seals that he was supposed to check. His initials and date of examination did not appear at the seals. That could be a serious oversight if methane should seep through a seal. Brazell said that when he reported Brown's inadequate fire bossing to management, Brazell was told that they didn't question Brown because of his seniority, or that they were obligated to Brown in some unexplained way. This went on for 4 or 5 years, according to Brazell. In his testimony, Jennings stated that a meeting was held involving the union and management in which Brown was told that he had to do thorough preshifts if he expected to continue in that position.

10. Item E in the MSHA complaint, or Exhibit A, is about bomb threats as to which Brazell claims to have revealed the persons responsible and got the threats stopped. Brazell stated that he found out, by overhearing a conversation off of mine property, that a red-headed woman was making the bomb threats on behalf of a miner who wanted to have the mine shut down so that the miner wouldn't have to work. After Brazell advised Jennings of the names of the persons responsible for the bomb threats, they stopped occurring after the miner reported by Brazell to Jennings had left Island Creek's mine. In his testimony, Jennings denied that Brazell had ever given him the name of any person who had made bomb threats and that all he could elicit from Brazell were innuendos, about which he was unable to make any investigation.

11. Item F in the MSHA complaint, or Exhibit A, refers to known false safety obfuscations. Brazell said that the aforesaid reference was to bomb threats and to occurrences such as Ken Hermes' objection to walking over or around tires leading to the mantrip. Brazell and Bill Green loaded out some of the tires just to get Hermes to move out of the way. Brazell said that the relationship of Hermes' objection to tires and Brazell's termination, was attributable to the fact that Hermes is still working for Island Creek while Brazell is gone. In his testimony, Jennings stated that materials did accumulate at times near the slope and that he would not challenge Brazell's statement that tires might have been in the miners' way at times, but he said that the tires were not there by design and that they were removed when it was brought to his attention.

12. Item G, in the MSHA complaint, or Exhibit A, is a reference to known users and usage of drugs. Brazell told about two different miners who were allegedly using drugs, or carrying them. One was a miner named Heady who was a son of a mine official named Dorris Heady. On one occasion Brazell found Heady asleep on coal where equipment had to move coal. So, Brazell put Heady in the shack and told Heady to stay there. But the mine foreman and the mine superintendent advised Brazell that he should not have done that. The next day Heady was alert and was operating a shuttle car when Grassiano, a mine official, complained to Brazell that Brazell should get Heady out of the mine. Brazell claims that he later heard that Heady had tried to run over Grassiano with the shuttle car Heady was driving. In his testimony, Jennings stated that Grassiano had never reported to him that anyone was trying to run him down and that he did not have any knowledge of that situation. The second miner on drugs referred to by Brazell was a man named Mike Albright who was once speeding in a railrunner and became upset when Brazell and his men blocked his path while they were doing work on the track. Brazell eventually arranged for a safety committee meeting regarding Albright, and Albright was put on medical leave and eventually overcame his drug problem. Jennings, in his testimony, corroborated the fact that Albright had been assisted in overcoming his drug problem, and that the man recently thanked Jennings for the role Island Creek had played in rehabilitating him.

13. Brazell testified at the hearing about other matters which he thinks resulted in his being terminated. One area of discussion was Brazell's description of the slope belt which became Brazell's responsibility during the last position Brazell held prior to his termination. The slope was the most outby portion of the conveyor system. It was about 2,300 feet long and when Brazell started supervising it, there were 19 employees shoveling coal along it. There was such a strong velocity of air along the belt that large accumulations of coal dust and float coal dust would accumulate along it. Brazell said the accumulation constituted both a fire and explosion hazard. The coal accumulations were greatly reduced after Brazell found an escapeway that had been blocked by a roof fall. When the escapeway was cleared out, intake air traveled a different route which reduced the velocity of air in the slope and permitted the slope belt to operate without as much danger or problems resulting from coal spillage. Brazell does not know if his finding the roof fall contributed in any way to his termination. Jennings, in his testimony, stated that the roof fall which Brazell discussed had already been brought to his attention and that the airway was cleaned out and that the traveling of the air was changed afterwards. Jennings denies that Brazell had any material part to do with the change in airflow or the cleaning out of the airway.

14. Brazell testified that an MSHA inspector named Goldsberry cited Island Creek for failure to have a guard at a tailpiece at the bottom of the slope. After guards were made, they were installed under Brazell's supervision. Later Brazell heard that Jennings, the mine manager, was trying to obtain an affidavit from two men named Cooper and Underwood stating that a guard existed at the tailpiece. Brazell didn't know what this guard, or alleged effort to get affidavits contributed to his termination. Jennings testified that no citation was issued for failure to have a guard at the tailpiece but that an inspector did suggest that one be placed there, and that it took two efforts by management personnel before one was constructed which met the inspector's specifications. Jennings also denied that he had ever tried to get an affidavit from people that the guard existed before it became the subject of a suggestion by an inspector. Jennings further explained that it would have been unnecessary to get an affidavit, in any event, because the fact that no citations had been issued made it unnecessary for Island Creek to compile evidence concerning the mitigating factor of negligence.

15. Brazell received some bonus checks but he did not like to get them because they appeared to be based on a combination of factors such as achievement of significant production as well as safety-related efforts. To show his disdain for such checks, Brazell once endorsed one for about $5.00 and gave it to Jerry Stewart when Jerry was on his way to buy drinks at a tavern. Brazell never did cash other bonus checks, he says. It is not clear how Brazell's aversion for the bonus checks affected his termination. Jennings testified in connection with Exhibit 1 in this proceeding, which shows that Brazell was paid a $50 bonus for safety-related activities, that a person getting a bonus check would know whether he was given it for achieving high production or for being safety-minded.

16. Brazell testified that the South Mine sometimes had personnel who could be spared to help clean along the belt at the North Slope where Brazell worked as belt foreman on the 12-to-8 a.m. shift. The South Mine personnel were sent on the surface to the slope at the North Mine. They would look in the slope and then would remain outside or go back to the South Mine without doing any work. Eventually, Brazell was notified of the men's names so that he could be certain that miners from the South Mine actually came into the slope to work. Once a miner named Mudbone got sick and was picked up by an ambulance. Mudbone had the ambulance to take him to Hamilton No. 2 Mine instead of to a doctor or a hospital. Brazell never heard of Mudbone after that, and Brazell doesn't know what the sending of miners from the South Mine to work in the slope in the North Mine contributed to his termination. Jennings testified that he had never heard of Mudbone, but he did say that they had had some trouble getting the men from the South Mine to report for work and actually work in the slope at the North Mine, and that that problem was overcome after they started sending a supervisor along with the men to make sure that they stayed and worked in the slope.

17. Brazell testified that new men are supposed to wear green hats to identify their lack of training and experience, but Brazell said that the experienced miners also started wearing green hats so that if they were inclined to avoid work they didn't like, they could plead ignorance or lack of experience. Brazell told about a young man named Buchanan who was only 20 years old, but who falsified the records so that it would make it appear that he had the experience of a 34-year-old man. The mine foreman, George Caudill, happened to use Buchanan on a special detail where his actual lack of training became obvious and caused the mine foreman to be extremely upset. Brazell did not say that anyone blamed him for the fact that Buchanan's records had been falsified or for the fact that experienced miners were wearing green hats. Consequently, there was no way to determine what these incidents had to do with Brazell's termination. Jennings, in his testimony, stated that he was unaware of a problem of a lot of miners who had experience wearing green hats to feign inexperience to avoid work. He pointed out, however, that any section foreman worth his salt would know which men on his shift were experienced miners and which ones were not.

18. Brazell testified about a miner named Don Brown who came to work on Brazell's midnight-to-8 a.m. shift after having spent some time in prison. Don was the son of the fire boss mentioned in Finding No. 9 above. Don had a habit of sleeping on the job and also had an affinity to be near a female miner named Smith. Brazell stated that Don Brown never molested the woman, but some of the miners criticized Brazell for not separating Don from the female miner. Eventually, the other miners stopped covering for Don's habit of sleeping on the job and Don was sent to another place after he had, on one occasion, been observed sleeping overly close to the haulage track. Brazell did not know how Don Brown's sleeping and attraction to the female miner contributed to his termination. Jennings, in his testimony, said that he was not aware of Don Brown's sleeping problem or of his affinity for the female miner.

19. Brazell, on cross-examination, agreed that he and an hourly employee named Powell had had a disagreement over the sharing of some welding equipment which Brazell needed for installing some pans along the belt conveyor. There were three oxygen cylinders and three acetylene cylinders and Powell was used to earning extra money for doing overtime in welding or cutting and he resented Brazell's use of the tanks because Powell sometimes had less oxygen and acetylene than he wanted. Powell started placing the cylinders where they didn't belong and that created a safety hazard, according to Brazell. This occurrence was put into the record by Island Creek's counsel, but the facts are as much in Brazell's favor as they are against him. So, it is not clear why it was made the subject of an inquiry. In Jennings testimony, he agreed that a conflict had occurred between Powell and Brazell concerning the use of the welding equipment and Jennings resolved the problem by having both men given keys to the place where the oxygen and the acetylene cylinders were kept, with the understanding that each man was entitled to use the equipment.

20. Four other managerial employees were laid off on May 30, 1980, at the time Brazell was laid off. One was L. W. Harris, who was physically older than Brazell and had been there longer than Brazell. The other three men were named Ballard or Doc Morgan, James Scott, and Red Wilson. Those three were all younger than Brazell, but James Scott had worked for Island Creek longer than Brazell. Since Brazell was not the oldest, physically, or the one with the most seniority, his being included among those laid off, does not indicate any specific kind of discrimination. In his testimony, Jennings agreed that L. W. Harris was not physically able to keep working as a section foreman. He also agreed that Ballard Morgan and James Scott had problems, and that all of the men would have been people whose absence from the work force would be advantageous to Island Creek. Jennings explained that Brzaell had been included among the five men from the North Mine who were laid off on May 30, 1980, because Brazell was unable to coordinate the work of a crew of men on a working section. The result was that Brazell's section produced less coal on an average basis than other sections produced. Jennings did not present any figures to support that contention, but he insisted that if the slope job [described in Finding No. 13, supra] had not been created for Brazell, Brazell would have been laid off as a section foreman at the time he was transferred to the job of supervising the slope belt and the bottom area.

21. Brazell was laid off on Friday, May 30, 1980. He went back to see Island Creek's president, Pete Petzold, who was courteous but made no commitments. Then Stilley Mason wrote Brazell a letter explaining to Brazell how he could keep his insurance in effect. Also, Island Creek recognized that Brazell had been laid off just 1 week before he would have received a vested interest in Island Creek's retirement program. Island Creek credited Brazell with the extra required week and gave him papers to fill out if he wished to do so. Brazell has never filled out the papers because he said that if he had kept working, he was covered by about $250,000 in insurance as compared with $5,000 as a retiree. Also, he would receive about $176 per month as a retiree with his wife claimed as a joint beneficiary. Brazell has been referred

to an Island Creek employee named Osborne in Lexington, Kentucky, for additional questions about retirement.

22. Brazell stated that on one occasion a miner named Pyro Williams tried to smuggle beneath his clothes 13 sex books as he was getting into the mantrip. Brazell made Williams leave the books in the safety office. Williams was mad about Brazell's not letting him take the books with him underground and thereafter made passes at the cables of some of the equipment until he succeeded in damaging the cable to the loading machine. Brazell said he found out afterwards that Williams was buying a trailer from an Island Creek superintendent named Cunningham, and that if he had known Williams had such connections, he wouldn't have objected to Williams' taking the books underground in the first place. Cunningham testified that he had not sold a trailer to Williams and that he didn't understand where Brazell obtained the information to the effect that he had sold a trailer to Williams. Also, Jennings testified that Cunningham is not in the business of selling trailers. The only trailer that was sold, apparently, was a house trailer and it wasn't sold to Pyro Williams.

23. Donald H. Watson testified on Brazell's behalf. Watson is a battery maintenance person at Island Creek. He thinks Brazell would rate a 9 on a scale of 1 to 10 for safety. He thought Brazell had made safety reports to management but couldn't cite a single example. He did not know of a time when Brazell refused to work on account of safety.

24. Kenneth W. Butts testified on Brazell's behalf. He still works for Island Creek. He respected Brazell's knowledge and rated him as a 10 on a scale of 1 to 10. Butts never knew of a slope boss prior to Brazell holding that position. Butts is a mechanic who goes where he's needed. He found fire in the slope at the end of his shift one day in February 1981. He and some other men put out the fire in about 45 minutes or an hour. The slope was closed down for cleanup for about one or two shifts. Butts also found a ground monitoring wire cut out of a cable, or blocked out of a cable, in March 1981, but these things occurred long after Brazell had been laid off. Butts had heard of an incident where miners were paid a bonus so that coal could be produced in quantity without worrying about safety. He said that that had occurred in March 1981, and that he had heard of it before that. Jennings testified that when he was transferred from the South Mine to the North Mine, he became aware of the fact that some miners were given extra pay to do work which they should have been required to do in the regular course of their assigned duties. He discouraged and stopped that type of thing, and by the conversion of the mine to a computer system for payroll purposes, he thinks he has been able to eliminate the juggling of time cards whereby a miner could be paid extra for either not being at the mine or for work not actually performed. Additionally, Jennings did away with the giving of barbeques for any section which might produce the most coal in the mine in a given week or a given month. The union itself objected to the process of giving special awards to those units which produced the most coal.

25. Charles A. Pease testified in Brazell's behalf. He was an electrician and still works for Island Creek. He believes Brazell is safety-minded, but he didn't work under Brazell's supervision. Pease sees things done occasionally that are an indication of meddling with electrical connections, but he said that he would have to see someone actually do something before he would be able to state that anyone had done an unsafe act. He thought that the Hamilton Mine was a safe mine in which to work.

26. Everett Miller testified in Brazell's behalf. He is a supply person now for Island Creek. He thinks Brazell is safety oriented and would rate him at the top of the scale from 1 to 10 as a safety-minded person. Miller thinks Island Creek has brought in new management personnel in the South Mine, where he moved in 1979, but he doesn't know about the North Mine. He knows that Brazell found methane in a section where it had never previously been found, but he said that methane comes and goes and can be found anywhere at certain times. He thought that management had worked to achieve a safe operation in the North Mine.

27. Dale E. Damin testified on Brazell's behalf. He is a temporary mechanic for Island Creek at the present time. He thinks that Brazell is an extremely safety-conscious miner, and he would rate Brazell as an 8 or 9 on a scale of 1 to 10. He doesn't know why Brazell would have been terminated, and he stated that Island Creek had employed Stan Belmar as a face boss on the No. 1 Unit after Brazell was laid off.

28. William D. Alvey testified on Brazell's behalf. He is now a supply person. He thinks Brazell is safety-conscious and would rate Brazell as an 8 or 9 on a scale of 1 to 10. He doesn't know of anyone who was hired to replace Brazell. He knows that the mine was cut back from 10 to 8 active working sections. He knows of an incident where Brazell would not turn on the electricity when it had been turned off until all men were accounted for, but he also stated that that was standatd procedure for turning the power back on after it had been off.

29. Jim Garrett, who is now working for Kenellis as a belt man in Harco, Illinois, was terminated as third-shift belt foreman on June 27, 1980, after Brazell left. He never heard that Brazell was terminated for making safety complaints. He thinks Brazell is safety-conscious and would rate him as a 10 on a scale of 1 to 10. He also knows that the sections were reduced from 10 to 8 active sections with 2 standby units. Garrett says that Island Creek brought in Stan Belmer, Bill Wood, Jack Milner, and Don Beverly. He says that these men were working as UMWA employees who were given supervisory positions. Jennings, in his testimony, corroborated Garrett's statements to the effect that no new supervisory personnel had been hired and that some of those who had been put in supervisory positions had been given those positions on a temporary, or acting basis, because either some section foreman was ill or there was a need for a replacement on a temporary basis. They were all qualified people to hold the positions that they were asked to hold on a temporary basis.

30. Dwight Witherspoon testified on Brazell's behalf. He was laid off on October 27, 1977, and reinstated and paid back wages after he filed an action against Island Creek in a state court. He was laid off twice again, but the final layoff was on July 10, 1978, after two legally imposed reemployments and occurrence of no actual working period between the first layoff on October 27, 1977, and the present time. He thinks that Brazell is safety-conscious and would rate Brazell as a 10 on a scale of 1 to 10 insofar as his ability as a safe and knowledgeable supervisor is concerned. He thinks Brazell was discharged because of Brazell's stand on safety, but his appraisal of Brazell is based on events which occurred in 1977, or about 3 years before Brazell was laid off. Witherspoon said that some section foremen paid men to run coal, but that involved the top-tonnage unit. If another section foreman, who was not in charge of the top-tonnage unit tried to give a bonus, he didn't succeed. Witherspoon discussed his having to install as many as 800 roof bolts in a crosscut after a top-tonnage shift had worked solely to achieve high production and had skipped placement of roof bolts. Witherspoon thought that the aforesaid events had something to do with Brazell's termination, but he conceded it all occurred about 3 years prior to Brazell's termination. Witherspoon also conceded that Brazell had testified on his behalf in his suit against Island Creek. Jennings testified that it was a fact that sometimes a shift will, in its eagerness to produce coal, fail to put in the proper number of roof bolts, and that nearly all section foremen, from time to time, find themselves slowed down on their shift because they have to do work which the previous shift should have done. Jennings tries to see that that type of thing does not occur.

31. Jennings testified that when he was required to reduce the number of personnel at the Hamilton Mine, the number of union workers, or hourly workers, was reduced from 604 to 548, and that the number of managerial employees was reduced from 96 to 83. He testified that some of the people laid off were his personal friends and that it was a difficult decision for him to determine which individuals should be laid off on May 30, 1980, when Brazell was laid off. He readily agreed that the selection of the personnel to be laid off was based on what was good for the overall operation of the mine, and that the people who were considered the least productive necessarily were among those who were laid off. Mr. Whitledge, in his closing argument, stressed the fact that a managerial employee has no contract with management as do the miners, and therefore have no way to insist that they be rehired if a prospective opening is filled at a future time after their discharge.

I believe that those findings of fact cover the essential facts that have been introduced in this proceeding. The question, of course, which is raised by the filing of a complaint under section 105(c)(3) of the Act is whether a violation of section 105(c)(1) occurred so as to entitle the complainant to the relief which he seeks under section 105(c)(3) of the Act. Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the

> statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In his closing argument, Mr. Nall, on behalf of complainant, stressed the fact that it is not always possible to prove by direct evidence that a violation of section 105(c)(1) has occurred. He correctly states that in some instances a violation of section 105(c)(1) can be proved only by inferences and by the fact that the preponderance of the evidence shows that a violation of the Act did occur. Mr. Nall stressed in his argument three different situations or factors that he thinks are particularly persuasive in showing that Island Creek violated section 105(c)(1). The first of his factors was that Island Creek had created a job of slope foreman for complainant to hold and thereby put complainant in a sort of standby position so that when a good excuse came along for laying complainant off, he could readily be cited as a nonessential employee because the job which had been created for him was not an essential job.

That is probably the best argument in this case that can be made for proving that a violation of section 105(c)(1) occurred. But it had to do more with the company's motive than with whether Brazell, or complainant, was discharged because of his reports of safety matters to the company. There is no doubt that complainant was put in a position from which he could be discharged without creating a problem for the company, but I think that Jennings satisfactorily explained that he was dissatisfied with complainant's performance as a section foreman, and that about 1977 or 1978, when complainant was transferred to the position of slope foreman, he could have made a decision to discharge complainant at that time, but instead created the position of slope foreman for him.

Jennings indicated that there had been some problems with the motors installed at the slope belt and that the company was rebuilding and upgrading the equipment so as to eliminate those problems. At that time having someone as a slope foreman was more important than it became later, after the motors had been upgraded and other work had been done on the slope belt to eliminate the need for having people to shovel coal off of the belt so that it could be started, and then having to shovel coal back on after the belt was started.

The next point that Mr. Nall made in his final argument was that complainant had irritated Island Creek by the fact that a problem had arisen with the man named Heady, who apparently was having a drug problem. I'm not persuaded that that argument is very effective because complainant did not discuss Heady with management and Jennings denied that anyone had ever mentioned to him the fact that Heady had been trying to run over Grassiano, one of the company officials, with a shuttle car. Since there's no indication that management was aware of any problems with Heady, who was the son of one of management's officials, I cannot conclude that Heady's having worked under complainant's supervision, would have been any reason for Island Creek to have chosen complainant as a person to be discharged.

The third item that Mr. Nall stressed in his closing argument was that complainant had reported to management that Dan Brown, who was a union fire boss, was failing to make his preshift examinations properly. Mr. Nall stressed the fact that since Brown was also the chairman of the safety committee, that he had a lot of power at the mine. I would agree that Brown had some influence in his position, but no one has refuted Jennings' claim that the alleged failure of Brown to perform his duties as fire boss effectively was the subject of a meeting at which management insisted that Brown satisfactorily carry out his job as fire boss if he wanted to continue doing that work.

Mr. Nall also stresses the fact that complainant demonstrated his abilities when he was called in to supervise 19 men at the slope belt at the beginning of the problems which brought about complainant's transfer from a section foreman to foreman over the slope belt. I cannot see that it would be very difficult to supervise 19 men along a stretch of one belt which is 2,300 feet long, as compared to maintaining supervision over a crew of 10 or 11 men on an active working section where supplies have to be moved smoothly, and the men have to be rotated from shotfiring to loading out coal, securing the roof, and installation of ventilation -- all in a smooth and satisfactory way so as to produce coal on a continuous basis.

Mr. Nall also stressed the fact that complainant stood his ground in dealing with management and that such practices undoubtedly irritated management and caused management to put complainant in a position where he would be vulnerable when it became convenient to lay off some people.

There occurred at least two or three incidents which failed to show that complainant stood his ground for safety against management. For example, when complainant brought the splice, from which the ground had been severed, outside the mine with the intention, apparently, of showing it to both of his supervisors, and to MSHA, if necessary, to get action taken on the matter, Jennings testified, Jennings being the superintendent of the mine, that after he had explained to complainant that it was improper for him to have left his section without supervision while he came out with the splice, Jennings testified, without being contradicted by any rebuttal evidence, that complainant apologized for his having acted hastily and that they shook hands and the matter was smoothed over at that time.

On another occasion, complainant spoke of having forced Pyro Williams to leave some sex books on the surface. Then complainant noted that Williams was buying a trailer from one of the high officials in the company, which of course is denied, but assuming that it was true, complainant stated that he would not have made an issue of it in the first place if he had known that Williams had connections with management.

The other incident which indicates to me that complainant was not willing to stand his ground against management was in connection with the fact that complainant claims to have discovered the person who was cutting grounds out of cables. He said that one of the reasons he did not report that person to management was that he knew that that person's father-in-law was a management official and that he didn't see any need in tangling with someone with that much influence.

The aforesaid occurrences lead me to believe that complainant was an average employee who would have liked to have gotten along with management and would have preferred to remain employed by working smoothly with management if he could have done so. I think the fact that complainant was included with the group of men who were laid off on May 30, 1980, can be explained on the basis of Jennings' testimony to the effect that despite the fact that Brazell was faithful in reporting to work and trying to do a good job, he simply was not the kind of section foreman that management preferred, insofar as achieving production goals is concerned.

As Mr. Whitledge stressed in his closing argument, it is a fact that coal mines are run for profit. If they cease to be profitable, they have to close down. That profit motive is something that the company is entitled to consider and I cannot find on the basis of the many incidents that have been given in complainant's testimony, that those incidents show that there was such a strong bias against complainant for his alleged safety-related activities, that he would have been picked out as a person to eliminate simply because he had complained about certain procedures in the mine.

One of the aspects of Jennings' testimony which is very persuasive for me in deciding this case is that Jennings stated that complainant did not come to him with any more problems than any of the other foremen in the mine. Jennings also stated that complainant had a problem of staying on a given subject long enough for Jennings to be advised in a short period of time of an exact problem and of the exact personnel involved, and what needed to be done. He said that complainant had a problem with rambling in his discussions and that at times it became frustrating to try to determine just what complainant's problems were. If complainant's direct testimony in this case is examined by anyone interested in reviewing the record, it will be readily perceived that it is very difficult for complainant to keep on any one subject, without engaging in many inferential discussions about other matters. For that reason, it was very difficult to follow any given point in his testimony on direct examination without being led astray into other matters which

were not the ones his counsel was trying to stress. I believe that that characteristic, which was very noticeable at this hearing, supports Jennings' statement that complainant was unable to communicate readily with him so as to apprise him of matters that complainant might have wanted to report, but seemed to get sidetracked in the process.

In Secretary of Labor, on behalf of Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981), the Commission stated that it was always the burden of the complainant in a discrimination case to show that respondent had violated section 105(c)(1) so as to entitle complainant to recover. The Commission stated that if complainant succeeded in establishing a prima facie case showing that he had been discharged because he was engaged in a protected activity, that the company would then have the responsibility of showing that even if one of the reasons for the complainant's discharge did relate to a protected activity, if the company's case succeeded in showing that complainant would have been discharged in any event for other matters in addition to the protected activity, that respondent should prevail in that situation. In this case, the complainant did not even prevail in establishing a prima facie case in his direct testimony. Assuming that complainant had proven in his direct case that he had been engaged in a protected activity, it appears to me that respondent successfully showed in its case that complainant would have been laid off in any event on May 30, 1980, for nondiscriminatory reasons.

This case is different from nearly all of the other cases that have had come before me under section 105(c) in that the complainant went into great detail and cited a large number of incidents which had occurred over 4 or 5 years prior to his termination. In none of those situations was it ever made perfectly clear that there had been a specific complaint about safety made to management in such a way that the complaint would have been an irritant to management in the sense that management thereafter would have said, "We're going to get rid of this fellow as soon as it's convenient."

Complainant described in his testimony several instances which would have been reasons for the company to have rewarded him, or complimented him, rather than for the company to have been upset about it. For example, assuming that the company didn't already know about the roof fall that was blocking air from getting into the mine, and which was allowing excess air to enter the belt slope, if complainant had been the first person to find that out, and had made it possible to reroute the air so as to permit less float coal dust, etc., to enter the slope entry, that would have been a reason for management to thank him rather than to have criticized him.

The fact that complainant may have had something to do with calling management's attention to Dan Brown, who was not making proper preshift examinations, that also would have been something they would have appreciated. If complainant could have actually identified the person who was making bomb threats so that that person could be arrested, or at least could have been investigated so as to eliminate him from the work force if necessary, there again, management would have had a reason to appreciate it.

As to the person who was using drugs, Michael Albright, not only did management appreciate Brazell's calling that to management's attention, but Albright himself was pleased with the way that turned out, when he succeeded in overcoming his problem.

Another item was the fact that management wanted some people from the South Mine to work on the slope at the North Mine. When management found out that those people were't coming, they sent a supervisor along with them to make sure they did come. So, if complainant had reported that to management, it would have been something that management would have appreciated.

Consequently, this case presented me with so many incidents which complainant said may have contributed to his termination which were not things that a company would normally resent, that it's impossible for me to add these inferences up, as suggested by Mr. Nall, in such a fashion that I could find that the preponderance of the evidence supports a finding that a violation of section 105(c)(1) occurred.

WHEREFORE, it is ordered:

The complaint of discharge, discrimination, or interference filed on December 5, 1980, in Docket No. KENT 81-46-D is denied for failure to prove that a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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JUL 13 1981

MONTEREY COAL COMPANY, Contestant	:	Contest of Citation
v.	:	Docket No. LAKE 80-413-R Citation No. 775259; 9/11/80
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Monterey No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 81-59 A/O No. 11-00726-03060
v.	:	No. 1 Mine
MONTEREY COAL COMPANY, Respondent	:	

DECISION

Appearances: Timothy M. Biddle, Esq., Thomas C. Means, Esq., Crowell & Moring, Washington, D.C., for Contestant-Respondent;
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent-Petitioner.

Before: Judge Charles C. Moore, Jr.

In August of 1979, MSHA approved a modification plan for Monterey's No. 3 Dam. This approval was in accordance with 30 C.F.R. §77.216 which requires that certain water sediment or slurry impoundments be constructed in accordance with approved plans.

On June 13, 1980, MSHA advised Monterey that it made a mistake in approving the plan and that accordingly the approval was withdrawn (see Joint Exhibit No. 1). Thereafter MSHA issued a citation because Monterey was not operating the dam and pond under an approved plan. The question before me is whether MSHA was justified in withdrawing its approval because if not, its subsequent action of issuing a citation was improper. I hold that MSHA was totally unjustified in withdrawing its approval and that accordingly, the subsequent citation was invalid. I further hold that this was not even a close question. The answer was clear from the very beginning and I cannot see how MSHA's engineers, its district manager and his assistant, and Dr. Wu refused to understand.

While the witnesses referred to safety often in their testimony, safety is only indirectly involved in this case. MSHA did not issue its citation and withdraw its approval because the dam in question was unsafe. It withdrew its approval because the dam and pond were not being operated in accordance with the Engineering and Design Manual, Coal Refuse Disposal Facilities prepared by E. D'Appolonia Consulting Engineers, Inc., and published by MSHA's predecessor, the Interior Department's Mining Enforcement and Safety Administration. The publication contains Table 6.6 (see page 6.62 of Joint Exhibit No. 6) which establishes the criteria for determining the size of a design storm that the impoundment must be able to accommodate. Table 6.6 classifies dams as small, intermediate and large and classifies their hazard potential as low, moderate and high. When MSHA approved Monterey's plans, it was agreed that the impoundment size was intermediate and that the hazard potential was low. This resulted in the design storm of 1 percent probability or OPB. Such a storm would occur once in a hundred years. Page 6.63 of Joint Exhibit No. 6 makes it absolutely clear that the size classifications of Table 6.6 are based on the depth of the water "above any settled material." That is the item which MSHA chooses not to understand. The MSHA witnesses argued that the size criteria of Table 6.6 should be based on the depth of the entire impoundment, including the settled materials.

Section 77.216 of Title 30, Code of Federal Regulations, provides that design, construction and maintenance plans are required if an impounding structure can:

> (1) Impound water, sediment, or slurry to an elevation of five feet or more above the upstream toe of the structure and can have a storage volume of 20 acre-feet or more; or
>
> (2) Impound water, sediment, or slurry to an elevation of 20 feet or more above the upstream toe of the structure, or
>
> (3) As determined by the District Manager, present a hazard to coal miners.

From this requirement that impounding structures having a total water slurry or sediment depth of 20 feet or more must be in accordance with a design plan, MSHA jumps to the conclusion that whenever there is a reference to the size of an impounding structure, it must always mean the amount or depth of the water slurry and sediment. In the 268 pages of deposition testimony, there was no scientific or engineering reason given for including or excluding the sediment when determining the size of the impoundment. There was no testimony as to the pressures on the inner surface of the dam below the top of the sediment level comparing that pressure to the pressure which would have been generated at that level if the entire impoundment had consisted of water. But the fact remains that Table 6.6, which MSHA relies on and which it charged Monterey with violating, counts only the water above the settled material in determining the size of a pond for design storm purposes.

If MSHA thinks a dam is dangerous it can close it with an imminent danger order or it can set up its own standards concerning design storms and charge a mine operator with a violation of those standards. It cannot, however, successfully charge an operator with a violation of the handbook's Table 6.6 and at the same time ignore the definitions of the terms used in that Table. The formula for deriving the circumference of a circle is only valid if "r" equals the radius, and "pi" equals approximately 3.1416. A change in the meaning of any of the terms destroys the effectiveness of the formula and the same is true of Table 6.6. MSHA's withdrawal of its approval was improper and the citation is VACATED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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JUL 13 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF CHARLES BOOTHE, Complainants	:	Complaint of Discrimination
	:	Docket No. WEVA 81-174-D
v.	:	
CEDAR COAL COMPANY, Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

Statement of the Case

This is a discrimination proceeding filed by the complainants against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, for an alleged act of discrimination which purportedly occurred sometime between November 1, 1978 and June 30, 1980. The matter was originally scheduled for hearing on May 5, 1981, in Charleston, West Virginia, but the hearing was continued at the request of the parties so that a proposed settlement could be submitted for my consideration.

On June 17, 1981, the Secretary filed a motion to withdraw the complaint of discrimination together with the proposed settlement agreement, the terms of which are as follows:

1. Complainant will withdraw his complaint, HOPE CD 80-57, filed under § 105(c) of the Federal Mine Safety and Health Act of 1977, with prejudice to a complaint related to the matters contained therein being refiled.

2. Complainant authorizes the Secretary of Labor to seek a dismissal with prejudice of the complaint pending as Docket WEVA 81-174 before the Federal Mine Safety and Health Review Commission. That dismissal with prejudice will be reflected on the basis of this voluntary settlement of all matters among the parties.

3. Upon notification that the complaint in Docket No. WEVA 81-174 has been dismissed with prejudice, Cedar will post for a total period of three (3) consecutive

weeks the Notice, which has been prepared and agreed to by Boothe, counsel for the Department of Labor, Cedar and counsel for Cedar. Provided, however, that such posting period shall begin on the day of effect of a new collective bargaining agreement applicable to Cedar's operations, on Cedar's receiving notice of the dismissal of Docket No. WEVA 81-174, with prejudice, whichever date is later.

Discussion

The aforementioned notice was filed by the Solicitor on July 6, 1981. This notice indicates that complainant was awarded a job bid which had been the subject of a grievance matter filed jointly with this discrimination complaint. As complainant now has received the job, he has chosen to withdraw his complaint.

The notice also states that there has been and will be no judicial determination as to whether or not there has been any discrimination by Cedar Coal Company. It also indicates the company policy of not condoning any discriminatory practices by its management or supervisory personnel.

Conclusion

After full consideration of the proposed settlement and the attached notice, I conclude that the settlement disposition of this dispute is a reasonable and fair resolution of the matter and that its approval would be in the public interest. It seems clear that both Mr. Boothe and the respondent are satisfied with the settlement disposition of this case, and the Secretary is in accord with the agreement.

ORDER

In view of the foregoing, the proposed settlement disposition of this matter is APPROVED, and the motion to withdraw the complaint of discrimination is GRANTED.

George A. Koutras
Administrative Law Judge

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JUL 14 1981

YOUNGSTOWN MINES CORPORATION, Contestant	:	Notice of Contest
v.	:	Docket No. WEVA 81-303-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 917568 February 24, 1981 Dehue Mine
LOCAL UNION 5869, UNITED MINE WORKERS OF AMERICA, Intervenor	:	

DECISION

Appearances: Roger S. Matthews, Esq., Youngstown Mines Corporation, Pittsburgh, Pennsylvania, for the Contestant;
James P. Kilcoyne, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent;
David Vidovich, President, Local Union 5869, District 17, United Mine Workers of America, Dehue, West Virginia, for the Intervenor.

Before: Judge Cook

I. Procedural Background

Youngstown Mines Corporation (Youngstown) timely filed a notice of contest in the above-captioned proceeding pursuant to section 105(d) 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III, 1979) (1977 Mine Act), to contest Withdrawal Order No. 917568. The withdrawal order was issued at Youngstown's Dehue Mine on February 24, 1981,

1/ Section 105(d) of the 1977 Mine Act provides as follows:
"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in

pursuant to section 104(d)(2) 2/ of the 1977 Mine Act. The notice of contest states, in part, as follows:

---

fn. 1 (continued)
a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by 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 (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

2/ Section 104(d) of the 1977 Mine Act provides as follows:

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

"(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."

The factual background and Youngstown's position with respect to the aforesaid Order is as follows:

1. On February 24, 1981, Federal Mine Inspector Dana Napier issued Order No. 917568 (hereinafter "Order") pursuant to the provisions of Section 104(d)(2) of the Act, for violations of the Federal Mine Safety and Health Act of 1977 based on a report contained in the third shift mine foreman's report book dated February 2, 1981. A copy of the Order is attached hereto and identified as "Exhibit "A".

2. Under the heading and caption "Condition or Practice" the Order alleges that:

> "The report of the 3rd shift mine foreman's report book dated 2/2/1981 and signed by Hiram Marcum, Jr. stating that the fan (No. 2) was off at 4:30 A.M. and in his statement in the record book indicate that men were started withdrawing at 5:06 A.M. on 2/2/81, which is not in compliance with 75.321."

3. A copy of the report of the third shift mine foreman's report book dated February 2, 1981 and signed by Hiram Marcum Jr. is attached hereto and identified as Exhibit "B". Under the [heading] and caption "Violation and Other Hazardous Conditions Observed and Reported" it states:

> "At 4:30 A.M. fireboss called and said he had no air on 2-South. Went to air lock doors inby 1st Rt. I then realized that the fan was off. I informed the dispatcher to get all sections on phone and tell them to come out side pulling disconnects and all power coming out. Started withdrawing men at 5:06 A.M. All men cleared mines at 5:40 A.M."

4. The Order further stated that that [sic] the alleged violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety and health hazard and that the alleged violation was caused by the unwarrantable failure of the operator to comply with a mandatory standard.

5. Youngstown avers that Order No. 917568 is invalid and illegal and should be vacated for the following reasons:

(a) The Order failed to cite a condition or practice which constitutes a violation of a mandatory health or safety standard;

(b) In issuing the Order, the Inspector acted arbitrarily, unreasonably, capriciously and in total disregard of the prevailing standards for issuance of Section 104(d)(2) Orders;

(c) The Order is improper because the violation was not "caused by an unwarrantable failure" of Youngstown to comply with the cited standard; and

(d) The Order is improper since conditions related to the alleged violation were not of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard."

* * * * * * *

WHEREFORE, Youngstown respectfully requests that the Order which is challenged herein be vacated and set aside and that all actions taken, or to be taken, with respect thereto or in consequence thereof, be declared null and void and of no effect.

On March 26, 1981, the Secretary of Labor (Secretary) filed an answer alleging, in part, that Withdrawal Order No. 917568 was properly issued pursuant to section 104(d) of the 1977 Mine Act; and that there was a violation of a mandatory safety standard which was caused by Youngstown's unwarrantable failure to comply with such mandatory safety standard. Additionally, the Secretary denied all other allegations in the notice of contest. Also, on March 26, 1981, Local Union 5869 of the United Mine Workers of America (Intervenor) filed a notice of intent to intervene.

In addition to filing its notice of contest, Youngstown also filed a motion to expedite the proceedings. As grounds therefore, Youngstown stated that "the alleged unwarrantable violation * * * is a serious allegation of impropriety of [Youngstown's] mine foreman, which could cause a serious loss of his ability to carry out his supervisory and other duties under the law." On March 27, 1981, a telephone conference was held with the undersigned Administrative Law Judge and representatives of the three parties participating. During the conference, counsel for Youngstown agreed to an April 28, 1981, hearing date. Accordingly, on March 30, 1981, a notice of hearing was issued scheduling the case for hearing on the merits on April 28, 1981, in Charleston, West Virginia.

On April 1, 1981, the Secretary filed a motion for continuance and opposition to motion for expedited proceedings. The Secretary opposed Youngstown's motion to expedite the proceedings and moved for a continuance pending the filing of the associated civil penalty proceeding. On April 10, 1981, an order was issued denying the motion for a continuance. The order recounted the results of the March 27, 1981, telephone conference. It was noted that the notice of hearing was issued on March 30, 1981, giving the parties 29 days

notice as to the time, place, nature of the hearing, the legal authority under which it was to be held, and the matters of fact and law asserted. The Rules of Procedure of the Federal Mine Safety and Health Review Commission (Commission) require only that such notice be given to the parties at least 20 days before the date set for hearing. 29 C.F.R. § 2700.53 (1980). The 29 days notice given to the parties was considered adequate to protect the Secretary's rights.

The hearing was held as scheduled with representatives of the three parties present and participating. Youngstown made a motion to dismiss at the close of the Secretary's case-in-chief. The motion was taken under advisement to be ruled upon at the time of the writing of the decision. Following the presentation of the evidence, a schedule was set for the filing of post-hearing briefs and proposed findings of fact and conclusions of law. However, subsequent events necessitated a revision of the schedule for filing reply briefs. Under the revised schedule, reply briefs were due on or before June 8, 1981.

Youngstown, the Secretary and the Intervenor filed posthearing briefs on May 20, 1981. On May 22, 1981, the Secretary filed amendments to correct typographical errors in his posthearing brief. Youngstown and the Secretary filed reply briefs on June 1, 1981. The Intervenor did not file a reply brief.

II. Witnesses and Exhibits

A. Witnesses

The Secretary called as his witnesses Dana Trescott Napier, a Federal mine inspector; and Naman J. Kitchen, a union safety committeeman at the Dehue Mine.

Youngstown called as its witnesses Gary Evans, a scoop operator on February 2, 1981; and Hiram Marcum, Jr., the third shift mine foreman at the Dehue Mine.

Both the Secretary and Youngstown called Frank Marino, the dispatcher, as a witness.

The Intervenor did not call any witnesses.

B. Exhibits

1. The Secretary introduced the following exhibits in evidence:

M-1 is a copy of a letter dated February 18, 1981, received by the Mine Safety and Health Administration detailing a Union complaint and requesting an inspection of the Dehue Mine pursuant to section 103(g) of the 1977 Mine Act.

M-2 is a copy of the mine examiner's report prepared on February 2, 1981.

M-3 is a copy of the dispatcher's log prepared on February 2, 1981.

M-4 is a copy of Withdrawal Order No. 917568, February 24, 1981, 30 C.F.R. § 75.321, and a copy of the termination thereof.

M-5 is a copy of a two-page document styled "104(D) Unwarrantable Failure."

M-6 is a copy of the policy for fan stoppage procedures in effect at the Dehue Mine on February 2, 1981.

M-7 is a copy of the fan chart for the Dehue Mine's No. 2 fan covering February 2, 1981.

2. Youngstown introduced the following exhibit in evidence:

O-1 is a mine map.

3. The Intervenor did not introduce any exhibits in evidence.

III. Issues

A. The general question presented is whether Withdrawal Order No. 917568 was validly issued pursuant to section 104(d)(2) of the 1977 Mine Act. The specific issues presented as to the withdrawal order's validity are as follows:

1. Whether the Secretary has proved the existence of the underlying section 104(d)(1) citation and withdrawal order.

2. Whether the Secretary has proved the absence of an intervening "clean" inspection of the entire mine between June 9, 1980, the date of issuance of the underlying section 104(d)(1) withdrawal order, and February 24, 1981, the date of issuance of the subject section 104(d)(2) withdrawal order.

3. Whether the condition or practice cited in Withdrawal Order No. 917568 sets forth a February 2, 1981, violation of mandatory safety standard 30 C.F.R. § 75.321.

4. If the condition or practice cited in Withdrawal Order No. 917568 sets forth a February 2, 1981, violation of mandatory safety standard 30 C.F.R. § 75.321, then whether such violation was caused by Youngstown's unwarrantable failure to comply with such mandatory safety standard.

B. The subject withdrawal order contains the additional allegation that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

Youngstown sought review of this allegation in its notice of contest, and the issue was litigated by the parties. Accordingly, the following additional issue is presented in this case: If the condition or practice cited in Withdrawal Order No. 917568 sets forth a February 2, 1981, violation of mandatory safety standard 30 C.F.R. § 75.321, then whether such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

IV. Opinion and Findings of Fact

A. Stipulations

1. The Dehue Mine was owned and operated by Youngstown Mines Corporation at the time of the alleged violation (Tr. 10).

2. Youngstown Mines Corporation and its Dehue Mine are subject to the jurisdiction of the 1977 Mine Act (Tr. 10).

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Mine Act (Tr. 11).

4. Federal mine inspector Dana T. Napier issued Withdrawal Order No. 917568 and was a duly authorized representative of the Secretary of Labor (Tr. 11).

5. A true and correct copy of Withdrawal Order No. 917568 was properly served upon the mine operator in accordance with section 104(a) of the 1977 Mine Act (Tr. 11).

B. Standards Governing the Validity of Section 104(d)(2) Withdrawal Orders

Section 104(d)(1) of the 1977 Mine Act provides for the issuance of both citations and withdrawal orders. This section of the 1977 Mine Act provides for the issuance of a citation when an authorized representative of the Secretary, upon any inspection of a coal or other mine, finds: (1) that there has been a violation of any mandatory health or safety standard; (2) that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard; and (3) that such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory health or safety standard. The section also provides for the issuance of a withdrawal order if, during the same inspection or any subsequent inspection of the mine within 90 days after the issuance of the citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard caused by the mine operator's unwarrantable failure to comply.

If a withdrawal order has been issued pursuant to section 104(d)(1) with respect to any area in a mine, then section 104(d)(2) authorizes the issuance

of a withdrawal order by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the 104(d)(1) withdrawal order until such time as an inspection of such mine discloses no similar violations. Following an inspection of the mine which discloses no similar violations, the provisions of section 104(d)(1) again become applicable to that mine.

Section 104(d)(2) of the 1977 Mine Act imposes no requirement of substantive similarity of violations. Accordingly, a 104(d)(2) withdrawal order is not invalid because the underlying violation, as set forth in the underlying 104(d)(1) withdrawal order, involves a different mandatory health or safety standard. See Eastern Associated Coal Corporation, 3 IBMA 331, 346, 351-352, 81 I.D. 567, 1 BNA MSHC 1179, 1974-1975 CCH OSHD par. 18,706 (1974), aff'd. on rehearing, 3 IBMA 383, 81 I.D. 627 (1974), overruled in part by Zeigler Coal Company, 6 IBMA 182, 83 I.D. 232, 1 BNA MSHC 1446, 1976-1977 CCH OSHD par. 20,818 (1976), and Alabama By-Products Corporation, 7 IBMA 85, 83 I.D. 574, 1 BNA MSHC 1484, 1976-1977 CCH OSHD par. 21,298 (1976), and Zeigler Coal Company, 7 IBMA 280, 84 I.D. 127, 1 BNA MSHC 1518, 1977-1978 CCH OSHD par. 21,676 (1977).

Additionally, no consideration need be given to the significant and substantial criterion of the violation giving rise to the 104(d)(2) withdrawal order in order to determine its validity. To be validly issued, a 104(d)(2) withdrawal order must be based upon a violation of a mandatory health or safety standard caused by the mine operator's unwarrantable failure to comply with such mandatory health or safety standard. Zeigler Coal Company, 6 IBMA 182, 188-190, 83 I.D. 232, 1 BNA MSHC 1446, 1976-1977 CCH OSHD par. 20,818 (1976). A violation of a mandatory health or safety standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296, 84 I.D. 127, 1 BNA MSHC 1518, 1977-1978 CCH OSHD par. 21,676 (1977). A section 104(d)(2) withdrawal order "can be sustained, assuming the existence of procedural prerequisites and other necessary elements, whenever the operator actually knows or should know of a violation which it fails to abate. " Pocahontas Fuel Company, 8 IBMA 136, 145, 84 I.D. 488, 1 BNA MSHC 1580, 1977-1978 CCH OSHD par. 22,218 (1977), aff'd. sub nom. Pocahontas Fuel Company v. Andrus, 590 F.2d 95 (4th Cir. 1979).

C. Youngstown's Motion to Vacate the Withdrawal Order at the Close of the Secretary's Case-in-Chief

Youngstown moved to vacate section 104(d)(2) Withdrawal Order No. 917568 at the close of the Secretary's case-in-chief. 3/ In support of

3/ Counsel for Youngstown styled the motion as a motion to dismiss, and requested that the withdrawal order be vacated. This motion will be

its motion, Youngstown argued: (1) that the issuing inspector applied an erroneous standard in issuing the withdrawal order by determining that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, where the significant and substantial criterion is not a requirement for the valid issuance of a section 104(d)(2) withdrawal order; (2) that the Secretary failed to prove that the underlying section 104(d)(1) withdrawal order was valid; (3) that the Secretary failed to prove the existence of the underlying section 104(d)(1) citation and withdrawal order; and (4) that the Secretary failed to prove that a clean inspection of the entire mine had not occurred in the period between the issuance of the underlying section 104(d)(1) withdrawal order and the issuance of Withdrawal Order No. 917568. The motion was taken under advisement to be ruled upon at the time of the writing of the decision based on the record as it existed when the motion was made (Tr. 176-181).

Only the third and fourth grounds identified above have been reasserted by Youngstown in its posthearing brief. However, all four grounds will be addressed herein.

The first two grounds advanced by Youngstown in support of its motion to vacate the withdrawal order can be quickly disposed of. First, the law simply states that no consideration need be given to the significant and substantial criterion of the violation giving rise to the section 104(d)(2) withdrawal order in order to determine its validity. Zeigler Coal Company, 6 IBMA 182, 188-190, 83 I.D. 232, 1 BNA MSHC 1446, 1976-1977 CCH OSHD par. 20,818 (1976); cf. United Mine Workers of America v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976). The law does not state that the inspector's inclusion of such findings on the face of a section 104(d)(2) withdrawal order renders it invalid. Second, the validity of the underlying section 104(d)(1) withdrawal order is not an issue in this proceeding. It is well established that the validity of the underlying section 104(d)(1) withdrawal order is not in issue in a proceeding for review of a section 104(d)(2) withdrawal order unless a notice of contest was filed within 30 days of the issuance of such 104(d)(1) withdrawal order to contest its validity. Zeigler Coal Company, 6 IBMA 182, 83 I.D. 232, 1 BNA MSHC 1446, 1976-1977 CCH OSHD par. 20,818 (1976); Zeigler Coal Company, 5 IBMA 346, 82 I.D. 632, 1975-1976 CCH OSHD par. 20,232 (1975).

The third argument advanced by Youngstown in support of its motion to vacate the withdrawal order asserts that the Secretary failed to prove the existence of the underlying section 104(d)(1) citation and withdrawal order (see Tr. 176; Youngstown's Posthearing Brief, pp. 8-9). In response, the Secretary maintains that sufficient evidence was adduced to prove the

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footnote 3 (continued
referred to in this decision as a motion to vacate the withdrawal order at the close of the Secretary's case-in-chief because this proceeding was initiated by Youngstown's filing of a notice of contest, and because of the nature of the relief requested in the motion.

existence of the underlying section 104(c)(1) withdrawal order (Secretary's Posthearing Brief, pp. 7-8). The Secretary also maintains, for various reasons, that he was not required to prove the existence of the underlying section 104(c)(1) citation (Secretary's Reply Brief, pp. 1-3).

The matter of the existence of the underlying section 104(d)(1) withdrawal order can be easily disposed of. Section 104(d)(2) Withdrawal Order No. 917568 contains an entry identifying the initial action as Order No. 910780, issued on June 9, 1980. The Secretary did not introduce in evidence either the original or a copy of Order No. 910780. However, Inspector Napier testified that he and others searched the files in the Logan, West Virginia, office of the Department of Labor's Mine Safety and Health Administration (MSHA). The search revealed that Order No. 910780, dated June 9, 1980, was issued pursuant to section 104(d)(1) of the 1977 Mine Act (Tr. 129-130). Accordingly, it is found that the Secretary has proved the existence of the underlying section 104(d)(1) withdrawal order.

The Secretary maintains that he was not required to prove the existence of the underlying section 104(c)(1) citation because, in the Secretary's view, Youngstown did not raise the issue either in its notice of contest or in its opening statement. The Secretary also maintains that the existence of the section 104(d)(1) citation can be logically inferred from the unrebutted evidence establishing the existence of the underlying section 104(d)(1) withdrawal order. Finally, the Secretary maintains that by challenging the validity of the section 104(d)(1) withdrawal order in its motion to vacate, Youngstown admitted such order's existence, and that, in so doing, it is without basis to challenge the existence of the section 104(d)(1) citation upon which the section 104(d)(1) withdrawal order is based. For the reasons set forth below, I conclude that the Secretary was required to prove the existence of the underlying section 104(d)(1) citation. I further conclude that the Secretary failed to prove the existence of such citation.

A mine operator's section 105(d) application for review or notice of contest must contain, amongst other things, a short and plain statement of the mine operator's position on each issue of law and fact that the mine operator contends is pertinent. 29 C.F.R. §§ 2700.20(c) and 2700.21(b) (1980). The Secretary has the obligation of presenting a prima facie case, with respect to each issue raised by the mine operator, that the withdrawal order or citation in question was validly issued. Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1 BNA MSHC 1267, 1974-1975 CCH OSHD par. 19,633 (1975); Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111, 1 BNA MSHC 1260, 1974-1975 CCH OSHD par. 19,478 (1975). In the case of a section 104(d)(2) withdrawal order, the issues which can be raised by the mine operator include: (1) the existence of the underlying section 104(d)(1) citation and withdrawal order, (2) the fact of violation, (3) unwarrantable failure, (4) the occurrence of an intervening "clean" inspection of the entire mine, and (5) the other requirements for issuance of a section 104(d)(2) withdrawal order. C F & I Steel Corporation, 2 FMSHRC 3459, 2 BNA MSHC 1057, 1980 CCH OSHD par. 24,994 (1980); Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1 BNA MSHC 1267, 1974-1975 CCH OSHD par. 19,633 (1975).

Youngstown's notice of contest alleged that Withdrawal Order No. 917568 was invalid because, amongst other reasons, it was issued "in total disregard of the prevailing standards for issuance of Section 104(d)(2) Orders." This allegation was sufficient under 29 C.F.R. § 2700.20(c) (1980), to raise all issues pertaining to the validity of section 104(d)(2) Withdrawal Order No. 917568, including the issue as to the existence of the underlying section 104(d)(1) citation. The regulation, which sets forth the requirements for the contents of a notice of contest, "is not a license for academic quibbling over words, [but it plainly requires] a degree of specificity in pleading sufficient to apprise the trier of fact and other parties of the grounds of invalidity in issue." Zeigler Coal Company, 3 IBMA 448, 457, 81 I.D. 729, 1 BNA MSHC 1213, 1974-1975 CCH OSHD par. 19,131 (1974). The mine operator's allegation was sufficiently specific to provide notice to all parties that all issues pertaining to the validity of the withdrawal order had been raised. One of the prevailing standards for the issuance of a valid section 104(d)(2) withdrawal order is the existence of an underlying section 104(d)(1) citation.

The fact that Youngstown had raised all issues concerning the validity of Withdrawal Order No. 917568 was underscored at the beginning of the hearing when counsel for Youngstown outlined the issues presented. At one point in response to a question from the undersigned Administrative Law Judge, counsel for Youngstown stated that he expected "the government to put on a prima facie case as to all aspects of a 104(d)(2) order" (Tr. 7).

In view of the foregoing, I conclude that Youngstown raised all issues, including the issue as to the existence of the underlying section 104(d)(1) citation, both in its notice of contest and in its opening statement. The Secretary's position that the issue was not raised is not well founded.

The Secretary's position that the existence of the underlying section 104(d)(1) citation can be logically inferred from the unrebutted evidence establishing the existence of the underlying section 104(d)(1) withdrawal order is not well founded. A finding that the existence of the underlying section 104(d)(1) citation has been proved must be based on reliable, probative, and substantial evidence in order to comply with the requirements of the Administrative Procedure Act. See, 5 U.S.C. § 556(d). The evidence presented is not sufficient to make a finding as to the existence of such citation which complies with this requirement.

The testimony of Inspector Napier was the only reliable, probative, and substantial evidence establishing the existence of the underlying section 104(d)(1) withdrawal order. A copy of that withdrawal order, which should have contained an entry identifying the underlying section 104(d)(1) citation, was not placed in evidence. Additionally, neither the original nor a copy of the citation was placed in evidence, nor did any of the witnesses testify as to its existence. Furthermore, it cannot be concluded that the existence of the underlying section 104(d)(1) citation can be inferred from the entries contained in Exhibit M-5. The entries are not self-explanatory, and none of the witnesses identified any of the entries as denoting the underlying section 104(d)(1) citation.

The Secretary's final argument on this issue asserts that Youngstown is precluded from challenging the existence of the underlying section 104(d)(1) citation. The Secretary's reasoning is set forth as follows:

> Youngstown challenged the validity of the underlying 104(d)(1) order in its Motion to Dismiss [4/], thereby admitting its existence. (See Kentland-Elkhorn Coal Corporation, supra.) By admitting the existence of the underlying 104(d)(1) order, Youngstown is without basis to challenge the existence of 104(d)(1) citation on which the 104(d)(1) order is based.

In Kentland-Elkhorn, the mine operator sought review of a withdrawal order issued pursuant to section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970) (1969 Coal Act). In its application for review, the mine operator challenged the underlying section 104(c)(1) notice of violation and withdrawal order as "* * * issued arbitrarily, unjustly, and without legal basis or foundation in law * * *." At no time did the mine operator challenge the existence of such 104(c)(1) notice and order. The Interior Board of Mine Operations Appeals (Board) held that the validity of the underlying notice and order could not be challenged in the proceeding because the mine operator had not sought timely review of them, but that they were admissible in evidence to establish their existence as an underlying part of the section 104(c) chain. However, the Board held that the Judge committed harmless error when he ruled the 104(c)(1) notice and order inadmissible because the mine operator, by challenging their validity, had admitted their existence.

In the instant case, Youngstown never challenged the validity of the underlying section 104(d)(1) citation and, accordingly, never admitted its existence. Assuming for purposes of argument that Youngstown admitted the existence of the underlying section 104(d)(1) withdrawal order by challenging its validity, such admission did not preclude Youngstown from continuing its challenge to the existence of the underlying section 104(d)(1) citation.

In view of the foregoing, I conclude that the Secretary was required to prove the existence of the underlying section 104(d)(1) citation. I further conclude that the Secretary failed to prove such citation's existence.

The fourth argument advanced by Youngstown in support of its motion to vacate the withdrawal order asserts that the Secretary failed to prove that a "clean" inspection of the entire mine had not occurred in the period between the issuance of the underlying section 104(d)(1) withdrawal order and the issuance of Withdrawal Order No. 917568. The Secretary concedes that this issue was raised, and that he was required to present a prima facie case regarding the absence of an intervening "clean" inspection of the entire mine (Tr. 8-9; Secretary's Reply Brief, p. 3).

4/ See n. 3, supra.

In C F & I Steel Corporation, 2 FMSHRC 3459, 2 BNA MSHC 1057, 1980 CCH OSHD par. 24,994 (1980), the mine operator sought review of a withdrawal order issued on December 5, 1975, pursuant to section 104(c)(2) of the 1969 Coal Act. The order was based upon an underlying section 104(c)(1) withdrawal order issued on August 6, 1975. The evidence presented showed that the Department of the Interior's Mining Enforcement and Safety Administration (MESA) had conducted two complete regular quarterly inspections of the mine between (1) July 25, 1975, and September 25, 1975; and (2) October 2, 1975, to December 16, 1975. Of the 38 inspection days required to complete both inspections, 30 were in the period between August 6 and December 5, 1975. The Commission held that "a prerequisite to the issuance of an order of withdrawal under section 104(c)(2) of the 1969 Coal Act was the absence of an intervening 'clean' inspection of the entire mine, and that it was MESA's obligation to present a prima facie case of that fact to sustain the order." 2 FMSHRC at 3461. To present a prima facie case on the "clean" inspection issue, the Government needed to show that a "clean" inspection of the entire mine had not occurred in the period between the two orders. The Commission specifically rejected the Government's position that a "clean" inspection of the entire mine within the meaning of section 104(c)(2) occurs only when it conducts a regular quarterly inspection from beginning to end after the underlying section 104(c)(1) order has been issued.

Additionally, a series of spot health, safety, health and safety, ventilation and section 103 inspections which collectively cover the entire mine and which do not result in the issuance of any section 104(c)(2) orders, have been held to constitute a "clean" inspection of the entire mine within the meaning of section 104(c)(2) of the 1969 Coal Act. Old Ben Coal Corporation, 3 FMSHRC 1186, 2 BNA MSHC 1305, 1981 CCH OSHD par. 25,397 (1981).

The language used in section 104(c)(2) of the 1969 Coal Act is identical in all material respects to that used in section 104(d)(2) of the 1977 Mine Act. Accordingly, the foregoing precedents are equally applicable to cases involving the validity of withdrawal orders issued pursuant to section 104(d)(2) of the 1977 Mine Act.

The underlying section 104(d)(1) withdrawal order, Order No. 910780, was issued on June 9, 1980. The subject section 104(d)(2) withdrawal order was issued on February 24, 1980, i.e., 260 days later. The evidence presented is not sufficient to prove that an intervening "clean" inspection of the entire mine had not occurred between those dates.

The Secretary sought to prove through Exhibit M-5 that an intervening clean inspection of the entire Dehue Mine had not occurred between June 9, 1980, and February 24, 1981. The exhibit is styled "104(d) Unwarrantable Failure," and consists of two pages, each of which is divided into five vertical columns. The column headings, when read from left to right, are "Date Issued," "Citation/Order No.," "Reg. Section," "Date Due," and "Abatement Date." The exhibit contains a total of 30 entries, beginning May 30, 1980, and ending February 24, 1981.

In the column bearing the heading "Reg. Section," 29 provisions of Title 30 of the Code of Federal Regulations and one provision of the 1977 Mine Act are cited. The notation "104 b" appears adjacent to two of the entries, "104 d 1" appears adjacent to seven of the entries, and "104 d 2" appears adjacent to eight of the entries. No notation appears adjacent to 11 of the entries in this column.

The entries contained in Exhibit M-5 are not self-explanatory. This defect in the exhibit was highlighted by the inspector's testimony that he required outside assistance to determine that No. 910780 was a 104(d)(1) withdrawal order, and not a citation (Tr. 129-130). Furthermore, the inspector gave testimony explaining only several of the individual entries appearing on the exhibit (Tr. 129, 132-133).

Inspector Napier gave a general explanation as to the nature of Exhibit M-5. When asked to explain the exhibit, he testified that he and his supervisor searched the records to determine whether the Dehue Mine was on a "(d) sequence," or whether a "clean" inspection had been made at that mine. He further testified that according to the instructions he had received, a "clean" inspection is a regular inspection of the complete mine, performed by one or more inspectors, during which the "(d) sequence violation" is not issued (Tr. 34-35). 5/ He testified at a later point in his testimony that when such an inspection is performed, the notation "clean inspection" is entered on Exhibit M-5. Since Exhibit M-5 does not contain such a notation, the inspector concluded that a "clean" inspection of the entire Dehue Mine had not been made (Tr. 131-132). He further testified that the last complete inspection of the Dehue Mine was performed between the months of October and December, 1980 (Tr. 132-133).

In addition to the foregoing, it is unclear whether Inspector Napier researched the Dehue Mine's inspection history as far back as June 9, 1980,

5/ Inspector Napier testified on this point as follows during direct examination:

"Q. Okay. I will now show you what has been received in evidence as MSHA's Exhibit Number 5 (indicating). Will you explain that for the Court?

"A. Yes, sir. My supervisor, Oscar Nally, and myself, we searched the records to determine if the mine was on a (d) Sequence or if there was a clear inspection at the coal mine or if a clear inspection had been made at the coal mine.

"And by a clear interpretation of this, our instructions are that a clear inspection is a regular inspection of that complete coal mine by either one or more inspectors where that the (d) Sequence violation is not issued during that inspection.

"And that clears the run on the (d) Sequence. To our determination, they had not had, on the (d) Sequence, within ninety days, a clear inspection, or within the last portion we had been there the (d) Sequence was in continuance at this coal mine" (Tr. 34-35).

with an eye toward determining whether a "clean" inspection of the entire mine had been performed between such date and February 24, 1981. He testified that Exhibit M-5 revealed three unwarrantable failure violations occurring at the mine on December 3, 1980 (Tr. 132-133), and he appeared to imply that he had not researched the time period prior to the commencement of the regular inspection which began in October of 1980 (Tr. 35). Given his definition of a "clean" inspection, he may well have considered it unnecessary to research the time period prior to the commencement of the last regular inspection because the search had already revealed three unwarrantable failure violations dated December 3, 1980.

The foregoing evidence is not sufficient to support a finding that a "clean" inspection of the entire Dehue Mine had not occurred in the 260 days between June 9, 1980, and February 24, 1981. The Secretary's case on this issue stands or falls on the basis of Exhibit M-5, and that document is fatally flawed. The only type of inspection that would be expected to be recorded on Exhibit M-5 as a "clean" inspection would be a complete regular inspection of the entire mine which resulted in the issuance of no unwarrantable failure violations. A series of spot health, safety, health and safety, ventilation and section 103 inspections which collectively cover the entire mine and which do not result in the issuance of any unwarrantable failure violations would not be expected to be recorded on Exhibit M-5 as a "clean" inspection of the entire mine, given the policy in effect at MSHA's Logan, West Virginia, office. This is contrary to the rule of law set forth by the Commission in C F & I Steel Corporation, 2 FMSHRC 3459, 2 BNA MSHC 1057, 1980 CCH OSHD par. 24,994 (1980), and Old Ben Coal Corporation, 3 FMSHRC 1186, 2 BNA MSHC 1305, 1981 CCH OSHD par. 25,397 (1981), and precludes a finding that the Secretary has established a prima facie case as to the absence of an intervening "clean" inspection of the entire mine between June 9, 1980, and February 24, 1981.

In view of the foregoing, I conclude that the Secretary has failed to prove a prima facie case as to (1) the existence of the underlying section 104(d)(1) citation, and (2) the absence of an intervening "clean" inspection of the entire mine.

It is found later in this decision (1) that the cited violation of mandatory safety standard 30 C.F.R. § 75.321 occurred at Youngstown's Dehue Mine on February 2, 1981, (2) that such violation was caused by Youngstown's unwarrantable failure to comply with such mandatory standard, and (3) that such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. Accordingly, Youngstown's motion will be granted in part and denied in part. The subject section 104(d)(2) withdrawal order will not be vacated, but it will be modified to a section 104(d)(1) citation.

D. Power to Modify a Section 104(d)(2) Withdrawal Order to a Section 104(d)(1) Citation

Section 105(d) of the 1977 Mine Act provides, in part, that if, within 30 days of receipt thereof, a mine operator notifies the Secretary that he

intends to contest the issuance of an order issued under section 104, the Secretary shall immediately advise the Commission of such notification. Then, the Commission is required to afford an opportunity for a hearing in accordance with 5 U.S.C. § 554, but without regard to 5 U.S.C. § 554(a)(3). Section 105(d) empowers the Commission and its Administrative Law Judges to thereafter "issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's * * * order, or directing other appropriate relief." (Emphasis added.) It is therefore clear that the statute empowers the undersigned Administrative Law Judge to modify the subject 104(d)(2) withdrawal order to a 104(d)(1) citation.

It is recognized that certain Board decisions under the 1969 Coal Act can be broadly read for the proposition that an Administrative Law Judge does not have the authority under any circumstances to modify a withdrawal order to a citation. See Freeman Coal Mining Company, 3 IBMA 434, 444-446, 81 I.D. 723, 1 BNA MSHC 1209, 1974-1975 CCH OSHD par. 19,177 (1974); Zeigler Coal Company, 2 IBMA 216, 224-225, 80 I.D. 626, 1 BNA MSHC 1078, 1973-1974 CCH OSHD. par. 16,608 (1973); Freeman Coal Mining Corporation, 2 IBMA 197, 209-210, 80 I.D. 610, 1 BNA MSHC 1073, 1973-1974 CCH OSHD par. 16,567 (1973), aff'd. on other grounds sub nom. Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974). To the extent that such a broad reading of those decisions is possible, they are not considered good law under the 1977 Mine Act. A blanket prohibition against modifying a withdrawal order to a citation is considered contrary to the powers expressly conferred on the Commission and its Administrative Law Judges by section 105(d) of the 1977 Mine Act.

The subject withdrawal order must be pronounced invalid as a section 104(d)(2) withdrawal order only because the Secretary failed to prove both the existence of the underlying section 104(d)(1) citation and the absence of an intervening "clean" inspection of the entire mine. The failure of proof on one or both of these two issues requires a disposition invalidating the order as a section 104(d)(2) withdrawal order.

However, the fact that the withdrawal order is invalid because of a failure of proof on these two issues does not mean that the additional allegations appearing on the face of the order are not well founded. The withdrawal order alleges, and the proof shows, the occurrence of a condition in violation of mandatory safety standard 30 C.F.R. § 75.321; that such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard; and that such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. These issues have been litigated by the parties, and findings of fact and conclusions of law are set forth herein resolving these issues in favor of the Secretary. It is therefore considered appropriate to modify the withdrawal order to a section 104(d)(1) citation containing findings which reflect what the proof shows. The modification will not result in a finding that a condition existed other than the one charged, nor that Youngstown violated any mandatory standard other than the one charged.

E. Occurrence of Violation

Federal mine inspector Dana T. Napier issued Withdrawal Order No. 917568 at Youngstown's Dehue Mine on February 24, 1981, during the course of a special inspection conducted pursuant to section 103(g) of the 1977 Mine Act (Exh. M-1; Tr. 19-20, 28). The withdrawal order alleges a violation of mandatory safety standard 30 C.F.R. § 75.321 in that:

> The report of the 3rd shift mine foreman's report book dated [February 2, 1981,] and signed by Hiram Marcum, Jr. stating that the fan (No. 2) was off at 4:30 a.m. and in his statement in the record book indicate that men were started withdrawing at 5:06 a.m. on [February 2, 1981,] which is not in compliance with [30 C.F.R. §] 75.321.

(Exh. M-4).

Mandatory safety standard 30 C.F.R. § 75.321 provides as follows:

> Each operator shall adopt a plan on or before May 29, 1970, which shall provide that when any mine fan stops, immediate action shall be taken by the operator or his agent (a) to withdraw all persons from the working sections, (b) to cut off the power in the mine in a timely manner, (c) to provide for restoration of power and resumption of work if ventilation is restored within a reasonable period as set forth in the plan after the working places and other active workings where methane is likely to accumulate are reexamined by a certified person to determine if methane in amounts of 1.0 volume per centum or more exists therein, and (d) to provide for withdrawal of all persons from the mine if ventilation cannot be restored within such reasonable time. The plan and revisions thereof approved by the Secretary shall be set out in printed form and a copy shall be furnished to the Secretary or his authorized representative.

30 C.F.R. § 75.321-1 provides that "[u]nless a different period of time is approved by the Coal Mine Safety District Manager, 'reasonable period' referred to in § 75.321 means a time lapse of not more than 15 minutes." The Dehue Mine's fan stoppage plan, in effect on February 2, 1981, contained the following requirement:

> If FAN is OFF for more than 15 MINUTES, notify all people underground and tell them to come outside and the last people coming out of an area will knock the AC and DC Power for their area. When the FAN is OFF for 15 MINUTES and people start outside EVERYONE (INCLUDING FOREMEN) will come directly outside. [Emphasis in original.] (Exh. M-6.)

In short, the fan stoppage plan required the mine operator, amongst other things, to start withdrawing all people from the mine if the fan was off for more than 15 minutes (see Tr. 29).

The evidence presented shows that three fans are used to ventilate the Dehue Mine. The No. 1 fan ventilates the old portion of the mine, and produces approximately 150,000 cubic feet of air per minute (Tr. 32). The No. 2 fan ventilates the active portion of the mine, and produces approximately 250,000 cubic feet of air per minute (Tr. 32-33). According to Mr. Hiram Marcum, Jr., the third shift mine foreman, the No. 2 fan is the main ventilating fan for the active working area (Tr. 227). The No. 3 fan, a bleeder fan, produces approximately 16,000 cubic feet of air per minute (Tr. 32).

The No. 2 fan stopped at approximately 4 a.m. on February 2, 1981 (Exh. M-7; Tr. 33-34, 87, 107-108). The fan was not restarted until approximately 7 a.m. on February 2, 1981 (Exh. M-7; Tr. 58). Youngstown did not begin withdrawing the miners from the Dehue Mine's underground workings until approximately 5:06 a.m. (Exh. M-2; Tr. 30-31, 170-171), i.e., approximately 1 hour after the No. 2 fan stopped.

In summary, the Dehue Mine's No. 2 fan was off for approximately 1 hour on February 2, 1981, before Youngstown began withdrawing the miners from the mine's underground workings. This clearly violated the 15-minute requirement set forth in the Dehue Mine's fan stoppage plan. Accordingly, it is found that a violation of mandatory safety standard 30 C.F.R. § 75.321 has been established by a preponderance of the evidence.

F. Unwarrantable Failure Criterion

Withdrawal Order No. 917568 contains the allegation that the cited violation was caused by the mine operator's unwarrantable failure to comply with mandatory safety standard 30 C.F.R. § 75.321. A violation of a mandatory health or safety standard is caused by an unwarrantable failure to comply where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296, 84 I.D. 127, 1 BNA MSHC 1518, 1977-1978 CCH OSHD par. 21,676 (1977). The evidence presented in this case shows that the No. 2 fan was off for approximately 1 hour before Youngstown began to withdraw the miners from the Dehue Mine's underground workings, and that Youngstown's failure to begin the evacuation earlier was caused by an unwarrantable failure to comply with mandatory safety standard 30 C.F.R. § 75.321.

The evidence presented as to the general layout of the Dehue Mine reveals that the mine's underground workings are situated on both sides of the Guyandotte River. The No. 3 fan, the dispatcher's office and the slope entrance are located on the east side of the river (Exh. O-1; Tr. 41-45). The dispatcher's office is located on the surface next to the slope entrance (Tr. 45, 172).

The underground areas identified as First Right, First Northwest, South Mains (10 Drive), and Second South are located on the west side of the river.

The No. 2 fan and two intake air shafts are also located on the west side of the river (Exh. O-1; Tr. 32-33, 41-45). One of those intake air shafts is located in reasonably close proximity to the No. 2 fan. The other intake air shaft, known as the Sugar Branch Shaft, appears to be located in one of the westernmost portions of the mine (Exh. O-1).

The underground areas located on the east side of the river are connected to the underground areas on the west side of the river by three entries passing underneath the river. One of those entries is on return air and another is on neutral air. The middle entry is the track entry, and it is on intake air (Exh. O-1). The No. 2 fan and the nearby intake air shaft are located fairly close to the point at which the three entries passing underneath the river join the underground workings on its western side (Exh. O-1). In terms of distance, the No. 2 fan is located on the surface approximately one-quarter of a mile from the slope entrance which, as noted above, is located on the east side of the river (Exh. O-1; Tr. 117). An individual proceeding underground from the slope entrance to the underground workings on the west side of the river would be required to pass close to the No. 2 fan's air shaft (Tr. 116).

The evidence as to the specific activities occurring on the morning of February 2, 1981, reveals that two fire bosses, Mr. Louis Zeto and Mr. Isaac Nelson, were on duty on the third shift on February 2, 1981. Mr. Zeto had responsibility for Second South Mains and First Right Mains. Mr. Nelson had responsibility for 10 Drive, Second Right off South Mains, and First Northwest (Tr. 220-221). Additionally, it is important to bear in mind throughout the discussion which follows that the fan alarm for the No. 2 fan was inoperable at all times relevant to the February 2, 1981, violation of mandatory safety standard 30 C.F.R. § 75.321 which is the subject matter of this case. 6/

6/ The alarm system for the No. 2 fan was wired to a horn signaling device located at or near the lamphouse. The horn signaling device was approximately 30 or 40 feet from the dispatcher's office. The alarm system is the usual method for determining whether a fan stoppage has occurred. However, the fan alarm did not sound on the morning of February 2, 1981, because the alarm system was inoperable at all times relevant to the violation charged. Inspector Napier issued a separate citation to Youngstown for its failure to have an operable fan alarm system. The inoperable fan alarm was taken into account by the inspector in making his decision to issue the subject withdrawal order (Tr. 82-83, 102, 189).

The citation encompassing the inoperable fan alarm is not part of the subject matter of this proceeding. The Secretary has not stressed the inoperable fan alarm in arguing that the violation which is the subject matter of this case was caused by Youngstown's unwarrantable failure to comply with mandatory safety standard 30 C.F.R. § 75.321.

Mr. Hiram Marcum, Jr., the third shift mine foreman, went underground at approximately 12:30 a.m. on February 2, 1981. He eventually proceeded to First Northwest where he and Messrs. Gary Evans and Ray Wolford performed work to prepare the area for mining which was to occur on the following day. The setting of timbers was one of the activities that the three men intended to perform there. However, no available timbers were present. Therefore, the three men proceeded outside the mine for the purpose of obtaining some. They used a track-mounted jeep to ride to the bottom of the slope and, thereafter, transferred to the slope car, or cage, for the ride up the slope (Tr. 201-203, 218-219). It is clear beyond any doubt that the three men passed through the intake entry located beneath the Guyandotte River while riding from First Northwest to the bottom of the slope.

Upon reaching the top of the slope, Mr. Marcum was immediately summoned to the dispatcher's office by Mr. Frank Marino, the dispatcher, who informed him that Mr. Zeto had just called on the pager to report an air problem, and that Mr. Zeto was standing by to talk with him (Tr. 183-184). Mr. Marcum proceeded immediately to the dispatcher's office and took the call. At 4:45 a.m., Mr. Marcum was informed by Mr. Zeto that he had "no air" on the Second South Mains (Tr. 183-185, 221-222). Mr. Zeto informed Mr. Marcum that he was going to check the section further to see if he could find anything wrong, and requested Mr. Marcum to call Mr. Isaac Nelson, the other fire boss, for the purpose of determining whether everything was all right at 10 Drive (Tr. 185, 221).

Then, Mr. Marcum asked Mr. Marino where Mr. Nelson was located. Mr. Marino responded that Mr. Nelson had departed South Mains heading for First Northwest at 4:30 a.m. (Tr. 184-185). Mr. Marcum then contacted Mr. Nelson on the pager. Mr. Nelson was on First Northwest at the time. Mr. Marcum asked Mr. Nelson whether he had made 10 Drive, and Mr. Nelson responded in the affirmative (Tr. 185-186). Mr. Marcum followed up this question by asking Mr. Nelson whether he had found anything wrong on 10 Drive, such as any downed curtains or any falls. Mr. Nelson responded in the negative, but stated that he could not get any air on 10 Drive (Tr. 186-187, 197-198). Mr. Marcum instructed Mr. Nelson to "go on up at First Northwest and see if you're getting any air" and to immediately report his findings to Mr. Marino (Tr. 187, 198-199).

Mr. Marcum, accompanied by Messrs. Evans and Wolford, returned underground. Mr. Marcum intended to go to 10 Drive to personally check the area and determine the cause of the problem (Tr. 187-188).

The three men stopped at First Right so that Mr. Marcum could call Mr. Marino. He placed the call and asked Mr. Marino whether Mr. Nelson had reported back. Mr. Marino responded in the negative (Tr. 188, 206, 232-233). Mr. Marcum testified that he knew something was wrong when he stopped at First Right because the volume of air passing through the area was noticeably less than it should have been (Tr. 223, 232-233). Mr. Evans' testimony indicates that after calling Mr. Marino, Mr. Marcum stated that he could not feel any air movement. Mr. Evans further testified that he acknowledged Mr. Marcum's remark by stating: "Well, I can't feel nothing, either" (Tr. 206).

Then, the three men proceeded inby First Right along the G.K. Mains toward South Mains High Top (Tr. 206, 223; Exh. O-1). The men stopped at the double air lock doors which had been installed in No. 38 break, and Mr. Evans headed for those doors (Tr. 224). Mr. Marcum testified that he knew that no air was coming down the return even before Mr. Evans opened the air lock door because he could not hear the air whistling through the return (Tr. 224, 232-233). The first double door opened effortlessly (Tr. 224). Both Mr. Evans and Mr. Marcum testified that they knew at that point that the fan had stopped (Tr. 206, 224, 232-233).

The three men retreated outby and checked the return overcast at First Right. There was no air movement in the overcast. Mr. Marcum called Mr. Marino on the pager, informed him that the fan had stopped, and told him to begin withdrawing the men from the mine. Mr. Marino received this call at approximately 5:06 a.m., and the evacuation of the mine began (Tr. 188, 224-225).

The evidence presented in this case points unmistakably to the conclusion that Youngstown's failure to begin withdrawing the miners from the Dehue Mine's underground workings until 5:06 a.m. was caused by an unwarrantable failure to comply with mandatory safety standard 30 C.F.R. § 75.321, notwithstanding the fact that the No. 2 fan's alarm system was inoperable at all times relevant to this proceeding. This conclusion is based on the combined actions of Mr. Isaac Nelson, one of the two fire bosses, and Mr. Hiram Marcum, Jr., the third shift mine foreman.

Federal law imposes an affirmative obligation on the operator of a coal mine which is subject to the provisions of the 1977 Mine Act to maintain adequate ventilation in such mine's underground workings so as to dilute, render harmless, and carry away volatile methane gas. Explosive concentrations of methane gas pose well recognized dangers to the safety of the miners in the mine's underground workings, and the ventilation requirements set forth in the various mandatory safety standards applicable to underground coal mines are intended, in part, to eliminate those dangers. 7/ See, e.g.,

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7/ See S. Rep. No. 95-181, 95th Cong., 1st. Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 629 (1978), which states, in part, as follows:

"Investigation of the Scotin [sic] mine disaster in Eastern Kentucky provides but one case in point. On March 8 and 11, 1976, two explosions of methane gas in the Scotia mine resulted in the deaths of twenty-three (23) miners and three (3) federal mine inspectors. Methane is a colorless, odorless, tasteless gas which is liberated or escapes naturally in certain mines. (Although methane liberation is most commonly associated with coal mining, it is present in connection with the mining of other minerals also, trona, for example.) Methane is explosive when it constitutes between 5 and 15 percent of the atmosphere of a mine, and when, while in that concentration range, it is ignited by some ignition source. The pressure of methane in a mine is controlled by adequate ventilation; and thus, ventilation of a mine is important not only to provide fresh air to miners, and to

30 C.F.R. §§ 75.300, 75.301, 75.301-4, 75.301-5, 75.302, 75.307, 75.308, 75.309, 75.310, 75.311, and 75.312. In addition, the need for vigilance and timely action as to health and safety matters is underscored by those provisions which require the performance of examinations and tests designed to determine whether there is compliance with the mandatory health and safety standards and to detect safety and health hazards. See, e.g., 30 C.F.R. §§ 75.205, 75.300, 75.300-4, 75.303, 75.304, 75.305, 75.306, 75.307, and 75.320.

In view of these considerations, it must be concluded that a fire boss, amongst others, who detects a loss of air during the course of his duties is under an affirmative obligation to immediately notify the appropriate representatives of the mine operator that he has detected a loss of air. A "fire boss" is defined, amongst other definitions, as "[a] person designated to examine the mine for gas and other dangers," and as "[a] state certified supervisory mine official who examines the mine for firedamp, gas, and other dangers before a shift comes into it and who usually makes a second examination during the shift * * *." Paul W. Thrush (ed.), A Dictionary of Mining, Mineral, and Related Terms (Washington, D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at page 429. It must be further concluded that a mine foreman, or other similarly situated representative of the mine operator, who receives a report that a loss of air has been detected underground, is required to conduct his search for the cause of the problem in the most direct and most efficient manner available to him. In the instant case, both Mr. Nelson and Mr. Marcum were negligent in discharging their respective duties.

Mr. Nelson detected the loss of air on 10 Drive prior to departing South Mains for First Northwest at 4:30 a.m. Yet, he made no attempt to promptly inform his superior as to the existence of the condition. In fact, he made no attempt to communicate his findings to his superior until he was contacted by Mr. Marcum at approximately 4:45 a.m., i.e., after the mine foreman directed an inquiry to him (Tr. 198). The knowledge acquired by Mr. Nelson at or before 4:30 a.m. as to the loss of air is properly imputed to Youngstown. The actual or constructive knowledge of a person designated by the mine operator to perform required examinations is properly imputed to the mine operator. Pocahontas Fuel Company, 8 IBMA 136, 84 I.D. 448, 1 BNA MSHC 1580, 1977-1978 CCH OSHD par. 22,218 (1977), aff'd. sub nom. Pocahontas Fuel

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fn. 7 (continued)
control dust accumulation, but also to sweep away liberated methane before it can reach the range where the gas could become explosive. In terms then of the safety of miners, the requirement that a mine be adequately ventilated becomes one of the most important safety standards under the [1969] Coal Act."

Additionally, Inspector Napier testified that a recent methane gas explosion at Westmoreland Coal Company's Ferrell No. 17 Mine, which resulted in the death of five miners, occurred when improper ventilation permitted the gas to build up (Tr. 39).

Company v. Andrus, 590 F.2d 95 (4th Cir. 1979). Additionally, his negligence in failing to promptly communicate his findings to mine management is imputable to Youngstown. See generally, Nacco Mining Company, 3 FMSHRC 848, 2 BNA MSHC 1272, 1981 CCH OSHD par. 25,330 (1981).

Mr. Marcum testified that he did not think that a fan problem existed when he began his return trip to the mine's underground workings because: (1) the fan alarm did not go off, (2) only one fire boss had called reporting "no air," and (3) none of the workers underground had called to report an air problem (Tr. 225-226). Significantly, he maintained that he did not talk to Mr. Nelson before beginning his return trip underground (Tr. 223, 232). But he also maintained that he might have suspected a fan problem had he been successful in contacting Mr. Nelson before returning underground, and had Mr. Nelson also reported "no air" (Tr. 223).

Mr. Marcum's testimony is not credible insofar as he maintains that he did not talk to Mr. Nelson before beginning his return trip underground. Mr. Marino testified that Mr. Marcum contacted Mr. Nelson on the pager after talking to Mr. Zeto and before returning underground, and that Mr. Nelson reported a loss of air, or "no air," on 10 Drive during their conversation (Tr. 184-197, 197-198). Mr. Marino's testimony is considered credible on this point. Therefore, Mr. Marcum, by his own admission, should have suspected a fan problem before beginning his return trip underground.

However, it appears that Mr. Marcum managed to convince himself before beginning his return trip underground that the problem had been caused by either a roof fall or a downed curtain somewhere on South Mains (10 Drive) (Tr. 199, 205, 211). It further appears that Mr. Marcum became so preoccupied with this belief (1) that he failed to notice those things which a reasonable man in his position would have noticed, observations which should have led him to deduce that a fan stoppage had occurred, and (2) that he passed, but failed to stop and to examine, the No. 2 fan's air shaft on his way to South Mains. A reasonable man in his position would have stopped and examined the air shaft, an examination which would have conclusively revealed that a fan stoppage had occurred, instead of proceeding farther into the mine.

The evidence shows that the largest volume of intake air used to ventilate the active workings enters the mine through the slope entrance (Tr. 106). In fact, approximately 95,000 cubic feet per minute of the 250,000 cubic feet per minute of air drawn into the mine by the No. 2 fan enters through the slope, and moves at a speed of approximately 10 to 12 miles per hour (Tr. 35-36, 140-141). Air movement is barely perceptible in the slope when the No. 2 fan is off (Tr. 141-142). A number of observations could and should have been made in the vicinity of the slope, observations which would have led a reasonable man to conclude that a fan stoppage had occurred. First, the slope entrance is approximately 15 feet wide and 8 to 9 feet high (Tr. 158, 159). A cloth rag attached to a wire was hanging in the slope entrance. The rag was hanging approximately 2 feet down from the roof, and measured approximately 8 inches in length and 4 inches in width (Tr. 140-142, 158-159, 190). The

rag is drawn horizontally until it almost touches the roof when the No. 2 fan is on, but hangs in a vertical position and barely moves when the No. 2 fan is off (Tr. 140-142). Second, Mr. Marcum should have been able to feel the lack of air movement as he stood at the top of the slope (Tr. 35-36, 99, 141). Third, Mr. Marcum should have detected a lack of air pressure pushing against a small wooden door located at the top of the slope which must be opened to board the slope car (Tr. 140-141, 161). Fourth, Mr. Marcum should have detected the absence of air while riding the open slope car (Tr. 140-141, 147). Finally, Mr. Marcum should have noticed the lack of air movement when he reached the bottom of the slope (Tr. 106-107).

Only a stoppage of the No. 2 fan could have accounted for the absence of air in the slope area. The roof fall or short circuit in the air which Mr. Marcum appears to have suspected would not have accounted for this phenomenon (Tr. 36-37, 99-100, 148-149). The mine is too large, covers too much territory, for a roof fall or similar problem to have interferred with the ventilation in such a way that Mr. Zeto would not get any air on Second South (Tr. 148-150).

Additionally, Mr. Marcum passed, but failed to stop and examine, the No. 2 fan's air shaft on his way to South Mains. He could have disembarked from the jeep and walked through some air lock doors into an overcast, and thereafter proceed to the air shaft. If the No. 2 fan had been working, the air movement at the bottom of that shaft would have been quite noticeable (Tr. 116-117, 150-153, 157-158). Similarly, the absence of air movement would have been quite noticeable.

In view of the combined actions of Messrs. Nelson and Marcum, I conclude that Youngstown failed to abate a violative condition that it knew or should have known existed because of a lack of due diligence or because of indifference or lack of reasonable care. The failure to begin withdrawing the miners from the Dehue Mine's underground workings until approximately 5:06 a.m. was caused by an unwarrantable failure to comply with the requirements of mandatory safety standard 30 C.F.R. § 75.321.

G. Significant and Substantial Criterion

Withdrawal Order No. 917568 contains the additional allegation that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. Although no consideration need be given to the significant and substantial criterion in order to determine the validity of a section 104(d)(2) withdrawal order, Youngstown sought review of the allegation in its notice of contest and the issue was litigated by the parties.

In National Gypsum Company, 3 FMSHRC 822, 2 BNA MSHC 1201, 1981 CCH OSHD par. 25,294 (1981), the Commission held:

> [T]hat a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine

safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

3 FMSHRC at 825. Additionally, the Commission stated that:

> Although the [1977 Mine Act] does not define the key terms "hazard" or "significantly and substantially," in this context we understand the word "hazard" to denote a measure of danger to safety or health, and that a violation "significantly and substantially" contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial. 3 FMSHRC at 827. [Footnote omitted.]

The No. 2 fan ventilates the active portion of the mine, and produces approximately 250,000 cubic feet of air per minute (Tr. 32-33). It is the main ventilating fan for the active working area (Tr. 227).

A substantial amount of the methane gas liberated by the Dehue Mine is removed from the underground workings by the No. 2 fan. Methane gas is removed from the mine by that fan at a rate of approximately 175,000 cubic feet in a 24-hour period. Of the three fans used to ventilate the mine, the No. 2 fan removes the most methane (Tr. 33, 38). The fan stoppage could have permitted a substantial amount of methane gas to build up in the Dehue Mine's active workings. Given an ignition source, an explosion could have occurred. All miners in the active workings would have been exposed to fatal injuries (Tr. 38-39, 49). Approximately 19 men were working underground at the time (Tr. 220). Accordingly, it must be concluded that the violation was extremely serious.

In view of the foregoing, I find that the violation could have been a major cause of a danger to safety or health. The particular facts surrounding the violation show the existence of a reasonable likelihood that the hazard contributed to would result in an injury or an illness of a reasonably serious nature. Accordingly, I conclude that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

V. Conclusions of Law

1. Youngstown Mines Corporation and its Dehue Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal mine inspector Dana T. Napier was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Withdrawal Order No. 917568.

4. The Secretary of Labor has failed to prove that Withdrawal Order No. 917568 was validly issued pursuant to section 104(d)(2) of the 1977 Mine Act because he has failed to prove: (1) the existence of the underlying section 104(d)(1) citation; and (2) the absence of an intervening "clean" inspection of the entire Dehue Mine between June 9, 1980, the date of issuance of the underlying section 104(d)(1) withdrawal order, and February 24, 1981, the date of issuance of Withdrawal Order No. 917568.

5. The violation of mandatory safety standard 30 C.F.R. § 75.321 charged in Withdrawal Order No. 917568 is found to have occurred.

6. The subject violation of mandatory safety standard 30 C.F.R. § 75.321 was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard.

7. The subject violation of mandatory safety standard 30 C.F.R. § 75.321 was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

8. All of the conclusions of law set forth in Part IV, supra, are reaffirmed and incorporated herein.

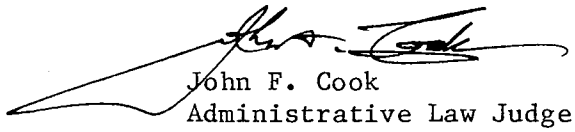
VI. Proposed Findings of Fact and Conclusions of Law

The Secretary, Youngstown, and the Intervenor filed posthearing briefs. Additionally, the Secretary and Youngstown filed reply briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

Accordingly, IT IS ORDERED that Youngstown's motion to vacate section 104(d)(2) Withdrawal Order No. 917568 at the close of the Secretary's case-in-chief be, and hereby is, GRANTED IN PART and DENIED IN PART; and that Youngstown's notice of contest be, and hereby is, GRANTED IN PART and DENIED IN PART. IT IS THEREFORE ORDERED that Withdrawal Order No. 917568 be, and hereby is, MODIFIED from a section 104(d)(2) withdrawal order to a section 104(d)(1) citation containing findings: (1) that a violation of mandatory safety standard 30 C.F.R. § 75.321 occurred at Youngstown's Dehue Mine on February 2, 1981, in that the No. 2 fan stopped at approximately 4 a.m. and Youngstown did not begin to withdraw the miners from the mine's underground workings until approximately 5:06 a.m., in violation of the 15-minute requirement set forth in the fan stoppage plan; (2) that such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory safety standard; and (3) that such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

IT IS FURTHER ORDERED that No. 917568, as so modified, be, and hereby is, AFFIRMED.



John F. Cook
Administrative Law Judge

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Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUL 17 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RALPH W. JOHNSON,	COMPLAINT OF DISCRIMINATION
v. Complainant,	DOCKET NO. WEST 81-69-D
PATHFINDER MINES CORPORATION,	MINE: Lucky McMine
Respondent.	

ORDER APPROVING SETTLEMENT

On July 9, 1981, the parties filed a stipulation of settlement, consent and motion. According to the terms of the settlement, respondent is to pay the complainant, Ralph W. Johnson, the sum of $1,000.00 for loss of back wages and other expenses resulting from his discharge. Furthermore, the complainant's employment record will be expunged of any adverse references relating to his discharge. Having given due consideration to the proposed settlement I conclude that it should be granted.

IT IS THEREFORE ORDERED that the stipulation of settlement, consent and motion is hereby approved. Respondent is ORDERED to pay the complainant $1,000.00 within 30 days from the date of this order.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUL 20 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PHOENIX SAND AND ROCK, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-396-M A/C No. 02-01037-05005 MINE: Agua Fria Pit

APPEARANCES:

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For the Petitioner

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Mesa, Arizona 85201
For the Respondent

Before: Judge Jon D. Boltz

DECISION

By authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the petitioner seeks an order assessing civil monetary penalties against the respondent for alleged violations of regulations as more particularly set forth in four citations, all of which were issued on March 11, 1980.

At the hearing, the parties agreed to the following:

1. I have jurisdiction over the parties and subject matter of these proceedings.

2. The respondent is an operator of moderate size and has a moderate history of prior violations.

3. The imposition of requested civil monetary penalties will not impair respondent's ability to remain in business.

4. The citations were in fact issued on the date indicated in the body of the citations.

5. The inspector who issued the citations was an authorized representative of the Secretary.

At the conclusion of all of the evidence, the parties agreed to waive the filing of post hearing briefs and agreed to have a Decision rendered from the bench after closing arguments. The bench Decision is as follows:

BENCH DECISION

Citation No. 376188
Citation No. 376191

The petitioner alleges in Citation No. 376188 a violation of 30 C.F.R. 56.14-1[1]/ because the self cleaning tail pulley of a transfer belt under the cone crusher was unguarded. In Citation No. 376191 petitioner alleges a violation of 30 C.F.R. 56.12-8[2]/ in that electrical wires leading into a junction box were pulled away from the strain relief clamp and were rubbing on the metal part of the junction box. These allegations were admitted by the respondent. Accordingly, considering the criteria set forth in section 110(i) of the Act, these citations are affirmed and penalties are assessed in the amounts of $106.00 and $48.00 respectively.

Citation No. 376189

A violation of 30 C.F.R. 56.12-32[3]/is alleged in that the electrical panel on the trailer for the control switches of the crusher operator did not have an adequate cover to fully cover the electrical wires. All of the wires and the connections in the box were not covered. These facts were

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1/ 56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and take up pulleys; fly wheel; couplings; shafts; saw blades; fan inlets; similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

2/ 56.12-8 Mandatory. Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splices boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushing.

3/ 56.12-32 Mandatory. Inspection and cover plates on electrically equipment and junction boxes shall be kept in place at all times, except during testing or repairs.

undisputed. The regulation requires cover plates on electrical junction boxes to be kept in place, and since this had not been done, the citation is affirmed. The penalty assessed is $20.00, as alleged in the petition.

Citation No. 376190

The petitioner alleges a violation of 30 C.F.R. 56.14-1, which is the guarding regulation previously cited. Specifically, the third and fourth return idlers under the belt coming from the cone crusher were not guarded. The evidence was that these return idlers were 5 1/2 to 6 feet off the floor, and that no citations had been issued for this alleged violation during four previous inspections, "plus the complimentary inspection." (Tr. 34). The citation at issue was served because an employee had been observed walking under the idlers with a shovel at the time of the inspection. (Tr. 38). There was no evidence that any person had been observed in that area before.

I conclude that the return idlers being 5 1/2 to 6 feet above floor level and in a remote area were guarded by their location in this case. Thus, the return idlers were not moving machine parts which might be contacted by persons and which might cause an injury.[4]/ Citation No. 376190 is vacated.

ORDER

The foregoing bench Decision is affirmed and the respondent is ordered to pay civil penalties in the total amount of $174.00 within 30 days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

4/ As an additional reason for concluding there was no violation, I erroneously stated that return idlers were not "similar exposed moving machine parts" as defined by the regulation. This error would not change the result since I also found that the return idlers were guarded by their location. Distribution:

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUL 21 1981

TODILTO EXPLORATION AND DEVELOPMENT CORPORATION, Contestant, v. SECRETARY OF LABOR, MINE SAFETY HEALTH ADMINISTRATION (MSHA), Respondent.	NOTICE OF CONTEST DOCKET NO. CENT 79-91-RM Citation No. 151433; 1/31/79 MINE: Haystack Underground
SECRETARY OF LABOR, MINE SAFETY HEALTH ADMINISTRATION (MSHA), Petitioner, v. TODILTO EXPLORATION AND DEVELOPMENT CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. CENT 79-310-M ASSESSMENT CONTROL NO. 29-01650-05003 MINE: Haystack Underground

Appearances:

U. Sidney Cornelius, Esq.
Office of the Solicitor
United States Department of Labor
555 Griffin Square, Suite 501
Dallas, Texas 75202
For the Petitioner

Mr. G. Warnock, President
Todilto Exploration & Development Corporation
3810 Academy Parkway South N.E.
Albuquerque, New Mexico 87109
Pro Se

Before: Judge Jon D. Boltz

DECISION

Contestant filed case No. CENT 79-91-RM in order to obtain review of the issuance of Citation No. 151433, which alleged a violation of 30 C.F.R. 57.5-50(b).[1/] Subsequently, in case No. CENT 79-310-M, the Secretary of

1/ [Mandatory.] (b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

Labor filed a petition proposing an assessment of several penalties for violations alleged in Citation No. 151433 and Citation No. 151105, the latter citation alleging a violation of 57.9-69.[2]/ The cases were consolidated for hearing in Albuquerque and the respondent Todilto Exploration and Development Corporation was represented pro se by its President, Mr. G. Warnock.

These cases were filed pursuant to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

At the conclusion of all the evidence the parties agreed to waive the filing of briefs and agreed to have a Decision rendered from the bench.

The bench Decision is as follows:

BENCH DECISION

I make the following findings:

1. I have jurisdiction over the parties and subject matter of these proceedings.

2. The inspectors who duly issued the citations and extensions thereof were authorized representatives of the Secretary.

3. The history of previous violations on the part of the respondent is not substantial or significant.

4. Proposed civil monetary penalties are appropriate to the size of the business of the operator.

5. The assessment of proposed penalties would not affect the operators ability to continue in business.

6. The operator demonstrated good faith in attempting to achieve rapid compliance after notification of the alleged violations.

2/ 57.9-69 Mandatory. Tires shall be deflated before repairs on them are started and adequate means shall be provided to prevent wheel locking rims from creating a hazard during tire inflation.

Citation No. 151105

This citation issued May 9, 1979, alleges that there was no means to prevent wheel locking rims from creating a hazard to the person inflating tires with locking rims, in violation of 30 C.F.R. 57.9-69. During the course of the hearing, the respondent agreed to withdraw his objection to the citation since he agreed with the facts as alleged by the Secretary.

The Secretary proposed a reduction of penalty from $66.00 to $49.00 as being a proper settlement.

I find that the criteria set forth in section 110(i) of the Act are met, and I approve the settlement.

Citation No. 151433

The petitioner alleges a violation 30 C.F.R. 57.5-50(b), in that the drill operator in the 440 South drift was exposed to 2,634 percent of a permissible limit for an eight hour exposure to noise. Hearing protection was being worn. Petitioner also alleges that all feasible engineering or administrative controls were not being utilized to reduce this level in order to eliminate the need for hearing protection.

I find that the tests made by the inspector were properly conducted and the results were accurate. It is undisputed that miners who were operating the jackleg drills were using ear plugs with ear muffs over the ear plugs at the time that the citation was issued. The miners exposure to noise did exceed the sound levels permissible during an eight hour period of exposure. A dBA level exceeding 90 dBA is not permissible and the dBA level during the eight hour period of the inspection measured approximately 114 dBA based on the table utilized by the MSHA inspector. That being the case, feasible administrative or engineering controls are to be utilized as required by the regulation, and if such controls fail to reduce the exposure to within the permissible levels, personal protection equipment must be provided.

The feasible controls that could be utilized as testified to by both parties was that of a muffler installation on the jackleg drill. With the utilization of this device, the dBA level would be reduced to approximately 110 dBA to 113 dBA. The respondent stated that the dBA level would be approximately 114 dBA to 115 dBA with the muffler installation. In any event, regardless of the use of this device, which was the only type of administrative or engineering control introduced as part of the evidence, it would fail to reduce the exposure to within permissible levels, that being 90 dBA for an eight hour period. Thus, personal protection was required since there would be no other way that the dBA level could be reduced to the permissible level.

On closing argument, counsel for the Secretary stated that the utilization of feasible controls is a necessary step as far as the regulation is concerned. In order to establish a prima facie case, the Secretary has shown in his case in chief that feasible controls were

available in that a muffler device could have been utilized on the jackleg drills. However, he has also shown that even with such controls the exposure to noise was not within permissible levels as required by the regulation. The reduction of noise exposure to a level of 110 dBA to 113 dBA by use of the muffler is a long way from the 90 dBA within an eight hour period required by the regulation.

Counsel for the Secretary also argues that there was no evidence that ear plugs and ear muffs reduced the noise to permissible levels. However, I note that on abatement the inspector was satisfied with this personal protection, even though the muffler used reduced the sound level from only one to four dBA.

Therefore, I conclude that the miner involved at the time of the inspection was exposed to unacceptable or impermissible noise; that no feasible controls were available to reduce the exposure to within permissible levels as set forth in 30 C.F.R. 57.5-50(b); and that the respondent in providing personal protection equipment, in this case, ear plugs and ear muffs which were not shown to be inadequate, was in compliance with the regulation.

Citation No. 151433 is vacated.

ORDER

The foregoing bench Decision is affirmed and respondent is ordered to pay a civil penalty of $49.00 within 30 days from the date of this Decision.

Jon D. Boltz
Administrative Law Judge

Distribution:

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Mr. G. Warnock, President, Todilto Exploration & Development Corporation, 3810 Academy Parkway South N.E., Albuquerque, New Mexico 87109

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 21 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-365
	:	A.O. No. 11-00599-03040
v.	:	
	:	Orient No. 6 Mine
FREEMAN UNITED COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Rafael Alvarez, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the petitioner;
Harry M. Coven, Esq., Chicago, Illinois, for the respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment for two alleged violations of certain mandatory safety standards. Respondent filed a timely answer and notice of contest and a hearing was convened in Terre Haute, Indiana, on May 20, 1981. The parties appeared and participated fully therein, and they waived the filing of posthearing proposed findings and conclusions. However, I have considered the arguments advanced by the parties in support of their respective cases during the course of the hearing in this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

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

Issues

The principal issue presented in this proceeding is (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Discussion

Citation No. 1003913, May 8, 1980, charging the respondent with an alleged violation of the provisions of 30 C.F.R. § 75.1719(1)(d), was settled by the parties in advance of the commencement of the hearing. The parties were afforded an opportunity to state their arguments in support of the settlement on the record, and after due consideration of same, the settlement was approved, and a payment of a civil penalty in the amount of $90, rather than the initial assessment of $106, was agreed to as a reasonable and proper settlement disposition for this citation.

Citation No. 1003911, issued on May 6, 1980, cites an alleged violation of 30 C.F.R. § 75.503, and the condition or practice described by the inspector on the face of the citation is as follows: "A non-permissible transformer welding machine was located inby last open crosscut in No. 2 entry of the 4th South entries off the 2nd main east entries, section I.D. 088."

Petitioner's Testimony and Evidence

MSHA Inspector Laverne Hinkle confirmed that he issued the citation in question during an inspection of the mine in question and that he did so after finding an energized non-permissible welder located in an area of the mine which he considered was inby the last open crosscut and therefore a violation of the provisions of section 75.503.

Inspector Hinkle determined that the last open crosscut was at a point shown on Exhibit P-4, a sketch of the scene of the alleged violation, marked with a notation "LOX" and circled with an X mark (Tr. 38). He believed the term "inby the last open crosscut" means anything in the direction of the ventilation flow of the air current as shown on the exhibit, or away from, or following the return air direction as depicted by the arrows on the

sketch as they proceed from right to left along the top of the sketch. The term "outby" would mean away from or down and towards the intake air flow from the mark "LOX" shown on the sketch toward the mine opening (Tr. 67-70).

With regard to the question as to how he determined there was a violation in this case, Mr. Hinkle testified that he relied on the Inspector's Manual "policy" statement found under the discussion of section 75.503, and specifically, the instruction that requires an inspector to cite section 75.503 when he finds any electric, non-permissible face equipment in a return air entry (Tr. 23, 30, 33-34, 37-38, 54; Exh. P-9). He candidly conceded that the reason he cited the law rather than the policy on the face of the citation was that it was his understanding that policy statements found in the manual are not enforceable (Tr. 37). His rationale for issuing the citation is reflected in the following colloquy (Tr. 160-163):

> THE COURT: I don't want to put you on the spot; that's not my intent in asking you my leadoff question.
>
> But when you went into the section, found this welder over in the return air--
>
> THE WITNESS: Yes, sir.
>
> THE COURT: --did you at that point make up your mind there was a violation because of what was the policy guidelines?
>
> THE WITNESS: No, sir. No, sir. I remembered what was in the policy guidelines. I did not decide it was a violation based on the policy guidelines. I decided it was a violation on the fact it was nonpermissible equipment in return air.
>
> THE COURT: Well, that's--you may--
>
> You made the decision that it was a piece of nonpermissible equipment in return air?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: That's what I asked. What I am saying is--
>
> THE WITNESS: I'm sorry.
>
> THE COURT: --standard 75.503 makes no mention of return air.
>
> THE WITNESS: Correct.
>
> THE COURT: So, if you made the decision that nonpermissible equipment being in return air was a violation, how

can you say it was a violation of a standard which doesn't mention return air?

THE WITNESS: In or inby the last open crosscut.

THE COURT: In other words, it met both criterias, if you will? Met not only the one on return air but it was also inby the last open crosscut?

THE WITNESS: Whether or not I followed the manual or not, the situation remains the same.

THE COURT: Again I think I am beating a dead horse, but when we think about the last open crosscut, your measurement is from a different reference point, is it not?

THE WITNESS: Yes, sir, frankly.

THE COURT: You are, aren't you? You are pursuing it from the standpoint of the ventilation--

THE WITNESS: Yes, sir. And Freeman is basing their measurement on geography.

THE COURT: That's right. And the standard doesn't say which party is right?

THE WITNESS: Right.

THE COURT: The standard doesn't say whether it's based on geography or whether it's ventilation or whether it's the way the moon comes out at night; isn't that correct?

THE WITNESS: Yes, sir.

MR. ALVAREZ: The case really is based on two factors, I guess you might say: the Inspector, despite that policy guideline there, the Inspector would still view it as inby the last open crosscut, and/or with the policy guidelines.

THE COURT: Well, you know, you can argue the case any way you want, but if the Inspector finds a piece of nonpermissible equipment in return air, then it's not too difficult for him to find inby the last open crosscut, but it depends on which reference point he is using; isn't that true? Intake or return--

With regard to the question as to how he applied the term "inby the last open crosscut" in this case, Inspector Hinkle testified as follows (Tr. 113-118):

THE COURT: Do you understand what I am talking about here? The terms, "inby" and "outby", you explained to us, was it used in relationship to the face?

THE WITNESS: It was used in relationship to the last open crosscut, sir.

THE COURT: That's right. What does-- The dictionary definition seems to define inby in relation to the working face; in other words, anything that is from this point here of this ribline toward the face would be inby the last open crosscut.

THE WITNESS: I believe my definition of inby the last open crosscut, if you use the face as a reference point, yes, sir, anything beyond that rib, away from the face, would be outby the last open crosscut.

THE COURT: If you used the face as a reference point?

THE WITNESS: yes, sir.

THE COURT: The Dictionary of Mining Methods and Terminology which Mr. Coven has a copy of defines inby as toward the working face or interior of the mine, away from the shaft or entrance.

How would that comport with your definition of it?

THE WITNESS: This definition, of course, is reliable, and everyone depends on it. However, I wrote the citation to say the welder was inby the last open crosscut, but in that place, sir, it would be inby the face, which is impossible because it had not been mined yet, virgin territory, so if we are going--if we are going in this direction from the face, according to the discussion we have just had, we are going outby, and going in this direction in relationship to the face is going inby. However, the violation as I seen it at the time I issued it was, in fact, the welder was inby the last open crosscut in a ventilating current of air. It was not a term to indicate geography; it was inby the last open break, crosscut, in the ventilating current of air.

* * * * * * *

MR. COVEN; You are going to 75.503, your Honor--

THE COURT: Why does someone pick return air as the reference point?

THE WITNESS: I don't believe I am qualified to answer that, sir, but return air becomes return after it passes the last open crosscut, ventilating these faces. It's right there, becomes return air. That is defined in the regulations.

THE COURT: If you are measuring--if the reference point in determining whether it's inby or outby would be toward the face, could it be toward the face?

THE WITNESS: Yes, sir.

THE COURT: When could it be toward the face?

THE WITNESS: Well, if this welder were placed right here, it would be inby the last open crosscut.

THE COURT: Why would it be inby?

THE WITNESS: Because the ventilating current of air goes here, sir. It's in the middle of it.

THE COURT: Then it's inby the last open crosscut?

THE WITNESS: Yes.

If it's back this way it's still inby, sir.

THE COURT: Where would it become outby?

THE WITNESS: If it were here, sir, outby the last open crosscut (indicating).

THE COURT: In relationship to which way the air is flowing?

THE WITNESS: Yes, sir.

THE COURT: You would say anything that is in intake area from that point, from that last open crosscut back towards the mine entrance, would be outby, and anything that, as it goes along the return air path, is inby?

THE WITNESS: Yes, sir.

THE COURT: We're using two different reference points. When you determine the inby, aren't you determining that as far as the last open crosscut as far as the ventilating air current, are you not?

THE WITNESS: Yes, sir.

THE COURT: Somebody else might use the face as a reference point; isn't that true?

THE WITNESS: Yes, sir.

THE COURT: So if someone is using the face as a reference point, they would come around 180 degrees from if you were using the ventilating current of air as the reference point as to location of the face equipment; isn't that true?

THE WITNESS: It would come out that way.

THE COURT: It would come out that way, wouldn't it? What do you mean, "could come out that way?" Wouldn't that logically follow? Tell me how it would come out the same if someone were to use toward the face as a reference and someone were to use ventilating current of air?

THE WITNESS: Okay.

This welder here, irrespective of our point of reference in our discussion, is still outby; it's outby this face, outby this face. In perfect, strict mining terminology, this direction would be outby.

THE COURT: Would it also be outby the last open crosscut from the face?

THE WITNESS: yes, sir, geographically it would still be outby the last open crosscut, because you are mining, in this case, in this direction.

THE COURT: This is inby, that is outby the last open crosscut geographically, and the standard doesn't make any distinction, does it?

THE WITNESS: No, sir.

THE COURT: Then how is there a violation here?

THE WITNESS: Because anything in return air must be permissible constuction [sic], 75.507, sir.

THE COURT: 75.507?

Well then, why didn't you cite 507 in this case?

THE WITNESS: Well, may I please refer to the manual? It indicates we should cite nonpermissible conditions under 503.

Respondent's Testimony and Evidence

Thomas R. Mitchell, respondent's maintenance chief, disputed the location of the welder in question as stated by Inspector Hinkle, and he testified that the welder was located in intake air outby the No. 12 room in the second crosscut outby the No. 2 entry at the time it was cited. To achieve abatement, he had it moved approximately 70 feet toward the main entry in the No. 2 entry approximately one crosscut outby where it had been previously located (Tr. 91-94). Using respondent's sketch, Exhibit R-2, Mr. Mitchell indicated where he thought the last open crosscut was located by penciling in "LOX" on the sketch, and he testified that using the faces of the Nos. 11 and 12 rooms as a point of reference, the welder in question would have been located outby the last open crosscut (Tr. 97-98). He also indicated that the terms "inby" and "outby", as commonly used by the industry in Southern Illinois, mean towards the working face and away from the working face (Tr. 99).

Thomas Bubanovich, employed by the respondent as its chief industrial engineer, testified that the terms "inby" and "outby" the last open crosscut, as used in the coal fields, refer to the direction of mining. Using a new vertical mine shaft as an analogy and reference point, he indicated that if one were driving away from the shaft in a northerly direction, the term "inby" would mean in that northerly direction, and the term "outby" would mean in a southerly direction coming back to the mine shaft (Tr. 120-121). Using the inspector's sketch, Exhibit P-4, Mr. Bubanovich expressed disagreement with the inspector's interpretation that the welder in question was located inby the last open crosscut, and he stated that he had never heard of the use of the flow of air as a reference point for applying the term "inby" as the inspector has in this case (Tr. 120-121, 127).

Mr. Bubanovich testified further that he visits the section in question once every month but that he was not with the inspector during the inspection in question (Tr. 135). However, he disputed the extent of the development of the section as depicted on the inspector's sketch (Exh. P-4), and he indicated that the mine records show that mining had not advanced or developed as far as the inspector indicated (Tr. 130-134).

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of the provisions of mandatory standard 30 C.F.R. § 75.503, which provides as follows: "The operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

The critical issue presented in this case is whether or not the welding machine in question was located inby the last open crosscut as alleged by the inspector on the face of the citation which he issued. The testimony presented by the inspector and respondent's witness Mitchell indicates a conflict as to where they believed the welder was actually located. The inspector's testimony reflects that it was located in return air, while the testimony of Mr. Mitchell reflects that it was located in intake air. The critical question, however, is whether it was located inby the last open crosscut as that term is generally understood and defined in the mining community. If the welder was inby the last open crosscut, then a violation occurred; if it was not, there is no violation.

The condition or practice stated in the citation issued by Inspector Hinkle makes no reference to the fact that the welder in question was located in a return air entry. The inspector simply states that it was located "inby the last open crosscut." It seems obvious to me that the reason Inspector Hinkle failed to include the fact that the welder was located in return air on the face of the citation is the fact that the standard makes no mention of any such prohibition. In this instance, Inspector Hinkle conceded that he issued the citation because the welder was located in a return air entry contrary to the policy stated in the inspector's guidelines.

The condition or practice cited by Mr. Hinkle on the face of the citation which he issued makes no reference or allegation to the fact that the welder in question was located in return air. It simply states that it was "inby the last open crosscut." However, the language contained in the Inspector's Manual policy statement prohibits such equipment from being operated in a return entry or in or inby the last open crosscut. These prohibitions are stated in the alternative, and unless they mean the same thing, MSHA may not rely on one to support the other. In this case, the terms are not synonymous since the inspector testified that in any section in a room and pillar-mining system intake air is not always inby the last open crosscut, and that once the intake air leaves the last open crosscut it becomes return air (Tr. 67).

It is well settled that inspectors' guidelines and manuals do not have the status of official mandatory regulatory safety standards. Kaiser Steel Corporation, 3 IBMA 489, 498 (1974); King Knob Coal Company, Inc., WEVA 79-360 (June 29, 1981). The "policy" statement instructing inspectors to issue citations citing section 75.503 when they find nonpermissible electric face equipment operating in a return entry is an expansion of the clear statutory language limiting such violations to equipment observed operating in or inby the last open crosscut. MSHA has cited no authority, short of formal rulemaking under the Act, legally authorizing such an amendment or expansion of a mandatory statutory standard through the publication of "policy" statements. Since the policy statement is stated in the alternative, an inspector could use it to cite a violation of section 75.503 if he observes non-permissible electric face equipment in or inby the last

open crosscut, and he may also cite a violation if he finds such equipment located in a return air entry. Since MSHA has not established that such a return air entry is always inby the last open crosscut, and since the cited standard does not prohibit such equipment from operating in a return air entry per se, MSHA must establish through credible evidence that the cited welder was in fact located and operating inby the last open crosscut in order to sustain the violation and citation which was issued in this case.

It seems clear to me that Inspector Hinkle's interpretation of the term "inby the last open crosscut" was based on his reliance on the policy statement found in the Inspector's Manual as well as his use of a reference point which is directly related to the ventilating current of air rather than to the working face of the mine (Tr. 24, 30, 33-34, 37-38, 54). As a matter of fact, Mr. Hinkle candidly admitted that anytime he finds non-permissible electric face equipment located in a return air entry he is free to issue a citation under section 75.503, and the reason he cites the "law" rather than the "policy" is that his instructions are not to cite the manual policy provision because an inspector may not rely on it (Tr. 37).

Unless the inspector can establish that the cited non-permissible welder was located inby the last open crosscut as that term is generally understood in the mining industry, he should not be permitted to arbitrarily rely on policy statements which clearly enlarge on a statutory regulation simply because he believes that non-permissible equipment should not be allowed to operate in return air. If MSHA believes that the operation of such equipment in return air is per se a hazard, then it is incumbent on MSHA to promulgate a mandatory standard prohibiting such a practice, rather than attempting to do so through unpublished policy statements. Further, if MSHA believes that the use of the terms "inby" and outby" in the mining industry are outmoded, then I suggest MSHA redefine them through normally acceptable rulemaking rather than through the issuance of policy statements. Petitioner's counsel conceded that the policy statement found in the Inspector's Manual expands the statutory language found in section 75.503, but he nonetheless maintained that an inspector may rely on the policy in citing an operator for a violation of that section if he finds a non-permissible welder located in return air (Tr. 36).

Respondent's defense to the citation is that the petitioner has failed to carry its burden of proof and has not established that the non-permissible welder was in fact located inby the last open crosscut as that term is defined by the mining dictionary as well as the commonly understood and applied meaning of that term within the coal-mining industry. Respondent maintains that the point of reference for determining the meaning of the terms "inby" and "outby" should be the working production faces and not the flow of ventilating currents. Respondent also maintains that since the Inspector's Manual policy guidelines are not mandatory standards, the inspector cannot legally apply them to expand the statutory language contained in section 75.503 (Tr. 79-82).

After careful review of the testimony presented during the hearing, I find the inspector's testimony as to the location of the welding machine in

question to be credible and I accept it. That is, I find that the welder was located at the approximate location and place in the return air entry as testified to by Inspector Hinkle and as reflected in his notes made at the time the citation issued, and as depicted in the sketch which is a part of the record (Exh. P-4).

The next question to be determined is whether the welder in question was inby or outby the last open crosscut. In this regard, I take note of the fact that neither the Act nor the standard defines the terms "inby" or "outby." However, the term "inby" is defined by the Dictionary of Mining, Mineral and Related Terms, U.S. Bureau of Mines, 1968 ed., p. 527, as follows:

> a. Toward the working face, or interior, of the mine; away from the shaft or entrance; * * * b. In a direction toward the face of the entry from the point indicated as the base or starting point. c. The direction from a haulageway to a working face * * *. d. Opposite of outby. [Emphasis added.]

The term "outby" is defined by the mining dictionary as follows:

> a. Nearer to the shaft, and therefore away from the face, toward the pit bottom or surface; toward the mine entrance. The opposite of inby. Also called outbyeside. B.C.I.; Fay. b. In a direction toward the mouth of the entry from the point indicated as the base or starting point.

In a 1977 publication entitled Introduction to Underground Coal Mining, NMHSA-CE-001, published by the U.S. Department of the Interior, and apparently used at the National Mine Health and Safety Academy in the training of MSHA's inspectors, the term "inby" is defined as follows in a glossary of terms listed at page 216: "Toward the working face or interior of the mine, away from the shaft or entrance."

The mining dictionary referred to above defines the term "face" in pertinent part as "the solid surface of the unbroken portion of the coalbed at the advancing end of the working place," "a point at which coal is being worked away," or "a working place from which coal or mineral is extracted." The term "face equipment" is defined as electrical equipment "normally installed or operated inby the last open crosscut in an entry or room."

In one of the earlier cases decided under the 1969 Act, Mid-Continent Coal and Coke Company, 1 IBMA 250 (December 29, 1972), the former Board of Mine Operations Appeals had occasion to define the term "inby the last open crosscut," and in so doing affirmed a judge's ruling that it means "inby the interior-most rib or wall." 1 IBMA 254.

Respondent maintains that the term "inby" must be determined by use of the dictionary definition of that term, and that the starting reference

point should be the interiormost rib or wall as stated in the Mid-Continent Coal and Coke Company case, supra, and that as applied to the facts of this case, it is clear that the welder was in fact located outby the face and not inby as contended by the inspector.

After careful review and consideration of all of the testimony and evidence adduced in this proceeding, including the arguments made by counsel in support of their respective interpretations of the term "inby," I conclude and find that the respondent has the better part of the argument and I accept those arguments and reject those advanced by the petitioner. I conclude and find that the applicable dictionary definition of the term "inby," coupled with the interpretation placed on that term in the Mid-Continent Coal and Coke Company case, supra, is controlling in this case. I therefore conclude that by utilizing the innermost rib of the block of coal which was being mined in this case as a starting reference point (Exh. P-4), the welder in question was located outby the last open crosscut labeled "LOX" on that exhibit, and that it was not in fact located inby the last open crosscut. I further find that the welder was outby the face which was being mined at the time in question, down the return air entry, and way from the face area as depicted on the sketch. The fact that it was in that location is not per se a violation, and MSHA's attempts to expand on the statutory language found in section 75.503, by means of a policy prohibition against the use of non-permissible electric face equipment in a return air entry is rejected. If MSHA believes such a practice should be prohibited, then I suggest it take the proper steps to promulgate an appropriate safety standard through the proper rulemaking procedures.

In view of the foregoing findings and conclusions, I find that the petitioner has failed to establish a violation of section 75.503, as charged in Citation No. 1003911, issued on May 6, 1980, and the citation is VACATED.

ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED THAT Citation No. 1003911, issued on May 6, 1980, charging a violation of 30 C.F.R. § 75.503, is VACATED, and petitioner's proposal for assessment of civil penalty for the alleged violation is DISMISSED.

In view of the approved settlement for Citation No. 1003913, May 8, 1980, 30 C.F.R. § 75.1719(1)(d), respondent IS ORDERED to pay a civil penalty in the amount of $90 in satisfaction of this violation, payment to be made within thirty (30) days of the date of this order, and upon receipt of payment by the petitioner, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUL 21 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING DOCKET NOS. WEST 80-14-M WEST 80-468-M WEST 81-50-M
v.	A/C NOS. 02-00152-05004 02-00151-05021 02-00151-05022
MAGMA COPPER COMPANY, Respondent.	MINES: Superior San Manuel San Manuel

APPEARANCES

Marshall P. Salzman, Esq., Office of the Solicitor, United States Department of Labor, 450 Golden Gate Avenue, Box 36017, San Francisco, California 94102
For the Petitioner

N. Douglas Grimwood, Esq., Twitty, Sievwright & Mills, 1700 TowneHouse Tower, 100 West Clarendon, Phoenix, Arizona 85013
For the Respondent

Before: Judge Jon D. Boltz

DECISION AND ORDER

The above-captioned cases were ordered consolidated for hearing and the hearing was subsequently held in Phoenix, Arizona, on May 15, 1981. All of the cases involved petitions for assessment of civil penalties brought against the respondent by the petitioner who alleged violations of various regulations promulgated pursuant tothe Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter "the Act").

At the hearing, the petitioner and respondent stipulated as follows:

1. The respondent is a large operator.

2. Respondent has a moderate history of previous violations.

3. Respondent demonstrated good faith in achieving rapid compliance after notification of violations.

4. The MSHA inspectors who issued the citations were authorized representatives of the Secretary of Labor.

5. The citations at issue were issued on the date and times indicated on the citations.

6. The imposition of the proposed penalties will not affect respondent's ability to continue in business.

The petitioner and respondent proposed the following as settlement to all of the citations at issue in the above cases, except Citation No. 599623 which will taken up last in this Decision:

Docket No. WEST 80-14-M

Citation No. 382625
Citation No. 380367

Both citations alleged violations of 30 C.F.R. 57.12-8 in that two junction or signal boxes did not have a strain relief clamp where the conductor entered the box. Respondent agreed to withdraw its contest and pay the penalties proposed of $60.00 and $122.00 respectively.

Citation No. 380364

This citation alleged a violation of 30 C.F.R. 57.11-1 for failure of the respondent to provide a safe means of access to a working place. Petitioner stated that investigation had disclosed that the gravity of the violation was not as serious as initially assessed and that the penalty should be reduced from $90.00 to $50.00. Respondent agreed to withdraw its contest and pay the revised penalty of $50.00.

Docket No. WEST 81-50-M

Citation No. 599628

Petitioner alleged a violation of 30 C.F.R. 57.13-21, however, counsel stated that additional investigation by MSHA indicated that there was insufficient evidence to sustain the allegation. Accordingly, the petitioner moved to withdraw the proposed penalty and vacate the citation. This motion was approved.

Docket No. WEST 80-468-M

Citation No. 599800
Citation No. 599801

In both citations, the petitioner alleged a violation of 30 C.F.R. 57.12-25 for improper electrical grounding. The respondent agreed to withdraw its contest to the alleged violations and to pay the two $255.00 penalties as proposed.

Citation No. 599623

Petitioner alleges that respondent violated 30 C.F.R. 57.11-1 in failing to provide a safe means of access to an employee's working place. Specifically, the electrician employed by the respondent was observed on top of a 20 foot light pole without a safe access to that area This employee had one leg straddled on the light cross beam. He then proceeded to slide 10 feet down the pole to reach a 10 foot ladder. Petitioner and respondent agreed to these facts, but respondent argued that the behavior of the employee was at variance with what the employee had been instructed to do on the job. Thus, the respondent argued that it should not be held strictly liable on the basis of the idiosyncratic behavior of an employee.

I find that respondent's argument goes only to the question of respondent's negligence as an employer and does not relieve the respondent of liability for the violation of the cited regulation. On the basis of the agreed facts, I find that there was a violation of the cited regulation, that respondent was liable, but that there was little, if any, negligence on the part of the employer. Accordingly, the proposed penalty should be reduced.

From the bench, I approved the proposed settlements after considering the statutory criteria as set forth in section 110(i) of the Act. In regard to Citation No. 599623, I find that a penalty should be assessed in the amount of $50.00.

ORDER

The settlements approved from the bench are hereby affirmed. Citation No. 599623 is also affirmed.

The respondent is ordered to pay total penalties in the sum of $792.00 within 30 days from the date of this Decision.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUL 23 1981

JOHN F. MONAHAN, Complainant,	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE
v.	DOCKET NO. WEST 81-196-DM
EXXON MINERALS COMPANY, Respondent.	MSHA CASE NO. 81-11

ORDER

On June 8, 1981, respondent filed a motion to dismiss. As grounds therefor, respondent states that complainant's employment with the respondent was terminated on February 14, 1980. It was not until October 13, 1980, nearly eight months later, that complainant filed a complaint with the Secretary alleging that his discharge was in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977.

Section 105(c)(1) provides that any miner who believes he has been discriminated against, "may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination." 30 U.S.C. § 815(c)(2). It has been held that, "none of the filing deadlines are jurisdictional in nature. Rather, they are analogous to statutes of limitation, which may be waived for equitable reasons." Secretary of Labor, on behalf of Gary M. Bennett v. Kaiser Aluminum and Chemical Corporation, CENT 81-35-DM (June 15, 1981). See also Christian v. South Hopkins Coal Co., 1 FMSHRC 126 (1979).

Complainant does not deny the delay in filing his complaint with the Secretary. Rather, complainant states that the delay was due to personal problems such as finding other employment and obtaining a divorce. Complainant's Reply, filed June 22, 1981.

I find that the explanations given by the complainant for the delay do not constitute "equitable reasons." The personal reasons listed by the complainant should not be considered justification for such a lengthy delay.

The delay in the filing of the complaint makes it difficult for the respondent to obtain evidence because of the passage of time, and to force the respondent to defend itself in a suit after such a long period would be unjust.

Therefore, respondent's motion to dismiss is hereby GRANTED and the case DISMISSED.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 24 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. HOPE 78-744-P
v.	:	A. C. No. 46-03467-02070
SEWELL COAL COMPANY, Respondent	:	Meadow River No. 1 Mine

SUPPLEMENTAL DECISION

The Petitioner seeks civil penalties under section 110(i) of the Federal Mine Safety and Health Act of 1977 for two violations alleged in notices issued on February 13 and 14, 1978, respectively, at Respondent's Meadow River No. 1 Mine. The first notice of violation alleges that Respondent violated 30 CFR § 75.1704(b), failing to maintain a designated intake escapeway to insure the passage of any person at all times. The second notice alleges that Respondent violated 30 CFR § 75.200 by permitting the occurrence of fractured and loose roof in the No. 1 section above the No. 1 entry roadway just inby the last open crosscut and extending in toward the face approximately thirty feet.

In its remand dated June 11, 1981, the Federal Mine Safety and Health Review Commission concluded that both violations occurred as charged by the Secretary and directed that penalties be assessed therefor.

The parties agreed in stipulations that the Respondent is a large operator (stipulation No. 4, Tr. 6), that it had a moderate history of previous violations (No. 12, Tr. 7), and that the Respondent demonstrated good faith in abating the notices of violations. Respondent concedes that the payment of appropriate penalties would not jeopardize its ability to continue in business (Tr. 48).

The statutory penalty assessment factors of "negligence" and "gravity" remain for discussion. These factors must be considered in light of the unique circumstances in which the notices were issued. At that time, employees at the mine had been on strike for over two months (stipulation No. 6, Tr. 6). Paul Given, Respondent's Safety Director, testified that during the strike the Respondent was unable to assign sufficient personnel for inspection and upkeep of the mine as would be necessary to prevent all violations. He stated that 50 to 60 miners would be needed during a strike to avoid violations, but that he had only 33 supervisory personnel working. Other than the inspector's unsupported opinion which I reject as not probative, there was no evidence that Respondent was negligent in committing the specific violations charged by Petitioner and found by the Commission to have occurred (Tr. 24, 39-41). There is substantial unrebutted evidence in the record that no negligence occurred (Tr. 36, 38, 113, 120, 127), and I so find.

The inspector testified that the escapeway violation was not particularly serious while the roof control violation was serious (Tr. 30, 37). Significantly, he also indicated that the gravity of the infractions was lessened by the fact that the mine was closed (Tr. 33), and that the policy behind issuing violations during "labor disputes" was to "document" hazardous conditions so that they could be corrected "when the work force returned." (Tr. 55, 57, 68, 71, 72). In this connection, he established the abatement time for the notices on a date he anticipated the strike would be over (Tr. 58, 71). In these circumstances, I find that neither violation was serious and that nominal penalties of $1.00 for each violation are appropriate.

ORDER

Respondent is ordered to pay $2.00 to the Secretary of Labor within 30 days from the date hereof.

Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

EASTERN ASSOCIATED COAL CORPORATION, Contestant	:	Contest of Citation
v.	:	Docket No. WEVA 80-619-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Federal No. 2 Mine
UNITED MINE WORKERS OF AMERICA, Intervenor	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 81-218
	:	A.C. No. 46-01456-03087
v.	:	
EASTERN ASSOCIATED COAL CORPORATION, Respondent	:	Federal No. 2 Mine
UNITED STEEL MINE WORKERS OF AMERICA, Intervenor	:	

DECISION

Appearances: Sally S. Rock, Esq., Eastern Associated Coal Corporation, Pittsburgh, Pennsylvania, for Eastern Associated Coal Corp.; Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Secretary of Labor;
Terry Osborne, United Mine Workers of America, Morgantown, West Virginia, for Intervenor.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

Eastern Associated Coal Corporation (hereinafter "Eastern") commenced this action on August 11, 1980, by filing a Notice of Contest, concerning Citation No. 0631927, against the Secretary of Labor, Mine Safety and Health

Administration (hereinafter "MSHA") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (hereinafter "the Act"). On February 18, 1981, MSHA filed a civil penalty proceeding against Eastern arising out of the same citation. Subsequently, the two proceedings were consolidated.

Upon completion of prehearing requirements, hearings were held in Pittsburgh, Pennsylvania on January 22 and 23, and March 30 and 31, 1981. The following witnesses testified for MSHA: Kevin Cross, Dominic Salentro, William Deegan, James Merchant, Lawrence Knisell, John Phillips, Fred Williams, and Paul Hall. The following witnesses testified on behalf of Eastern: Lamar Richards, Gary Cumberledge, Gary McHenry, Frank Peduti, and John Hetric. The United Mine Workers of America (hereinafter "UMWA") participated in this case as an intervenor on January 22, 1981, but not thereafter. Eastern and MSHA filed posthearing briefs.

ISSUES

Whether the citation was properly issued and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

30 C.F.R. § 75.1401-1 provides as follows: "The American National Standards Institute 'Specifications For the Use of Wire Ropes for Mines," M11.1 - 1960, or the latest revision thereof, shall be used as a guide in the use, selection, installation, and maintenance of wire ropes used for hoisting."

STIPULATIONS

The parties stipulated as follows:

1. Eastern is the owner and operator of the Federal No. 2 Mine.

2. The operator and the Federal No. 2 Mine are subject to the jurisdiction of the Act.

3. The presiding Administrative Law Judge has jurisdiction over this proceeding.

4. The inspector who issued the subject citation was a duly authorized representative of the Secretary.

5. True and correct copies of the subject citation, modification, and termination thereof were properly served upon the operator.

6. Copies of the subject citation, modification, and termination are authentic and may be introduced into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

7. All witnesses who will testify are accepted generally as experts in coal mine health and safety.

8. The latest revision of the American National Standards Institute "Specifications for the Use of Wire Ropes for Mines," M11.1-1960 is the 1980 edition, approved March 14, 1979. The standards set forth therein are the standards to be used in the inspection and removal of hoist ropes pursuant to 30 C.F.R. § 75.1401-1.

FINDINGS OF FACT

I find that the preponderance of the evidence of record establishes the following facts:

1. Eastern is the owner and operator of Federal No. 2 Mine in Fairview, West Virginia. The controversy at issue relates to the wire rope used on the manhoist at A shaft. During a normal working day, 40 miners simultaneously ride the manhoist between the surface and the area of the active workings located about 740 feet below. The manhoist and wire rope are used 80 times a day, 365 days a year.

2. The wire rope in question was installed by Eastern in 1968. In addition to the visual inspection required by law, Eastern contracted with Rotesco to perform electromagnetic tests of the rope. The last such test was performed on April 15, 1980. On May 21, 1980, Rotesco reported that the rope had lost a maximum of 13 to 14 percent of its strength but did not recommend that it be removed.

3. The American National Standards Institute approved the latest revision of its "Specifications for the use of wire ropes for mines" M11.1-1980 on March 14, 1979.

4. On April 15, 1980, three broken wires were found in one strand 1/ in one lay 2/ of the counterweight rope at A shaft. Thereafter, the counterweight rope was replaced by the only spare rope available at the mine property. On April 16, 1980, Eastern issued a purchase order for two spare wire ropes. Although these ropes were to be delivered to the mine on June 27, 1980, they were not received until July 24, 1980.

5. At Eastern's inspection on April 16, 1980, one broken wire in one strand of the hoist rope was discovered. This fact was recorded in the Report of Daily Inspection of Hoisting Equipment.

1/ A strand is a number of steel wires grouped together by twisting. The steel wire rope in question consists of a number of strands laid around a fiber core.

2/ A lay is the distance it takes one strand to make one complete turn around the axis of the rope.

6. Between April 17, 1980 and July 21, 1980, the date the citation was issued, MSHA conducted seven separate inspections of the rope in question pursuant to UMWA complaints under section 103(g) of the Act. The dates of these inspections and the pertinent findings by MSHA are as follows:

(a) April 17, 1980. Thirty broken wires were found. Two broken wires were found in the same lay, but the MSHA inspectors were not sure if they were in the same strand. The diameter of the rope was not recorded. MSHA inspectors advised the UMWA that there was no criteria by which to order the rope out of service.

(b) May 15, 1980. Thirty-three broken wires were found. Two broken wires were found in one strand and one lay.

(c) May 19, 1980. Thirty-three broken wires were found but the entire rope was not inspected. The MSHA inspectors again said there was no criteria by which to retire the rope because the rope did not have three broken wires in one strand or six broken wires in one lay.

(d) June 25, 1980. Thirty-nine broken wires were found in three different locations, with two broken wires in one strand in one lay.

(e) July 14, 1980. No record of results of inspection.

(f) July 16, 1980. Forty broken wires were found. In four strands, two broken wires were found in one lay. The smallest diameter of the wire rope was 2.14 inches. Eastern stated that a new wire rope was to be delivered on July 28, 1980.

(g) July 21, 1980. Forty-one broken wires were found. Four strands had two broken wires in one lay. The smallest diameter of the rope was 2.13 inches. Citation No. 0631927 was issued.

7. On July 21, 1980, MSHA Inspector John Phillips issued Citation No. 0631927 pursuant to section 104(a) of the Act and 30 C.F.R. § 75.1401-1. The citation alleged the following:

> The time for removal of the man cage wire rope in A shaft is indicated by the increased No. of broken wires; four locations with two broken wires in one strand in one lay, 33 broken wires at different locations, making a total of 41 broken wires. A marked reduction in rope diameter at four locations in the entire rope from a nominal diameter of 2.25 inches to a diameter of 2.13 inches. Evidence of excessive abrasion on the outside wires is evident. The above mentioned was determined by an inspection of the entire wire rope. The termination due date was established as midnight, July 28, 1980.

8. On July 28, 1980, Inspector Phillips modified and terminated the citation as follows:

> This citation is modified to indicate the American National Standards Specifications for use of wire ropes for mines M11.1 1960 or the latest revision thereof was not being used as a guide for inspection and removal of the man cage wire rope as indicated by the above mentioned conditions in the original Citation No. 0631927 and the Mine ID should have been 46-01456 instead of 46-01455.
>
> The Company installed a new wire rope on the man cage in A shaft.

9. On March 14, 1979, the American Standards Institute, Inc., approved a revision of the "American National Standard for wire rope for mines" ANSI M11.1-1980 (hereinafter ANSI Standard). The pertinent provisions of the above standard are as follows:

> 1.5 Mandatory and Advisory Rules. In the standard, the word "shall" is to be understood as denoting a mandatory requirement; the word "should" is advisory in nature and is to be understood as denoting a recommendation.
>
> 3.11.3 Visual Evidence of Rope Degradation. In addition to the regularly scheduled inspections, the machine's operating personnel should report any visual evidence of rope degradation, such as:
>
> (1) Severe abrasion, scrubbing, peening, or kinking, or broken outer wires
>
> * * * * * * *
>
> (3) Severe reduction of rope diameter or an observable increase in rope lay.
>
> * * * * * * *
>
> (8) A rapid increase in the number of broken wires. . . .
>
> 4.6.2 Retirement Criteria
>
> 4.6.2.1 Causes for Rope Retirement. The following are causes for removal of wire rope:
>
> (1) Visible Wire Breaks. More than six randomly distributed broken wires on one rope lay or three broken wires in one strand in one rope lay.

(2) Worn Wires.

(3) Evidence of Loss of Strength. An estimation of from 10%-25% loss of rope strength (based upon measurements of rope diameter, wear pattern dimensions, corrosion, and the number of broken wires), estimated with a series of charts and graphs; charts and graphs may be provided by a wire rope or equipment manufacturer. Electromagnetic or other non-destructive testing devices may be used as a supplement but not as a substitute for recommended inspection and tests.

(4) Evidence of Rope Abuse. The following are typical evidences of rope abuse: a kink (a pulled-out twisted loop); a dogleg (a simple, permanent bend); a birdcage (strands separated and ballooned out); loose or high strand(s); a badly out of round section; a crushed or flattened section with abraded or broken wires; loose or looped wires with no visible breaks; a protruding core; a local section with an unusually small diameter; or a local section with an usually short or unusually long lay length. It should be noted that these conditions are all evidence of radical changes - that is, constructional upsets - in the structure of the rope. Removal is not required if the abuse can be removed by an end cut.

10. The rope in question did not have more than six randomly distributed broken wires in one rope lay or three broken wires in one strand in one rope lay.

11. The maximum amount of reduction in the diameter of the rope was from 2.25 inches to 2.13 inches, or 5.3 percent.

12. MSHA did not issue a safeguard or limitation on the maximum load to be carried on this rope at any time prior to the issuance of the citation.

13. The term "worn wires" is not defined in the ANSI standard.

14. After the rope in question was removed, a 14 foot piece of the rope was tested to failure by Bethlehem Steel Corporation. The rope had a catalogue strength of 480,000 lbs. and failed at 453,000 lbs or 5.6 percent less than the catalogue strength.

15. The UMWA protested the continued use of the rope by refusing to work as follows:

April 24, 1980	1 shift
July 16, 1980	3 shifts
July 17, 1980	1 shift
July 21, 1980	3 shifts
July 22, 1980	2 shifts
July 23, 1980	1 shift

16. MSHA does not allege that the rope presented an "imminent danger" under section 107(a) of the Act.

DISCUSSION

Difficulty of Determining Time for Removal of Wire Rope

At the outset, it is recognized that determining the time for removal of a wire rope is an extremely difficult and complicated decision. This fact is demonstrated by section 4.6.1.1 of the ANSI Standard which states in pertinent part: "The decision concerning the proper time to retire a wire rope from service is difficult to make because of a significant lack of rope retirement criteria related to mining." MSHA's wire rope expert, Inspector Fred Williams, agonized over the "great burden to . . . look at a rope and make a decision and knowing that person's lives are involved and finally deciding that it is safe for another month or safe for another two months, it is quite a decision to make." (Tr. 302).

However, it must also be noted that this is not a case involving an alleged "imminent danger" under section 107(a) of the Act. MSHA never asserted that the rope presented an immient danger. Hence, much of the evidence and argument presented by MSHA concerning the fears of miners and inspectors about the "last safe trip" of the manhoist is irrelevant to this proceeding. The basic issue here is whether MSHA established the violation of 30 C.F.R. § 75.1401-1 pursuant to the citation issued under section 104(a) of the Act.

Analysis of the ANSI Standard

The issue of whether the 1960 ANSI Standard is a mandatory or advisory standard is presently pending before the Federal Mine Safety and Health Review Commission (hereinafter "the Commission"). In Jim Walter Resources, Inc., 2 FMSHRC 1890 (July 25, 1980) Judge George Koutras reviewed and analyzed the 1960 ANSI Standard and concluded that "the specific ANSI Standards relied on by MSHA in support of the alleged violation in this case are advisory guides for voluntary use by the industry." Id. at 1902. (Emphasis in original.) Judge Koutras was construing 30 C.F.R. § 77.1903(b) which is identical to the instant regulation at 30 C.F.R. § 75.1401-1. The Commission directed review of that decision. Curiously, MSHA neither addresses the issue of whether the ANSI Standard is mandatory or advisory nor mentions the Jim Walter Resources, Inc., decision, in its brief. Moreover, MSHA did not reply to Eastern's assertion that 30 C.F.R. § 75.1401-1 is not a mandatory standard.

It must first be determined whether the citation alleged the violation of a mandatory standard. Section 104(a) of the Act permits MSHA to issue citations for violations of the "Act or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act." Thus, a citation may be issued to an operator for violation of a regulation which is not a mandatory health or safety standard. However, section 110(a) of

the Act permits the assessment of a civil penalty only against a person who violates "a mandatory health or safety standard or who violates any other provisions of this Act . . . ."

30 C.F.R. § 75.2 states that all safety standards in Part 75 are mandatory. 30 C.F.R. § 75.1401-1 states that the ANSI Standard shall be used as a guide. However, section 1.5 of the ANSI Standard provides that these standards using the term "shall" are mandatory while others using the term "should" are advisory in nature.

In the instant case, the record is replete with references to various ANSI Standards. MSHA's inspectors allege violations of ANSI Standards concerning daily examination of the rope and record keeping requirements. This evidence is irrelevant since the citation in issue alleges only the violation of ANSI Standards for failure to remove or retire the rope. It is clear that Inspector Phillips issued the citation because of the reduction in the diameter of the rope and the existence of broken wires. Inspector Hall stated that the substance of the alleged violation was broken wires, marked reduction of the rope diameter, and excessive abrasion. Inspector Williams and Inspector Phillips expressed their belief that Eastern violated sections 3.11.3 and 4.6.2.1 of the ANSI Standard.

ANSI Standard section 3.11.3 begins as follows: "In addition to the regularly scheduled inspections, the machine's operating personnel should report any visual evidence of rope degradation, such as . . . ." (Emphasis supplied.) Pursuant to section 1.5 of the ANSI Standard, the use of the term "should" renders section 3.11.3 an advisory standard. Thus, since section 3.11.3 is not a mandatory standard, no civil penalty can be assessed for a violation of that section. Moreover, ANSI Standard 3.11.3 only suggests that "operating personnel should report any visual evidence of rope degradation . . . ." And does not purport to establish criteria for removal or retirement of the rope. The citation in issue was based upon Eastern's failure to remove or retire the rope. MSHA did not cite Eastern for violation of 30 C.F.R. § 75.1400-3 which sets forth the requirements for the daily examination of hoisting equipment. Therefore, I find that MSHA's reliance upon section 3.11.3 of the ANSI Standard is misplaced, since the issue here whether Eastern violated the ANSI Standard by failing to remove or retire the rope prior to the time the citation was written.

The only ANSI Standard applicable to this case is section 4.6.2.1 which describes "causes for rope retirement." It is noted that this standard does not contain the terms "shall" or "should" as defined in section 1.5 of the ANSI Standards. However, the introductory language of this section states: "The following are causes for removal of wire rope . . . ." I find that the above quoted language of this section denotes a mandatory requirement. Hence, if MSHA establishes a violation of section 4.6.2.1 of the ANSI Standard, the citation will be affirmed and a civil penalty assessed.

Section 4.6.2.1(1) provides for the removal of wire rope where there are "more than six randomly distributed broken wires on one rope lay or three broken wires in one strand in one rope lay." On this question, there is no conflict in the evidence. There is no evidence of more than six randomly distributed broken wires in one rope lay. Likewise, there is no evidence of three broken wires in one strand in one rope lay. On the date the citation was issued, MSHA found four strands with two broken wires in one lay. This evidence does not meet the criteria in section 4.6.2.1(1) concerning visible wire breaks.

Section 4.6.2.1(2) provides for the removal of wire rope when there are "worn wires." The term, "worn wires," is not defined in the ANSI Standard. MSHA contends that there were worn wires while Eastern denies this assertion. The evidence establishes that wearing or abrasion begins with the first use of every wire rope. To that extent, every rope in service has "worn wires." The failure of the ANSI Standard to define the term "worn wires" renders this section too vague to be enforceable. See Connally v. General Construction Co., 269 U.S. 385, 391 (1926). In any event, UMWA Safety Committeeman Kevin Cross testified that he inspected the wire rope on four occasions between April 17, 1980 and the date of this citation and he saw no evidence of wear on the rope.

Section 4.6.2.1(3) provides that a cause for rope removal is as follows:

* * * * * * *

> (3) Evidence of Loss of Strength. An estimation of from 10%-25% loss of rope strength (based upon measurements of rope diameter, wear pattern dimensions, corrosion, and the number of broken wires), estimated with a series of charts and graphs; charts and graphs may be provided by a wire rope or equipment manufacturer. Electromagnetic or other non-destructive testing devices may be used as a supplement but not as a substitute for recommended inspection and tests.

It must first be determined if this provision even qualifies as a standard of any kind. The section apparently provides that if it is estimated that there is a 10 to 25 percent loss of rope strength, the rope should be removed. It does not appear that ANSI intended that ropes with less than a 10 percent loss of strength should be removed. The standard can be read as requiring the removal of ropes with a loss of strength of 25 percent or more. For losses of strength of less than 25 percent but more than 10 percent, the standard is vague and unenforceable under the Act. Since there is no evidence in the record of a 25 percent loss of strength of the rope in question, MSHA failed to prove a violation of this section.

Section 4.6.2.1(4) deals with evidence of rope abuse. However, MSHA's wire rope expert, Inspector Fred Williams, conceded that there was no evidence of rope abuse in this case.

In conclusion, MSHA has failed to establish a violation of the applicable ANSI Standard. The foregoing discussion illustrates the problems encountered by MSHA in its attempt to delegate the promulgation of mine safety enforcement standards to a non-governmental body. On April 28, 1981, MSHA published a notice that it intends to propose "specific requirements for wire ropes [which] will eliminate the need to incorporate by reference the ANSI Standard." 46 Fed. Reg. No. 81 at 23987 (April 28, 1981).

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. Eastern and its Federal No. 2 Mine are subject to the Act.

3. The evidence of record fails to establish that Eastern violated the ANSI Standard as alleged and Citation No. 0631927 is vacated.

4. The evidence fails to establish the violation of a mandatory health or safety standard and the petition to assess a civil penalty is dismissed.

ORDER

WHEREFORE IT IS ORDERED that Eastern's Contest of Citation No. 0631927 is SUSTAINED and Citation No. 0631927 is VACATED.

IT IS FURTHER ORDERED that the petition to assess a civil penalty is DISMISSED.

James A. Laurenson

James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 30 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding : Docket No. KENT 80-292 : A.C. No. 25-02502-03018F
v.		: No. 18 Mine
SHAMROCK COAL COMPANY,	Respondent	:

DECISION

Appearances: George Drumming, Jr., Esq., Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Neville Smith, Esq., Manchester, Kentucky, for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Manchester, Kentucky, on May 19, 1981, and May 20, 1981. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered an opinion on the record. 1/ My bench decision containing findings, conclusions and rationale appears below as it appears in the record, aside from minor corrections.

> This proceeding was initiated by the filing of a petition for a penalty assessment by the Mine Safety and Health Administration on August 25, 1980, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 alleging two violations of 30 C.F.R. § 75.200 involving in turn two alleged infractions of the Respondent's approved roof-control plan on October 30, 1979. On this date, at approximately 6:30 p.m., a roof fall occurred in the No. 4 entry of the 005 section of Respondent's No. 18 Mine resulting in the death of section foreman Floyd D. "Dave" Burke. Following

1/ Tr. 201-220.

the accident, Mine Safety and Health Administration inspector Lawrence Spurlock issued a withdrawal order pursuant to section 103(k) of the Act to assure the safety of the miners until the MSHA investigation was completed. This withdrawal order which issued at 10 p.m. on October 30 was terminated on October 31, 1979, at 5 p.m. On October 31, 1979, Citation No. 736789 was issued alleging noncompliance with the roof-control plan in that additional support, such as timbers or cribs, was not being used with metal straps where abnormal conditions were encountered and, furthermore, that a test hole was not drilled in the subject area. This citation, which issued at 4:30 p.m., was terminated 2 days later on November 2, 1979, when the inspector determined that the roof-control plan was being complied with inasmuch as additional support, such as cribs and timbers, were installed in the accident area and a test hole had been drilled.

The parties, both of whom were represented by counsel at the hearing, entered various stipulations covering the jurisdiction of the Administrative Law Judge and further indicating that Respondent is a large operator; that the operator's history of previous violations for the 24-month period prior to October 30, 1979, revealed that Respondent was assessed and paid penalties for eight violations of 30 C.F.R. § 75.200; that Respondent demonstrated normal good faith in attempting to achieve compliance; that assessment of penalties would not affect Respondent's ability to continue in business; and that the injury frequency rate comparison of Respondent for the last quarter available prior to the accident was 9.62 for the coal mining industry and .62 for Respondent. That is, Respondent's injury frequency rate was .62 whereas the industry frequency rate was 9.62.

The paramount issues in this case involve the proper construction to be placed on pertinent language in the roof-control plan (Exh. P-8). That plan, at page 4, in pertinent part provides:

> Crossbars to be used when pots, slips, horsebacks or hill seams are encountered. A minimum of two crossbars to be used at each location. At least one post to be used under each end of the crossbars and the posts are not to be more than fourteen feet apart. Crossbars to be installed on four foot centers and the foreman in charge shall determine when the installation of crossbars is to be discontinued.
>
> Steel straps predrilled on not more than four foot centers and installed with roof bolts on not

more than four foot centers may be used in lieu of wood crossbars, as stated above, in areas where the roof structure is of such nature that it will provide adequate anchorage for roof bolts.

In areas where steel straps have been utilized in lieu of wood crossbars where abnormal roof conditions are encountered, the area shall be supported with cribs and-or posts set on four foot centers on each side of a sixteen foot wide roadway.

Counsel for both parties agree that the main legal issue is whether abnormal or subnormal roof conditions existed in the area where the roof fall occurred. The three-paragraph portion of the roof-control plan above quoted refers to abnormal roof conditions in the third paragraph thereof. At page 5 of the roof-control plan, an explanation is contained in paragraph 1 to this effect: "This is the minimum roof control plan and was formulated for normal roof conditions and the mining system(s) described. When subnormal roof conditions are encountered, indicated or anticipated, additional roof support such as longer and/or additional roof bolts, posts, or crossbars, shall be installed."

MSHA seeks penalties for two violations of the plan, the first being for the failure to install cribs or posts as required by the third paragraph of the plan quoted hereinabove and the second for failure to install a drill hole as MSHA contends is required by paragraph 12 of the plan shown on page 6 thereof which provides:

During each production shift at least one roof bolt hole in each active working place shall be drilled to a depth of at least twelve inches above the anchorage horizon of the bolts being used shall either: (a) be left open; (b) be plugged with a readily removable plug; or (c) a roof bolt compatible in length with the depth of the hole shall be installed and the plate shall be encircled with a paint distinctively different in color from the roof.

Inspector Spurlock testified on behalf of MSHA and indicated that after being notified of the accident he went to the mine, arriving there at approximately 8:30 p.m. on October 30. He returned on October 31 at approximately 9 a.m. and conducted an accident investigation. Among other things, he determined that the dimensions of the part of the roof which fell were approximately 40 feet long, 20 feet wide and 20 to 36 inches thick. These dimensions differ somewhat, but not in a material

way, from the dimensions provided in MSHA's Report of Investigation (Exh. P-7) at page 2 thereof.

The inspector testified that the Report of Investigation reflected what he found during his investigation. He also indicated that the roof fall covered approximately half of the entry in which it fell; that some of the roof which fell landed on a continuous miner and shuttle car which were in the area; and that there were hill seams present in the subject location, some three in number, running one side to the other about 30 to 40 feet as reflected in a sketch contained on page 3 of Exhibit P-7. Although at the commencement of the hearing Respondent challenged the accuracy of the sketch in a general way, I find that insofar as an evaluation of the accident scene for purposes of this proceeding are concerned, the sketch is sufficiently accurate to be accepted as an indication of the locations of the hill seams, equipment and personnel involved at the time and place of the accident. There was no substantial challenge or attack with respect to the accuracy of the sketch during the hearing.

The inspector also determined that the means of roof support employed was that designated in the second paragraph of the three-paragraph roof-control plan mentioned above, that is, steel straps installed with roof bolts. Steel straps and roof bolts were found at the place where the roof had fallen. The inspector testified that in his opinion the Respondent was not in compliance with the plan since it did not use cribs or timbers; that any fracture in the roof is "abnormal" and that in this respect he disagreed with the Respondent's safety director, Gordon Couch, with whom he had a conversation on October 31, 1979. According to the inspector, Mr. Couch's belief was that hill seams were normal because of their prevalence throughout the mine and in the section where the accident in question occurred.

With respect to the second alleged violation, the inspector testified that he was told by day shift foreman James Napier that he, Napier, had asked for a test hole to be drilled. The inspector, during his investigation on October 31, 1979, also conversed with the roof bolter on the day shift, Stanley Roark, who told the inspector that he was directed by Foreman Napier to drill a test hole but that he did not. The inspector testified that on November 31 he looked for a test hole but could not find one.

The No. 18 Mine has two production shifts each day, the first from approximately 7:30 a. m. to 3:30 p.m. and the second from 3:30 p.m. to 11:30 p.m.

The inspector indicated that in his opinion only a hairline crack in the roof would have been visible in the roof fall area prior to the fall. He was unsure whether a test hole, had one been drilled, would have made obvious any weakness in the roof. In that connection, the Report of Investigation, at paragraph 5 on page 2 thereof, indicates that the presence of draw rock in the No. 4 entry, "[p]revented the workmen from detecting the loose roof with sound and vibration tests."

The inspector confirmed that Respondent had a low injury frequency rate and he felt that the No. 18 Mine was a safety-conscious operation. With respect to hill seams, the inspector indicated that such may be manifested in the mine roof by only a hairline crack and that it may or may not be detectable by viewing the mine roof. He also indicated that the draw rock might not enable one to detect a loose roof with a sound-vibration test and that the 6 to 8 inches of draw rock in the roof would make it difficult to determine if the crack in the roof was simply a nondangerous crack or the manifestation of a hill seam. The record is clear, from the testimony of other witnesses, that the roof of the No. 18 Mine contains numerous cracks and according to Safety Director Couch, most of these hairline cracks throughout the mine are firm and safe when tested.

Focusing specifically on the roof fall itself, the record is also clear that the roof broke without significant prior warning about 3 hours into the second production shift and that the foreman on the first production shift, James Napier, had tested or sounded the roof with a hammer on his shift and found the roof to be safe in the sense that no structural weakness was ascertained. Napier testified that he made this test at approximately 2:50 p.m. and the roof sounded "solid." Napier indicated that 30 to 32 inches of rock can be sounded by this method (in this connection I note that the thickness of the roof which fell ranged from 20 to 36 inches according to the inspector). Napier indicated that he, as section foreman on the first shift, usually conferred with the foreman on the second shift prior to the changing of the shifts and that on October 30 he discussed with Section Foreman Burke the hill seams in the area of the roof fall. According to Napier, he did not recommend to Burke that Burke take any particular action on his shift with respect to the hill seams. It should be noted that although Napier confirmed that he had directed his employees to drill a test hole on his shift, that Napier did not check to see if the drill hole had been drilled before his shift ended. Thus, Napier did not mention to the decedent, Mr. Burke, that no test hole had been drilled in their conversation at the changing of the shifts.

I do find, on the basis of the inspector's testimony that during his investigation of the accident he was advised by the first shift roof bolter that no test hole had been drilled, and from Napier's testimony that his employees had reported to him after the accident that no hole had been drilled, that such was a fact.

Respondent has objected to the hearsay nature of this testimony. A report or statement made to an inspector during an investigation of an accident carries with it a higher degree of trustworthiness than may ordinarily be prevalent in a common conversation between two individuals. The testimony of Napier, a management person for Respondent, further vouches for this trustworthiness. According to the inspector, the reason that the roof bolter on the first shift did not drill a test hole was that he did not have any drill steel. This explanation given by the roof bolter to the inspector further supports the finding that a test hole was not drilled on the first shift. In any event, hearsay, by virtue of express provisions of the Administrative Procedure Act, is admissible in this proceeding. And for these various bases and various reasons, I credit the testimony of Napier and Inspector Spurlock in this connection.

I also find that the area where the roof fall occurred and where Napier directed that a test hole be drilled was inby the working place and that a test hole should have been drilled in this area during the first shift. This is vouched for by the fact that the section foreman during his shift directed that a test hole be drilled there. Although at one time during the proceeding, Respondent conceded that no test hole had been drilled on the second shift during the first 3 hours thereof before the accident occurred, Respondent subsequently withdrew this stipulation. Respondent's position is that the pertinent provision of the roof-control plan, paragraph 12 at page 6, permits the hole to be drilled "during each production shift" and that there could be no infraction thereof on the second shift since another 5 hours of the shift remained after the accident.

I concur with Respondent's position with respect to the second shift since it cannot be said that a bolt hole would not have been drilled during the shift. The regulation is a standard which determines the obligation of the mine operateor. It does permit the drilling of the bolt hole at an unspecified time during each production shift. To constitute a violation in this case, insofar as the second shift is concerned, paragraph 12 would necessarily have required the drilling of a bolt hole at the beginning of a shift rather than "during the shift." However, I do find that

the area in question was an active working place on the first shift and that a bolt hole should have been drilled during Mr. Napier's shift. And since I find that one was not, and Respondent has introduced no evidence that one was, I conclude that a violation of 30 C.F.R. § 75.200 did occur in this respect as alleged by MSHA.

In his gravity sheet (Exh. P-5), Inspector Spurlock indicated that:

> The crew was questioned and they stated they did not drill a test hole in the area to evaluate the extent of the roof conditions. However, due to the firmness of the shale it is very doubtful if the test hole would have detected the crack in the top.

I therefore find, based thereon, as well as other testimony in the record, that it is conjectural whether or not the test hole would have disclosed a structural weakness (see testimony of safety director Gordon Couch) and that there is no causal relationship, direct or otherwise, between the violation and the roof fall which resulted in the death of Second Shift Section Foreman Burke.

Turning now to the question whether or not the failure to install cribs or posts in the accident area in conjunction with the steel straps which were used to support the roof constitutes a violation, it first should be noted that Respondent has stipulated that in fact no timbers or cribs were used and that only steel straps installed with roof bolts were used to support the roof in the accident area on October 30, 1979. I so find.

According to Denver Collins, a shuttle car operator who was called as a witness by MSHA, cribs and posts would not have been installed in the subject entry due to its width--that is, the entry was 20 feet wide and because the continuous miner working in the area was 10 feet 9 inches wide and the cribs would have been approximately 4 feet wide each, there would not have been maneuvering or operating room in the area. This testimony was not further developed on the one hand or challenged on the other so, accordingly, I do conclude that the physical size limitations of the area would have precluded the use of cribs and posts. However, the question remains whether or not the roof-control plan, which the parties agree does authorize the use of steel straps installed by roof bolts, should be construed so as to require the supplementary installation of cribs and posts at all times the "steel strap" alternative is utilized. If

so, the impossibility of installing cribs or posts in the area would in turn preclude the use of the steel strap alternative and require the mine operator to use crossbars as the only means of roof support specifically authorized by the pertinent three-paragraph plan.

To fully understand this plan, the three paragraphs must be paraphrased. The first paragraph unequivocally requires crossbars to be used when the hill seams are encountered. The second paragraph permits an alternative: Steel straps installed with roof bolts. The third paragraph thus becomes critical. It states: "In areas where steel straps have been utilized in lieu of wood crossbars where abnormal roof conditions are encountered, the area shall be supported with cribs and/or posts--", etc.

This plan is glorious in its ambiguity and pregnant with the confusion which it necessarily creates in the minds of the miners, the operators and the Government enforcement personnel who must work with it, implement it, live with it, and enforce it. Nevertheless, it is a minimum plan and we must endeavor to answer various subquestions which arise. MSHA contends that the third paragraph is a necessary qualification to the second paragraph, that is, cribs and posts must always be used to back up the use of steel straps. Respondent, on the other hand, contends that it has the option to use either crossbars or steel straps and that cribs and posts are required to be used only "[w]here abnormal roof conditions are encountered." Respondent contends that the "pots, slips, horsebacks or hill seams" language contained in the first paragraph are not abnormal roof conditions. Petitioner contends that they are and that paragraph 3's reference to abnormal roof conditions must be referenced back to the first paragraph.

I agree with the Petitioner's position with respect to the construction of this regulation. My reasons for doing so are based first on the general philosophic principles governing statutory construction of remedial legislation, secondly on ancillary provisions of the roof-control plan itself and finally because of the severe hazards roof-control regulations seek to prevent.

In Cleveland Cliffs Iron Company, Inc., Docket No. VINC 79-68-PM, the Federal Mine Safety and Health Review Commission, in a decision dated February 9, 1981, endorsed the principle of the liberal construction of the Act and its implementing regulations so as to promote the remedy sought by such standards.

The roof-control plan itself, as previously noted, recognizes that the three paragraphs are minimums and it anticipates that additional bolts, posts or crossbars would be installed in subnormal roof conditions when such are "encountered, indicated or anticipated." Considering the rule of liberal construction and the apparent abundantly cautious tenor of the plan itself, a reading of the three paragraphs is required which would promote rather than diminish safety even though I do believe that the three paragraphs can be read as Respondent contends without an absurdity resulting.

I conclude that hill seams, as mentioned in paragraph 1, are an abnormal roof condition within the meaning of paragraph 3 and a subnormal roof condition within the meaning of paragraph 1 of page 5 of the plan. I do so for two reasons. The first phrase of paragraph 3 ends with the word "encountered." This encourages the construction that cribs and posts must be used in all cases where steel straps are utilized. A contrasting punctuation would have been to place a comma after the word "crossbars" in paragraph 3, in which event the concept of abnormal roof conditions would stand out as a separate situational classification which, by itself, would call for cribs and posts.

The second reason I find that hill seams are abnormal or subnormal roof conditions is based upon my view of the evidence in this proceeding and observation of various witnesses who testified concerning the nature of hill seams. Section Foreman Napier, although he indicated that "[j]ust because you have a hill seam or crack someplace doesn't mean it's dangerous," also stated: "You never know about a hill seam. You can test hole them and they'll be solid and it would fall anyway. You can't tell by looking." Napier's actions on October 30 indicated a considerable concern with the hill seams in the roof fall area. I felt the inspector's opinion that hill seams were abnormal conditions was also credible and should be accepted over those of Respondent's witness Gordon Couch, who, on two occasions, indicated that he did not really know what a hill seam was. Mr. Couch wanted to treat a hill seam as a "seam" even though there is considerable evidence in this record that a hill seam runs from the top or outside of the mountain down into the mine and manifests itself as a crack or a seam visible to the naked eye in the mine roof. I conclude that hill seams are abnormal or subnormal roof conditions within the meaning of the roof-control plan; that they pose a significantly higher degree of risk of roof falls because of their susceptibility to water which, indeed, on occasion has been seen leaking from them, and since hill seams

require and in fact were and have been given a much higher degree of attention by the mine foreman and the miners than other normal mine conditions.

There is credible unchallenged testimony in the record that cribs would have supported the amount of roof that fell on October 30, 1979, but also that neither the steel straps installed with 36-inch roof bolts and crossbars would not have held up the part of the roof which fell at that tragic time. Thus, crossbars and metal straps would support only 3 to 4 tons, whereas cribs would have supported 100 to 150 tons, according to Safety Director Couch.

I conclude, therefore, that unduly peculiar factual situations were posed in this case; that even though steel straps were used, where abnormal roof conditions were encountered and where cribs and posts were not susceptible to being installed in the entry in question, that only two options remained with Respondent: (1) to either use crossbars, which would have not held up that amount of roof, or (2) not mine--that is, cut into the area in question. The option was available to the Respondent to use crossbars in the situation which it encountered on October 30, 1979. Thus, it cannot be said that there is a direct causal relationship on these unusual facts between the failure to use cribs and posts and the roof fall which resulted in the death of Mr. Burke. Again, this is because the option was available to use crossbars--which would not have held the roof up.

Whether a causal relationship exists between the violation and an accident greatly determines the degree of gravity which must attach to the violation. However, any violation of a roof-control plan is a serious violation. I thus conclude that since two miners were immediately exposed to the roof fall, that is the continuous miner operator and the shuttle car operator, and other miners on the crew were also exposed to any hazard which might result from the violation in question, that both the failure to drill a test hole and the use of steel straps without cribs or posts were both serious violations.

I find, therefore, that the failure to use crossbars in the area at the time constituted a violation of 30 C.F.R. § 75.200. I find that the use of steel straps in the area, which was an area in which cribs and posts could not be utilized, is a corollary to this violation, that is, it is the other side of the coin.

With respect to negligence, which is the remaining statutory penalty assessment factor to be considered, in

view of the early stipulations of the parties, I find that Section Foreman Napier was negligent in not following through to determine whether the test hole he ordered drilled in the portion of the roof which fell was drilled. He also indicated that he did not tell Mr. Burke about the test hole--I infer this from his overall testimony including his testimony that he did not recommend any action on Burke's part when he spoke to Burke at the changing of the shifts. The record is clear that Napier recognized the danger the hill seam posed, as I have previously pointed out, and he did testify that he told Foreman Burke to "[w]atch and be careful." I thus find, based upon Napier's testimony, that at least one member of management considered the hill seams to be dangerous but that in the change-over of shifts, appropriate action failed to be taken by management with respect to the V-shaped hill seams in the accident area.

I do not find any negligence attributable to Respondent based on Napier's actions or nonactions to be of a high degree since Napier did sound the roof and did take action which he might have believed had been carried out by employees. I also find that culpability on the part of Respondent's management in the commission of the two violations found is substantially mitigated by the lack of clarity in the three-paragraph roof-control plan insofar as that particular violation is concerned. Weighing then the factors which must be considered in assessing penalties, the factors of the large size of the company, moderate degree of negligence, and seriousness of the violations, go toward raising any penalty which might otherwise be appropriate. Counterbalanced against those factors are the factors that Respondent's previous history of violations appears to be moderate, only relatively small penalties were paid for the eight prior violations of the cited regulation, and Respondent had a highly commendable injury frequency rate for the quarter immediately preceding the accident. Inspector Spurlock considered the Respondent to be a safety-conscious operation. Finally, it was stipulated that the Respondent demonstrated normal good faith in attempting to achieve compliance with the violated safety standard.

I would add that I believe the Respondent sincerely construed the roof-control plan in the manner that it urges here today and that such position is not a cynical one. Considering all of these factors, a penalty of $750 is assessed for the violation in Citation No. 736789 relating to the failure to drill a test hole and a penalty of $2,250 is assessed for the violation charged in Citation No. 736789 insofar as the same relates to the failure to comply with the

roof-control plan by using steel straps to support the roof without supplemental cribs and posts being utilized.

ORDER

It is ORDERED that Respondent pay the sum of $3,000 to the Secretary of Labor within 30 days from the date hereof. All proposed findings of fact and conclusions of law, which have not been expressly incorporated in this decision, are REJECTED.

Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUL 31 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-291
v.	)	ASSESSMENT CONTROL NO. 05-02820-03014
C F & I STEEL CORPORATION,	)	MINE: Maxwell
Respondent.	)	

DECISION AND ORDER

Appearances:

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For the Petitioner

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For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

This proceeding arose through initiation of an enforcement action brought pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. The Secretary of Labor, Mine Safety and Health Administration [hereinafter "the Secretary"], brought this action against C F & I Steel Corporation [hereinafter "C F & I"] alleging two violations of the Act. The Secretary seeks an order assessing civil monetary penalties against C F & I for its alleged violations of the Act.

On March 2, 1981, the parties filed with the Commission a Joint Motion to Approve Settlement regarding the alleged violation contained in Citation No. 387990. Pursuant to notice, a hearing on the merits was held on March 3, 1981, in Pueblo, Colorado. In anticipation of a favorable ruling on the pending motion, testimony at the hearing was limited to the alleged violation contained in Citation No. 387774. On March 16, 1981, I denied the pending motion, without prejudice, for failure to provide sufficient facts in support of the appropriateness of the penalty proposed by the parties. A Stipulation and Motion to Approve Settlement Agreement and Order Payment was subsequently filed with the Commission on May 28, 1981.

As a matter of procedure, I will treat the two citations separately in this decision. Citation No. 387774, to be addressed first, will be decided on the evidence presented at the hearing. Citation No. 387990 will then be decided based upon the pleadings contained in the record.

CITATION NO. 387774

FINDINGS OF FACT

1. C F & I is the operator of an underground coal mine located near Weston, Colorado, known as the Maxwell Mine.

2. Products of the Maxwell Mine enter or affect interstate commerce.

3. On March 19, 1979, during the course of an investigation of an unintentional roof fall in development Unit No. 2, a duly authorized representative of the Secretary conducted an inspection of the Maxwell Mine.

4. In that unit, the MSHA inspector observed a strike[1]/ running diagonally across five consecutive entries. The strike, which had advanced as far as Entry No. 12, was accompanied by water and unconsolidated roof.

5. Two unintentional roof falls had recently taken place at the Maxwell Mine. One fall occurred on February 6, 1979, in Entry No. 14, and the other occurred earlier on the day of the inspection, in Entry No. 13. The location of the two falls closely approximated points on the line formed by the strike.

1/ A strike is defined as a deformity in the roof which designates a weakness in the roof strata, (Tr. 117), or the direction or bearing of a horizontal line in a structual plane. U.S. DEP'T. OF THE INTERIOR, BUREAU OF MINES, A DICTIONARY OF MINING, MINERAL, AND RELATED TERMS 1089 (1968).

6. Citation No. 387774[2]/ was issued to C F & I by the MSHA inspector for its alleged violation of 30 C.F.R. § 75.200.[3]/

7. Two days prior to the roof fall in Entry No. 14, C F & I supervisory personnel concluded that the condition of the immediate roof was precipitous and that the area should be deadlined to prevent further travel. C F & I proceeded to timber-off the affected area and then waited for the roof to fall.

8. Following the roof fall of February 6, 1979, and prior to the roof fall of March 19, 1979, C F & I took the following steps to improve its roof control in the area in Entry No. 13 adjacent to the strike line: increased roof bolt lengths from 42 inches to 72 inches; decreased roof bolt centers from four feet to three or two feet, or whatever the roof bolt installer thought necessary to control roof conditions; spotted steel beams in the entry; installed steel carrying beams at crosscut intersections; and drilled weep holes in the roof to drain away water. These measures exceeded the requirements of the mine's roof control plan.

2/ The condition or practice cited alleges: "Although the approved roof control plan was exceeded, not enough precautions were taken in No. 13 entry on No. 2 unit to protect the miners, when known existing adverse conditions were approached. An unintentional roof fall has occurred at the intersection of crosscut No. 21. The operator shall take steps to further strenghthen (sic) the roof control in areas of this type."

3/ Roof control programs and plans. [STATUTORY PROVISIONS] Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

9. On March 12, 1979, C F & I submitted a proposed amendment to the roof control plan then in effect at the Maxwell Mine. The amendment sought to incorporate certain new provisions, including a requirement that additional roof supports would be installed when excessive amounts of water from the roof were encountered. The addendum received the approval of MSHA's District 9 Manager for Coal Mine Health and Safety on March 26, 1979.

10. On March 17, 1979, an idle work day, C F & I became aware of unstable roof conditions near the strike line in Entry No. 13. Additional timbering was added under the beam supports already in place, blocking the entry to further travel. The blocked-off portion of the roof fell sometime late on March 18, 1979, or early on March 19, 1979.

11. The roof control measures employed in the localized area of the March 19, 1979 fall included: ten 72-inch roof bolts on three to four foot centers, steel beams spaced approximately four feet apart, and steel carrying beams on both sides of the intersection.

12. In the hours following discovery of the roof fall and prior to the issuance of the subject citation, C F & I continued to employ those means of roof control outlined above in Finding of Fact No. 8. No work proceeded in entries adjacent to Entry No. 13, other than efforts to confine the cave-in to a limited area.

13. Payment of the proposed penalty will not impair the ability of C F & I to continue in business.

ISSUES

1. As a matter of law, can an operator be found in violation of 30 C.F.R. § 75.200 if it is complying with the minimum requirements of the mine's roof control plan?

2. As a matter of fact, did Respondent support the roof and ribs or otherwise control such areas to adequately protect persons from falls of the roof or ribs?

DISCUSSION

At the hearing, the Secretary admitted that C F & I was in compliance with the minimum requirements of the roof control plan then in effect at the Maxwell Mine. It is the Secretary's position that C F & I violated 30 C.F.R. § 75.200 by failing to comply with the first sentence of the regulation, which requires an operator to continually improve the roof control system at each coal mine. Additionally, the Secretary contends in his post hearing reply brief that an operator must control any and all roof conditions it encounters in the mine, even if control of those conditions requires the operator to exceed the minimum requirements of the roof control plan.

Petitioner's citation of authority for the proposition that an operator has responsibilities above and beyond the minimum requirements of the mine's roof control plan is well taken. In Ziegler Coal Company, 2 IBMA 216, September 18, 1973, the Interior Board of Mine Operations Appeals held that " ... an operator is under a duty to maintain a safe roof irrespective of any roof control plan and that the failure to do so constitutes a violation of the mandatory safety standard at section 302(a)." Id. at 222. Section 302(a) of the Act has since been superseded by an improved mandatory safety standard promulgated by the Secretary pursuant to section 101, namely 30 C.F.R. § 75.200. Unless and until overturned, this decision is binding upon the Commission and its judges. Section 301(c)(2). Therefore, as a matter of law, an operator can be found in violation of 30 C.F.R. § 75.200 even if it is complying with the minimum requirements of the mine's roof control plan.

Citation No. 387774 states in part that "[a]lthough the approved roof control plan was exceeded, not enough precautions were taken in No. 13 entry or No. 2 unit to protect the miners, when known existing adverse conditions were approached." However, based upon the evidence presented at the hearing and for the reasons presented below, I find that C F & I did not violate 30 C.F.R. § 75.200 as alleged.

The first sentence of the standard reads as follows: "[e]ach operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system." C F & I complied with this provision by implementing procedures to improve roof stability beyond the threshold level required by the roof control plan. See Finding of Fact Nos 8 and 12. Similarily, C F & I took independent affirmative action to upgrade the minimum requirements of the roof control plan then in effect at the Maxwell Mine. See Finding of Fact No. 9.

The second sentence of the standard requires that "[t]he roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." While no one can dispute the fact that the roof that fell in Entry No. 13 was not adequately supported, C F & I complied with this provision by blocking the entry to further travel before it fell. See Finding of Fact No. 10. This action otherwise adequately controlled the affected area to protect persons from falls of the roof or ribs. Therefore, as a matter of fact, Respondent discharged the obligations imposed on it by 30 C.F.R. § 75.200.

CITATION NO. 387990

Due consideration of all factors contained in the record convinces me that the proposed settlement is consistent with the purposes of the Act and should be approved.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and the subject matter of this proceeding.

2. Petitioner has failed to meet his burden of proving that Respondent violated the Act as alleged in Citation No. 387774.

3. Citation No. 387774 should therefore be vacated.

4. The settlement proposed in Citation No. 387990 is consistent with the purposes of the Act and should be approved.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Citation No. 387774 is hereby VACATED. It is FURTHER ORDERED that the joint motion regarding settlement of Citation No. 387990 is hereby GRANTED and that Respondent shall pay the agreed amount of $200.00 within 40 days of the date of this ORDER.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 1981

JOHNNY HOWARD, Complainant	:	COMPLAINT OF DISCHARGE, DISCRIMINATION, OR
v.	:	INTERFERENCE
	:	
MARTIN-MARIETTA CORPORATION, Respondent	:	Docket No. SE 80-24-DM
	:	
	:	MSHA Case No. MD 79-93

SUPPLEMENTAL DECISION

On June 19, 1981, I issued a decision in Complainant's favor on his complaint of discrimination under § 105(c) of the Act. The parties were ordered to confer for the purpose of effectuating paragraphs 1 - 6 of the order contained in the decision. It appears that the parties substantially agree on all issues save back pay. While they agree on the figures to be used in computing back pay, they disagree on the formula to be applied to those figures. The formula and award are set forth in this decision, which constitutes my final disposition of the proceedings.

Turning to the provisions of the order of June 19, 1981, reinstatement will not be ordered since Complainant has obtained full-time work elsewhere and does not wish to return to Respondent's employ. Therefore, paragraph 1 of the order is vacated.

Paragraph 2 directs back pay for Complainant. There have been few Commission decisions dealing with the computation of back pay under the Mine Act. In Bradley v. Belva Coal Co., 3 FMSHRC 921 (1981), I concluded that the remedial portions of § 105(c) were modeled on § 10(c) of the National Labor Relations Act, so the NLRB's approach to back pay computation should be followed. According to the Board,

> "Making whole" involves payment to the discriminatee of a sum equal to gross back pay (what the discriminatee would have earned in employment lost through discrimination) less net interim earnings (what was actually earned from other employment during the period less expenses incurred in seeking and holding interim employment), the difference between the two being the net back pay due.

3 NLRB CASEHANDLING MANUAL, § 10530 (1977).

Complainant renounced reinstatement at the hearing, so the period of back pay liability runs from July 31, 1979, to March 26, 1981. If the general formula were applied and total earnings for the period lumped together, no back pay would be due, since Complainant has earned more elsewhere during this period than he would have earned at Respondent's quarry in Jamestown, South Carolina. However, the NLRB computes back pay by calendar quarters of the year. 3 NLRB CASEHANDLING MANUAL § 10534.1 (1977). This policy has been in effect more than 30 years and was adopted because computations based on the entire period of liability fell short of the "make-whole" remedy the Board was attempting to provide. See NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 347 (1953). The Commission should draw on this experience. Therefore, Complainant's back pay award will be computed on a quarterly basis.

The parties have stipulated that Complainant's hourly rate was $4.76 with time and a half for overtime. Complainant worked 50 hours each week. During periods of unemployment, Howard received unemployment benefits from the State, but these will not be deducted from back pay. Bradley, supra, at 923. The back pay computation is as follows:

7/31/79 - 9/30/79	Lost earnings	
10 weeks	400 hrs. at 4.76	1904.
	100 hrs. at 7.14	714.
		2618.
	Interim earnings	0
	Net back pay	2618.
10/1/79 - 12/31/79	Lost earnings	
13 weeks	520 hrs. at 4.76	2475.20
	130 hrs. at 7.14	928.20
		3403.40
	Interim earnings	0
	Net back pay	3403.40
1/1/80 - 3/31/80	Lost earnings	
13 weeks	520 hrs. at 4.76	2475.20
	130 hrs. at 7.14	928.20
		3403.40
	Interim earnings	
Rogers & Wilson Co.		2253.25
	Net back pay	1150.15

4/1/80 - 6/30/80	Lost earnings	
13 weeks	520 hrs. at 4.76	2475.20
	130 hrs. at 7.14	928.20
		3403.40
	Interim earnings	
Georgetown Steel	480 hrs. at 8.73	4190.40
	Net back pay	0
	1/ Total back pay	7171.55

A rate of 6% interest per annum will be applied to the back pay award through January 31, 1980. Thereafter, a rate of 12% will be applied. Bradley, supra, at 925. Interest will accrue beginning with the last day of each calendar quarter of the back pay period. 3 NLRB CASEHANDLING MANUAL, § 10623.1.

Respondent is responsible for deducting the amounts required by state and Federal law and for any additional contributions which those laws may require.

The parties agree that $750 is a reasonable attorney's fee for Complainant's counsel.

The notice submitted by Respondent for posting at its Jamestown quarry is acceptable.

ORDER

1. Respondent shall pay to Complainant the sum of $7,171.55, as back pay with interest thereon at the rate of 6% per annum from July 31, 1979, through January 31, 1980, and at the rate of 12% per annum thereafter.

2. Respondent shall pay to counsel for Complainant the sum of $750 for legal services rendered to Complainant. Counsel for Complainant shall refund to Complainant so much of that fee as he has already paid.

1/ Interim earnings exceed lost earnings for every quarter after April 1980.

3. The notice submitted by Respondent shall be posted in a conspicuous place at Respondent's Jamestown quarry.

James A. Broderick
James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

Nathan Kaminski, Jr., Esq., Attorney for Johnny Howard, Complainant, Schneider & O'Donnell, 601 Front Street, P.O. Box 662, Georgetown, SC 29440

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of J. C. DUNCAN, WILLIAM DUNCAN, T. C. GALLION, and TOMMY TURNER, Complainants	:	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE Docket No. KENT 81-87-D Bakersport Mine
v.	:	
T. K. JESSUP, INC., Respondent	:	

DECISION

On August 25, 1980, six men comprising the second shift at Respondent's mine refused to start work. As a result, they were fired. Four of them subsequently filed complaints with the Mine Safety and Health Administration (MSHA). The issue is whether they were discharged in violation of § 105(c) of the Mine Act, 30 U.S.C. § 815(c).

A hearing was held, pursuant to notice, in Evansville, Indiana, on June 9 - 10, 1981. Witnesses for the Secretary of Labor were J. C. Duncan, T. C. Gallion, Tommy Turner, William Duncan, Jerry Van Crick, Jerry Vincent, James Greg East, and Boyd Mathis, all former employees of Respondent T. K. Jessup, Inc. Witnesses for Jessup were T. K. Jessup, the mine owner, Robert Sykes, former superintendent, William Jerry Anderson, night foreman, Michael Oates, reclamation and safety director, and James Utley, an MSHA inspector. The parties have filed briefs setting forth their positions. Based on the whole record, my decision is as follows.

Findings of Fact

1. At all times relevant herein, Jessup owned and operated the Bakersport Mine in Dawson Springs, Hopkins County, Kentucky. It produces coal by strip mining the surface.

2. During the months preceding their discharges on August 25, 1980, 1/ the complainants notified management of a

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1/ Two other miners were discharged with the complainants that day, James Greg East and Boyd Mathis. However, Jessup offered reinstatement to them a week later and they returned to work within one month. Neither is a party to this case.

number of problems with their equipment. Some repairs were completed and some were not by August 25, 1980. Complainants rarely notified management of equipment problems on the report slips intended for that purpose. Instead, the complaints were predominantly oral.

3. On August 23, 1980, Robert Sykes returned to the mine to check on the progress of work during the second shift. He had just finished sharing a six-pack of beer with Michael Oates. When he arrived, he found that James East was operating a dozer on a highwall in what Sykes considered an unsafe and unproductive manner. Sykes then got a dozer and proceeded to show East how he wanted the job done. The other men on the shift were watching and thought he was being reckless with the machine. They smelled alcohol on his breath and thought he was intoxicated and were very upset because of this. I find that Sykes was not intoxicated and was, in fact, trying to demonstrate a safer and more productive method of operating the dozer. However, East and the other men misunderstood his explanation and thought East was being told to operate the dozer in an unsafe manner.

4. After Sykes left the mine on the night of August 23, the men spoke with foreman Jerry Anderson and expressed their dismay at Sykes's conduct and their general dissatisfaction with him as a superintendent. They asked Anderson to arrange a meeting between them and Sykes and T. K. Jessup on August 25. Anderson agreed. Anderson attempted to contact Jessup but was unsuccessful. On August 25, before the second shift, he confronted Sykes with the men's concerns. Sykes admitted that he was wrong to visit the mine after drinking. Anderson did not tell Sykes that the men wanted a meeting.

5. At the start of the second shift on August 25, Anderson told the men that their problems had been "taken care of." The men were still dissatisfied and demanded a meeting with Sykes. J. C. Duncan then saw Sykes approaching in a road grader and motioned him to stop. Duncan related the men's concerns but did not raise specific safety complaints. Rather, he alluded to the incident on August 23 and stated the men's belief that they were being mistreated and were being required to operate unsafe equipment in an unsafe manner. Sykes and Duncan became quite hostile and finally Duncan dared Sykes to fire him. At that, Sykes fired him.

6. Next, Sykes went to each member of the second shift in turn and asked if he was going to work. Each of them expressed solidarity with Duncan and with the group as a whole. Sykes fired each of them.

7. The next day, the men went to the local MSHA office and filed a § 103(g) request for an inspection, listing their complaints. An inspector arrived at the mine on August 27, 1980, and subsequently issued two citations and one withdrawal order.

Issue

Did the complainants engage in activity protected under § 105(c) and, if so, were they discharged because of it?

Discussion

In Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), the Commission announced its formula for weighing the evidence in a discrimination case. To establish a prima facie case, the Secretary must demonstrate that the Complainants engaged in protected activity which played some role in the decision to discharge them.

The parties agree that during the months preceding their discharges, each complainant notified management of various problems with his equipment affecting safety. These ranged from broken mirrors and windshields to faulty brakes. The fact that the complaints were registered orally, rather than written on slips of paper as required by company rules, is immaterial. The complaints constituted protected activity.

By the date of their discharges, dissatisfaction with Robert Sykes had been building for months among the miners on the second shift. No doubt, personality clashes played a major role. J. C. Duncan, in particular, believed neither Anderson nor Sykes were running the mine as it ought to be run. When Sykes arrived at the mine on August 23, 1980, with beer on his breath, the miners decided that he was unfit to supervise them. They therefore requested a meeting with Sykes and Jessup. Whether concern for their safety was the dominant motive for the request is unclear. The fact that it figured in the request is enough, however. The request for a meeting was protected under § 105(c).

On August 25, 1980, the miners on the second shift found that no meeting had been arranged. They were determined to air their grievances before commencing work, so J. C. Duncan stopped Sykes, who was working a short distance from them, and began to relate the miners' concerns. Sykes and Duncan began to argue almost immediately, so Sykes left.

Sykes soon returned and once again exchanged heated words with J. C. Duncan. Beyond raising the incident of August 23, Duncan did not relate any specific safety concerns but rather expressed general dissatisfaction with the way the mine was being operated. Finally, Duncan dared Sykes to fire him, which he did.

Again, the fact that concern over safety played some role in J. C. Duncan's complaints to Sykes on the miners' behalf is enough to bring the complaints within the protection of § 105(c). Although the complaints were voiced in a provocative and combative tone, I cannot conclude that Duncan's conduct was so opprobrious as to forfeit the protection of the Act. Cf. American Telephone and Telegraph Co. v. NLRB, 521 F. 2d 1159 (2d Cir. 1975).

Before they were discharged, the miners on the second shift collectively and individually refused to work. Whether a refusal to work is protected under § 105(c) depends on whether a miner has a good faith, reasonable belief that continuing work would pose a safety hazard. Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803, 812 (1981). In my judgment, none of the complainants satisfied this standard.

I assume, as Respondent's brief concedes, that the complainants honestly believed their jobs presented unjustifiable risks from time to time. However, while generalized complaints over safety are protected under § 105(c), they cannot form the basis for a refusal to work. Reasonableness requires, at a minimum, that the miner's refusal to work concern a condition actually confronting him at the time. 2/

Only two miners on the second shift expressed any concern over the safety of the tasks they were about to perform. James East, who did not join the complainants in this action, renewed his misgivings about the brakes on his dozer. Sykes responded that the dozer had been taken out of service for repairs and that he would lay off East temporarily and recall him when the brakes were fixed. East

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2/ Reasonableness cannot be established after the fact. The day after they were fired, the complainants prepared a list of unsafe conditions and presented it to the local MSHA office, requesting an inspection under § 103(g). Had they coupled their refusal to work with such specific complaints, I could then analyse whether their beliefs in these allegedly dangerous conditions were reasonable. As it was, even this threshold element of reasonableness was not present.

declined, preferring to remain with the group. According to Sykes, Tommy Turner claimed that the mirrors on his truck had not been fixed. Sykes told him they were fixed earlier in the day. Still, Turner refused to work.

The actual safety of the work the complainants were about to perform has some bearing on the reasonableness of the complainants' refusal to work. An MSHA inspector visited the mine two days after they were discharged, with a list of their complaints. Two citations were issued, one for an inoperative back-up alarm and one for a missing fire extinguisher. One withdrawal order was issued, covering a road grader with faulty brakes, which none of the complainants had operated. The equipment that caused them the greatest concern had been removed from service. I cannot conclude, on the basis of this record, that complainant's refusal to work was reasonably related to conditions believed to be unsafe.

Whether the Secretary has established that the complainants' protected activity figured in the decision to discharge is academic at this point. Even if it did, the record is clear that they would not have been discharged had they not refused to work. Therefore, Respondent has established an affirmative defense under Pasula, supra, at 2799 - 2800.

Based on the above, I find that Respondent did not violate § 105(c) when it discharged the complainants.

Conclusions of Law

1. I have jurisdiction over the parties and the subject-matter of this proceeding.

2. Respondent did not violate § 105(c) when it discharged the complainants.

Order

1. The complaint of discrimination in this case is DISMISSED.

2. Any proceedings aimed at assessing a civil penalty against Respondent for the allegations in the complaint are hereby ordered DISMISSED. No penalty shall be assessed.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-399
Petitioner	:	A.C. No. 11-00588-03079 F
v.	:	
	:	No. 21 Mine
OLD BEN COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Thomas Lennon, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Robert J. Araujo, Esq., Old Ben Coal Company, Chicago, Illinois, for Respondent.

Before: Judge Charles C. Moore, Jr.

The above case was tried in Evansville, Indiana, on April 8, 1981, and final briefs of the parties were submitted by May 29, 1981. The citation alleged a violation of 30 C.F.R. § 77.1700 in that:

> A bulldozer operator was allowed to perform work in a hazardous area where he could not be seen or heard by others and no communication means was provided. This violation was determined during a fatal accident investigation of the bulldozer operator working atop the raw coal storage pile on 4/8/80.

Although no one will ever know exactly how this accident occurred, and although there was some difference of opinion as to whether the bulldozer backed into a hole or fell through a bridged-over area of the coal, the evidence indicates that the events could have taken place as described in the "Commentary" and "Discussion and Evaluation" sections of the accident report (Petitioner Exh. 13). Those sections are as follows:

"Commentary

> On Tuesday, April 8, 1980, at midnight, the surface preparation plant crew under the supervision of Gale Pearce, Surface

Foreman, entered their respective work areas and routine coal preparation activities commenced. At this time, Robert Mitchell, Bulldozer Operator, mounted the TD-25-C International bulldozer and began coal pushing operations on top of the unusually large raw coal pile located near the preparation plant. Mitchell's duties consisted of pushing coal away from the coal stacker and pushing coal over the four load-out holes located beneath the coal pile. Coal is loaded out from beneath the raw coal pile by feeders located on four sides of the coal stacker. The preparation plant operator, Jesse Jones, began loading out coal from the north feeder at the beginning of the shift and continued until 1:30 a.m. when he received a telephone call from Mitchell requesting that he switch over and load from the south feeder. Jones switched to the south feeder and continued loading out coal until he received another call from Mitchell at 1:45 a.m. At this time, Mitchell told Jones it was alright to load from any hole because he had come down off the raw coal pile with the bulldozer. Jones then began loading coal from the various feeders until he achieved the desired flow rate of coal to satisfy the preparation plant. To do this, Jones loaded coal approximately 10 minutes from the west feeder which would have conveyed approximately 100 tons of coal from the coal pile on the west side of the stacker. At approximately 2:30 a.m., Mitchell pulled a stuck vehicle from a mud hole in the mine yard and trammed the bulldozer onto the coal pile to resume coal pushing. However, Mitchell did not contact the plant operator, Jones, to inform him that he was returning to the coal pile.

"At approximately 6 a.m., a belt line in the head house stopped and Steve Mazur, Top Utility Man, walked up to the top of the stacker to investigate why it had stopped. At that time, Mazur looked out over the coal pile and saw a small portion of the bulldozer blade protruding from beneath coal directly over the west feeder hole location.

"It was quickly determined that Mitchell was still on the buried bulldozer because he could not be located elsewhere. Rescue operations were commenced immediately. An endloader and a backhoe were driven onto the coal pile to help, but they were ineffective in moving the large quantity of coal. Two large bulldozers brought to the accident scene from a nearby mine began digging out Mitchell and the buried bulldozer. The stacker had apparently dumped a large quantity of coal on top of Mitchell and the bulldozer after the accident occurred.

"At approximately 9 a.m., enough coal had been removed to get to the operator's cab which had filled up with coal when the front windows of the cab were pushed in under the weight

of the coal which buried the bulldozer. At 9:20 a.m., Mitchell who had apparently been suffocated by the inrush of coal into the cab was found and removed from the cab of the still partially buried bulldozer.

"Discussion and Evaluation

The investigation revealed the following factors relevant to the occurrence of the accident:

"1. The unusually large raw coal pile, approximately 75,000 tons, had accumulated due to poor coal sales recently.

"2. It had rained heavily several times during the shift on which the accident occurred.

"3. Illumination for the coal pile was provided by large spotlights on the top of the stacker as well as headlights on the bulldozer.

"4. It was assumed that as Mitchell operated the bulldozer in reverse it fell through crusted over coal into a void created when coal was loaded out by the west feeder.

"5. The two previous shifts had not loaded coal from the west feeder and the bulldozer operators had trammed over the west feeder hole location numerous times. This action presumably tightly compacted the loose coal on the surface of the pile in this area.

"6. The gear shift in the cab of the bulldozer was in the reverse position when the bulldozer was recovered.

"7. The bulldozer was examined after the accident and found to be mechanically sound.

"8. No means of communication was provided between the preparation plant operator and the dozer operator."

The statement above that there was no means of communication between the bulldozer operator and the preparation plant operator means that there was no means of constant communication. There were telephones that the bulldozer operator could use to phone the preparation plant operator. But in order to do so, he would have to drive his dozer off of the top of the raw coal storage pile to telephone the preparation plant operator. There were three locations from which he could make such telephone calls.

Mr. Jesse Jones and Mr. Hosea Thomas are both bulldozer operators who work on top of the raw coal storage pile at the present time. At the time of the accident, however, Mr. Jones was the preparation plant operator. The

testimony of these two miners resulted in a detailed description of the operations of the raw coal storage pile and the preparation plant insofar as this accident is concerned. The pile itself is created by the stacker which is a tube approximately 60 feet high containing rectangular holes at various levels. The coal is brought to the top of the stacker by means of a conveyor tube and is dropped into the top of the stacker. The coal comes out of the stacker through the aforementioned rectangular holes and forms a cone of coal around the stacker. The bulldozer operator's job is to create a plateau out of the lower portions of this cone in such a manner that he can keep coal feeding into four coal feeders which are openings 6 feet on a side with grates at the bottom or ground level of the stack of coal. The coal feeders are in all four cardinal directions from the stacker and 40 feet away from it. The bulldozer driver has to guess where these coal feeders are because on the surface of the coal, which at the time of the accident was approximately 40 feet above the coal feeders, he has no way of knowing where they are located except, as aforesaid, that they are 40 feet from the stacker and either north, east, south, or west. When a feeder is taking coal and the coal is feeding properly an indentation or a "bird's nest" appears above the feeder at the surface of coal and the dozer operator can continually push coal in such a manner as to make sure there is an adequate supply over the feeder. At the time of the accident, the plateau area had become unusually large and about 40 feet in height. When coal gets wet, it is possible for the bulldozer running over the surface to compact it in such a way that when a feeder starts to load coal from beneath the pile a cavity or a void is created in that the looser coal near the feeder goes into the feeder and onto a conveyor belt to be taken into the preparation plant, whereas the surface of the coal bridges over creating a situation similar to that of a snow bridge over a crevasse in a glacier. A bulldozer may be able to run over the bridged-over area for a time, but it is not uncommon for one to collapse the bridge and fall into the void. There appears to be no problem when the bulldozer goes forward into a void, because both of the bulldozer operators said when they suspected a void they deliberately put their blade down into the area and drove forward. The blade itself apparently protects the bulldozer from going too deep into the void.

MSHA's theory of this case is that if there had been two-way radio communications, the preparation plant operator would have informed the victim that he had been feeding out of the east feeder and that the victim upon seeing no "bird's nest" would have known that a void existed and would have avoided the area or collapsed the bridge with his blade. It is the theory that he did not know this, that he was running over the bridged-over area and that on one of his trips backing over the bridged area, it collapsed and that he fell backwards into the void and that coal fell in behind him, crushed the front window of the cab and that he suffocated under the coal.

When the bulldozer was found, only one tip of the blade was not covered with coal because the coal stacker had continued to run after the accident and had buried the bulldozer. There is no evidence as to the extent of its burial immediately after the accident. There was no autopsy report. There was no testimony as to what would happen if a bulldozer either backed into

a hole or fell through a bridge and the engine continued to run with the treads in reverse. According to the accident report, the bulldozer was found with the front portion elevated 60 degrees from the horizontal. The pictures look more like 80 degrees but there was apparently no attempt to determine what caused the bulldozer engine to stop or whether the continued action of the treads would cause the elevation angle to become steeper. The victim was found with his arms stretched out in front of him but the significance of that finding was not explored. It is puzzling to me that if the accident happened as MSHA supposes in that the bulldozer suddenly fell into a collapsed void in an almost vertical position and that the inrush of coal following the collapse covered the cab and crushed the front windshield so that coal could come in and smother the driver, that he should have had his arms stretched out in front of him. The inrush of coal it would seem would have brushed his arms aside.

Certainly if the victim had been alive and in control of himself within seconds after the collapse through the bridge, he would not have left the operating controls in a reverse position. There are thus a lot of questions that the investigation leaves unanswered.

There is nothing in the accident report, for example, that would negate the possibility that the victim had a heart attack or some other seizure, backed into or caved into the hole and died while the engine was still turning the treads in reverse with the stacker continuing to pile up sufficient coal to cave in the windshield and eventually almost cover the bulldozer.

I think it possible that the accident happened as envisioned by MSHA in its accident report but I think it matters little whether the victim backed into a hole that had collapsed behind him, or actually broke through the bridged-over area. In either event, there is no contention by MSHA that a two-way radio would have enabled the victim to call for help and thus be rescued. The contention is that if a two-way radio had been present in the cab, the operator would have found out from the plant operator which feeders had been in use and thus would be aware of the location of possible voids.

30 C.F.R. § 77.1700 provides:

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

This standard has been interpreted by other Commission judges. In Secretary of Labor v. B.S.K. Company, Inc., Docket No. BARB 79-190-P, 2 FMSHRC 998, 1006, Judge Cook said:

> All surface mines present certain common dangers, yet the wording of the regulation is such that its mandate applies only when conditions outside the norm are present.

> The regulation is designed to assure that an individual working in an area where hazardous conditions exist that would endanger his safety is within sight or hailing distance of others who can render or summon assistance when necessary.

Judge Broderick reached a similar conclusion in a bench decision issued on February 11, 1981, in Monterey Coal Company v. Secretary of Labor, Docket No. WEVA 81-203-R, 3 FMSHRC 439, 442, Judge Broderick said:

> I do not accept the interpretation that apparently MSHA follows, that any work at a mine site is in an area where hazardous conditions exist that would endanger an employee's safety. Such an interpretation would render the words meaningless. And I am bound to give all words in a mandatory standard meaning, and can only conclude that the standard applies to areas where conditions exist that are hazardous, which would endanger an employee's safety, over and above the conditions that exist throughout the mining industry, or indeed in any industry.

I agree with these decisions.

In hindsight, since a miner was killed on the raw storage stockpile, it is easy to say that it was an area that was more hazardous than other areas. At the time of the accident, however, falling into a void was a frightening and uncomfortable experience that the miners did not like, but there is no evidence that they feared for their lives when they fell into one of these voids. If the bulldozers had been equipped with two-way radios prior to the accident, there is no reason to assume that all of the operators, including the victim, would have inquired as to which feeders had been in use. In fact, the victim could have stopped to telephone the plant operator on his way back to the storage pile if he had been inclined to do so. The situation after the accident is, of course, different. The bulldozer operators are informed as to which feeders have been in use and if there is no "bird's nest" present they proceed to collapse the bridge.

The safety standard involved in this case appears to be more concerned with rescuing a miner after an accident than it is in preventing the accident in the first place. If someone had kept the bulldozer constantly in sight, it would not have prevented the accident. Nor would the accident have been prevented by having another miner sit in the cab with the victim or having a miner close enough so that he could have heard the victim call out. Rescue operations could have begun earlier but whether that would have saved the miner's life is a matter of conjecture. Yet, by the wording of the regulation itself, if there had been another miner in the cab with the victim or within hailing distance or if the victim and his bulldozer had been constantly observed by someone, there would be no violation. Old Ben attempted to prove that the victim's bulldozer was visible but the evidence, at most, amounted to the fact that the bulldozer was visible when operating in certain parts of

the raw storage coal pile area if someone had been looking. While I reject the Government's argument that I should disregard the words of the regulation and interpret it as though it were a panacea to prevent accidents of the type involved here, I also reject Old Ben's defense that the victim was under observation or in sufficient communication with others to avoid a violation of the regulation.

I find that this was in fact a hazardous area, this raw coal storage pile that was 40 feet high, but I also find that it was not so considered by MSHA or the operator prior to the accident. MSHA was specifically requested at the hearing to indicate whether it considered other companies' storage piles as hazardous areas where communication would be required and while the Government's brief mentioned the problem, it did not supply an answer. I do not know whether any other company has been cited for failure to provide two-way communication with the bulldozer operators on top of a raw storage coal pile. Nor do I know whether MSHA would have issued the citation in this case had the coal pile been only 30 feet high or if it had not been raining or if there had been no accident. I find that there was a violation and that the current system of two-way radio communication is a much safer way to operate the raw coal storage pile than is required by the regulations. Under the present system, the accident that occurred in this case would not happen, if the cause actually was a bridging over of a void. At the time, however, it is very doubtful that two-way communication would have prevented the accident. The fact that the victim told the plant operator by phone that he could feed out of any of the feeders he wanted because the operator was leaving the top of the storage pile for another chore and the fact that when he returned to the pile he did not stop to phone the preparation plant operator to find out which feeders had been used indicates that he did not consider it a matter of great concern. There is no reason to think he would have used a two-way radio to ask the appropriate questions.

While I find a violation of the regulation, I find that MSHA has failed to carry the burden of proof that the violation caused the fatal accident or that compliance with the regulation would have prevented the accident. Old Ben is a large company with a substantial history of violations, although I am not aware of a history of violating this particular section. The negligence was of a very low order, there was good faith abatement and the degree of hazard is questionable. A penalty of $900 is assessed.

ORDER

It is therefore ORDERED that Old Ben Coal Company pay to MSHA, within 30 days, a civil penalty in the amount of $900. It is FURTHER ORDERED that all arguments not specifically adopted in the above opinion are REJECTED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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