JULY 1982

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

JULY

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

Secretary of Labor, MSHA v. Richard Klippstein and W.O. Pickett, Jr., Docket No. WEST 81-383. (Judge Merlin, Default Decision, June 3, 1982)

Secretary of Labor, MSHA v. United States Steel Corporation, Docket Nos. LAKE 81-116-M, 81-77-RM. (Judge Vail, May 27, 1982)

Secretary of Labor, MSHA on behalf of John Cooley v. Ottawa Silica Company, Docket No. LAKE 81-163-DM. (Judge Koutras, June 3, 1982)

Secretary of Labor, MSHA v. United States Steel Corporation, Docket Nos. LAKE 82-6-RM, 82-35-M. (Judge Broderick, June 8, 1982)

Secretary of Labor, MSHA v. Mathies Coal Company, Docket Nos. PENN 82-3-R, 82-15. (Judge Lasher, June 8, 1982)

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

Gerald D. Boone v. Rebel Coal Company, Docket No. WEVA 80-532-D. (Judge Melick, January 11, 1982)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 2, 1982

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 80-145
EASTOVER MINING COMPANY	:	

DECISION

In this case we are called upon again to interpret the cab and canopy standard for underground coal mines, 30 C.F.R. § 75.1710-1(a). 1/ This mandatory standard requires installation of cabs and canopies on self-propelled electric face equipment pursuant to a staggered schedule coordinated with progressively descending "mining heights." In section

1/ Section 75.1710-1(a) states in part:

> [A]ll self-propelled electric face equipment ... which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in subparagraph (1), (2), (3), (4), (5), and (6) of this paragraph (a), be equipped with substantially constructed canopies or cabs located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib or from rib and face rolls. The requirements of this paragraph (a) shall be met as follows:
>
> (1) On and after January 1, 1974, in coal mines having mining heights of 60 inches or more;
>
> (2) On and after July 1, 1974, in coal mines having mining heights of 60 inches or more, but less than 72 inches;
>
> (3) On and after January 1, 1975, in coal mines having mining heights of 48 inches or more, but less than 60 inches;
>
> (4) On and after July 1, 1975, in coal mines having mining heights of 36 inches or more, but less than 48 inches;

(footnote 1 continued)

317(j) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979), the statutory standard that section 75.1710-1(a) implements, the Secretary is authorized to require cabs and canopies for such equipment "where the height of the coalbed permits." 2/ The central issues in this case are the meaning and relationship of the key phrases, "height of the coalbed" and "mining heights." For the reasons that follow, we hold that "height of the coalbed" in section 317(j) refers to actual mined height, and that section 75.1710-1(a) therefore properly keys compliance to "mining height." We accordingly reverse the judge's decision, which is premised on a contrary view of the meaning of the statutory language. 3/

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footnote 1 cont'd.

> (5) (i) On and after January 1, 1976, in coal mines having heights of 30 inches or more, but less than 36 inches;
>
> (ii) On and after July 1, 1977, in coal mines having mining heights of 24 inches or more, but less than 30 inches;
>
> (6) On and after July 1, 1978, in coal mines having mining heights of less than 24 inches.

In Sewell Coal Company, 3 FMSHRC 1402 (June 1981), we rejected a challenge to the validity of section 75.1710-1(a). We concluded that in promulgating this standard the Secretary had "acted properly procedurally in availing himself of the option to improve the statutory cabs and canopies standard (section 317(j)) under the authority of section 101(a) of the Act." 3 FMSHRC at 1408.

2/ Section 317(j) of the Mine Act, 30 U.S.C. § 877(j), states:

> An authorized representative of the Secretary may require in any coal mine where the height of the coalbed permits that electric face equipment, including shuttle cars, be provided with substantially constructed canopies or cabs to protect the miners operating such equipment from roof falls and from rib and face rolls.

This language was originally contained in section 317(j) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977), and was unchanged when the Mine Act was enacted.

3/ The judge's decision is reported at 3 FMSHRC 1155 (April 1981).

I.

The facts of this case are not disputed. On April 10, 1980, an MSHA inspector observed a continuous mining machine being operated without a canopy in Eastover's No. 1 mine. 4/ A continuous mining machine is "self-propelled electric face equipment" within the meaning of the standard. The machine was being used in the entry of a section where the coal seam had narrowed due to a roll condition. In order to give the machine sufficient space in which to operate, approximately 15 inches of top and bottom rock were being extracted along with the coal. The floor-to-roof extracted height, or actual mined height, of the entry in question was 53 inches; the height of the coal seam at its lowest point in the entry was 38 inches. 3 FMSHRC at 1155. The inspector cited Eastover for a violation of section 75.1710-1(a), and the Secretary subsequently sought a civil penalty for the alleged violation.

Following a prehearing conference, Eastover moved for summary judgment. The company contended the Secretary had exceeded his authority in promulgating section 75.1710-1 and that as a consequence the standard was without force and effect. The judge issued an order to show cause why the Secretary's penalty petition should not be dismissed. The Secretary responded, asserting the validity of his promulgation of the standard. However, prior to a ruling on the show cause order or a hearing on the merits, the parties agreed to a settlement which the Secretary, on behalf of the parties, moved the judge to approve. 5/ The judge denied the settlement motion and granted Eastover's prior motion for summary judgment.

In his decision, the judge concluded that no violation of section 75.1710-1(a) existed at the time the citation was issued and that, pursuant to our decision in Co-op Mining Co., 2 FMSHRC 3475 (December 1980), the proposed settlement had to be rejected and the case dismissed. In reaching this result, the judge construed the phrase "height of the coalbed" in section 317(j) of the Mine Act to mean height of the coal seam. 3 FMSHRC at 1156. He noted that the Bureau of Mines' Dictionary of Mining, Mineral, and Related Terms defines a coalbed as "a bed or stratum of coal." Id. Although the actual extracted height,

4/ Eastover had initially operated the machine with a canopy, but had removed it after MSHA alleged that the canopy configuration being used made the machine unsafe for the equipment operator.

5/ Eastover did not expressly withdraw its previous summary judgment motion. The settlement motion does not contain any express admission or denial by Eastover of the alleged violation. However, the settlement motion contains references to the seriousness and good faith abatement of the "violation."

floor to roof, in the mine entry in question was 53 inches, the height of the coalbed or coal seam was 38 inches. Taking 38 inches as "the controlling height for determining the requirement for canopies," the judge stated that the Secretary had suspended the cab and canopy requirement in "coalbed heights below 42 inches" and concluded that no violation existed at the time the citation was written. Id. at 1155. 6/

6/ Enforcement of some of the standard's requirements was suspended in 1976 and 1977. In order to place the suspension in proper prospective, we briefly review the history of the standard, both under the Coal Act when the standard was promulgated by the Secretary of Interior, and since the enactment of the Mine Act. In 1971, acting under the authority of section 101(a) of the 1969 Coal Act, the Secretary of Interior proposed an improved mandatory canopy standard that made no reference to mining height or coal seam height. 36 Fed. Reg. 5244 (1971). Based on objections received, the Secretary scheduled a hearing to determine whether there should be a "staggered installation schedule ... dependent upon the mining height of the particular mine." 37 Fed. Reg. 12643 (1972). After the hearing, the Secretary concluded that technological problems mandated a staggered schedule of compliance keyed to descending "mining heights." 37 Fed. Reg. 20689 (1972). The latter phrase was not defined in either the Secretary's notice of the hearing or his subsequent findings. Section 75.1710-1(a) was thereafter published with the compliance schedule contained in subparagraphs (1) through (6). In an internal memorandum dated September 20, 1973, the Secretary for the first time expressly defined "mining height," and described it as "the distance from the floor to finished roof less 12 inches."

During the early enforcement history of section 75.1710-1(a), it was discovered that certain human engineering problems arose when canopies were installed at the lower mining heights. Accordingly, on June 9, 1976, the Secretary of Interior extended the dates for compliance with regard to "mining heights" of less than 30 inches--that is, the heights covered in section 75.1710-1(a)(5)(ii) and (6). 41 Fed. Reg. 23200 (1976). In this suspension notice, the Secretary retained the definitional approach to "mining height" set forth in his 1973 memorandum. Application of that definition meant that the suspension was directed to heights of less than 42 inches, since the 30 inches referred to in the standard was a remainder after subtraction of 12 inches. On July 7, 1977, the dates for compliance in sections with mining heights of less than 30 inches (that is, 42 inches from floor to finished roof) were indefinitely suspended to allow time to develop specifications for cab and canopy compartment configurations at those lower heights. 42 Fed. Reg. 34876 (1977).

After the Mine Act became effective, the Secretary of Labor continued in effect the Secretary of Interior's suspension notice and adopted (with minor refinements) his definitional approach to "mining height." MSHA Policy Memorandum No. 80-4C (August 22, 1980).

The judge rejected the Secretary's various arguments that "mining height" as used in the standard, meant the actual extracted or mined height--that is, the distance from the roof to the floor. 3 FMSHRC at 1156-58. The judge reviewed the record of rulemaking as reported in the Federal Register and found nothing to show that the "plain meaning" of the statutory term coalbed height had been revised or amended. The judge acknowledged that the Secretary of Interior's enforcement instructions issued on September 30, 1973, and his suspension of the enforcement of section 75.1710-1(a)(5)(ii) and (6) (n. 6 above) indicated that "mining height" meant actual mined height. However, the judge found that neither was issued in accordance with substantive or procedural rule making requirements. Consequently, he concluded, neither effected a "legally binding change" in the authority, granted by section 317(j), to require canopies on the basis of the "height of the coalbed." Id. Thus, the judge determined that the interpretation presently contended for by the Secretary had no valid legal basis, and that the Secretary of Interior, in promulgating the standard, "must be taken to have ascribed the same meaning to the term 'mining height' as Congress had ascribed to the term 'coalbed height'." Id. at 1157 n. 6.

II.

The two central issues in this case are the meaning of the phrase, "height of the coalbed" in section 317(j), and whether "mining height" in section 75.1710-1(a) is consistent with that statutory language. To understand the meaning of section 317(j) we look not only to its words, but also to the intent underlying the words.

The statutory canopy standard first appeared in the Senate and House bills that ultimately became the 1969 Coal Act. 7/ A prime motive in enactment of the 1969 Coal Act was to "[i]mprove health and safety conditions and practices at underground coal mines" in order to prevent death and serious physical harm. Legis. Hist. at 128. One of the problems that greatly concerned Congress was the high fatality and injury rate due to roof falls. The legislative history is replete with references to roof falls as the prime cause of fatalities in underground mines. 8/

7/ Section 217(f) of S. 2917 and section 317(k) of H.R. 13950 stated:

> An authorized representative of the Secretary may require in any coal mine where the height of the coalbed permits that face equipment, including shuttle cars, be provided with substantially constructed canopies or cabs to protect the operator of such equipment from roof falls and from rib and face rolls.

Senate Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part 1 Legislative History of the Federal Coal Mine Health and Safety Act of 1969 as Amended Through 1974, at 79 and 1013 (1975)("Legis. Hist.").

8/ See Legis. Hist. at 134, 136, 148, 149, 210, 538-547, 610, 1125-1126.

To combat the roof fall problem, Congress devised a two pronged plan. One remedial course of action was aimed at reducing the number of falls by requiring operators to adopt various roof control practices, including comprehensive roof control plans. 9/ The second important remedial provision authorized the Secretary to protect miners from those falls that did occur by requiring the installation of cabs or canopies on electric face equipment. In the express words of section 317(j), the devices were to be installed "to protect the miners operating such [electric face] equipment from roof falls and from rib and face rolls." The devices were to be installed where "the height of the coalbed permits."

As the judge noted, the word "coalbed" may be used in mining parlance to mean bed or stratum of coal. We conclude, however, that when the drafters used the word "coalbed" as a benchmark for the canopy requirement, they were not referring literally to the height of the coal bed, but were conditioning installation on the actual height of the material being extracted. Although the legislative history does not contain an express explanation as to why the phrase was used, Congress was concerned with protecting miners under actual mining conditions. In practice, sound mining methodology and safety considerations often dictate extraction of more or less than the entire coal seam itself. Common sense suggests that in practice it is the actual extracted height in the entry rather than the coal seam height that provides the space in which to accomodate a canopy. Thus, given Congress' expressed desire to protect life and limb, we conclude that the drafters used the term "height of the coalbed" to indicate that the Secretary could require canopies where the actual extracted or mined height permitted. 10/

This conclusion is reinforced by examining the practical consequences of interpreting "height of the coalbed" in its technical sense, for such an interpretation yields results that impair the protection Congress so

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9/ See Legis. Hist. 150, 1125-1126.

10/ The House Committee on Education and Labor in its report on H.R. 13950 stated that section 317(k) of that bill, which is identical to section 317(j) of the Act:

> authorize[d] the inspector to require protective cabs on face equipment where the height of the coal permits installation of such cabs to protect the operator from roof falls, and from rib and face rolls.

Legis. Hist. at 1103. The judge cited to this statement in support of his conclusion that Congress intended the phrase "where the height of the coalbed permits" to mean that canopies would be required where the height of the stratum of coal permits. 3 FMSHRC at 1156. We are not convinced. The lack of consistency in the use of terms emphasizes to us that the drafters were not using "height of the coalbed" in its technical, geologic sense, but rather in a colloquial fashion to indicate the Secretary could require canopies where the extracted height provided sufficient room for their use.

urgently sought to provide. For example, because of adverse top or bottom conditions an operator may be compelled to take top or bottom rock when extracting coal. If the coal seam height were lower than that at which canopies were required but the extracted height were higher, no canopy protection would be mandated. The same result would follow if, as here, an operator took top or bottom rock because the mining equipment was higher than a thin coal seam which was being mined.

In mines where it is good practice not to mine the entire coal seam but to leave top or bottom coal, the judge's interpretation could also lead to a literal requirement that canopies be provided although the floor to ceiling space could not safely accommodate them. This could subject miners to the danger of the canopies striking roof support or to the danger of being crushed while trying to see around too low a canopy. In short, we conclude that the phrase "height of the coalbed" refers to the actual mined or extracted height from floor to roof, rather than to the height of the coal seam itself.

The Secretary's use of the phrase "mining height" in section 75.1710-1(a) is thus entirely consistent with Congress' intent. The plain meaning of the term "mining height" connotes extracted height -- that is, the height mined. Thus, the phrase fulfills the intent of its authorizing provision, section 317(j). We accordingly reject the judge's suggestion (3 FMSHRC at 1156-57) that the Secretary revised or amended the meaning of the statutory term "height of the coalbed" when he promulgated the regulation. 11/

III.

In light of the foregoing, we cannot affirm the judge's conclusion that the record on which the parties' proposed settlement is premised shows that no violation occurred. There is no dispute that the cited continous miner lacked a canopy and that the actual extracted or mined height in the entry where the machine was being used was 53 inches. Such a height would be subject to the non-suspended provisions of section 75.1710-1(a). In short, the judge's conclusion that no violation occurred cannot stand.

11/ We likewise reject the judge's suggestion of procedural infirmities in the standard's promulgation. The judge takes issue with what he perceives to be a lack of notice to operators of the meaning of the term "mining height." 3 FMSHRC at 1157-58. Yet, as we have concluded above, that term in and of itself connotes extracted height. Furthermore, the chief issue discussed at the public hearing on the proposed canopy standard (n. 6 above) was whether "substantially constructed canopies [should] be required on a staggered installation schedule, dependent upon the mining height of the particular mine." (Emphasis added) 37 F.R. 11779 (1972). Eastover participated in this hearing, and has never argued in the present case that it was misled by the Secretary's use of this phrase. The Secretary, in using a term which faithfully reflected what Congress intended and which itself gave notice of its meaning, did not act in violation of substantive or procedural rulemaking requirements.

For the foregoing reasons, we reverse the judge's rejection of the proposed settlement and his granting of the earlier summary judgment motion. In the interest of judicial economy, we have considered the parties' settlement motion at this time. 29 C.F.R. § 2700.30. The Secretary originally proposed a penalty of $150 for the violation. The parties have proposed that a $75 penalty would be appropriate. The settlement motion and the stipulation to which it refers set forth reasons in support of the proposed settlement and information relevant to the six statutory penalty criteria in section 110(i) of the Mine Act. We have examined the reasons proffered by the parties and have weighed the statutory criteria. We conclude that the settlement agreement comports with the purposes and policies of the Act, and the motion for approval of the settlement is granted.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 6, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 81-383
RICHARD KLIPPSTEIN and W. O. PICKETT, JR.	:	

DIRECTION FOR REVIEW AND ORDER

Respondent, who is pro se, has petitioned for review under the provisions of section 113 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823, claiming that the administrative law judge erred in defaulting him.

Upon reviewing the entire record in this matter, we find that under our rules of procedure the administrative law judge had a sound basis for entering the default judgment. 29 C.F.R. § 2700.63, 2700.28 and 2700.7(b). However, because respondent is not represented by counsel, and because his petition presents a question of jurisdiction under the Act that has not been presented to the judge below, equitable application of our rules and the Act in this case persuades us to afford the respondent opportunity to be heard on his claim. It is expected, however, that from here on the respondent will follow closely the instructions of the judge and the Commission's rules of procedure. A copy of these rules is enclosed.

Accordingly, the petition for review received from respondent Klippstein is granted. The default judgment is vacated and the case is remanded for further proceedings.

Rosemary M. Collyer, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 15, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. VINC 77-164
v.	:	IBMA No. 77-66
INLAND STEEL COAL COMPANY	:	

DECISION

This proceeding arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977). 1/ The central issue is whether 30 C.F.R. § 75.1712-1 requires bathing facilities to be provided for construction employees who perform work on the surface of an underground coal mine. The administrative law judge concluded that the standard did not require bathing facilities for such workers, and, for the reasons that follow, we reverse.

In 1977 Inland Steel Coal Company was developing a new underground coal mine in Illinois, and employed several contractors for the work. A major component of the mining complex was a coal preparation plant being constructed on the surface of the mine by the Roberts and Schaefer Company, one of Inland's chief contractors. Roberts and Schaefer provided its employees with changing facilities, but not a bathhouse. A different contractor was building bathing facilities for the miners Inland would employ when the mining complex was opened. This building was scheduled for completion in May 1978, although Inland did not plan to make the bathing facilities available to the employees of the various construction contractors. 2/

1/ The appeal was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before us for decision. 30 U.S.C. § 961 (Supp. IV 1980). (The Mine Safety and Health Administration has been substituted for its predecessor agency, the Mining Enforcement and Safety Administration (MESA)). This proceeding originally arose on review of an unabated notice of violation issued under section 104(b) of the 1969 Coal Act. For the reasons stated in our decision in Eastern Associated Coal Corp., 4 FMSHRC 835, 835-36 (May 1982), we will review the merits of the notice at this time.

2/ Among the other contractors involved in the development of the mine was the Zeni, McKinney and Williams Corporation, which was sinking the shaft. Zeni provided its employees with a temporary bathhouse. In

(Footnote continued)

In August 1977, a MESA inspector ascertained that there was no bathhouse for the Roberts and Schaefer employees and that a number of those employees wanted bathing facilities. Subsequently, MESA issued a section 104(b) notice of violation to Inland for failure to comply with 30 C.F.R. § 75.1712-1. Section 75.1712-1 provides:

> Availability of surface bathing facilities; change rooms; and sanitary facilities.
>
> Except where a waiver has been granted ..., each operator of an underground coal mine shall ... provide bathing facilities, clothing change rooms, and sanitary facilities, as hereinafter prescribed, for the use of the miners at the mine. [3/]

Section 75.1712-1 in turn implements 30 C.F.R. § 75.1712, which states:

> The Secretary may require any operator to provide adequate facilities for the miners to change from the clothes worn underground, to provide for the storing of such clothes from shift to shift, and to provide sanitary and bathing facilities. Sanitary toilet facilities shall be provided in the active workings of the mine when such surface facilities are not readily accessible to the active workings.

Section 75.1712 mirrors section 317(1) of the 1969 Coal Act and was carried over intact as section 317(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. IV 1980).

Section 75.1712-1 permits operators to seek waivers from the standard's requirements, and after receiving the notice of violation, Inland applied to the MESA District Director of District Eight for a

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fn. 2/ continued
support of a contention that it was not an industry practice to provide bathhouses for surface construction workers, Inland argues that Zeni's provision of a bathhouse to its shaft sinking employees and Roberts and Schaefer's provision only of changing facilities to its construction employees were consistent with the collective bargaining agreement that both contractors had with the United Mine Workers. We need not attempt to resolve this question of contractual interpretation since this case does not require it. This case concerns only the language of regulatory standards and, in addition, the Zeni employees are not involved in the present litigation. See generally Loc. Union No. 781, etc. v. Eastern Assoc. Coal Corp., 3 FMSHRC 1175, 1179 (May 1981).

3/ The original notice, which was issued on August 23, 1977, alleged a violation of 30 C.F.R. § 71.400. Section 71.400 notes that "[s]anitary facilities at surface work areas of underground coal mines are subject to the provisions of [30 C.F.R.] § 75.1712 ... et seq." Relying on this language, MESA modified the notice of violation on September 30, 1977, to allege a violation of section 75.1712-1 on the grounds that the construction work in question was being performed on the surface of an underground coal mine.

waiver from the bathhouse requirements. 4/ District Eight denied the waiver in accordance with its policy of denying waivers unless a survey of the miners indicated they would not use a bathhouse. 5/ Inland also applied for review of the notice of violation. 6/ In his decision, the administrative law judge vacated the notice of violation, concluding that section 75.1712-1 required bathing facilities only for miners working underground. We disagree.

This case turns on the meaning of section 75.1712-1's provision that the various facilities to be supplied are "for the use of the miners at the mine" (emphasis added). The underscored language raises two questions: whether the Roberts and Schaefer construction workers were "miners" within the meaning of the 1969 Coal Act and, if so, whether the provisions regarding bathing facilities applied to them.

With respect to the first question, we agree with the judge that there is "no doubt that the broad definition of miners in the Act includes construction workers such as those employed by Roberts and Schaefer in this case." Dec. at 9. Section 3(g) of the Coal Act, 30 U.S.C. § 802(g)(1976)(amended 1977), defined a miner as "any individual working in a coal mine." Section 3(h) of the Coal Act, 30 U.S.C. § 302(h)(1976)(amended 1977), defined a coal mine as:

4/ Section 75.1712-4 sets forth relevant procedures for such waiver applications:

> The Coal Mine Safety District Manager for the district in which the mine is located may, upon written application by the operator, waive any or all of the requirements of §§ 75.1712-1 through 75.1712-3 if he determines that the operator of the mine cannot or need not meet any part or all of such requirements, and, upon issuance of such waiver, he shall set forth the facilities which will not be required and the specific reason or reasons for such waiver.

In applying for the waiver, Inland did not concede the applicability of section 75.1712-1 to the Roberts and Schaefer construction employees.

5/ On appeal, Inland does not argue that a waiver should have been granted. Accordingly, although we might question the wisdom of the waiver denial, that issue is not before us. We note that District Eight's use of surveys on waiver applications was solely its own policy, and was not advocated or suggested by MESA headquarters.

6/ Pending disposition of Inland's applications for waiver and review, MESA extended the time for abatement of the noticed violation. As of the issuance of the judge's decision vacating the notice, the alleged violation remained unabated.

> an area of land and all structures, facilities ... placed upon, under, or above the surface of such land by any person, used in, or to be used in ... the work of extracting ... coal ... from its natural deposits in the earth ... and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

(Emphasis added.) The surface coal preparation plant being constructed here was "to be used ... in the work of ... preparing coal," and thus would clearly qualify as part of a coal mine. Therefore, the construction workers in this case were miners. See Bituminous Coal Operator's Ass'n, Inc. v. Secretary of Interior, 547 F.2d 240, 244-25 (4th Cir. 1977).

Despite his conclusion that the construction workers were miners within the meaning of the 1969 Coal Act, the judge reasoned that not every standard necessarily applies to all miners and determined that the bathing facility requirements of section 75.1712-1 covered only miners working underground. Based on the standard's broad language and derivation, we conclude that the bathing facility provisions extended to the surface construction workers in this case.

The plain language of the regulation expressly states that bathing facilities shall be provided for "miners at the mine." The regulation does not limit its coverage only to underground miners, but rather expressly requires bathing facilities for "miners." We cannot discern from the face of the standard an intent to exclude miners such as the surface construction workers involved here from the broad sweep of the standard's coverage. Although the judge focused on the fact that the standard is contained in safety regulations for underground coal mines, the location of the standard is explicable and is not legally significant in this case. Indeed, the relevant history of the standard reinforces our conclusion as to its broad meaning.

To understand the scope of section 75.1712-1, it is necessary to examine a related standard in Part 71. A bathing facility requirement for surface miners of underground coal mines was originally contained in 30 C.F.R. § 71.400, the standard under which MESA first cited Inland. The proposed rules for Part 71 were entitled "Mandatory Health Standards--Surface Work Areas of Underground Coal Mines and Surface Coal Mines." Subpart E of the proposed rules was entitled "Surface Bathing Facilities, Change Rooms, and Sanitary Toilet Facilities." In its original proposed form, section 71.400 provided:

> On and after June 30, 1971, each operator of an underground coal mine and each operator of a surface coal mine shall provide bathing facilities, clothing change rooms and adjacent sanitary facilities as hereinafter prescribed, for the use of miners employed in surface installations and at surface work sites of such mines.

36 Fed. Reg. 254 (1971)(emphasis added). This language and the relevant titles indicate that bathing facilities were contemplated for the surface work areas of both underground and surface mines.

After public hearings on the proposed regulations, the Secretary deleted the reference in section 71.400 to underground coal mines. He specifically found:

> With respect to surface bathing facilities, change rooms, and sanitary flush toilet facilities, that:
>
> > Operators of underground coal mines are presently required by 30 C.F.R. Part 75 to provide surface bathing facilities, change rooms, and sanitary flush toilet facilities for the use of miners.

36 Fed. Reg. 20127 (1971). As already noted, section 71.400 as finally promulgated applies only to miners at surface mines and states that "[s]anitary facilities at surface work areas of underground coal mines" are subject to 30 C.F.R. § 75.1712 et seq. 7/ In short, what the Secretary left out of section 71.400 is precisely what he found was already covered by section 75.1712--namely a requirement for provision of sanitary facilities for the use of miners employed in surface installations and at surface work areas of underground coal mines. Thus, section 75.1712-1 was intended to apply to surface miners, as well as underground miners, at underground coal mines. Since the construction employees in this case were employed at a surface installation and surface work area of an underground mine, we conclude that the regulation applied to them.

For the foregoing reasons, the judge's decision is reversed and the notice of violation is reinstated.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

7/ The judge expressed his view that the note in section 71.400 that "sanitary facilities" at surface work areas were subject to section 75.1712 et seq. referred only to sanitary toilet facilities. In light of the history of section 71.400 set forth above, we conclude that the term was used broadly in this instance to cover various types of sanitary facilities, including those for bathing.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PITT 76X241-P
v.	:	
	:	IBMA 77-60
PENN ALLEGH COAL COMPANY, INC.	:	

DECISION

This penalty proceeding arose under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977)("the Coal Act"). 1/ The administrative law judge concluded that Penn Allegh Coal Company, Inc., violated 30 C.F.R. § 75.1403 and assessed a penalty of $7,500 for that violation. We affirm the judge.

Section 75.1403 is contained in 30 C.F.R. Part 75, Subpart O. Part 75 sets forth mandatory safety standards for underground coal mines. Subpart O contains mandatory standards applicable to hoisting and haulage equipment used to transport men and materials. Section 75.1403 reiterates section 314(b) of the Coal Act and provides:

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

The administrative procedures by which a representative of the Secretary advises an operator of other safety devices or practices required to be provided are found in 30 C.F.R. § 75.1403-1. This section in pertinent part provides:

1/ On March 8, 1978, this case was pending before the Department of Interior's Board of Mine Operations Appeals. Accordingly, it is before the Commission for disposition. 30 U.S.C. § 961 (Supp. IV 1980). The Mine Safety and Health Administration (MSHA) has been substituted for its predecessor agency, the Mining Enforcement and Safety Administration (MESA).

> The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

On March 5, 1973, a representative of the Secretary issued the following "notice to provide safeguards" to Penn Allegh:

> The two overcasts crossing No. 2 entry where the mantrip passed under were not posted with signs to warn of the low overhead clearance in the 1st right section.
>
> Abrupt changes in vertical clearance that present a hazard to persons riding on mobile equipment shall be eliminated where possible. Otherwise, signs, preferably luminous, shall be posted to warn of the change in clearance.

On March 1, 1975, a haulage accident occurred in Penn Allegh's mine in which a miner was fatally injured while operating a battery powered scoop in an entry. The evidence indicates that the lamp cord from the miner's battery lamp caught on a roof bolt or the roof itself. The miner was lifted out of the vehicle, and apparently squeezed between the vehicle and the roof. The normal floor to ceiling height of the entry in which the accident occurred was 48 inches. The judge found, however, that beginning 24 feet outby the site of the accident the floor of the entry gradually rose until, at the point of impact, the floor level had risen 8 inches. Two inches of the buildup occurred near the point of impact. The judge also found that beginning 10 feet outby the accident site, the roof of the entry rose 6 inches and then, one foot before the accident site, the roof dropped down 6 inches. He concluded that the 6 inch drop in the roof together with the 8 inch rise in the floor resulted in a reduction in clearance at the point of impact from the normal 48 inches to 40 inches.

The judge's findings further revealed that the 6-inch rise in the roof was caused by a cut into the roof above the normal roof line made in June 1972, and that the floor buildup resulted from slag being placed on the floor during the summer months prior to the March accident. Moreover, he found that the entry where the accident occurred was the mine's main haulage entry and was traveled daily by miners and management personnel. Although Penn Allegh's general manager testified that "everyone" knew of the reduced entry height at the point of the accident, neither reflectors nor other devices were posted to warn of the reduced height.

Immediately after the accident, MESA conducted an investigation which resulted in the issuance of the notice of violation of section 75.1403 at issue. The notice of violation stated:

> During the investigation of a fatal accident, March 1, 1975, it was observed warning lights or other approved devices were not installed along unit tractor haulage road No. 2 main entry indicating the change in overhead clearance.... [N]otice to provide safeguard No. 1 H.O.W. March 5, 1973.

In finding that the alleged violation occurred, the judge concluded that the lowering of the roof and the corresponding rise in the floor constituted an abrupt change in vertical clearance which presented a hazard to persons riding on mobile equipment, and that Penn Allegh's failure to eliminate the abrupt change or to post warning devices violated the notice to provide safeguards. The judge further found that the violation was extremely serious and that Penn Allegh was "grossly negligent" in allowing it to exist.

Penn Allegh argues that the judge erred in concluding it violated the proscriptions of the safeguard notice. The essence of its argument is that the condition for which it was cited in the notice of violation is not encompassed by the safeguard notice. Penn Allegh asserts that the notice of violation addresses only overhead clearance, whereas the notice to provide safeguards is concerned with vertical clearance. We disagree. The judge found, and Penn Allegh does not dispute, that vertical clearance is the distance between the mine floor and the mine roof. It is beyond question that changes in the roof, floor, or both affect that distance. Here 6 inches of the reduction in the floor to roof distance was directly attributable to the 6 inch change in roof height. We agree with the judge that citation of the roof condition in the notice of violation was encompassed by the reference to vertical clearance in the notice to provide safeguards.

Penn Allegh also challenges the judge's conclusion that the clearance change was "abrupt" within the meaning of the safeguard notice. We reject this semantic challenge and affirm the judge's conclusion. The judge based his conclusion upon findings that at the point of impact the roof dropped 6 inches and the floor rose 2 inches out of a total 8 inch rise, and as a result, the entry height was reduced from 48 to 40 inches within the span of a foot. The element of abruptness also existed in view of the speed at which a miner was likely to approach that change. In this regard, we note the unrefuted testimony of one of the inspectors who issued the safeguard notice that equipment like that involved in the accident travels 300 to 400 feet a minute and would traverse the 24 feet before the point of impact in 3 or 4 seconds. Thus, we agree with the judge that the change in clearance at issue was abrupt.

Penn Allegh next disputes the judge's determination that the reduction in clearance constituted a hazard to persons riding on mobile equipment. This argument does not warrant extended discussion. We have found that the change in clearance was abrupt. The record establishes that in travelling the entry, a miner was fatally injured at the point of the clearance change. We find that the record amply supports the judge's conclusion that the abrupt clearance change posed a hazard to miners.

Accordingly, we conclude that the judge properly found all elements required to establish a violation of the notice to provide safeguards and, consequently, the cited standard.

Penn Allegh also takes issue with the judge's findings that it was "grossly negligent" and that the violation was extremely serious. Without engaging, as did the judge, in a quantification of degrees of negligence, we find that Penn Allegh failed to exercise that care required by the circumstances. The conditions which constituted the violation had existed for some time and were known to Penn Allegh. The evidence also establishes that the change in clearance was observable by section foremen who traveled the haulageway on a regular basis. Indeed, as we have noted, Penn Allegh's own witness stated that everyone knew about the "squeeze." Thus, we conclude that the record establishes Penn Allegh's negligence. 2/

Regarding the gravity of the violation, the notice to provide safeguards sought to eliminate the hazard posed to miners riding on mobile equipment by abrupt changes in clearance. In such a situation, should an accident occur, the resulting injury clearly could be serious, even fatal. The record establishes that the probability of such an accident occurring was heightened by the fact that the haulageway where the violation occurred was frequently traveled by management personnel and miners. Therefore, we find that the gravity of the violation was serious.

In light of our conclusions that the violation existed, Penn Allegh was negligent, and the hazard presented was serious, we find that the penalty assessed by the judge was appropriate and consistent with the statutory penalty criteria. Accordingly, the judge's decision is affirmed.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

2/ Although two of the Secretary's witnesses testified that they did not believe the operator was negligent, the judge was not bound by their opinion. Rather, he was required to draw his own legal conclusion based upon the evidence of record considered as a whole. In our view, that evidence establishes the company's negligence.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 16, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. HOPE 76-197-P
ITMANN COAL COMPANY	:	IBMA No. 77-58

DECISION

This case arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("the Coal Act"). 1/ The administrative law judge concluded that Itmann Coal Company committed two violations of section 103(e) of the Coal Act and regulations implementing that section (30 C.F.R. §§ 80.10 and .11 (1975)). The judge assessed a penalty of $7,500 for each violation.

Itmann appealed the judge's decision and argues that in both instances the judge erred in finding violations. In the alternative, Itmann argues that proper application of the gravity and negligence penalty assessment criteria requires penalties "substantially less" than those assessed by the judge.

We have reviewed the judge's decision and the record in this case in view of the arguments presented by Itmann on appeal. Based on our review, we conclude that the judge's findings of two violations of section 103(e) of the Coal Act are supported by the evidence. To the extent that the judge made credibility findings to resolve conflicting testimony, we find no basis for disturbing those findings.

We also find that the judge correctly ruled upon the questions of law raised by the operator. In particular, we agree that the acquittal and dismissal of criminal charges brought against Itmann and several of its employees do not bar the present civil action. The criminal proceedings involved charges that the defendants conspired "to impede the due and proper administration of law" by fabricating a story about the

1/ On March 8, 1978, this case was pending on appeal before the Department of Interior's Board of Mine Operations Appeals. Accordingly, it is before the Commission for disposition. 30 U.S.C. § 961 (Supp. IV 1980). The Mine Safety and Health Administration (MSHA) has been substituted for its predecessor agency, the Mining Enforcement and Safety Administration (MESA).

methane ignition at issue and by giving false testimony during the investigation thereof, and that Itmann willfully violated mandatory safety and health standards. The violations of the Coal Act at issue in the instant civil proceeding concern Itmann's failure to properly notify the Secretary of an accident and to prevent the destruction of evidence that would assist in the investigation of the accident. Apart from the differences in the nature of the allegations at issue in the criminal and civil proceedings, different standards of proof apply, i.e., proof beyond a reasonable doubt and proof by a preponderance of the evidence. Therefore, we agree with the judge that the present civil proceedings are not barred. United States v. Nat'l Assoc. of Real Estate Bds., 339 U.S. 485, 94 L.Ed 1007, 70 S.Ct. 711 (1950).

We also affirm the judge's conclusion that a civil penalty could be assessed for the failure to immediately notify MESA of the ignition. As the Board of Mine Operations Appeals held: "[T]he element of immediacy is to be construed as an integral part of the notification and preservation of evidence obligation of section 103(e) [of the Coal Act]." U.S. Steel Corp., 8 IBMA 230, 236-37 (1977). Therefore, by failing to comply with 30 C.F.R. § 80.11 (1975), Itmann violated section 103(e) of the Coal Act and a penalty must be assessed for this violation. 2/

Finally, based on our review of the record, and in light of the circumstances of this case, we conclude that the penalties assessed by the judge reflect consideration of the statutory penalty criteria, are appropriate for the violations and should not be disturbed.

Accordingly, the decision of the administrative law judge is affirmed.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

2/ Thus, we need not decide whether section 80.11 was, in and of itself, a mandatory safety and health standard.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 16, 1982

GERALD D. BOONE	:	
	:	
v.	:	Docket No. WEVA 80-532-D
	:	
REBEL COAL COMPANY	:	

ORDER

On June 1, 1982, counsel for Rebel Coal Company filed a petition for discretionary review and a "Motion to Permit Late Filing of a Petition for Discretionary Review." We construe the latter to be a request for relief from a final Commission order. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply in absence of applicable Commission rule); Fed. R. Civ. P. 60 (Relief from Judgment or Order). Cf. Marshall v. Monroe & Sons, 615 F.2d 1156 (6th Cir. 1980); J.I. Hass Co. v. OSHRC, 648 F.2d 190 (3d Cir. 1981).

On July 8, 1981, a Commission administrative law judge issued a decision in which he concluded that Gerald D. Boone was discharged by Rebel Coal Company in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977. In that decision the judge ordered the parties to engage in further proceedings to determine the amount of specific damages due Boone. 3 FMSHRC 1751 (July 1981)(ALJ). The Commission dismissed as premature Rebel Coal Company's Petition for Discretionary Review of the judge's decision. The Commission concluded that, in view of further proceedings ordered by the judge, his decision was not a reviewable "final decision" within the meaning of the Act and the Commission's rules. 3 FMSHRC 1900 (August 1981).

On January 11, 1982, the judge issued a decision and order awarding damages and costs to Boone. 4 FMSHRC 37 (January 1982)(ALJ). No petition for discretionary review of the judge's decision was filed and forty days after its issuance it became a final order of the Commission by operation of law. 30 U.S.C. § 823(d)(1).

In its request for relief from this final order, the operator details the procedural history of this case including the fact that review of the judge's finding of discrimination had been sought, albeit prematurely. The operator further states that previously-retained counsel "were under continuous instruction to appeal any decision directing [the operator] to reemploy Complainant [miner]," but "[f]or some unknown reason" prior counsel did not file a petition for review of the judge's final decision of January 11, 1982.

We have reviewed present counsel's request for permission to file a petition for discretionary review at this time against the standards set forth in Fed. R. Civ. P. 60(b)(1). 1/ See 7 Moore's Federal Practice § 60.22[2]; 11 Wright & Miller, Federal Practice and Procedure § 2858. Although the claims of previous counsel's omission and the operator's ignorance of the status of the litigation are not supported by affidavit, in the particular circumstances of this case, we accept the operator's representations as being made in good faith. We note that the judge's final decision was served on previous counsel, but not on the operator itself, and that the request for relief was filed within a reasonable time after the operator learned of the present posture of the case. Further, although counsel for the miner opposes the granting of any relief at this time, no showing has been made that the claims made by the operator are untrue. 2/

Accordingly, in the circumstances of this case, we grant the operator's request for permission to file its late-filed petition for discretionary review. 3/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

1/ Fed. R. Civ. P. 60(b)(1) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect....

2/ The present situation is not analogous to that involved in Duval Corp. v. Donovan & FMSHRC, 650 F.2d 1051 (9th Cir. 1981). In Duval the operator's petition for discretionary review was filed on the thirty-first day after the issuance of the administrative law judge's decision. Thus, although the petition for review was untimely filed under the Act and the Commission's rules, the judge's decision had not become a final order of the Commission because 40 days had not passed since its issuance. 30 U.S.C. & 823(d)(1). In a Duval situation, the inquiry is whether good cause for the untimely filing has been established. Valley Rock & Sand Corp., WEST 80-3-M (March 29, 1982); McCoy v. Crescent Coal Co., 2 FMSHRC 1202 (June 1980). In the present case, however, the judge's decision became a final order of the Commission and, therefore, the request for relief is appropriately addressed under Fed. R. Civ. P. 60(b).

3/ In this order we have not considered whether to grant the petition for discretionary review. We only rule that the petition may be filed at this time so that the Commission may proceed to review the issues raised and act upon the petition. 30 U.S.C. § 823(d)(2).

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 2 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 82-110
v.	:	A. C. No. 46-01369-03038
AMHERST COAL COMPANY, Respondent	:	MacGregor Cleaning Plant

DECISION AND ORDER OF DISMISSAL

Counsel for the Secretary of Labor filed on June 24, 1982, in the above-entitled proceeding a motion for approval of settlement. Under the settlement agreement, respondent has agreed to pay reduced penalties totaling $180 instead of the penalties totaling $1,260 as proposed by the Assessment Office.

The motion for approval of settlement gives the following reason for reducing the penalties proposed by the Assessment Office (p. 2):

> The underlying citations in this action are based on nine separate violations of 30 CFR 71.208(a), each of which was originally assessed a penalty of $140. The cited standard requires that each operator take a valid respirable dust sample from each designated work position on a bimonthly basis. In this action, subsequent to the filing of the civil penalty petition, respondent presented evidence showing that it had, in fact, taken the required respirable dust samples and submitted them to MSHA within the established timeframe. Copies of the dust data cards indicating that the samples were taken at each of the nine designated work positions are attached hereto as Exhibit A. However, due to the transposition of two numbers in block No. 10 of each dust data card, respondent was not given credit for having taken and submitted the sampling results to MSHA. Under the circumstances, the parties agree that respondent's negligence was significantly less than originally assessed and that a considerable reduction in penalty is warranted.

Each of the nine citations involved in this proceeding alleges that the operator violated section 71.208(a) by failing to submit a required respirable dust sample for a certain occupation in a designated work area for the bimonthly sampling cycle of June-July 1981. Seven of the nine citations designate the area involved as the "001-0" section and two of them designate the area involved as the "002-0" section. The seven citations in the "001-0" section cite seven different occupational codes and the two citations for

the "002-0" section designate two different occupational codes. Each citation is based on an "Advisory of Non-Compliance" sent out by MSHA's computer.

Each of the Dust Data Cards furnished by respondent in support of its claim that it did not violate section 71.208(a) shows that respondent did, in fact, submit a respirable dust sample for each of the occupational codes involved for the bimonthly sampling cycle of June-July 1981. The only mistake which respondent made was that respondent wrote in Block No. 10 of the card the numbers "010-0" for the seven samples submitted for section "001-0" and wrote the numbers "020-0" for the two samples submitted for section "002-0". Naturally, when data for respondent's samples were entered in MSHA's computer, the computer gave respondent no credit for seven samples submitted for section 001-0 because respondent's samples had an erroneous designation of section 010-0. Likewise, MSHA's computer did not give respondent credit for two samples for section 002-0 because respondent had erroneously designated the samples for section 020-0.

Section 71.208(a) provides as follows:

> (a) Each operator shall take one valid respirable dust sample from each designated work position during each bimonthly period beginning with the bimonthly period of February 1, 1981. The bimonthly periods are * * * June 1-July 31 * * *.

The evidence submitted with the motion for approval of settlement shows without question that respondent did "take one valid respirable dust sample from each designated work position during" the bimonthly period here involved of June 1 to July 31. Section 71.208(a) does not provide that respondent shall make no mistakes in filling out his dust data card. The requirements of the regulations were fulfilled when respondent took the required respirable dust samples for the designated working positions and submitted them within the June-July 1981 time period.

Computers perform the functions which they have been programmed to carry out. When mistakes are made by the human beings who feed facts into a computer, those mistakes are not corrected by the computer. When an operator proves, however, that he took the samples, but made a clerical error in submitting them to MSHA, the mistake should be corrected so that the operator may be given credit for the having taken the samples and having submitted them within the time period required by section 71.208(a).

In Co-Op Mining Co., 2 FMSHRC 3475 (1980), the Commission reversed an administrative law judge's decision which had accepted a settlement agreement in circumstances almost identical to those which exist in this proceeding. In the Co-Op case, a respondent had submitted a respirable dust sample for an employee who did work for it but had not submitted a sample for a person who MSHA mistakenly thought worked for respondent. The Commission said that no violation of section 70.250(b) had occurred in that case. The Commission

observed that the deterrent effect of paying penalties would not be advanced by having a penalty paid for a violation which had not occurred. I believe that the Commission's holding in the Co-Op case is controlling in the factual circumstances which exist in this proceeding. A respondent should not have to pay penalties for a clerical error. In Old Ben Coal Co., 2 FMSHRC 1187 (1980), the Commission affirmed a judge's decision in which he had held that an inspector's clerical mistake of writing section 104(c)(1), instead of section 104(c)(2), on four different unwarrantable-failure orders should not be considered as a reason for invalidating the orders since the inspector's mistake did not in any way prejudice respondent.

The purposes of the respirable-dust standards were not thwarted in any way by the fact that respondent inadvertently transposed two numbers when submitting nine respirable-dust samples. The provisions of section 71.208(a) were complied with when respondent took the required samples and submitted them within the required time period. Therefore, I find that no violations of section 71.208(a) occurred, that the citations should be vacated, and that the motion for approval of settlement should be denied.

WHEREFORE, it is ordered:

(A) Citation Nos. 9915322 through 9915330 dated August 13, 1981, were issued in error and are hereby vacated.

(B) The Petition for Assessment of Civil Penalty filed January 7, 1982, in Docket No. WEVA 82-110 is dismissed.

(C) The motion for approval of settlement filed on June 24, 1982, in Docket No. WEVA 82-110 is denied.

(D) The hearing now scheduled to be held on August 3, 1982, in this proceeding is canceled.

Richard C. Steffey

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

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WALTER A. SCHULTE,	:	Complaint of Discharge,
Complainant	:	Discrimination, or Interference
v.	:	
	:	Docket No. YORK 81-53-DM
LIZZA INDUSTRIES, INC.,	:	
Respondent	:	

DECISION

Appearances: G. Martin Meyers, Esq., Denville, New Jersey, for Complainant;
Frederick D. Braid, Esq., Mineola, New York, for Respondent;

Before: Judge Melick

This case is before me upon the complaint of Walter A. Schulte, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that Lizza Industries, Inc., (Lizza) discharged him on October 15, 1980, in violation of section 105(c)(1) of the Act. 1/ Evidentiary hearings were held on Mr. Schulte's complaint in Morristown, New Jersey, on October 13, 1981, and March 29, 1982, and, in a telephone conference call, on April 16, 1982.

Mr. Schulte can establish a prima facie violation of section 105(c)(1) of the Act if he proves by a preponderance of the evidence that he has engaged in an activity protected by that section and that the discharge of him was motivated in any part by that protected activity. Secretary ex rel David Pasula v. Consolidation Coal Company, 2 FMSHRC 276 (1980), rev'd. on other grounds, Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd Cir. 1981). Before his discharge on October 15, 1980, Schulte had been

1/ Section 105(c)(1) of the Act provides in part as follows:
"No person shall discharge * * * or cause to be discharged * * * or otherwise interfere with the exercise of the statutory rights of any miner * * * in any coal or other mine subject to this Act because such miner * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, 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 * * * has instituted or caused to be instituted any proceeding under or related to this Act * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this Act."

employed at Lizza's Mount Hope Quarry as a bulldozer operator and laborer. He asserts three separate claims of protected activity. First, he alleges that two weeks before his discharge he made safety complaints to foreman Jesse Parzero concerning unguarded belts, inadequate "stop devices" on moving machinery, explosive and flammable material stored near electric receptable boxes, unsafe catwalks and obstructed fire fighting equipment. Second, he asserts that around the same time he had complained to some unidentified person or persons that he had not received training needed to safely perform an assignment to stem explosives. Third, he alleges that he reported some of the above safety complaints to an official of the Federal Occupational Safety and Health Administration (OSHA) on October 6, 1980, and later that same day to Bernard Quinn, an employee of the Federal Mine Safety and Health Administration (MSHA).

While the credible evidence of record does not support Schulte's first two claims of protected activity and indeed he appears to have abandoned those claims in his posthearing memorandum, there is no dispute that Schulte did in fact report safety complaints to MSHA on October 6, 1980. 2/ These latter complaints are clearly protected activities under section 105(c)(1). Supra note 1, p. 1. Accordingly, following the Pasula analysis, the next step is to determine whether the operator, in discharging Schulte, was motivated in any part by those protected activities.

Direct evidence of motivation in section 105(c) discrimination cases is rare. Secretary ex rel Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (1981). In this regard, in the Phelps Dodge case the Commission quoted with approval from the circuit court decision in NLRB v. Melrose Processing Co., 351 F.2d 693 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

In this case, the evidence is undisputed that Mr. Schulte reported his safety complaints to MSHA on October 6, 1980, and that two MSHA inspector's

2/ The first allegation of safety complaints is denied by Parzero. In addition, presumably available witnesses who it is claimed would have corroborated Schulte's allegations in this regard were not called by Schulte to testify. Under the circumstances, it may be inferred that those witnesses would not in fact have corroborated Schulte. It is not at all clear, moreover, whether the second complaint was made to any management personnel. In addition, the credible evidence shows that Schulte was in fact trained in stemming explosives.

appeared at the Mount Hope Quarry on October 14, and 15, 1980, to conduct their inspection. On the first day of their inspection, they cited the operator for inadequate guarding of a conveyor. Mr. Schulte was discharged on the second day of the inspection by plant manager Fred Oldenburg. The decision was apparently made at a meeting that day in which Oldenburg, foreman Jesse Parzero, company official Jim Greniti, and shop steward Vincent "Vinnie" Crawn were present. Both Oldenburg and Parzero admitted that at the time of Schulte's discharge, they knew of "rumors" that Schulte had initiated the MSHA inspection.

Oldenburg also testified that "Jimmy [Greniti] may have brought up the fact [at this meeting] that this [Schulte's discharge] [had] absolutely nothing to do with the MSHA inspection." This gratuitous statement, while facially a denial that Schulte's complaints to MSHA had anything to do with his discharge, suggests in the overall context of the circumstances a guilty awareness that indeed the contrary was true. The remark is suggestive, moreover, of the existence of a conspiratorial agreement that in the event Schulte's discharge should be challenged the response of the conspirators would be that his discharge had "absolutely nothing to do with the MSHA inspection."

The evidence that the Lizza officials had some knowledge, albeit "rumors", that Schulte had called in the MSHA inspectors, the coincidence in time between the MSHA inspection and Schulte's discharge and the peculiar gratuitous denial that Schulte's discharge was the result of the MSHA inspection are relevant circumstantial factors in determining motivation. 3/ From this circumstantial evidence, it could very well be inferred that Mr. Schulte's discharge was at least partially motivated by his protected activities.

Even assuming, however, that Schulte had therefore established a prima facie case under Pasula, that would not be the end of the matter. The Commission also stated in Pasula that the employer may affirmatively defend against such a case by proving by a preponderance of all the evidence that, although part of its motivation was unlawful, (1) it was also motivated by the miners' unprotected activities, and (2) that it would have taken adverse action against the miner in any event for the unprotected activities alone. 2 FMSHRC at 2799-2800.

3/ On the subject of motivation, Schulte had also alleged that immediately after he was notified of his discharge, Parzero told him, in the presence of co-worker Robert Boisvert, "this is what you get, Mister, for bringing in MSHA". However, both Parzero and Boisvert denied that any such statement was made. Under the circumstances, I give no credence to Schulte's testimony in this regard. Schulte further alleged that shop steward "Vinnie" Crawn also said to him "you stirred up a hornet's nest -- it's a new company -- they didn't need the trouble, that's why they routed you". In the absence of any corroboration from Mr. Crawn himself, I can give but little weight to this hearsay evidence. Finally, Schulte also claimed that one of the MSHA inspectors, Robert Held, warned him that Lizza had singled him out for complaining to MSHA. Since Inspector Held flatly denied making any such statement, I am likewise able to accord but little weight to this allegation.

Within this framework, Lizza alternatively defends by claiming that Schulte was fired for his attendance problems and that he would have been fired in any event for that unprotected reason alone. In support of this defense, Lizza produced Schulte's time cards dating from June 30, 1980, and warning letters evidencing progressive disciplinary action against Schulte because of attendance problems preceding his discharge. The Commission has stated that in analyzing this evidence, the function of the Administrative Law Judge is only to determine whether the asserted business justifications are credible and, if so, whether they would have motivated the particular operator as claimed. Frederick G. Bradley v. Belva Coal Company, 4 FMSHRC _____ (Decided June 4, 1982).

Plant Manager Fred Oldenburg, testified that Schulte was discharged because of his repeated and unexcused tardiness, early departures, and failure to show up for work. Referring to Mr. Schulte's time cards (Operator's Exhibit No. 4) Oldenburg observed that Shulte's problem began on September 14, 1980, when he "punched out" early. Presumably Mr. Oldenburg was referring to the time card for the pay period ending September 14, 1980, which reflects that on September 10, 1980, Mr. Schulte punched the time clock shortly after 2 p.m., giving him only 6-1/2 hours in a regular 8-1/2 hour work day. Oldenburg told foreman Parzero to talk to Schulte about this early departure. Oldenburg testified that he also had the letter dated September 23, 1980 (Operator's Exhibit No. 3) prepared and that he personally delivered it to Schulte on September 23, or September 24, 1980. According to Oldenburg, Schulte signed the letter in his presence and returned it without protest. The body of the letter reads as follows:

> Your attendance practices leave much to be desired. These practices cannot be tolerated. I am, therefore, formally informing you that if these practices continue, you will be suspended and subsequently terminated. If you have any questions, please let me know.

Schulte acknowledged receiving that letter by his signature in pencil and by doing so, also acknowledged the following statement: "I hereby understand that if my poor attendance practices continue, I will be suspended for 3 days and terminated thereafter if the practices continue."

Schulte's attendance problems continued, according to Oldenburg, and led to the issuance of another disciplinary letter and to his later discharge. Oldenburg observed that Schulte was 6 to 10 minutes late for work on September 23, and on September 24, 1980, that he left work 1-1/2 hours early on September 30, 1980, and that he did not show up for work or call in on October 2, 1980. The corresponding time cards (Operator's Exhibit No. 4) support this testimony. Although Schulte claims that he called in concerning his absence on October 2, it is clear that none of these incidents was excused by the operator. Oldenburg told Schulte on Saturday, October 4, that he was being suspended for 3 days, and that he was not to report to work on the following Monday, Tuesday, and Wednesday. Oldenburg followed up with a letter to Schulte dated October 6, 1980,

(Operator's Exhibit No. 2) which he personally delivered to Schulte upon Schulte's return from the 3-day suspension. The letter reads as follows:

> Your attendance practices and work attitude leave much to be desired. You have been warned about these practices, yet you continue to be insubordinate. You are therefore suspended without pay for 3 days. If your performance does not improve, your employment will be terminated. If you have any questions, please let me know.

Schulte admits receiving and signing the acknowledgement on this letter, presumably on Thursday, October 9, 1980. In signing the letter, Mr. Schulte acknowledged the following statement: "I hereby understand that if my poor attendance practices and work attitude continue, I will subsequently be terminated." Schulte reportedly stated upon his receiving the letter, "I'm not going to give you any trouble. I'll sign it." 4/

According to Oldenburg, even after the warning letters and suspension, Schulte continued to show up late and to leave early. Schulte left work one-half hour early on October 10, 1980, left early on October 14, 1980, and showed up 6 minutes late on October 14, 1980. Schulte's time cards corroborate this testimony and indeed, Schulte himself admits that he left early without an excuse on October 10 and 14. Moreover, although Schulte alleges that he called in on October 2nd, he presented no affirmative evidence that any of his absences were excused.

Schulte was thereafter discharged on October 15, 1980. The discharge letter (Operator's Exhibit No. 1) of the same date reads as follows:

> You had been warned several times and subsequently suspended without pay as a result of poor attendance practices and insubordination. At a meeting held on Wednesday, October 15, 1980, you stated that your attitude had not improved and would not improve as a result of your no longer operating the bulldozer out at out Mount Hope plant.
>
> You were reminded on several occasions, and specifically on Thursday, October 9, 1980, by your foreman, Jesse Parzero, that your job required over time each day. You have opted to neglect these instructions and have left your work area prior to the designated quiting time.

4/ Schulte claims that he was handed the disciplinary letters dated September 23, 1980, and October 6, 1980, at the same time, presumably on October 9th, and signed those letters, one right after the other, using the same pen. The original letters were subsequently admitted into evidence (Operator's Exhibits 2 and 3) and clearly show that Mr. Schulte signed one in pencil and one in pen. Under the circumstances, I give no weight to Schulte's allegations in this regard.

> Our prior verbal warnings, written warning, and disciplinary suspension have obviously failed to rehabilitate you. You have therefore left us no choice but to terminate your employment, effective today, October 15, 1980, at 1:30 p.m.

The uncontradicted evidence of Schulte's poor work attendance clearly supports the operator's alleged business justification for Schulte's discharge. Schulte contends, however, that his discharge was nevertheless discriminatory because other employees had equally poor attendance records but were not similarly disciplined. This contention, if true, could very well affect the credibility of the operator's alleged business justification. Belva Coal, supra. In particular, Schulte claims that co-workers Harley, Bell, and Brock had attendance records as poor as his own but were not similarly discharged. The time cards for those employees are in evidence, however, and Schulte has not shown how those records support his argument. Moreover, from my own independent appraisal of those records, I do not find that they support Schulte's contention in this regard.

In conclusion, I find that while Lizza may very well have had a "mixed motivation" for discharging Schulte, it had credible "business justifications" to discharge Schulte exclusive of any protected activities and it clearly would have discharged Schulte in any event for his unprotected activities alone. Pasula, supra., Belva Coal, supra. Accordingly, the complaint of unlawful discharge is denied and this case is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 7 1982

SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceeding
	:	Docket No. SE 79-46-PM
v.		AC No. 01-00040-05006-F
	:	
ALLIED PRODUCTS COMPANY, Respondent	:	Montevallo Quarry & Mill

ORDER ON REMAND

In Allied Products Co. v. Federal Mine Safety and Health Review Commission, No. 80-7935, 5th Cir. Unit B (February 1, 1982), rehearing den. March 9, 1982, the Court affirmed a final order of the Commission in this case, finding that Allied Products violated three mandatory safety standards. 2 FMSHRC 2517 (ALJ, Sept. 1980). The Court found, however, that the penalties assessed were an abuse of discretion and remanded for further proceedings "with instructions to recalculate the penalties based on the existing record and on considerations outlined in this opinion." The Court's mandate was received by the Commission on April 9, 1982.

The Commission remanded the case to me on May 5, 1982, for "the initial determination of the necessary and appropriate action in light of the Court's decision and remand."

On June 26, 1982, the parties filed a Settlement Agreement proposing total penalties of $5,000 for the three violations found in my original decision. I find this Settlement to be consistent with the Court's decision and remand.

WHEREFORE IT IS ORDERED that:

1. The proposed Settlement Agreement is APPROVED.

2. The penalties issued in my decision of September 14, 1980 are hereby changed to read as follows: A penalty of $2,000.00 for Citation No. 81004, a penalty of $1,000.00 for Citation No. 81007, and a penalty of $2,000.00 for Citation/Order No. 81053.

3. Respondent shall pay the Secretary of Labor the above penalties, in the total amount of $5,000.00, within 30 days of this Order.

William Fauver
WILLIAM FAUVER, 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

JUL 8 1982

EASTERN ASSOCIATED COAL CORP., Contestant	:	Contest of Notice
	:	Docket No. PITT 76X203
v.	:	Notice No. 1 CPB; 6/24/76
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Delmont Mine

ORDER OF DISMISSAL

On May 3, 1982, the Commission reversed my decision of April 14, 1977, vacating the citation issued in this case. At the same time, the Commission remanded the case to me "for further proceedings consistent with this decision."

On May 24, 1982, I directed the parties to advise me as to whether they desired to be heard further on the remand.

On June 29, 1982, respondent MSHA advised me that the violation of June 24, 1976, has been vacated and that a civil penalty was never assessed against the operator. In addition, MSHA advises that Eastern Associated Coal Corporation no longer owns the mine in question, and considering the lengthy time interval since the issuance of the citation, MSHA has decided that no further enforcement action will be initiated.

On July 1, 1982, Eastern Associated Coal Corporation advised me that it desires no further opportunity to be heard in this matter, that it does not believe that there is a necessity of further briefing, and that it would appear that there are no remaining issues to be decided.

In view of the foregoing, this matter is now DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 8 1982

FRED GANCHUK,	:	Complaint of Discrimination
LESKO BUGAY,	:	
Complainants	:	Docket No. PENN 81-164-D
	:	
v.	:	Docket No. PENN 81-165-D
	:	
ALOE COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Ronald J. Zera, Esquire, Belle Vernon, Pennsylvania, for the complainants; Robert A. Kelly, Esquire, Pittsburgh, Pennsylvania, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

On February 19, 1981, the complainants filed discrimination complaints with the Secretary of Labor (MSHA), against the respondent pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977, claiming that the respondent had discriminated against them by issuing two letters concerning an accident which had occurred on mine property. Both complainants were involved in the accident, and the letters advised them that should such an accident be repeated, the respondent company would take "necessary disciplinary steps appropriate with the accident" against them. Subsequently, on May 8, 1981, MSHA advised the complainants that upon completion of an investigation concerning their complaints MSHA determined that violations of section 105(c) had not occurred. Complainants were advised that if they disagreed with MSHA's disposition of their complaints, they were free to file complaints on their own behalf with this Commission. Complainants subsequently filed their complaints pro se with the Commission on June 3, 1981, and subsequently retained counsel to represent them.

The letters which prompted the complaints of discrimination are dated January 2, 1981, are addressed to the complainants at their residences, and are signed by respondent's Safety Director, P. R. Belculfine. The content of both letters are identical, and they state as follows (Exhibit R-2):

> This letter is being written in reference to the incident on January 2, at noon, whereby the 275-B Hi-Lift backed into the right front side of Company Jeep #20 at the raw coal feed area of the Coal Washer.
>
> Due to the rash of such accidents happening in the last two months, we reposted a Notice in reference to Company Safety Rules and Policy regarding moving equipment in work areas. Fortunately no one has been injured by these accidents, but the near misses and expensive repair bills due to these accidents warrant us to put you on notice.
>
> Equipment operators should have their equipment in control at all times and personnel vehicles should keep far enough away that they will not be backed into by heavy equipment.
>
> Should such a similar accident happen again, the Company will have to take the necessary disciplinary steps appropriate with the accident.

By agreement of the parties, these cases were consolidated for trial in Pittsburgh, Pennsylvania, April 7, 1982, and the parties appeared and participated fully therein. Posthearing briefs were filed, and the arguments presented have been fully considered by me in the course of these decisions.

Issues

The principal issue presented in these proceedings is whether or not the respondent has discriminated against the complainants and whether the letters which they received as a result of the accident in question were in fact prompted by any protected mine health and safety activities.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 30 CFR 2700.1 et seq.

Testimony and evidence adduced by the complainants.

Lesko Bugay testified that he has been employed by the respondent for 38 years, is a member of the mine safety committee, and also serves as President of Local Union 9636. On January 2, 1981, he was performing

his duties as a "hi-lift" operator at the coal stock pile located on a hill above the mine office. In accordance with the usual procedure, he had been relieved for lunch by Mr. Fred Ganchuk, and he drove a company jeep to lunch. Upon his return, he parked the jeep in the usual spot. As he alighted from the vehicle and looked back, Mr. Ganchuk backed the hi-lift up and struck the jeep. After a few words between them, Mr. Ganchuk went to the mine office and reported the accident. The next day, Mr. Pat Belculfine gave him a letter concerning the incident and informed him that "it didn't mean anything". However, upon reading the letter Mr. Bugay concluded that the last paragraph of the letter placed him on probation for being involved in the accident and he asked Mr. Belculfine to withdraw the letter. When he refused, Mr. Bugay filed a "regular grievance", and another "safety grievance" was also subsequently filed (Tr. 10-14).

On cross-examination, Mr. Bugay stated that he parked the jeep in question in the same spot where Mr. Ganchuk had parked it when he came to relieve him for lunch. He also indicated that he parked it next to the fuel tanks near the coal pile, but no personal vehicles were parked there and he does not park his personal vehicle there either. Mr. Bugay described the coal loading process with the hi-lift and confirmed that he was aware of company policy and the posting of a notice on December 15, 1980, concerning vehicles.

Mr. Bugay testified that the vision to the rear of the hi-lift is bad because of the different equipment obstacles and he assumed that Mr. Ganchuk had observed him when he parked the jeep. He also indicated that Mr. Ganchuk did not waive to him, and he confirmed that he was aware of the fact that prior accidents had occurred and that from his experience around heavy equipment, extra precautions were called for (Tr. 14-18). He also confirmed that during the grievance complaint which he filed, his position was that an oral reprimand, rather than a written letter, would have been appropriate in his case and he wanted the letter retracted, particularly the last paragraph (Tr. 19). He also indicated that others who have been involved in similar accidents never received any letters, and while the company did give him an opportunity to make restitution for the damage to the vehicles, he declined to pay because he did not believe it was "the right way" (Tr. 21).

In response to bench questions, Mr. Bugay stated that the procedure of parking the jeep and being relieved by Mr. Ganchuk for lunch had been followed by both of them over a period of a year prior to the accident. The fender of the company jeep was damaged, but he could not estimate the cost of repairs, and he confirmed that a "hi-lift" is in fact a front-end loader (Tr. 24). It had a back-up alarm, but he could not recall whether it was operational and he confirmed that the loader backed into the jeep while the jeep was parked, and that he was standing approximately 15 feet away at the time of impact. He did not have to get out of the way of the loader in trying to get Mr. Ganchuk's attention, and he assumed that Mr. Ganchuk had seen him and that is why he parked the jeep where he did (Tr. 24-25).

Mr. Bugay stated that the letter jeopardized his job because it places him in an "evaluation program", that "the next step could be my job", and that this was true even if the last paragraph of the letter were to be deleted. He believed that an oral reprimand would have been more appropriate because it makes a person be more alert "by someone telling you that they're not happy with it" (Tr. 26-27).

Fred Ganchuk testified that he was operating the front-end loader which collided with the jeep in question on January 2, 1981. He confirmed that he had relieved Mr. Bugay for lunch and that he did not see Mr. Bugay when he parked the jeep because "he pulled into my blind spot". The jeep was able to move after he hit it, and he reported the accident (Tr. 27-29).

On cross-examination, Mr. Ganchuk described the loader in question as a "six or seven yard bucket", and generally described its dimensions. He conceded that the accident was serious and could have resulted in a fatality. He also confirmed that he was aware of the posted company policy concerning vehicles, and he explained the accident as follows (Tr. 30-31):

> Q. And yet, Mr. Bugay went ahead and parked within your working radius and within your blind spot as you say?
>
> A. Well, this is where we always stop at, because, we watch for each other coming in there. It just happened to be he got in when I wasn't looking back. Got into the blind spot and I didn't see him.
>
> Q. Now, before you pull in there don't you gain the attention of the operator?
>
> A. We do now. At that time we didn't. I watched to make sure that he was looking back and see me and I pulled in there and stopped.
>
> Q. So before this you would always try to gain his attention before you entered his work area?
>
> A. I always watched to make sure he was looking back to see me. He would always give me some kind of a signal that he had seen me in some sort or other, he'd wave his hand or something.
>
> Q. Did you give any signal on this day that you had seen Mr. Bugay come back from lunch?
>
> A. No, sir.
>
> Q. In fact, you say, he must have been within your blind spot?
>
> A. Yes, sir.

Mr. Ganchuk stated that had he seen Mr. Bugay the accident would have been avoidable, and had he waited until he acknowledged his presence the accident would not have happened. He confirmed that the company gave him an opportunity to make restitution for the damaged vehicles but that he declined to do so (Tr. 33).

In response to bench questions, Mr. Ganchuk confirmed that the reason the jeep was brought in close proximity to the end loader he was operating was for the convenience of he and Mr. Bugay, and that this "was a routine thing" (Tr. 35). He also indicated that there is no written procedure as to where the jeep is parked when he relieves Mr. Bugay, and it is "a matter of habit" (Tr. 35). He believed the letter discriminated against him because "the next time that anything happens I lose my job" (Tr. 36). He believes the letter could be used against him as the first step in any future disciplinary action against him, and he confirmed that he also filed a grievance over the incident (Tr. 36).

On further cross, Mr. Ganchuk conceded that the accident merited an oral reprimand from his supervisor, but since it was his first offense of this kind, he believes that the letter was not appropriate (Tr. 40).

Pat Belculfine respondent's safety engineer and safety director, was called as an adverse witness and confirmed that he issued the letters in question to Mr. Bugay and to Mr. Ganchuk. The letters were issued to make them aware of company policy dealing with working around equipment and they are still in their personnel files and will remain there until the instant case is decided. He stated that the accident in question was a serious one and could have resulted in serious injury or death. He explained the last paragraph of the letter and indicated that any future accidents would have to be considered on the merits (Tr. 41-44). Mr. Belculfine identified a copy of a company Notice dated February 13, 1981, dealing with the operation of heavy equipment and a system for operators acknowledging each other. The notice was issued after the letters in question were served on the complainants, and it was part of the settlement of the Union safety grievance (Tr. 44, exhibit R-4).

Mr. Belculfine confirmed that other accidents had occurred at the site of the accident involving Mr. Bugay and Mr. Ganchuk, as well as other accidents involving equipment operators. However, he denied that those involved in those accidents did not even receive a verbal warning (Tr. 45). In response to questions concerning prior accidents involving a Mr. Wolfe and a Mr. Chumpko, Mr. Belculfine acknowledged that they received no letters from the company concerning the incidents (Tr. 46). Mr. Belculfine conceded that the Union had made complaints about the coal pile in question, but insisted that they dealth with "different matters" (Tr. 46).

With regard to the incident involving Mr. Wolfe, Mr. Belculfine stated that while Mr. Wolfe backed into a coal truck, the truck driver was at fault and Mr. Wolfe was not required to make restitution because it was his own truck (Tr. 46). As for Mr. Chumpko, he was verbally reprimanded, and it was one of the determining factors leading to his discharge (Tr. 47).

Mr. Belculfine confirmed that he spoke with Mr. Bugay about the accident, but could not recall whether he discussed it with Mr. Ganchuk. He denied that he issued the letter to Mr. Bugay because he was on the safety committee and the president of the local (Tr. 48). He also indicated that in considering other accidents which had occurred prior to the incident in question, each incident is taken on its own merits, and in certain instances, reprimands were given (Tr. 48). In response to questions concerning these past accidents, Mr. Belculfine testified as follows (Tr. 50-53):

> THE WITNESS: Okay. On December 12th, there was a hi-lift that backed over the supply truck and demolished the supply truck. The person involved in that accident didn't come back to work. There was a letter drafted to be given to this person. This person did not come back to work and this person voluntarily quit.
>
> The other accident that I think he is referring to at that time, is the Wolfe accident where the hi-lift backed into the coal truck.
>
> JUDGE KOUTRAS: Okay. And is that the case, in which you stated that the truck, that the trucker owned the truck?
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: He was at fault?
>
> THE WITNESS: Yes, the trucker was at fault.
>
> JUDGE KOUTRAS: Who would have been a recipient of a letter, in that case, the other individual?
>
> I take it that since you made a determination that the trucker was at fault, that he was the only one that would have been reprimanded. And was he an independent contractor, owned his own truck?
>
> THE WITNESS: Independent, yes.
>
> JUDGE KOUTRAS: Not a company employee?
>
> THE WITNESS: No.
>
> JUDGE KOUTRAS: Does that explain why you didn't send him a letter?
>
> THE WITNESS: Yes.

JUDGE KOUTRAS: All right, Mr. Zera.

BY MR. ZERA:

Q. The hi-lift operator who backed into the supply truck, was that your employee?

A. Yes.

Q. He didn't receive a letter, did he?

A. No he didn't.

JUDGE KOUTRAS: But, Mr. Zera, I think he explained. Is that the gentleman that --- just a minute.

Am I to understand that the hi-lift operator is the fellow that never came back to work?

THE WITNESS: No. The supply truck driver, the union employee who was driving the supply truck, behind the hi-lift.

JUDGE KOUTRAS: Didn't return to work?

THE WITNESS: No.

JUDGE KOUTRAS: Why didn't the hi-lift operator get a letter? That's what he's asking you.

THE WITNESS: Because, it was not his fault.

BY MR. ZERA:

Q. Well, who's fault was the accident between Mr. Bugay and Mr. Ganchuk?

A. Both.

Q. What was the incident involving Mr. Chumpko?

A. Foreman on the midnight turn approached Mr. Chumpko, it was foggy and bad visibility and he approached the hi-lift and the hi-lift operator didn't see him.

Q. What happened?

A. His wheel hit the pick up truck.

Q. Who's wheel?

A. The foreman's truck. The hi-lift wheel hit the foreman's vehicle.

Q. Who was driving the hi-lift?

A. Danny Chumpko. The hi-lift operator.

Q. And he hit the foreman's truck?

A. Yes.

Q. And Danny Chumpko, the hi-lift operator, hit the foreman's truck did not receive a disciplinary letter?

A. No.

Q. And that's very similar to the accident between Mr. Bugay and Mr. Ganchuk, is it not?

A. No. That is different.

On cross-examination, Mr. Belculfine identified a copy of a letter that he had personally drafted in December 1980, for the mine superintendent proposing to suspend an employee for five days for violating company policy and safety rules in connection with an accident involving a company supply truck. The employee subsequently quit his job voluntarily, and Mr. Belculfine identified a copy of company personnel records confirming this fact (Tr. 53-59; exhibits R-6 and R-7). He also indicated that after he spoke with Mr. Bugay about the accident on January 2, 1981, he discussed the matter with Mark and David Aloe in the mine office and they instructed him to write the two letters in question because of the seriousness of the accident (Tr. 61).

In response to bench questions, Mr. Belculfine stated that he considered Mr. Bugay to be a very good worker and commented that I wish I had two more dozen men like him". He stated that the damage to the jeep was approximately $650 and that the loader sustained no damage. He indicated that there is no company policy concerning an employee making restitution for damaging company property, but conceded that had Mr. Bugay and Mr. Ganchuk made restitution the instant case would have been settled (Tr. 63-64). In further explanation, respondent's counsel stated that had restitution been made, the letters would have been retracted and the matter resolved (Tr. 66-67).

Testimony and evidence adduced by the respondent

Mark Aloe, President, Aloe Coal Company, testified that he has known Mr. Bugay for all of his life, and that Mr. Ganchuk has worked for the company approximately seven years. He confirmed that he instructed Mr. Belculfine to send the letters in question after he informed him about the accident in question. He explained that he did so because of a rash of the same kind of accidents, which were potentially serious in that someone could have been injured or killed, and because of the potential loss of company property. He considered both Mr. Bugay and Mr. Ganchuk to be good employees and confirmed that this was the first such incident in which they were involved (Tr. 93-95).

On cross-examination, Mr. Aloe stated that he was not involved in the question of restitution and that his brother David, a company vice-president, made that decision. He confirmed that he employs approximately 63 miners, but that he normally does not attend grievance meetings, but on occasion attends monthly union and management communications meetings. He never attended any meetings in which the safety of the coal pile was discussed (Tr. 95-97).

Responding to the complainants' assertions that none of the individuals involved in the prior accidents received any reprimand letters, Mr. Aloe stated that each accident is taken on its own basis, and that mine management attempts to determine who was at fault. Conceding that a foreman was fired some months after his involvement in an accident, Mr. Aloe stated that the accident was approximately 85% of the reason why he was fired (Tr. 98). With regard to the so-called "rash of accidents" mentioned in the letters sent to Mr. Ganchuk and Mr. Bugay, Mr. Aloe confirmed that they refer to the prior accidents testified to in this proceeding (Tr. 99).

Complainants' arguments

In their post-hearing arguments, complainants assert that the "disciplinary letter" they received violates the Act in that they were discriminated against for engaging in protected activity. In support of this conclusion, complainants maintain that the testimony at the hearing reflects that the Union, by and through its president and spokesman Lesko Bugay, made frequent complaints about the safety of the coal pile area, and that the respondent was aware of the employees concern about this area and that Mr. Bugay was the spokesman for these concerns. Since Mr. Bugay is president of the local, as well as a safety committeeman, complainants suggest that he was singled out for discipline so as "to stem the constant complaints and concerns of the membership". No such argument is advanced on behalf of Mr. Ganchuk.

Aside from Mr. Bugay's service as a union officer and member of the safety committee, complainants argue that prior accidents had occurred at the coal pile area in question, but that no one involved in those accidents received letters of the type given to the complainants. Citing an incident involving a Mr. Wolfe, complainants state that he was involved in a serious incident where a hi-lift backed into a truck, but received no disciplinary letter. Citing a second incident involving a Mr. Danny Chumpko, where another hi-lift operator again hit a foreman's truck, complainants assert that again, the hi-lift operator never received a disciplinary letter or warning. Although respondent maintained that the foreman was discharged as a result of this incident, since the discharge occurred four months after the incident, complainants argue that it is incredible to believe that the discharge was motivated by the accident in question.

With regard to the respondent's posting of the December 15, 1980, "Notice", complainants maintain that this notice does not justify the letters issued to the complainants, and that the notice does not cover

the circumstances of the Bugay-Ganchuk accident. Since a new "Notice" was reposted with new instructions after the January 2, 1981, accident, complainants conclude that the respondent recognized the fact that the prior notice did not cover the incident in question, and that had the complainants violated the December 15 notice, respondent would not have found it necessary to post a new and different notice.

Complainants assert that the facts of this case lead to the conclusion that Mr. Bugay and Mr. Ganchuk were treated disparately or differently than other employees who happened to be in similar or identical accidents, and that the only one factor that separates them from all of the other individuals involved in accidents at the coal pile is the fact that Mr. Bugay is an officer of the union and a safety committeeman, and that the respondent sought to stem the complaints concerning the inherent dangers in that area.

Complainants believe that it is obvious that if all other employees involved in like or similar accidents at the coal pile received warning letters, there would be nothing to distinguish Mr. Bugay and Mr. Ganchuk from the normal practice of the respondent. However, on the facts of this case, complainants maintain that this is not so and that the complainants cases are a "first". This is all the more shocking, argue the complainants, when one considers Mr. Bugay's previous unblemished record with nearly 40 years work experience and the employer's statement that he wished he had "two dozen more" like him (Bugay). If that were true, maintains the complainants, no warning letter would issue.

In conclusion, the complainants assert that the letters they received are "threats" which have placed their jobs in jeopardy, even though some 15 months have elapsed since the accident in this matter and there have no intervening accidents involving the complainants here. Citing the cases of Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), and Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978), complainants assert that they have the right, and are protected in the exercise of that right, to express their safety concerns to their immediate supervisor or to their employer.

Respondent's arguments

Citing Pasula v. Consolidation Coal Company, 2 FMSHRC 2786; 2 BNA MSHC 1001, October 14, 1980, respondent argues that to establish a prima facie violation of section 105(c) of the Act, complainants must prove by a preponderance of the evidence:

(1) That they engaged in a protected activity; and

(2) That the adverse action was motivated in any part by the protected activity.

Respondent maintains that a search of the pleadings and record in this case fails to reveal or identify the nature of the protected activity in which the complainants were engaging at the time the letters in question were given to them. Conceding that complainant Bugay has been president of the local Union for 12 years, and has served as a safety committeeman for 15 to 18 years, respondent points out that complainant Ganchuk holds no position at the mine other then as an employee. Further, respondent asserts that the only testimony of protected activity as argued by the complainants appears during the following colloquy with the presiding Judge in the questioning of Patrick Belculfine, respondent's safety director and the person who signed the letters in questions, and in the cross-examination of Mr. Belculfine by complainants' counsel:

> Q. You handled both regular and contractual grievances and safety grievances?
>
> A. Yes.
>
> Q. As part of your duties did you also meet periodically with the union concerning safety matters?
>
> A. Yes.
>
> Q. How often were these safety meetings held?
>
> A. At least once a month we would have a two hour safety meeting. (Tr. 42).
>
> * * * *
>
> Q. Now you are aware that the union made constant complaints about the danger of that area because, of the height of the coal pile, were you not?
>
> A. Not the height of the coal pile, no.
>
> Q. You are aware that the union made complaints, in safety meetings, about that area?
>
> A. Dealing with different matters. (Tr. 46).

Respondent maintains that the fact that there were conversations between union leaders and mine management about safety at the mine is not only customary in the coal industry, but is also mandated by the collective bargaining agreement. Respondent sees nothing unusual about conversations and meetings on safety, and believes that the mentioning of these meetings at the hearing appears to be an afterthought and not a basis of filing the complaint as they were never mentioned in the original pleadings. Respondent concludes that the accident which occurred was not protected activity, and to hold otherwise would mean any activity by an employee would qualify as a protected activity.

Assuming that the complainants were engaged in a protected activity, respondent nonetheless argues that the action taken by the respondent in this case was not motivated in any part by the protected activity. Respondent maintains that the action taken by the respondent was based on its sincere desire to protect its employees and equipment, and since accidents had happened previously, and since appropriate action had been taken by the respondent, these incidents evidence a consistent and fair policy by the respondent.

With regard to the posting of the December 15, 1980, safety notice, respondent states that it was in fact a reposting of a safety notice issued March 30, 1976, and that it was posted on December 15 because of an accident which occurred on December 12, 1980. The notice required all employees to "make sure the equipment operators see you when approaching them", and respondent asserts that both complainants were aware of this safety notice and knew of its contents. Respondent asserts that the notice was reposted because mine management wanted to protect its legitimate interest in its employees and equipment, and concludes that the accident which occurred would not have happened but for a violation of this rule.

Regarding the December 12, 1980, accident, respondent states that the incident occurred at a different area of the mine where a supply truck driven by one August Parilli, Jr., was struck by a piece of heavy equipment. Since Mr. Parilli was at fault, a letter of reprimand was drafted to him but was never sent because he voluntarily terminated his employment. With respect to a second incident where a hi-lift operator backed into the side of the struck of an independent coal hauler (the Wolfe incident), respondent states that the truck driver was at fault because his truck was in an inappropriate area and no reprimand was given to the hi-lift operator. Since the truck driver was an independent contractor, respondent states that he could not be reprimanded.

Regarding the third accident which occurred in mid-1980, where the wheel of a piece of heavy equipment struck a foreman's vehicle (the Chumpko incident), respondent states that it was determined that because of the foggy conditions, the employee was not at fault. However, respondent also states that the foreman was orally reprimanded for this incident and it was but one of the factors leading to his subsequent termination in November of 1980.

Respondent maintains that the record in this case demonstrates that the next logical step by mine management when the rules were violated was to send a letter to those who failed to comply with those rules, and to deny the respondent to take this step would prevent it from any protection of its interests in such situations. Respondent asserts that the aforesaid incidents with the hi-lift and truck of the independent coal operator and the incident concerning the foreman further demonstrates the fair, consistent and unbiased approach in similar matters. Respondent also notes that Patrick Belculfine, when called by the complainants as per cross-examination, testified as to questions of counsel Zera on Record, Page 48, as follows:

Q. It is also not true, had Mr. Bugay not been on the safety committee and president of the local, he would not have received this letter?

A. I wouldn't reprimand a man because he's a union official, no.

In conclusion, respondent maintains that any conclusion of a prohibited motivation in this case is entirely unwarranted, and that from a reading of the entire record, respondent suggests that the conclusion most warranted is that the complainants are upset that their otherwise good working record and history is now blemished by the letters which they received. Respondent notes that both complainants acknowledge some form of reprimand would have been appropriate. The mere fact that they do not feel the reprimand should have been in writing is of no consequence, since it is a matter for mine management to determine the nature and tenor it its reprimands. The mere fact that the complainants do not agree with the nature and tenor of the reprimand does not give grounds for the filing of a discrimination case under the Act, and the degree of discipline or whether any discipline should have been issued at all is not the determining factor. The test to be applied is whether or not the complainants were engaged in protected activity and whether the action of the mine operator was notivated in any part by reason of the protected activity. Respondent concludes that both items must be answered in the negative.

Discussion

The record in this case reflects that the union grievances filed by Mr. Bugay and Mr. Ganchuk concerning the letters they received have been held in abeyance pending the outcome of the instant discrimination complaints. The grievances have progressed through the first three stages, but any final decision in this regard has been "allowed to lie dormant" (Tr. 37).

With regard to the union safety grievance, exhibit R-4, concerning the area where the accident in question occurred, the information of record reflects that it was resolved at the second stage by the Union and Mine Management through the posting a notice and the distribution to all employees of an established procedure for operating equipment in work areas (Tr. 38-39).

It seems clear to me that under certain conditions a disciplinary letter of reprimand may be discriminatory under the Act since it may affect an employees pay, promotional opportunities, and even employment. See: Local Union 1110, UMWA et al., v. Consolidation Coal Company, MORG 76X138, Judge Michels, May 26, 1977. In that case, Judge Michels concluded that certain disciplinary letters were not issued in retaliation for reporting alleged safety violations, and therefore were not discriminatory.

In the case of Ronnie Ross v. Monterey Coal Company, et al., 3 FMSHRC 1171; 2 BNA MSHC 1300 (May 11, 1981), it was held that singling out one safety committeeman to receive a letter of reprimand, while ignoring another committeeman who engaged in similar conduct, was discrimination under the

Act. However, in Ross, the reprimand was affirmed and the complaint was dismissed because it was found that the conduct engaged in by Mr. Ross which led to the letter of reprimand was improper, and there was no showing that the letter was issued out of retaliation for safety complaints.

In Local Union 1110 and Carney v. Consolidation Coal Company, 1 FMSHRC 388 (1979), the Commission affirmed a Judge's ruling that giving a safety committeeman three letters of reprimand for insubordination because he failed to ask mine management's permission to leave his work area for the purpose of filing safety complaints was discriminatory under the Act because the leaving of work for that purpose was protected activity.

Complainants do not dispute the fact that an accident occurred and that they were at fault. In addition, they conceded that the circumstances surrounding the accident which occurred in this case warranted a reprimand. Their contention is that the reprimand should have been an oral one, rather than one in writing. They believe that the written record of a reprimand will, at some future time, possibly expose them to discharge if they are again found to be in violation of company rules. Aside from the fact that an oral reprimand is not in the form of a written document, I have some difficulty in accepting complainants' conclusions on this question. A reprimand is a reprimand, and if it is justified in the first place, I see little distinction in putting it in writing. It seems to me that once an employee is reprimanded by management, or someone authorized to mete out such punishment, management is free to document this fact, whether it be by a notation placed in the employee's record, or whether it be in some other form, such as the supervisor making a note of the fact that he orally admonished an employee so that he can rely on this in taking any future action against him if warranted.

During the course of the hearing, the complainants' stated that their real concern was over the last paragraph of the letter, which they view as a perpetual threat to discharge or otherwise punish them at some future time. While it is true that the language used in this paragraph clearly serves as a warning, it is limited to similar accidents of the kind which occurred on January 2, 1981, and since it states that any future discipline taken "will be appropriate with the accident", I assume this means that lack of fault by either individual will not result in any discipline. This is particularly true in this case where the respondent opted not to discipline two employees involved in two prior accidents because they were not at fault.

Findings and Conclusions

While it may be true that complainant Bugay, acting in his capacity as president of the local and as a safety committeeman, was the spokesman for miner complaints concerning the coal pile where the accident in question occurred, the evidence adduced in this case simply does not support any conclusion that the letters given to the complainants were in reprisal for such complaints. As a matter of fact, as correctly pointed out by the respondent's counsel, the complaint filed in this case did not suggest or aver that the letters were given to the complainants because of any asserted safety complaints. This issue was raised for the first time at trial by the complaintants' counsel, and it is rejected.

Further, the record suggests that the safety complaints concerning the coal pile were resolved during the grievance stage, and they were separately and independently addressed and resolved.

With regard to the question of any disparate treatment of the complainants by the respondent with respect to the letter concerning the accident in question, I conclude and find that this is not the case. Respondent has established by a preponderance of the credible evidence and testimony adduced in these proceedings that it did in fact enforce its rules and policies concerning employee involvement in accidents on mine property. The testimony establishes at least three prior accident incidents which gave rise to some action by company management against certain employees who were involved in those accidents. Even though no actual letters were ever delivered in these instances, I conclude and find that the circumstances surrounding these incidents are satisfactorily explained by the respondent, and they do not give rise to any inference, real or imagined, that the respondent intended to treat the individuals involved any differently from the complainants.

One of the prior incidents in question involved a culpable contractor truck driver who was not employed by the respondent. Management decided not to reprimand its employee who was involved in that accident because he was not at fault. Under these circumstances, I cannot conclude that management's discretionary decision not to give out any letters of reprimand in that instant was unreasaonble.

With regard to the second incident involving a Mr. Parilli, respondent has established through credible testimony and evidence, which is unrebutted, that had Mr. Parilli not resigned his job voluntarily, he would have received the letter which had been drafted for the mine superintendent's signature by Mr. Belculfine. As for the third incident involving a foreman (Chumpko), respondent has established that it did not reprimand the employee involved because it was determined that he was not at fault. Again, I cannot conclude that management was wrong in not reprimanding him. Further, complainants' arguments that it is incredible to believe that Mr. Chumpko's discharge was prompted by the accident in question must be taken in context. Respondent does not argue that the foreman was discharged solely because of the accident. Rather, respondent's testimony is that this was but one factor in the decision to fire him.

After careful consideration of all of the facts and circumstances presented in these proceedings, including the post-hearing arguments presented by the parties in support of their respective positions, I conclude that the respondent has the better of part of the argument and has satisfactorily rebutted any claims of discrimination in these proceedings. In short, I cannot conclude that the respondent discriminated against the complainants when it issued them the letters in question. To the contrary, given the circumstances of the accident, and the fact that prior incidents

of the same nature resulted in damage to respondent's equipment and property, as well as exposing its personnel to possible serious injuries, I conclude that respondent acted reasonably to protect its legitimate interests when it issued the letters in question. Under the circumstances, the complaints of discrimination filed in these proceedings ARE DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 8 1982

ROGER A. ANDERSON, Complainant	:	Complaint of Discrimination
	:	Docket No. WEVA 80-73-D
v.	:	Itmann No. 3A Mine
ITMANN COAL COMPANY, Respondent	:	

Appearances: F. Alfred Sines, Jr., Esq., for Complainant
Jerry F. Palmer, Esq., for Respondent

Before: Judge William Fauver

FINAL ORDER

On May 28, 1982, a decision finding liability was issued in this proceeding with the following provision pertaining to damages and other relief:

> "Pending a final order counsel for the parties are directed to confer in an effort to stipulate the amount of back pay, interest, attorney's fee, and costs due Complainant under this decision, and to stipulate the other terms of a proposed final order."

On June 24, 1982, the parties advised this Judge that they had reached an equitable settlement for a proposed final order. Said joint stipulation of settlement was reduced to writing and signed by the parties on June 29, 1982.

Based on an independent evaluation and de novo review of the circumstances, I conclude the proposed settlement is in accord with the purposes and policy of the Mine Safety Law and the decision of May 28, 1982.

ACCORDINGLY, IT IS ORDERED that:

1. The Joint Stipulation of Settlement filed on July 1, 1982 is ACCEPTED and APPROVED, and incorporated in this order by reference.

2. Respondent is assessed a civil penalty of $100 for its violation of section 105(c)(1) of the Act.

3. Respondent shall pay to Petitioner the sum of Thirty-three Thousand Dollars ($33,000) within seven days of the date of this Decision, said sum to be apportioned between Complainant and his counsel in accordance with counsel F. Alfred Sines, Jr.'s letter to me of June 29, 1982, and pay to the Mine Safety and Health Administration a civil penalty in the amount of One Hundred Dollars ($100) within thirty days of the date of this decision.

William Fauver

WILLIAM FAUVER, 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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 81-355
v.	:	A. C. No. 46-01364-03026V
AMHERST COAL COMPANY, Respondent	:	Amherst No. 4H Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Edward I. Eiland, Esq., Eiland & Bennett, Logan, West Virginia, for Respondent.

Before: Judge Lasher

A hearing on the merits was held in Charleston, West Virginia, on May 11, 1982, at which both parties were represented by counsel. After consideration of the evidence submitted by both parties and proposed findings and conclusions proffered by counsel during closing argument, a decision was entered on the record. This bench decision appears below as it appears in the official transcript aside from minor corrections.

This proceeding was initiated by the filing of a petition for assessment of civil penalty against the Respondent by the Secretary of Labor on May 12, 1981, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C., Section 820(a).

The Secretary seeks a penalty of $1,000 for the violation alleged to have occurred in citation number 912359, dated September 18, 1980, which was issued by the duly authorized representative of the Secretary (hereinafter "Inspector") and which charged Respondent as follows:

"The approved roof control plan in Road 218 was not being complied with (sic). The TRS system was not being maintained in proper working condition in that in Number 4

heading crosscut left working face, the TRS supports were not placed firmly against the roof before the roof bolter operators proceeded inby permanent supports."

In notes contained after the description of the condition or practice on the face of the citation, the Inspector added, "You could see over top of the TRS when it was extended at full length," and also, "Area of equipment: the roof bolter was removed from service."

The citation which was issued at 1800 hours was terminated at 1830 hours on the same date, in reference to which the issuing Inspector, Earnest E. Mooney, Jr., noted: "The RCP was discussed with the section crew and roof jacks were set as required, and the plan was being complied with."

The Secretary contends that the alleged violation is a transgression of 30 C.F.R. 75.200. The Respondent generally contends that because of the specific language of the roof control plan, no violation occurred. Their arguments will be more specifically discussed subsequently herein. Based upon my consideration of all the testimony, having observed the demeanor of the witnesses and having considered the weight which differing views of the evidence should be accorded, I find that the reliable probative evidence submitted during the formal hearing herein preponderates in the following manner.

(1) On September 18, 1980, Inspector Mooney, while conducting a triple A inspection of Respodent's 4-H Mine and while being accompanied by Respondent's evening shift foreman, Robert Mitchem, approached a crosscut where roof bolting was being conducted in Road 218 by two roof bolter operators, Lee Brown and Ernie Adkins. Brown and Adkins were installing roof bolts with the use of a Lee-Norris TD-2 roof bolting machine as depicted on Exhibit 10 (Respondent's Exhibit 1), and which has on each side safety arms which are extendable to at least 72 inches.

(2) The Respondent's roof control plan (portions of which have been placed in the record as Petitioner's Exhibit G-2) provides specific safety precautions for roof bolting machines with approved automatic supports. Page 6 of this plan provides:

"The (ATS) and (TRS) system maintained in proper working condition is acceptable support during roof-bolting operations, provided that:

"(a) The controls necessary to position and set the automated supports are located in such a manner that they will be operated from under permanent support.

"(b) Such supports are placed firmly against the roof before the roof bolt operator proceeds inby permanent supports.

"(c) The sequence of installing supports and bolts, as shown on the drawing, is followed. The distance from automated supports to the rib shall not exceed five feet unless additional support is installed to reduce the distance.

"(d) The manner in which the automated support system is otherwise employed is consistent with the approved roof control plan.

Temporary supports in accordance with an approved plan shall be installed prior to bolting when the automated support system is inoperative or does not make firm contact with the roof." 1/

(3) At approximately 1800 hours on September 18, 1980, Inspector Mooney walked up to the roof bolting machine in question, sometimes referred to as a "Top Dog" machine and "double headed roof bolter," and observed that the roof bolters were going around to the left of the crosscut in question. Inspector Mooney observed that the first cut had recently been made and that a normal phenomenon was ensuing, i.e., that the roof was "working" or "falling down."

(4) The Inspector observed that one of the roof bolters was working under a canopy-which is attached to the safety arm (or boom) which in turn is attached to the roof bolting machine-which was not firmly set against the roof. Inspector Mooney asked Foreman Mitchem if he observed the same condition and, if so, what he was going to do about it. Mitchem told the operator of the machine to shut it off, after which the machine was taken out of service.

(5) The canopy (or ring) under which Roof Bolter Ernie Adkins was working, at the time observed by the Inspector, was not placed firmly against the roof under which Adkins was working. Adkins was thus four feet beyond (inby) permanent supports.

(6) After the continuous miner had made its first cut into the crosscut in question, Brown and Adkins cut or drilled and installed two rows of roof bolts (pins) and were in the process of installing a third row of roof bolts when the Inspector arrived on the scene. The first row, consisting of of one bolt, and the second row, consisting of two bolts, were both installed by Mr. Brown who was working on the left-hand side of the roof bolting machine under the canopy attached to the top of the safety arm on the left-hand side of the machine. The roof bolts were, according to the plan, to be set four feet

1/ Petitioner primarily argues that Paragraph (b) is the section which was violated by Respondent.

apart and the rows were to be four feet apart, thus in effect establishing a system of four foot centers for the placement of roof bolts.

(7) After the completion of the second row, the roof bolting machine was moved forward a distance of four feet. As customary practice dictated, Mr. Brown on the left-hand side of the roof bolting machine and Mr. Adkins on the right-hand side of the roof bolting machine, elevated the safety arms with the canopies attached simultaneously. This function was completed in a matter of seconds. Upon completion of this procedure and before drilling on the third row commenced, both canopies (roof supports) were placed firmly against the roof. Adkins and Brown then commenced drilling holes in the roof for the placement of roof bolts. The hole is drilled at a point in the center of the canopy (or ring) affixed to the boom.

(8) After drilling approximately 35 to 40 seconds the roof bolting machine operator prevented their further drilling by turning off the machine at the direction of Mr. Mitchem. At some point in time during this 35 to 40 second period, the exact juncture of which is not subject to more precise identification, a defect in the bushings (sometimes referred to in the record as "rollers") 2/ occurred which resulted in the canopy-roof support dropping down from the roof a distance of three or four inches. When this happened, the condition was observed by Inspector Mooney, who immediately took action to stop further drilling since the roof bolter was under unsupported roof. As previously noted, such action was his bringing the situation to Mr. Mitchem's attention. 3/

(9) On September 15, 16, 17 and 18, 1980, Respondent's Assistant Mine Foreman Grover Grimmett, in on-shift reports, emphasized that he had reminded the pin crew (the roof bolting crew) to use jacks where the canopies didn't touch the top.

(10) On September 18, 1980, Mine Superintendent Elster Hurley was told by the day shift foreman, after the day shift was completed, that the coal seam was getting higher and that

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2/ Shown as points "B" to "C" on Exhibit 10.

3/ A conflict in the testimony between the Inspector and Mr. Mitchem on this point was posed at the hearing. The Inspector indicated that it was he who told the operator to stop the machine. Mitchem testified that it was he who told the operator to shut the machine off. I find this conflict to be a relatively unimportant disagreement on facts which have little, if any, bearing on the determination of the ultimate issues involved. I have previously concluded that Mr. Mitchem's version will be accepted on this point.

the TRS equipment might not reach the top so as to support the same. At the time the evening shift started, approximately 3:30 p.m., Mr. Hurley talked with section foremen and the roof bolters themselves to emphasize that jacks should be set before they started pinning since the TRS equipment might not reach the higher top.

(11) The top (roof) of the 4-H Mine was "the worst" that Superintendent Hurley and Foreman Robert Mitchem has experienced in their many years in coal mining.

(12) After the Inspector issued citation number 912359, he explained the roof control plan to those of Respondent's employees who were concerned with the same. The citation was then abated, and roof bolting continued with the use of jacks, which are rectangular metal poles and which were capable of assuming a greater length than the safety arm of the TRS system. Subsequently, Respondent, after it had moved the defective Lee-Norris TD-2 machine out of the area, replaced it with a Lee-Norris TD-1 roof bolting machine. Subsequently, five rows of roof bolts were installed (approximately) in a continuation of the installation pattern which was interrupted at the third row when the defect in the canopy occurred, and these rows were installed at a height which could have been accomplished by the Lee-Norris TD-2 machine, which was removed from service after issuance of this citation.

(13) The failure of equipment which occurred and which resulted in issuance of the citation, i.e., dropping of the canopy by reason of defective bushings, is rare. The bushings in question were defective because of wear over a long period of time and not because of any traumatic happening or unusual circumstances which occurred on September 18, 1980.

(14) Because the bushings or rollers in question were not maintained in proper working condition, they failed, resulting in the roof above the canopy on the right side of the roof bolting machine in question not being supported and ultimately resulting in the occurrence of an unsafe condition which jeopardized the life and well-being of the roof bolter working under the canopy, Ernie Adkins.

(15) The bushings were so located on the roof bolting machine as to be externally visible.

Ultimate Findings, Conclusaions and Discussion

The background conditions affecting the circumstances which are involved in this litigation are that the mine in question has a very bad, presumably dangerous, top, and that the Respondent's management has taken, and had taken prior to the incident in question, unusual measures toward prevention

of roof falls. One of these courses of action was causing those who worked under this roof to be intensely aware of safety precautions which should be taken because of the unusual hazards posed. The record indicates that jacks were to be used whenever the TRS equipment was unable to reach the roof and support it because of the height of the coal seam being extracted. However, equipment failure is another means by which a safety hazard can come to fruition. The Government has taken the position that a violation occurred because the roof control plan was not complied with because when the roof bolting machine was moved from the second row to the third row of support in the crosscut in question, the seam of coal was too high and the result was that the TRS equipment did not reach the top so as to support it. I find that the Government's theory throughout this case was not supported by the evidence, other than a rather tenuous belief of the Inspector which was articulated in a relatively unclear manner. Thus, much of the focus of the evidence in this case from the Government's standpoint was misfired. Nevertheless, I do believe that a violation was established within the context of the matters alleged in the citation and within the mandatory safety standard alleged by the Inspector to have been violated, 30 C.F.R. 75.200.

The Respondent contends that no violation occurred because, under Paragraph (b) of the roof control plan at page 6 thereof, the roof bolt operators did not proceed inby permanent supports before the TRS supports (in this case, the canopies) were placed firmly against the roof. The key word in Respondent's contention is the word "before." Indeed, I have found that the great preponderance of the evidence in this case is that the right-hand side canopy was firmly placed against the roof when Mr. Adkins proceeded to institute drilling at that point.

I have also found that the defective failure of the bushings occurred some time in the 35 to 40 second period after Mr. Adkins commenced drilling. However, Paragraph (b) is not operative without the coincidence of the prerequisites required in the opening paragraph of the required "Safety Precautions For Roof Bolt Machines With Approved Automated Supports," appearing on page 6. That paragraph requires that the TRS system to be acceptable support during roof bolting operations be maintained in proper working condition.

The roof control plan is authorized by and is an extension of the mandatory standards implemented by Congress and further delineated in 30 C.F.R. 75.200. In pertinent part, that section provides:

"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 six 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 support will not pose a hazard to the miners."

The key word in the last sentence is "adequate." The requirement of the mandatory standard is that the temporary support system be adequate.

Read in this light, the provision of the roof control plan requires that the system must be maintained in proper working condition, and then, in that underlying safe environment, the TRS supports are to be placed firmly against the roof before the roof bolt operator proceeds inby permanent support.

I find that the (essence of the violation) is that the roof bolting machine was not maintained in proper working condition, and that it was inadequate. It did, indeed, fail, and this I find to be a violation of 30 C.F.R. 75.200. I find Respondent's argument to be hypertechnical in view of the testimony as to the severe problem which the roof in this mine presents.

One person, Mr. Adkins, was placed in jeopardy by the hazards created by the violation. There is no showing of specific negligence in the occurrence of this violation. However, reference is made to the general tort principle that the unexcused violation of a governmental safety regulation is negligence per se. Gatenby v. Altoona Aviation Corp., 407 F.2d 443 (3rd Cir., 1968); Miles v. Ryan, 338 F. Supp. 1065 (1972), affirmed 484 F.2d 1255 (3rd Cir., 1973). I therefore find that the Respondent was negligent in the commission of the violation.

The parties have stipulated that Respondent is a medium sized coal mine operator and that the assessment of a reasonable penalty in this case will have no effect on its ability to continue in business. The parties also stipulated that the operator proceeded in ordinary good faith to achieve rapid compliance with the violated mandatory safety standard after notification thereof. I further find, based on stipulations, that in the 24-month period preceding the commission of the violation in question the Respondent committed 105 violations of the Act.

I find this, based upon other evidence in the record, to be a normal number of violations, and on that basis the penalty imposed will neither be increased nor decreased.

Weighing all the factors which I have previously described in this case, and further considering the extreme risks-which are well documented in mine safety law-flowing from roof control violations, and considering the evidence which Respondent has placed into evidence in mitigation (for the most part evidence of extreme safety consciousness with regard to roof control violations), I find that the penalty initially proposed by MSHA in this case, $1,000, is reasonable, and it is so assessed.

ORDER

Respondent is ordered to pay the Secretary of Labor the sum of $1,000.00 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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JUL 13 1982

WILLIAM A. WILLIAMSON, Complainant	:	Complaint of Discrimination
v.	:	Docket No. VA 80-32-D
BISHOP COAL COMPANY, Respondent	:	Dry Fork No. 37 Mine

DECISION

Appearances: James Haviland, Esq., for Complainant
Jerry F. Palmer, Esq., for Respondent

Before: Judge William Fauver

This proceeding was brought by Complainant, William A. Williamson, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for review of alleged acts of discrimination. The case was heard at Charleston, West Virginia.

Having considered the evidence and contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent operated a coal mine known as the Dry Fork No. 37 Mine in Tazwell County, West Virginia, which produced coal for sales in or substantially affecting interstate commerce.

2. The mine had three working sections. Complainant was a section foreman in the First Left Section, afternoon shift (4 p.m. to midnight), which used a continuous-mining method to mine coal. The dust control and ventilation plan required that at least 3,200 cubic feet of air per minute (cfm) be supplied to each working face and that water spray pressure on the mining equipment be at least 75 pounds per square inch (psi). Dust at the working face was normally controlled by ventilation and water-suppression methods. The continuous-mining machine was equipped with water sprays to control dust. Water sprays were also installed above the chain conveyor, which transported coal from the face to shuttle cars.

3. Section foremen were primarily responsible for implementing the ventilation and dust-control plan by ensuring that the continuous miner was supplied with adequate water for the water sprays, that the sprays were working properly, and that the working section was adequately ventilated. A ventilation reading was usually taken once at the start of the shift and once at the end of a shift. A section foreman could move the check curtains closer to or farther from the face to control the flow of air to the face; however, he was not authorized to increase or decrease the amount of air by opening, closing, or modifying an air regulator, a small opening made in a stopping or wall to control the flow of air. He was also not permitted to change the water pressure for the water sprays. Only the mine foreman was allowed to change the air regulator or the water pressure for the water sprays. If a section foreman was aware that insufficient air was reaching the section, he was instructed to adjust the check curtains, notify a supervisor, or withdraw his crew from the face.

4. The dust-control program also included monitoring dust levels by issuing each miner a dust-sampling device every 6 months. This was a small pump that drew air from the miner's atmosphere and recorded the quality of air on a small cassette. Dust-sampling personnel were responsible for conducting the tests and sending the results to a lab for analysis. If the dust sampling results showed compliance with the dust-control plan, which required that levels of respirable dust not exceed 2 mg/m^3, the miner would not be required to wear the sampling device for another 6 months. However, if the results showed excessive exposure to respirable dust, the miner would be retested. Miners showing high exposure, such as a continuous-miner operator, might have to wear the device for weeks at a time. Also, if a group of dust samples showed an average above the 2.0 standard, Respondent would be subject to a citation and civil penalty for a dust violation.

5. The dust-sampling pump was battery-operated and attached to the miner's belt. The cassette was supposed to be worn within arm's length of the mouth. A hose extended between the cassette and belt.

6. Only dust-control personnel were trained in the operation of the dust-sampling device; however, the device was easily turned on and off. Usually a miner was handed the device and required to put it on and wear it for an entire 8-hour shift.

7. A miner operator or shuttle car operator might find that the dust-sampling device interfered with operation of the equipment because the cassette hose would become tangled with the levers on the equipment. In such cases the operator was allowed to remove the cassette from his clothing and attach it to the machine within arm's length of his mouth. If the cassette was not kept within that distance, the operator was supposed to turn in the device, void the cassette, and undergo another test.

8. Miners assigned to wear a sampling device did not always wear it as required. At times, the devices were left in the bathhouse, in the dinner hole, or hanging on a piece of equipment while still running. No miner had

ever been disciplined for not wearing a dust-sampling device when assigned to wear one and Respondent had never received a citation for its methods of sampling dust. Cassettes that had not been used properly for test purposes were supposed to be voided at the end of the shift, but there were times that such cassettes were not voided.

9. Both mine management and mining personnel contributed to a lax or inconsistent approach to the dust-sampling program. For example, the mine superintendent, Joseph Aman, */ occasionally observed improper sampling practices, e.g., leaving an activated pump in the dinner hole or wearing a deactivated pump, but took no action. Luther Young, a union safety committee member, toured the mine periodically and on one occasion observed sampling pumps hanging in the dinner hole in the Four Right Section. Aman was present; however he did not inquire as to why the pumps were not being worn or take any action to ensure that the cassettes were voided.

Often, Young did not wear a pump that was assigned to him. He understood that it was supposed to be worn the entire shift; however, he would remove it if he found operation of the shuttle car difficult while wearing the pump. Sometimes he would leave the pump running in the dinner hole. He was never questioned for turning in a cassette that did not record an entire shift or that was unrepresentative of the mine atmosphere.

Complainant, when assigned a dust-sampling device, rarely wore it the entire shift. He understood that the pump was supposed to run the entire shift or the sample was to be voided, but he would turn it off if it interfered with his work or if he had to go behind a line curtain to take air readings. When Complainant had been an equipment operator, he had often disconnected his pump because he continued to get bad samples and would otherwise have been required to wear the sampler until he received good samples.

In March 1980, Complainant observed Superintendent Aman at his desk when three dust pumps were sitting on top of the desk and running. On that day, the whole crew was supposed to be wearing dust-sampling devices.

10. Respondent placed considerable pressure on section foremen to keep the dust-samples under the 2.0 level. On occasion, company officials threatened Luther Young about having bad dust-samples. In 1977 or 1978, Bubba Bradley told Young that, if samples were returned showing a violation of the law, the mine would be shut down. In 1980, Doc Davison told Young that if the samples were out of compliance, the mine would be shut down. In 1978, Young also heard a fire boss threatened by the day shift foreman when

*/ In pertinent parts of 1979, Complainant was Section Foreman, Evening Shift, of the First Left Section, Joe Aman was the Mine Superintendent, Bill Steel was the Day Shift Foreman, Johnny Woods was the Day Shift Section Foreman on the First Left Section, and Doug LaForce was the Day Shift Mine Foreman.

the fire boss was going to record a bad ventilation condition in the Six Right Crosscut. The day shift foreman had stockpiled coal in the return and the flow of air was thereby reduced.

11. The First Left Section presented a number of dust problems. It was in old workings, there was only one intake and usually only one return, and the belt haulage ventilated into the working face rather than away from it. Samples taken during Complainant's shift on September 27 and October 6, 1978, included dust levels of 2.5 and 7.0. A sample taken on Johnny Woods' shift (day shift) on December 12, included a dust level of 7.7. On December 20, 1978, the First Left Section received a citation for a violation of the dust-control plan. The citation stated in part:

> Based on the results of 10 dust samples collected by the operator and reported on the attached teletype message, dated 12/19/78, the cumulative concentration of respirable dust in the working environment of the high-risk occupation in Section 008, was 23.7 mg/m^3 of air. Management shall cause such working environment to be sampled every production shift until compliance with the applicable limit of 20.0 milligrams per cubic meter of air for this section is achieved.

After receiving these results, Aman met with the section foremen on the First Left Section, and their shift foreman, and told them that dust levels were too high and had to be decreased. He explained the dangers of high levels of respirable dust and discussed measures required to reduce those levels. Aman offered advice and help to the section foremen and solicited ideas from them. Aman received no comments or suggestions from Complainant during that meeting.

12. On March 8, 1979, the First Left Section received another citation for a violation of the dust-control plan. The citation stated in part:

> Based on the results of 10 dust samples collected by the operator and reported on the attached teletype message, dated 3/05/79, the cumulative concentration of respirable dust in the working environment of the high-risk occupation in section 008, was 21.0 milligrams. Management shall cause such working environment to be sampled every production shift until compliance with the applicable limit of 20.0 milligrams per cubic meter of air for this section is achieved.

The results from the cited samples were as follows:

Date	Section	Levels
1-11-79	day	3.4
1-19-79	midnight	.5
1-19-79	day	2.8

1-25-79	evening	1.5
1-25-79	day	1.8
1-30-79	midnight	2.3
1-31-79	evening	2.4
2-01-79	evening	.8
2-20-79	evening	1.2
2-26-79	day	4.3

After receiving these results, and the citation, Aman again discussed the dust problem with the foremen and explained the required methods of reducing dust levels. Aman received no comments or suggestions from Complainant.

13. After the first or second citation, Complainant spoke with Aman and Bill Steel, the Day Shift Foreman and Complainant's immediate supervisor, about the dust conditions in the section. Complainant told them that he could not reduce the dust levels because water pressure for the sprays was too high and ventilation was inadequate. Complainant contended that when the water pressure was too great, the dust would be forced into the mine atmosphere instead of falling to the mine floor. Complainant had no tool to measure the water pressure; however, he conducted a test with his miner operator to show that, when the water hit the coal face with great force, the air and dust were forced back into the operator's face and sometimes even as far back as the shuttle car operator. The test was conducted with the miner operator and miner helper, and in the presence of the shift foreman, Bill Steel. Complainant's supervisors told him that he was exaggerating and that he could get good dust samples with the water pressure that was being used. Complainant also told Aman that the belt haulage was ventilating into the face rather than away from it. Complainant recommended that air be vented into the returns.

14. On May 21, 1979, the day shift crew, supervised by Johnny Woods, mined the No. 1 Face in the First Left Section. The crew also spot-bolted between the No. 1 and No. 2 Faces. The Mine Foreman, LaForce, and two federal mine inspectors were present. There was adequate ventilation. At about 3 p.m., before Complainant's shift, Woods told Complainant that the heading was behind and that it needed to be cut through to release the air. The No. 1 Face was about four cuts beyond the No. 2 Face in the working section. The No. 1 Face ventilated into the return, but the No. 2 Face ventilated into the old workings where the amount of air was very low. Complainant was told that a federal inspector was expected and to cut No. 2 through to get ventilation.

Complainant entered the mine, measured the air with an anemometer, and determined that no air current was reaching the No. 2 Face. He removed most of his crew from the section, to tighten and set timbers to seal off the check curtains all the way to the No. 2 Face. After about 3 hours, Complainant

recorded air movement of about 2,100 cfm and his crew resumed production, although the ventilation plan required 3,200 cfm. The miner operator was using a dust-sampling device that shift. In all, Complainant took four anemometer readings on that shift and all were below the velocity required by the company plan and the federal regulation.

At the end of the shift, Complainant told his immediate supervisor, Steel, that the air was insufficient. Complainant drew a diagram to show Steel how he thought sufficient quantities of air could be obtained. Steel then met Ermil Stacy, the Midnight Shift Foreman, and suggested a different method of ventilating the section to meet standards. Stacy made the changes and the section had sufficient quantities of air. To do this, Stacey moved one check curtain from the right rib in the No. 2 working section to the left rib and built a fly curtain in the crosscut between the return and intake entries.

15. On May 22, 1979, about 8 a.m., Aman became aware of the ventilation problem that had occurred on the afternoon shift on the previous day. Aman took air readings and found there was enough air reaching the working section; however, there was still a dust problem. Dust from the No. 2 working section would travel to the No. 1 working section and, to correct this problem, they placed each working section on its own separate split of air and the volume of air reaching the No. 2 Face was increased by adjusting the regulator to allow an additional 10,000 cfm.

Complainant met Aman leaving the mine at about 3 p.m. Aman wanted more details of the problems Complainant had encountered on May 21 and Complainant told him that the No. 2 Face had not received enough ventilation to prevent dust buildup. Later in their discussion, when Aman learned that the miner operator had been equipped with a dust-sampling device, he told Complainant that he would lose his job if the results were not in compliance.

After meeting with Aman and Steel, Complainant met the Mine Foreman in the foreman's office and learned that the ventilation problem had been corrected during the midnight shift.

16. Results of the May 21 sampling were included in an MSHA report received on the afternoon of June 4, with a citation charging the following:

> Based on the results of ten dust samples collected by the operator and reported on the attached teletype message, dated 5/31/79, the cumulative concentration of respirable

dust in the working environment of the high-risk occupation in Section 008 was 22.3 milligrams. Management shall cause such working environment to be sampled every production shift until compliance with the applicable limit of 20.0 milligrams per cubic meter of air for this section is achieved.

One sample taken on Complainant's shift showed a reading of 3.0 and another, for the miner operator, was 7.6. One reading on Woods' shift showed 6.9.

Aman met with Complainant that afternoon before his shift began and told him of the results; however, they did not discuss disciplinary measures.

Aman then met with supervisors Steel and LaForce to discuss the dust problem and possible disciplinary action. They decided that, as a disciplinary measure, the two responsible section foremen would have to work weekends. On June 6, 1979, at the end of the day shift, Steel told Complainant that the miner operator's dust sample taken on May 21 was in excess of the permissible level and, as disciplinary action, Complainant would have to work weekends until he demonstrated the ability to meet the dust standards. On June 7 Aman repeated instructions of the discipline and told Complainant that he had to achieve proper levels of respirable dust by using proper ventilation and water-suppression techniques and measures or he would be discharged. By this time, Complainant had learned of his grandmother's illness; he told Aman that he could not work weekends because of her illness. Aman would not guarantee Complainant days off and told him he would have to choose between his family and work. On June 7, Complainant quit his employment rather than accept the discipline of working on weekends.

Johnny Woods, the Section Foreman on the day shift, was also disciplined for high-dust levels by having to work on weekends in June. During his discipline, Aman examined Woods' section daily and observed that there were proper line curtains, adequate amounts of water, adequate levels of air, and a general improvement of section management. Dust samples were also taken and they were below 2.0 milligrams. Water pressure was not reduced to achieve this compliance. Aman determined that Woods had demonstrated the ability and attitude to meet the dust standards, and terminated his disciplinary weekend duties after about two weekends.

17. About 2 weeks after leaving the mine, Complainant returned and asked to be reemployed. He filled out an application form, inserting "quit" in the space for reasons for leaving the last job. He has not been reemployed.

DISCUSSION WITH FURTHER FINDINGS

The basic issues in this case are (1) whether Complainant was engaged in protected activity under section 105(c)(1) of the Act and if so, (2) whether the Respondent discriminated against him because of such activity.

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

> 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 * * * has instituted or caused to be instituted any proceeding under or related to this Act * * *.

One of the purposes of the legislation is to ensure that a miner will not be inhibited in exercising his rights under the Act, including making safety complaints. The Report of the Senate Committee on Human Resources stated:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 31 (1977), reprinted in, Legislative History of The Federal Mine Safety and Health Act of 1977 at 623 (1978) (hereinafter "Senate Report").

The drafters of section 105(c) intended that "[w]henever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." Senate Report at 36, reprinted at 624. The Report also stated:

> It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefits or threats of reprisal. It should be emphasized that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved. Senate Report at 36, reprinted at 624.

In Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2790 [1980], 2 MSHC 1001, 1006 (BNA) (October 14, 1980), the Commission stated:

> We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event.

Complainant contends that Respondent's dust-sampling program is one means of communicating to MSHA dust concentrations in the mine and that these communications by a miner and his efforts to ensure integrity of the dust-sampling procedures are protected activities under section 105(c) of the Act. Complainant contends that his refusal to acquiesce in implied demands by the operator to permit the taking of unrepresentative dust samples was protected activity under section 105(c). He contends that Respondent violated the Act by ordering his discipline for his upholding the integrity of the dust-sampling procedures by taking a valid, representative dust sample on May 21, 1979.

Complainant argues that, although he received no express instructions to obtain improper samples, the dust-sampling program was poorly administered and notorious for unrepresentative dust samples. As examples of poor administration he points to: A lack of affirmative steps to ensure that the pumps were worn properly for an entire 8-hour shift; failure to void unrepresentative samples; threats of closing down the mine unless "good samples" (i.e., 2.0 mg/m^3 or less) were obtained; intentional withdrawal of miners from dusty areas while they were equipped with sampling devices; and the withholding of authority of section foremen to make necessary adjustments in the air regulators and water pressure to control dust levels.

Complainant argues that, because of the air problems on the working section Complainant mined coal in violation of the law on May 21, 1979, but that his supervisors did not object to this but threatened disciplinary action only if the dust sample results exceeded the 2.0 standard. There was no discussion concerning his running coal without adequate quantities of air.

When the results were received and found to be in excess of 2.0, Complainant was subjected to discipline. Complainant argues that the timing of the disciplinary action demonstrates that the reason for the discipline was not related to mining coal in violation of the law, but that Complainant was disciplined because the dust samples on his shift exceeded 2.0 and this was discrimination because of his participation in a government-enforcement activity.

Respondent contends that Complainant had the options of solving the ventilation dust problem on his own, seeking assistance from his superiors, or withdrawing his crew from the section, and that he was disciplined for operating his section in violation of the dust-control plan and dust standards of the Act. It argues that two foremen were found responsible for dust violations and they were disciplined equally to achieve compliance.

Part 70.100 of the Mandatory Health Standards, 30 CFR, requires that the average concentration of respirable dust in the mine atmosphere to which each miner is exposed be at or below 2.0 milligrams of respirable dust per cubic meter.

On December 20, 1978, the 1st Left Section of the Dry Fork Mine received a citation because the respirable dust concentration on that section exceeded the allowable limits of Part 70.100. (The average level was 2.4.) Each of the section foremen on that section, i.e., Johnny Woods, Carl Horton, and William Williamson (Complainant), was told of the citation and instructed as to the importance of dust compliance. Each foreman was asked if he had any questions or needed help in having his shift comply. Complainant sought no help. The section came back into compliance on January 24, 1979, with an average concentration of 2.0.

On March 8, 1979, the 1st Left Section received another citation for excessive respirable dust (average level 2.1). Each section foremen was told of the citation and was instructed as to the importance of dust compliance. Questions were solicited and help was offered. None of the foremen offered any excuse or reason as to why his section was out of compliance. Emphasis was placed on keeping sufficient air in each place, line curtains up, and water sprays in good order. They were told if the working place became dusty, mining was to cease and the miner operator was to remove himself to good air and not to resume operation until the dust had cleared. It was mentioned that if the 1st Left Section again went out of compliance, disciplinary action would probably be taken. The section came back into compliance on April 9, 1979, with an average concentration of 1.4.

On June 4, 1979, the 1st Left Section again received a citation for respirable dust (average level 2.2), and each of the foremen on 1st Left was told of the citation and was instructed as to the importance of dust compliance. Questions as to how and why the section was again out of compliance were asked in an attempt to pinpoint the problem and its causes. It was determined that on May 21, 1979, on Complainant's shift, the miner operator, Jimmy Bonds, had worn a dust pump and received a high sample result. The

section foreman, Complainant, acknowledged to Bill Steel (afternoon shift foreman) and Joe Aman (superintendent) that he had been lax in following the ventilation and dust-control plan. Also, a high dust sample was obtained on April 10, 1979, on the day shift, and no explanation was offered by the day shift section foreman, Johnny Woods. No high samples were found on the midnight shift.

Management decided that the performance of Complainant and Johnny Woods was unacceptable and that disciplinary action was required. It was decided that each foremen would work each weekend until he demonstrated that he could perform his job in compliance with the dust standards. Termination of both foremen was strongly considered but it was decided that the foremen would be given one last chance. It was to be made clear to them that this was the last chance and failure to achieve acceptable dust samples would result in termination in the absence of a valid excuse. The logic behind the disciplinary action of working weekends was that it was stronger than just talking to the foremen but less stringent than termination. If a foreman could not demonstrate improvement, he would be terminated but if he did, he would not be working many weekends. Suspension without pay was also considered, but past experience (with other employees) had shown it to cause more harm than good.

Johnny Woods was told of the disciplinary action to be taken and he worked June 9 and 10 (he was given off June 7 and 8). On June 6, Bill Steel told Complainant of the action to be taken. Joe Aman also discussed the action with Complainant on June 7. Complainant stated that illness in his family would prevent him from working weekends. The superintendent told him that, if there were idle days during the week he would have those off but he would be required to work on weekends until he proved himself. Complainant said that he would rather quit, and he did on June 7.

When Woods was disciplined, Superintendent Aman visited the 1st Left Section each day looking primarily at dust control and ventilation. Aman later told Woods that he had demonstrated that he could perform his job properly and that he would not have to work any more weekends except as normally required of all foremen. The section was reported back in compliance on June 21 with an average concentration of .5 milligrams. The dust samples taken after the meeting with the foremen in June averaged 0.2.

The discipline taken against Complainant and Woods, ordering them to work weekends, was to further compliance with health and safety standards at the Dry Fork Mine. They had been warned several times to follow the dust-control plan and to keep their sections in complaince. Complainant and Woods failed to do so and management applied equal and non-discriminatory discipline to effect compliance if possible. In prior meetings and warnings, it was made clear that they were expected to comply with the dust-control plan to keep dust conditions in compliance and, if they could not, they were not to work their crews in excessive dust but were to keep them out of dust and

seek assistance from supervisors to correct the dust conditions. Management had considered firing Complainant and Woods but working cn weekends was considered to be a last chance. Complainant was told that this was his last chance and if he went out of compliance again without a valid excuse he would be discharged. Johnny Woods, day shift section foreman, received the same warning and discipline as did Complainant.

Complainant has shown that there were problems with the dust program, and that management exerted pressure to avoid obtaining dust samples above 2.0. However, he was also given instructions, and the authority, to remove his men from excessive dust and to seek the assistance of supervisors if he could not correct an excessive-dust condition himself. Complainant has not proven by a preponderance of the evidence that his instructions from management meant that he was to cause misrepresentative dust samples and that he was disciplined for refusing to obey such instructions. His participation in the dust-sampling program was a protected activity under section 105(c) of the Act, but he has not proven that he was discriminated against because of such activity. He was disciplined for failure to meet the dust standards.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the parties and subject matter of this proceeding.

2. Complainant has failed to meet his burden of proving a violation of section 105(c)(1) of the Act.

Proposed findings and conclusions inconsistent with the above are rejected

ORDER

WHEREFORE, IT IS ORDERED that this proceeding is DISMISSED.

William Fauver
WILLIAM FAUVER, 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

NATIONAL MINES CORPORATION, Contestant	:	Contest of Order
	:	Docket No. KENT 80-130-R
v.		
	:	Order No. 997527
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	December 10, 1979
	:	Stinson No. 5 Mine

DECISION ON REMAND

A decision was originally issued in this proceeding granting the notice of contest and vacating Order No. 997527, 2 FMSHRC 2576 (1980). The original decision was based on the Commission's decisions in The Helen Mining Co., 1 FMSHRC 1796 (1979), and Kentland-Elkhorn Coal Corp., 1 FMSHRC 1833 (1979), in which the Commission had held that an operator does not have to pay a miner who accompanies an inspector who is making a "spot" inspection.

The Commission issued an order on May 20, 1982, remanding the case to me for further proceedings consistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in United Mine Workers of America v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (1982), in which the court reversed the Commission's rulings in the Helen Mining and Kentland-Elkhorn cases and held that operators are required to pay miners for accompanying inspectors who are making "spot" inspections. I issued a procedural order on May 27, 1982, requesting that counsel for the parties advise me as to whether they wished to present any additional evidence or file any additional briefs before a decision on remand was issued.

Counsel for contestant orally advised me on June 14, 1982, that he does not wish to present any additional evidence or make any additional arguments. Counsel for the Secretary of Labor filed on July 9, 1982, a letter advising me that he does not wish to introduce any additional evidence or make any additional arguments.

Order No. 997527 was issued on December 10, 1979, citing contestant for a violation of section 103(f) of the Federal Mine Safety and Health Act of 1977 because contestant had declined to pay a miners' representative who had accompanied an inspector during a "spot" inspection made on November 7, 1979. The order was terminated on the same day after contestant

had paid the miners' representative for accompanying the inspector on November 7, 1979. Inasmuch as the court's opinion in the UMWA case cited above requires that miners' representatives be paid for accompanying inspectors who are conducting "spot" inspections, I find that my original decision issued in this proceeding erroneously held that Order No. 997527 was invalid. Therefore, Order No. 997527 should be reinstated and the notice of contest should be denied.

WHEREFORE, it is ordered:

(A) The order accompanying the decision issued September 11, 1980, 2 FMSHRC 2576, is vacated as having been issued in error.

(B) The notice of contest filed on January 7, 1980, in Docket No. KENT 80-130-R is denied and Order No. 997527 dated December 10, 1979, is reinstated and affirmed.

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 16 1982

ISLAND CREEK COAL COMPANY, Petitioner	:	Contest of Citation
	:	Docket No. VA 79-74-R
v.	:	Citation No. 694946
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	June 4, 1979
	:	Virginia Pocahontas No. 4 Mine
UNITED MINE WORKERS OF AMERICA, Respondent		
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VA 80-9
v.	:	A. C. No. 44-02134-03011
	:	Virginia Pocahontas No. 4 Mine
ISLAND CREEK COAL COMPANY, Respondent	:	

DECISION ON REMAND AND APPROVING SETTLEMENT

A decision was originally issued in this consolidated proceeding granting the notice of contest, vacating Citation No. 694946, and dismissing the petition for assessment of civil penalty, 2 FMSHRC 2583 (1980). The original decision was based on the Commission's decisions in The Helen Mining Co., 1 FMSHRC 1796 (1979), and Kentland-Elkhorn Coal Corp., 1 FMSHRC 1833 (1979), in which the Commission had held that an operator does not have to pay a miner who accompanies an inspector who is making a "spot" inspection.

The Commission issued an order on May 20, 1982, remanding the cases to me for further proceedings consistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in United Mine Workers of America v. Federal Mine Safety and Health Review Commission, 671 F. 2d 615 (1982), in which the court reversed the Commission's rulings in the Helen Mining and Kentland-Elkhorn cases and held that operators are required to pay miners for accompanying inspectors who are making "spot" inspections. I issued a procedural order on May 27, 1982, requesting that counsel for the parties advise me as to whether they wished to present any additional evidence or make additional arguments before a decision on remand was issued.

Counsel for the Secretary of Labor filed on July 9, 1982, a response to the aforesaid procedural order requesting that Citation No. 694946 and the petition for assessment of civil penalty be reinstated, and moving that a settlement agreement be approved under which the operator has agreed to pay a reduced penalty of $15, instead of the penalty of $34 proposed by the Assessment Office.

Citation No. 694946 was issued on June 4, 1979, alleging that the operator had violated section 103(f) of the Federal Mine Safety and Health Act of 1977 by failing to compensate a miners' representative who accompanied an inspector on May 14, 1979, with respect to a 5-day "spot" inspection. Inasmuch as the court's decision in the UMWA case cited above holds that a miners' representative is entitled to compensation when he accompanies an inspector during both "spot" and regular inspections, I find that my decision issued on September 11, 1980, in this proceeding erroneously vacated Citation No. 694946 and improperly dismissed the petition for assessment of civil penalty filed in Docket No. VA 80-9.

Section 110(i) of the Act lists six criteria which are required to be considered in determining civil penalties. As to the criterion of the size of the operator's business, the proposed assessment sheet in the official file shows that the operator produces over 8 million tons of coal on an annual basis, thereby supporting a finding that Island Creek Coal Company is a large-sized company and that civil penalties should be in an upper range of magnitude insofar as they are based on the size of the operator's business.

As to the criterion of whether payment of penalties would cause the operator to discontinue in business, there are no facts in the official file pertaining to the operator's financial condition. The former Board of Mine Operations Appeals held in Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), that if an operator fails to present any evidence concerning its financial condition, a judge may presume that payment of penalties will not cause a respondent to discontinue in business. In the absence of any data in the file to support a contrary conclusion, I find that payment of penalties will not cause the operator to discontinue in business.

As to the criterion of whether the operator demonstrated a good-faith effort to achieve rapid compliance after having been cited for a violation of section 103(f), the abatement portion of the citation shows that the operator paid the miner immediately after Citation No. 694946 was issued. Under the assessment formula then applicable, the Assessment Office assigned six negative penalty points, thereby giving the operator proper credit for prompt abatement of the alleged violation.

The pleadings contain no data pertaining to the criterion of the operator's history of previous violations other than showing assignment of four penalty points under that criterion on the proposed assessment sheet in the

official file. In the absence of any other data, I find that a sufficient amount was assigned by the Assessment Office under the criterion of the operator's history of previous violations.

The remaining two criteria of negligence and gravity are discussed in the motion for approval of settlement. The motion states that reduction from the $34 proposed by the Assessment Office to the settlement amount of $15 is warranted because the operator declined to pay the miners' representative so that the operator could institute a legal challenge of the walk-around compensation provisions of section 103(f). The legal challenge did not expose miners to unsafe conditions.

There is legal precedent for assessing low penalties in the circumstances which existed in this proceeding. In Bituminous Coal Operators' Association, Inc. v. Ray Marshall, 82 F.R.D. 350 (D.D.C. 1979), the court noted that it would be necessary for an operator to violate section 103(f) of the Act in order to obtain judicial review of the enforcement procedures which MSHA intended to use with respect to a miner's walk-around rights. The court also recognized that the operator would be subject to a civil penalty for violating the section just to test MSHA's enforcement procedures. The court then stated (82 F.R.D. at 354) that "* * * it would seem improbable that stiff supplemental civil penalties would be imposed where a genuine interpretative question was raised as to section 103(f), a provision which normally is not absolutely vital to human health and safety."

On the basis of the discussion above, I find that the parties' settlement agreement should be approved.

WHEREFORE, it is ordered:

(A) Ordering paragraphs (A) and (B) accompanying the decision issued September 11, 1980, in this proceeding are vacated as having been issued in error.

(B) The notice of contest filed in Docket No. VA 79-74-R is denied and Citation No. 694946 dated June 4, 1979, is reinstated and affirmed.

(C) The petition for assessment of civil penalty filed in Docket No. VA 80-9 is reinstated.

(D) Pursuant to the parties' settlement agreement, Island Creek Coal Company shall, within 30 days from the date of this decision, pay a civil penalty of $15.00 for the violation of section 103(f) alleged in Citation No. 694946 dated June 4, 1979.

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 16 1982

FREDERICK G. BRADLEY, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	
	:	Docket No. WEVA 80-708-D
BELVA COAL COMPANY, Respondent	:	Belva Coal Mine

DECISION AND ORDER

On June 4, 1982, the Commission affirmed my decision finding that Respondent had discriminatorily discharged Complainant in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The case was remanded to recompute the back pay award.

On July 14, 1982, the parties submitted a stipulation showing the gross wages due Complainant, the actual interim earnings, the amounts to be withheld under State and Federal law, the interest on the back pay, Complainant's transportation costs, and the legal fees and expenses due Complainant's counsel.

The parties agreed to waive any rights of appeal and Complainant agrees to waive his right to reinstatement since he had previously refused an offer of Respondent, and has taken other employment.

Having duly considered the matter, I conclude that the stipulation is in Complainant's interest and in the public interest and should be approved.

Therefore, IT IS ORDERED:

1. Respondent shall within 30 days of the date of this decision pay to Complainant the sum of $21,048.58 his net back pay (which includes interest at 12 percent per annum) plus $333 as transportation costs or a total of $21,381.58.

2. Respondent shall within 30 days of the date of this decision pay to Complainant and his attorney the sum of $2,502 as attorneys fees and legal expenses incurred in the prosecution of this proceeding.

3. Complainant waives his right to reinstatement under my order of February 11, 1981. Therefore, Respondent need not reinstate or offer to reinstate Complainant.

4. Upon payment of the above amounts, Complainant shall have no further rights under the Federal Mine Safety Act against Respondent arising out of his discharge on June 11, 1980.

James A. Broderick
James A. Broderick
Administrative Law Judge

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JUL 16 1982

OMAR MINING COMPANY, Contestant	:	Contest of Citation
	:	Docket No. WEVA 81-284-R
v.	:	Citation No. 667436; 2/3/81
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Chesterfield Prep. Plant

DECISION

Appearances: Donald A. Lambert, Esq., Charleston, West Virginia, for the contestant; Leo J. McGinn, Attorney, U.S. Department of Labor, Arlington, Virginia, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a contest filed by the Contestant challenging the legality and propriety of a citation issued by MSHA charging the contestant with a violation of mandatory safety standard 30 C.F.R. 77.216-2 (a)(18). Respondent filed a timely answer in the proceeding asserting that the citation was properly issued, and pursuant to notice duly served on the parties, a hearing was conducted in Charleston, West Virginia, on April 28, 1982, and the parties appeared and participated fully therein.

Applicable Statutory and Regulatory Provisions

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

2. 30 CFR 77.216 and 77.216-2.

3. Commission Rules, 20 CFR 2700.1 et seq.

Issues

The critical issue presented is whether or not the contestant violated cited mandatory safety standard 30 CFR 77.216-2(a)(18), as charged in the modified citation issued in this case. Additional issues raised by the parties are discussed at the appropriate places in this decision.

Discussion

The original section 104(a) citation in this case No. 0667436, was issued on February 3, 1981, and it charged the contestant with a violation of mandatory safety standard 30 CFR 77.216-2(b). The condition or practice described by the inspector as a violation states as follows on the face of the citation (Exh. G-2):

> Company has not submitted the additional information for impoundment 1211 WV 40430-02 which was requested by the District Manager on October 30, 1980.

The citation was subsequently modified on March 10, 1981, for the purpose of amending the original citation to reflect the correct citation to the mandatory standard allegedly violated as 30 CFR 77.216-2(a)(18).

The October 30, 1980, letter referred to in the citation, is from MSHA District Manager Jim Krese (Exh. G-1), and it states as follows:

> It has recently come to our attention that the emergency spillway for the subject impoundment is not of adequate size to meet design criteria. We have evaluated the original design and our analysis indicates that the emergency spillway discharge data used in the flood routing was too high.
>
> It is requested that your company evaluate the emergency spillway design and submit a plan for corrective action.
>
> If you have any questions concerning this matter, or are not in agreement with our conclusion, please contact this office at the earliest possible date.

Mandatory standard 30 CFR 77.216, requires a mine operator to submit design, construction, and maintenance plans for structures which impound water, sediment, or slurry if such an existing or proposed 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.

Mandatory standard section 77.216-2, contains the minimum information required to be filed with MSHA by a mine operator once the initial plan

required by section 77.216 is filed, and included among the kinds of information which must be filed is a general "catch-all" stated in subsection (a)(18) of section 77.216-2, which states as follows:

> (18) Such other information pertaining to the stability of the impoundment and impounding structure which may be required by the District Manager.

The citation issued after the inspector determined that the contestant had not responded to the aforementioned letter from District Manager Krese.

Testimony and evidence adduced by MSHA

MSHA Inspector Stuart H. Shelton, testified that he is a graduate civil engineer, that he is familiar with Omar Mining Company's Robinson Creek Impoundment, and that as part of his MSHA inspection duties has "been looking at this site off and on for close to 10 years" (Tr. 12). Mr. Shelton identified exhibit G-1 as a copy of a letter dated October 30, 1980, signed by MSHA District Manager J. J. Krese, and which was sent to the contestant. He identified exhibit G-2 as copies of the initial citation which he issued on February 3, 1981, and which he subsequently modified on March 10, 1981, citing a violation of 30 CFR 77.216-2(a)(18). He confirmed that he issued the citation because of the failure by the contestant to provide the information requested by the district manager in his letter as required by the cited mandatory standard (Tr. 13-14).

Mr. Shelton stated that he spoke with Mine Superintendent Ray Holbrook and Mr. Karu Ison, the Chief Engineer, and they informed him that they had no intention of responding to the letter. Mr. Shelton believed that a reasonable time had gone by from the date of the letter and the time the citation was issued. He also indicated that the letter was issued after MSHA's engineering staff at the Mt. Hope office conducted a field survey of the impoundment spillway to determine whether it was adequate in terms of capacity. These studies indicated that the spillway capacity was inadequate to meet the design criteria. The instant case is the only one that he is aware of where additional information pursuant to the cited standard was requested from a mine operator (Tr. 14-17).

Mr. Shelton testified that during the time period from October 30, 1980, until February 3, 1981, no response was received by MSHA with regard to the district manager's letter. However, subsequently, on February 27, 1981, the contestant sent a letter to the district manager stating that MSHA had no basis for requesting any additional information concerning the spillway, and enclosing a legal paper explaining its position in the matter (Tr. 18-19; Exh. G-3).

On cross-examination, Inspector Shelton stated that during the past ten years he has inspected the impoundment in question approximately three or four times a year, for a total of some 30 or 40 inspections. During

this time he has issued citations concerning a fire on a slate dump near the impoundment, all of which were corrected. He has never issued any citations concerning the structural integrity of the impoundment until the citation in issue in this case was issued (Tr. 21, 23). He confirmed that he issued the citation because of the contestant's failure to respond to the district manager's letter of October 30, 1980 (Tr. 23).

Mr. Shelton stated that he is familiar with MSHA's annual report and certification requirements of 30 CFR 77.216-4, and the purpose of this requirement is to report any changes in the structure which might affect the stability of the impoundment. He identified copies of three letters dated June 13, 1979, July 23, 1980, and July 30, 1981, from MSHA's district manager to the contestant, all advising the contestant that the information submitted meets the requirements of section 77.216-4 (Tr. 24-27; Exh. C-1 through C-3).

Mr. Shelton stated that the "certification" requirements of section 77.216-4, requires the mine operator's registered engineer to certify that the impoundment was built according to a plan approved by MSHA's district manager, and "it doesn't say anywhere in there that it is safe" (Tr. 28).

With regard to any "approved MSHA plan" for the impoundment structure in question, Mr. Shelton testified in pertinent part as follows (Tr. 28-31):

> Q. All right.
>
> Can we not garner from the approval of the plan that the District Manager must necessarily feel it's a safe structure or he would not approve the plans?
>
> A. You are treading on a very gray area at the moment. Omar Mining Company is one of the sites that does not have a specific approved plan. They -- we accepted it. We did not actually, specifically accept it.
>
> Now, for practical purposes, we did accept it. But, if you are going to say "approved plan", technically, they've never had an approved plan.
>
> Q. Is that because MSHA wasn't in existence or didn't have jurisdiction of these structures when it was started?
>
> A. You want a conclusion?
>
> Q. No.

JUDGE KOUTRAS: Do the best you can with the question.

THE WITNESS: All right.

JUDGE KOUTRAS: If you don't understand the question, he can clarify it.

THE WITNESS: Well, as I understand it, his question is: why was no approved plan ever issued for this site?

When we first got started, we were as inexperienced in all of this as anybody else was and a number of sites slipped through under much the same condition as Omar. They, more or less, submitted information and we approved the plan, or we "accepted" the plan, or however you want to say it. There was no formal procedure for approving or disapproving a plan. That did not come until later.

BY MR. LAMBERT:

Q. In essence, or to sum up this line of questioning, Mr. Shelton, your letter of October 30th, 1980 came about, or was delivered -- let's see: July 23rd -- August, September --

* * *

A. Right.

Q. Ninety-three (93) days later, after we got a certification or our structure, they felt it necessary to ask for additional information.

JUDGE KOUTRAS: Mr. Krese did?

MR. LAMBERT: Mr. Krese did, right.

THE WITNESS: Well, this comes back to the question which was never really decided as to what 77.216.4 addresses. As I understand it, it basically addresses changes in the structure.

BY MR. LAMBERT:

Q. And any other aspect of the impounding structure affecting its stability -- I'm asking you: would the District Manager give us a -- I'm calling it a "certification" of our structure if he felt the structural integrity was in doubt?

A. The District Manager approved the plan as it came out at the time.

Q. And, even after you issued the citation notice, June 30, 1981, you again approved our plan without giving us any information as to any structural deficiency; is that correct?

A. As far as I see that I have anything to do with it, the two are not related. The two are different questions. They are different sections of the law.

Q. You, in response to a question by Mr. McGinn -- you said the basis of the letter, as far as you are concerned, was based on hearsay testimony.

A. I said that I don't know for a fact what happened, That's correct. I was not involved in it.

Q. And you were simply instructed to issue a notice; is that correct?

A. Issued it because the paper had not been -- the response had not been submitted by Omar Mining Company.

With regard to the specific impoundment design criteria information that the district manager sought to obtain from the contestant in this case, Mr. Shelton responded as follows (Tr. 31-33):

Q. Did you ever inform Mr. Ison or Mr. Holbrook or the company of what the standard criteria you wanted them to respond to -- in other words, were they to respond to a probable maximum floor or a hundred-year flood or to standard engineering practices, or what were they to respond to?

A. The company itself has admitted that the proper -- that there are structures that are downstream of the impoundment. That is beyond any dispute. The offices are below the impoundment. There are several communities below the impoundment and the currently accepted practice where loss of life is possible is to use the probable maximum precipitation as the criteria.

Q. Has the District Manager informed this company, or any other company of that change of criteria from what is contained in 77.216?

A. That is the criteria; so far as I'm aware, there is no dam in the sub-district that I work that has a lesser criteria than the PMP. This is the criteria that has always been accepted ever since about 1974 when we finally got organized.

Q. Since when, Mr. Shelton?

A. It was about 1974 or thereabouts when we started using the probable maximum precipitation for any impoundment which has the possibility of loss of life if it failed.

Q. What is the PMP criteria?

A. The Probable Maximum Precipitation is a criteria that has evolved based on historical records and also assuming the worst possible set of conditions. If you ask me exactly how it is evolved, I would have to say: I do not know. It is figured by the U.S. Weather Bureau. They put out a publication called TP-4 which shows what it is for each area of the country. For this area of the country, it is 27 inches in a six-hour period. Excuse me, that's been corrected a year or so -- a couple of years ago -- go 28 inches. The previous was 27 but, about two years ago, they changed it to 28 inches in six hours.

Q. What was the design criteria on the storm in 1974 except the criterion on the enegineers -- hydrolics and so forth?

A. So far as I'm aware, it has always been the probable maximum precipitation, among experienced hydrologists, where loss of life is possible. We did not pick these figures out of a hat. It's what the Corps of Engineers uses. It's what the Bureau of Reclamation uses, and those are probably two of the biggest dam-building groups in the United States.

Q. They are the ones that built Teton?

A. Yes.

Q. Subsequent to the notice of the filing of the amendment and so forth, Mr. Shelton, have you had conversations with the District Manager as to what he feels is reasonable required of Omar in the way of design data?

A. No, I have not.

Contestant's testimony

Karu Ison, contestant's Chief engineer for the past eleven years, testified that he is acquainted with the impoundment in question and has been the Chief engineer beginning with its design and construction. The company hired a consulting engineering firm to do the initial dam design after a permit was obtained from the West Virginia Public Service Commission. Construction of the impoundment was completed sometime in 1974, and it was initially inspected by the Bureau of Land Management. Correspondence with MSHA after the plans were filed began either in 1973

or 1974, and MSHA inspected the site. In addition, "as-built" dam drawings and construction maps were submitted to MSHA, and they made certain recommendations concerning the emergency spillway. In his opinion, the spillway was designed and built according to MSHA's recommendations (Tr. 51-55).

Mr. Ison confirmed that during the period 1974 until 1980, the company has been required to submit to MSHA certifications from a registered professional engineer as to the physical integrity of the impoundment structure, and that MSHA has accepted these without making any recommendations for changes. The 1980 certification was submitted, and MSHA did not question the integrity of the structure or the emergency spillway, nor has MSHA ever told him what information was required after the district manager's letter in question (Tr. 55-56). He also indicated that he does not really know how to respond to the letter, but he understands that MSHA was asking the company to enlarge the spillway. However, he has no competent engineering advice from his consultants indicating that the spillway is inadequate. He confirmed that the response finally made by the company taking exception to the district manager's judgment was the only answer he could make. The company believes that since it hired competent engineers to design the impoundment, "it is way late in the game to try to make changes now" (Tr. 57).

On cross-examination, Mr. Ison confirmed that if the regulations concerning the approval of dams went into effect on September 9, 1972, all correspondence between the company and MSHA would have taken place prior to that date (Tr. 57). He also confirmed that he disagreed with the contents of the district manager's letter of October 30, 1980, and did not express his disagreement in response to that letter, but did so later after the citation was issued (Tr. 58).

In response to further questions, Mr. Ison stated that the consulting firm of L. Robert Kimble Associates was selected by the company from a list of such firms recommended either by MSHA or another Federal agency. After the initial plans were submitted, MSHA and the Bureau of Land Management conducted a field inspection at the site and issued a report and recommendations. After the spillway was enlarged and relocated according to these recommendations, it was approved by MSHA as the "as-built structure" (Tr. 60-61). This approval was sometime in 1974 after the dam was built (Tr. 62).

Contestant's arguments

In its post-hearing "statement of facts", contestant states that the impoundment in question (#1211Wv40430-02), was constructed during 1973 and 1974, was essentially completed in 1974, and is used as an alternate slurry disposal area. Contestant asserts that at the time of the design-construction phase of this structure, such dams were under the jurisdiction of the West Virginia Public Service Commission. Subsequently the United States Bureau of Land Management and three other

agencies became involved in the permitting of such structures. In 1973 MSHA became involved, requiring submission of data as set out in § 77.216, 30 C.F.R. At this stage, the structure was, for all practical purposes, a completed structure, and that under § 77.216 a plan for the continued use of an existing structure would be required before May 1, 1976. Prior to this date, MSHA was supplied "as built" drawings and these were evaluated by the "Denver Technical Support Group" of MSHA. After a review of the "as built" drawings MSHA required an alteration to the spillway design and after a review by the company's engineering consultants, a revised plan was submitted for MSHA review.

Contestant maintains that after MSHA review, the spillway was altered in that this portion of the structure was relocated and expanded according to the ostensibly approved plans. This necessitated the expenditure of a considerable amount of time and money but the result was a wider, deeper and more stable structure. The structure is equipped with a under-flow drain of 48" x 48" totaling 1700 feet in length. A Decant system, to allow water to flow out of the impoundment into the underflow system, is in place and apparently is functioning as designed. The spillway, in place for approximately 7 years, has never received water and remains "as built" after the required MSHA alterations referred to above.

Contestant submits that all of the plans required by section 77.216-2, have been submitted to MSHA and are on file at the District Manager's Office in Mount Hope, West Virginia. In addition, contestant states that the required annual certifications, as required by section 77.216-2(17), have been filed by the contestant. I take note of the fact that the annual certifications for the past three years are a matter of record in this proceeding (Exhs. C-1, C-2, and C-3). In addition, by agreement of the parties, additional exchanges of correspondence during the time period November 14, 1973, through April 24, 1979, concerning the structure in question are a part of the record by way of "background", and the parties have been furnished copies of these documents.

With regard to the October 30, 1980, letter in question, contestant's Notice of Contest filed March 2, 1981, asserts that the letter was based on receipt by MSHA of a report compiled by the State of West Virginia Department of Natural Resources, Coal Refuse and Dam Control Section, which report was prepared under a contract with the U.S. Corps of Engineers under the National Dam Inspection Act. Contestant points out that the letter lacks any reference to a specific "design criteria" relied on by the district manager to support the "presumptive" conclusion that the energency spillway "is not of adequate size", and that "corrective action" is necessary. Contestant states that upon receipt of the letter, it informed Inspector Sheltom that it took exception to the district manager's conclusion, and that contestant was of the opinion that the structure was safe and that its design was in accordance with current prudent engineering practices as required by section 77.216-2(17).

Contestant views the critical issue in this case to be as follows:

> Does the citation, including the District Manager's letter of October 30, 1980, contain sufficient specificity to adequately inform the Contestant of the nature of the supposed violation?
>
> - Phrased in another fashion -
>
> Is it a violation of the law on the part of the company to fail to answer or reply to a request for additional information made by the District Manager when the request for such information is made in presumptive, pre-judgment terms applying an unknown standard or criteria?

Citing the case of Secretary of Labor v. Walker Stone Company, 1 MSHC 2262, decided by Judge Michels on December 10, 1979, contestant argues that the instant citation should be vacated because it is vague and ambiguous, and does not give sufficient notice as to the exact nature of the violation. In Walker Stone, the inspector cited a violation of 30 CFR 56.12-35, which requires that all metal enclosing or encasing electrical circuits be grounded or provided with adequate protection. In vacating the citation, Judge Michels ruled that "If the citation is based on an improper grounding, it should specify what standards set out in the Code was violated so that the company will know exactly what it is being charged with" (emphasis added).

Comparing the Walker Stone decision with the case at hand, contestant asserts that the citation issued by Inspector Shelton would not stand the test of specificity in that contestant was not informed by the district manager, the inspector, nor through the citation issued as to the standard or criteria that has been supposedly violated. Further, contestant states that to require the contestant to speculate or guess as to the standard or design criteria of impoundments used by the district manager to determine that the impoundment spillway "is not of adequate size to meet design criteria", is unthinkable in any due process sense, and that the attendant expenditure of resources by the contestant and the likelihood of non-acceptance of the conclusions by the district manager creates an impossible predicament for this Contestant.

Another point made by the contestant as to whether the inspector was justified in issuing the citation is the fact that no time or deadline was set out in the district manager's letter, nor does § 77-216(2)(a)(18), place a time limit on a response date by contestant. Even assuming that the citation is justified under any conceivable set of existing conditions, contestant concludes that it was premature.

Concluding its arguments, contestant suggests that MSHA's district manager should be required to inform the contestant as to the "design criteria" he used to make the stated determination enunciated in his letter.

At this point, the contestant could then evaluate its plan and design, and either take exception to the district manager's findings, or challenge the criteria used as being outside of or repugnant to "prudent engineering practice". Contestant concludes further that it would appear that the district manager, after reading or being informed of the contents of what, for purposes of this case, amounts to a "phantom report" from an agency not a party to these proceedings, adopted a design criteria that is outside the laws, regulations and standards that he is charged to uphold and administer. Should this be the case, contestant strongly suggests that the district manager be required to state and publish that he has, in fact, adopted such criteria, thus allowing the contestant an opportunity to either accept such design criteria and to properly evaluate its impounding structure in this light, or to take exception to the criteria and offer evidence of what it considers the criteria to be, consistant with prudent engineering practices.

Respondent MSHA's position

MSHA did not file any post-hearing arguments in this case. However, during the course of the hearing, its position is that the citation in this case was validly issued because of the contestant's noncompliance with the reporting requirements of the cited standard. In short, MSHA's position is that by failing to respond to the district manager's letter, contestant violated the cited standard, and the citation was warranted (Tr. 70). In addition, MSHA's counsel indicated that notwithstanding the merits of its arguments concerning the design of the spillway in question, the fact is that the contestant opted not to respond to the district manager's letter, even to record its disagreement, and under these circumstances, a violation of the cited standard has occurred (Tr. 73). MSHA's counsel concedes that the citation has presented the district manager with an available vehicle to initiate further enforcement action to correct certain conditions concerning the impoundment in question (Tr. 75). Since the citation remains unabated, I assume that what counsel has in mind is that MSHA can issue a withdrawal order for contestant's failure to abate the cited violation.

MSHA's counsel also indicated that pursuant to section 77.216, the mine operator initially formulates a plan and design for the construction and maintenance of an impoundment and submits it to MSHA for evaluation (Tr. 65). However, prior to the promulgation of this section, another mandatory standard required that all impoundment structures which can impound water, sediment, or slurry shall be of "substantial construction". The submission of "as-built" plans were required separately under this general "substantial construction" standard, but subsequently, detailed submissions for such impoundments were required to be filed with MSHA pursuant to section 77.216 (Tr. 65-66).

Inspector Shelton indicated that pursuant to the present impoundment criteria considered by MSHA, the impoundment in question must adequately control any designed storm. The mine operator has discretion whether

to do this by a "de-cap pipe" which permits water to flow automatically, or by means of a spillway to control the maximum water level. Another alternative is to simply store the water and drain it out during a "ten-day draw-down period" (Tr. 66-67).

Mr. Ison indicated that the impoundment in question has never used the emergency spillway, and that it has a 48-inch pipe under the entire structure to carry away the normal water stream, as well as a "decant" system to drain any water away. He also indicated that there has never been a need to release any water through the emergency spillway, and that the 1700 feet of 48-inch pipe was designed as part of the emergency spillway (Tr. 68). Mr. Ison did not believe that anything has occurred since October 30, 1980, that would cause the district manager to change his position with regard to the spillway design (Tr. 69).

Findings and Conclusions

Fact of violation

In this case the contestant is charged with a violation of mandatory standard section 77.216-2(a)(18), because of an asserted failure to respond to a letter of October 30, 1980, from MSHA's District Manager Krese. In that letter, the district manager informed the contestant that the emergency spillway for the impoundment in question was not of adequate size to meet certain design criteria. The letter does not inform the contestant where the information supporting the "inadequate size" statement came from, but based on an "evaluation" and "analysis", apparently conducted by the district manager's office, he concluded that corrective action was necessary, and he requested the contestant to evaluate the spillway design and to submit a plan for corrective action.

The general regulatory scheme found under section 77.216, requires a mine operator to submit certain plans for the design, construction, and maintenance of impoundments if such impoundments impound water, sediment, or slurry under the conditions stated under section 77.216(a)(1) or (2), or the impoundment presents a hazard to miners as determined by the District Manger. Section 77.216-2(a) provides guidelines for the minimum information required to be filed by an operator when he submits the plan specified in section 77.216, and the cited subsection, 77.216-2(a)(18) requires an operator to submit "/s/uch other information pertaining to the stability of the impoundment and impounding structure which may be required by the District Manager". The citation issued when the inspector discovered that the contestant had not responded to the letter of October 30, 1980.

Contestant's defense is based on an argument that the District Manager has already made a judgment that the impoundment spillway in question is of inadequate design, that it poses a hazard to miners, and that corrective action is necessary. Since the contestant obviously disagrees with these conclusions, contestant maintains that before it can be charged with a violation, it must first be informed of the specific

design criteria which the District Manager has in mind, and must be given an opportunity to refute the contention that the spillway is unsafe. Citing the inspector's testimony that there are no published regulatory standards for the design and construction of impoundments, contestant concludes that it is placed in the untenable position of accepting the District Manager's unchallenged judgment that the spillway needs to be redesigned to correct certain uncommunicated defects which he (the manager) believes makes the spillway unsafe.

The record in this case reflects that since the original construction of the impoundment sometime in 1973 or 1974, several State and Federal agencies were involved in policing the construction and maintenance of the impoundment in question. Subsequent to this time, from 1973 to the present, MSHA and the contestant have exchanged correspondence concerning the impoundment, and contestant has filed its annual reports and certifications as required, and until this controversy arose, the impoundment apparently met all of MSHA's requirements.

During the course of the hearing in this case, MSHA's counsel asserted that the contestant chose not to file any response to the letter of October 30, 1980, even to record its disagreement with the District Manager's conclusions. I venture a guess that had contestant simply voiced its objections, it would still be cited because the letter specifically requests the filing of a plan for corrective action. In any event, the inspector testified that contestant advised him that it did not intend to respond to the letter, and it seems clear to me that the letter, on its face, concludes that the spillway is unsafe and that something must be done to correct this condition. I find that the method used to achieve compliance in this case to be somewhat arbitrary, and I agree with the contestant's arguments in support of its position in this matter. As a matter of fact, the inspector indicated that this is the first case that he is aware of where the standard in question was used to elicit information from an operator.

I conclude and find that the letter of October 30, 1980, fails to advise the contestant of the specific inadequacies in its spillway design, that it fails to adequately inform the contestant as to the basis for the District Manager's unsupported conclusion that the spillway presents a hazard, and that it fails to support any conclusion that corrective action needs to be taken. Further, it seems to me that if MSHA believes the spillway in question is unsafe and fails to meet design criteria (whatever they may be), then MSHA should address this question head-on rather than relying on some vague and rather obscure regulatory requirement for the filing of "such other information * * which may be required". This is particularly true in a case such as this where the citation remains unabated. Only in this way will the contestant have a fair and open opportunity to chellenge and rebut the conclusions that its spillway design is anadequate and presents a hazard.

In view of the foregoing findings and conclusions, the citation, as modified, IS VACATED, and this case IS DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 16 1982

UNITED MINE WORKERS OF AMERICA, ON BEHALF OF BILLY DALE WISE, Complainants	:	Complaint of Discrimination
	:	Docket No. WEVA 82-38-D
v.	:	Ireland Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Thomas Myers, Esquire, United Mine Workers of America, Shadyside, Ohio, for the complainants; Jerry F. Palmer, Esquire, Pittsburgh, Pennsylvania, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This matter concerns a discrimination complaint filed by the complainants against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Complainant Wise claims that he was unlawfully discriminated against and suspended from his job for three days by the respondent for engaging in activity protected under section 105(c)(1) of the Act. Respondent filed a timely answer denying any discrimination and asserting that complainant Wise was suspended because he violated State and Federal mine safety laws. A hearing was convened on March 16, 1982, in Pittsburgh, Pennsylvania, and the parties appeared and participated therein.

Issue Presented

The principal issue presented in this case is whether Mr. Wise's suspension was prompted by protected activity under the Act. Additional issues raised are discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 20 CFR 2700.1, et seq.

The discrimination complaint filed in this case states the following circumstances on which the alleged act of discrimination is based:

1. At all times relevant to this proceeding Complainant Billy Dale Wise was a member of the Mine Health and Safety Committee. In connection with his duties as a member of the Mine Health and Safety Committee, Mr. Wise regularly inspects areas of the mine and reports unsafe or unhealthy conditions to the employer and to the appropriate federal and state agencies.

2. On or about June 30, 1981, Complainant Wise reported a condition involving an improperly functioning belt feeder to the West Virginia Department of Mines. After investigating the complaint, the State Department of Mines assessed a personal fine against Mine Superintendent Mr. Omear.

3. On or about July 2, 1981, Complainant Wise filed a complaint with the State Department of Mines, which alleged that miners were permitted to enter an area of the mine prior to such area being declared safe by the fireboss. After investigating Mr. Wise's complaint, the West Virginia Department of Mines assessed a personal fine against Mine Superintendent Mr. Omear.

4. In the course of conducting an inspection of the mine on Friday, July 10, 1981, Mr. Wise and another member of the Safety Committee, Mr. Leo O'Connor, observed that parts of the 1 North submain track entry contained inadequate roof support, a condition which they believed posed a serious danger to the miners at the Ireland Mine.

5. After observing the above-described dangerous condition, Mr. Wise called Mr. Omear, the Superintendent of the Ireland Mine, and informed him that the area should be dangered off. When Mr. Omear disputed Mr. Wise's evaluation of the condition of the track entry, Mr. Wise requested that MSHA Inspectors Moffitt and Tyston be called to the affected area to evaluate the condition. Mr. Omear thereupon indicated that such action would not be necessary and that he would assign men to correct the situation.

6. Approximately two hours later, the Safety Committee returned to the affected area to check on the progress being made toward correcting the condition. While he was inspecting the area in question and questioning the workers regarding the adequacy of the temporary supports, Mr. Wise was ordered by Mr. Omear to leave the area. After assuring himself that the miners assigned to correct the dangerous condition were proceeding to do so in a safe manner, Mr. Wise left the dangered-off area.

7. Later that day, Mr. Omear informed Complainant Wise that his action in remaining in the dangered-off area constituted insubordination and that he would be disciplined for this activity. The following Tuesday, July 14, 1981, Complainant Wise was suspended for three days.

On July 15, 1981, Mr. Wise filed a complaint of discrimination with MSHA, and on September 28, 1981, he received written notification of the Secretary's determination that no violation had occurred. The instant complaint followed, and complainants maintain that Mr. Wise's suspension resulted directly from activity protected under the Act and that his suspension was, therefore, a violation of section 105(c).

Respondent's answer admits to the following:

1. Billy Dale Wise is employed at Consolidation Coal Company's Ireland Mine in Moundsville, West Virginia, and is a miner as defined in section 3(g) of the Act.

2. At all relevant time herein mentioned, Respondent Consolidation Coal Company did business and operated the Ireland Mine in the production of coal and therefore was an "operator" as defined in section 3(d) of the Act.

3. The subject Ireland Mine, located in or near Moundsville, West Virginia, is a "mine" as defined in section 3(h)(1) of the Act, the products of which enter or affect commerce.

4. At all times relevant to this proceeding Complainant Billy Dale Wise was a member of the Mine Health and Safety Committee. In connection with his duties as a member of the Mine Health and Safety Committee, Mr. Wise regularly inspects areas of the mine and reports unsafe or unhealthy conditions to the employer and to the appropriate federal and state agencies.

Testimony and evidence adduced by the complainants

Billy Dale Wise testified that he has been employed at the mine for over 15 years and has been a member of the safety committee for some 13 years. He is familiar with the provisions of the 1981 Bituminous wage agreement as well as his rights and responsibilities under the applicable state and Federal mine safety laws. On July 10, 1981, sometime after 10:00 a.m. he and two members of the safety committee conducted a regular safety inspection of the mine and while in the One-North section observed three overcasts which were in need of attention. After discussing

the situation with shift foreman James Siburt, mine superintendent Robert Omear was called to the scene. After inspecting the area further, Mr. Omear agreed that the overcasts needed attention, and Mr. Wise advised him that work should proceed immediately to correct the conditions. Mr. Wise observed that several roof bolts were not tied into the roof, the overcasts were loaded with stone, and wire mesh was hanging down. Although Mr. Wise told Mr. Omear that the conditions did not present an imminent danger, he suggested to Mr. Omear that two Federal inspectors who were in the mine could be brought to the area to inspect the overcasts, Mr. Omear stated that this would not be necessary and assured Mr. Wise that the conditions would be immediately corrected. Mr. Siburt and Mr. Omear hung "Danger" tags over the overcast area, Mr. Wise left the area to inspect another mine section, and Mr. Omear proceeded to make preparations to correct the conditions.

Sometime between 1:30 and 2:00 p.m. on July 10, 1981, Mr. Wise and safety committeeman Leo Connor returned to the overcast areas. A man-door had been erected near the first overcast, and although Mr. Wise could observe two men working outby the door and from his position outby the danger tags, he could not observe the men who were working behind the door and a wall. He and Mr. Connor proceeded beyond the danger tags and Mr. Wise looked in the man door and asked one of the workmen, Kenneth Simmons, about how the work was progressing and whether they "were making the area safe." Mr. Simmons advised Mr. Wise that they were "making it safe as we go".

Mr. Wise stated that after leaving the overcast area and going outside at approximately 2:30 p.m. Mr. Omear advised him that he was "wrong" in going past the danger sign at the overcast area and that he was going to discipline him but did not know exactly what course of action he would take. The following Monday, July 13, Mr. Wise and Mr. Omear discussed the matter further but no decision was made. On Tuesday, July 14, they discussed it again, and later that evening Mr. Wise was summoned to Mr. Omear's office and he was advised that he would be suspended for three days for insubordination for going beyond the danger tag. Mr. Omear then gave him a letter of suspension (exhibit C-1), confirming his suspension in writing.

Mr. Wise testified that after receiving the letter of suspension he took the next two days off, and since the mine was on strike on Friday he consulted with his union as to whether he should count that day as a suspension day. He was advised not to, and therefore stayed off work the next Monday and reported to work on Tuesday. He subsequently filed a grievance contesting his suspension, and the results of his arbitration hearing held on October 22, 1981, were made a part of the record (exhibit C-2).

Mr. Wise stated that he was not aware of any company policy or procedure concerning a miner crossing a posted danger tag. He indicated that he has in the past crossed beyond such posted signs while conducting regular inspections in his safety committeemen's capacity and that his July 14 suspension was his first for doing so.

Regarding prior safety complaints, Mr. Wise confirmed that on June 29, 1981, he observed pipe being carried on a personnel carrier "jeep" and advised Mr. Omear that it was a safety violation. Mr. Omear disagreed with him, and Mr. Wise reported the incident to a state of West Virginia mine inspector that same day and requested an investigation. A second incident occurred on June 30, 1981, when Mr. Omear summoned him to a belt feeder located in the 6-D, 2-South supply track section where a mechanic was performing some work. Mr. Wise observed a protective cover which had been removed from the belt, and he also observed that the feeder had been "pumped out" while the belt was running. He advised Mr. Omear that this was a violation and then reported it to the state mine inspector and requested an investigation. A third incident occurred on July 2, 1981, when Mr. Wise was informed that two men went into the mine at 3 p.m. before it was firebossed. He learned that Mr. Omear had sent them in and he discussed the matter the next morning with Mr. Omear and advised him that sending men into the mine before it was fire-bossed was a safety violation. Mr. Omear stated that he would send men into the mine "anytime he felt", and Mr. Wise then filed a complaint with state mine inspector Arthur Price (Tr. 8-59).

On cross-examination, Mr. Wise confirmed that he is aware of the fact that the respondent has taken prior disciplinary action against employees. He also confirmed that he was aware that employee Rex Whipkey had received a five day suspension, but had no knowledge concerning prior disciplinary actions taken against employees Roger King, Joe D. Marciano, and Alan Goody. He also testified that he has in the past observed danger signs posted in the mine and that did not cross beyond them. He also indicated that by crossing beyond such danger signs he exposes himself to the hazards which may be present in the danger areas.

Mr. Wise stated that when he first arrived at the overcast areas which had been posted with danger signs he could not observe the men working behind the man door from where he was standing outby the danger signs. Although he did not disagree with the corrective action being taken by Mr. Omear with regard to the roof conditions, he proceeded beyond the danger signs in order to inspect the area and work being done beyond the danger signs in order to inspect the area and work being done behind the man-door and to ascertain from the men working there as to the progress of the work. He indicated further that Mr. Siburt said nothing to him about crossing beyond the danger sign, and although Mr. Connor had also passed beyond it nothing was said to him. After crossing the sign Mr. Wise leaned in through the man door and discussed the work going on with Mr. Simmons. After determining that the area was "being made safe" he left the area. He estimated that he was in the "danger" area for about five minutes and he reiterated that he crossed the danger area because he believes he has a right to do in his capacity as a safety committman in order to check any area of the mine where men are working (Tr. 59-77).

Kenneth P. Simmons, employed by the respondent as a pumper, testified that on July 10, 1981, he was instructed to take some cribbing material to the overcast area in question, and when he arrived there Mr. Omear

instructed him to proceed with the installation of roof cribbing in the first overcast location. Mr. Simmons observed that construction work was proceeding to complete a man door in the side of the overcast and he also observed a roof bolter in the area. The car carrying the cribbing material was parked near the man door beyond the danger signs which had been posted. Mr. Omear showed him where to install the cribs. Mr. Simmons and another miner were installing jacks and cribs inby the man door, and two other miners were outby passing the cribbing material through the door to them.

Mr. Simmons stated that at approximately 2:30 or 3:00 p.m., after completing the installation of two cribs and while working on the third one he heard some conversation outside the door. Mr. Wise then looked inside and asked him how the work was progressing. Mr. Simmons showed Mr. Wise where the jacks and cribs were installed and he heard Mr. Omear yelling at Mr. Wise not to go beyond the posted danger signs. Mr. Omear was positioned oubty the danger signs approximately 20 feet from the door. Mr. Simmons stated that he asked Mr. Omear "if it was not safe for Mr. Wise to be there, what about me." Mr. Omear told him to "shut up and keep working". He continued working until 3:25 p.m. when he left the area at the end of the shift (Tr. 99-108).

On cross-examination, Mr. Simmons confirmed that while Mr. Wise did not pass through the man door where he was working, he did lean in to observe the area and to inquire how the work was progressing. He also confirmed that Mr. Omear also looked in behind the man door after he had completed his work on the roof cribbing (Tr. 109-110).

Leo Conner testified that he has been employed by the respondent for approximately 15 years and is the president of the local union as well as a member of the safety committee. He confirmed that he was with Mr. Wise on July 10, 1981, during a post-vacation mine inspection when they observed an overcast area along the haulage track which needed attention. They passed through a man door for a closer inspection of one of the overcasts and observed that it needed roof support. The conditions were called to the attention of shift foreman James Siburt and Mr. Omear was then summoned to the scene. Although all of them agreed that the conditions did not present an imminent danger, Mr. Conner and Mr. Wise informed Mr. Omear that the overcast conditions required immediate attention and Mr. Omear agreed to take care of the situation. Mr. Conner and Mr. Wise then left to visit another area of the mine.

Mr. Conner stated that at approximately 2 or 2:30 p.m. on July 10, he and Mr. Wise returned to the overcast area. Mr. Conner had a hand saw with him and Mr. Siburt had asked him to bring it with him. Upon their return to the area Mr. Omear was there, and Mr. Simmons and several others were working on the roof crib installation. Mr. Conner proceeded beyond the danger sign, and as he was returning Mr. Wise walked inby the danger sign and proceeded to the man door to inspect the work which

was going on. Mr. Conner overheard Mr. Omear comment "How easy it is to forget", but he said nothing to Mr. Conner about passing beyond the danger sign. Mr. Conner later learned that Mr. Omear would take disciplinary action against Mr. Wise for passing beyond the danger sign.

Mr. Conner testified that he had no knowledge of any company policy regarding employees passing beyond a posted danger sign and never saw such a policy posted. He confirmed that weekly safety meetings were held between the safety committee and mine management, but was not aware that any policy concerning danger signs was discussed. He confirmed that he had previously crossed beyond danger signs while accompanied by mine inspectors or company management (Tr. 125-139).

On cross-examination, Mr. Conner stated that he was not aware that any employee at the Ireland Mine had ever been disciplined for violating safety regulations. He also confirmed that when he passed beyond posted danger signs in the past he was engaged in walkaround inspections with state or Federal Mine inspectors or inspecting the mine face areas. He also confirmed that when he passed beyond the signs in the company of management personnel he was authorized by management to do so. In the instant case, since he was carrying a hand saw to be given to the crew installing roof cribs he believed he was authorized to go beyond the posted danger sign and Mr. Omear said nothing to him.

Mr. Conner stated that he believed he and Mr. Wise had the authority to go beyond the danger sign in their capacity as safety committmen in order to check on the men working in the area, and he did not believe he needed Mr. Omear's authorization to do so. Mr. Conner confirmed that he commented to Mr. Omear that "you can't get me", and he explained his comment by indicating that since he had brought in a hand saw as directed he believed he had permission from management to pass beyond the posted danger sign (Tr. 140-171).

Arthur Price, State of West Virginia Mine Inspector, confirmed the fact that he investigated the complaints concerning three alleged violations of state mine laws which occurred at the mine on June 29 and 30, and July 2, 1981. The complaints concerned the matter of hauling pipe on a personnel carrier, a belt feeder safety switch being by-passed, and men entering the mine before it was fire-bossed. He explained the procedures he followed in conducting the investigations and confirmed that he interviewed Mr. Omear during the course of his investigations. He also confirmed that he recommended and proposed that individual personal assessment fines be issued to Mr. Omear for at least two of the citations and identified two reports which he prepared concerning the matter (exhibits C-3 and C-4; Tr. 172-191).

On cross-examination, Mr. Price referred to sections of the West Virginia mining laws which set out the prohibitions against persons going beyond posted danger boards, specifically sections 22.114 and 22.2-21.

Mr. Price also testified that mining companies should make available to miners copies of the applicable laws and regulations and he confirmed that he was once employed by the respondent at the Ireland Mine but quit to go to work with the state as a mining inspector. He confirmed that Mr. Omear did contact him to inquire whether it was legal for a person to cross beyond a posted danger sign and he advised Mr. Omear that it would depend on the circumstances presented but gave him no definitive answer (Tr. 191-192).

Testimony and Evidence Adduced by the Respondent

Robert E. Omear, testified that he is the general superintendent at the Luveridge Mine, but that in July 1981, he was the underground superintendent at the Ireland Mine. He discussed the general company policy concerning employee safety violations, and indicated that depending on the circumstances or facts of a given case, employees may be reprimanded orally or in writing, or they could be discharged. The policy was enforced while he was superintendent at the Ireland Mine, and during that time he and members of the mine safety committee had weekly meetings concerning safety matters of mutual concern. He confirmed that during his tenure as the underground mine superintendent, Mr. Wise was a member of the safety committee, and he worked with him for a period of some eight years on matters dealing with mine safety. During this time he has discussed the matter of union safety committeemen going beyond "danger boards" and has advised them of his belief that they had no right to go beyond such signs (Tr. 213-216).

Mr. Omear testified that on July 10, 1981, he met with Mr. Wise, Mr. Conner, and foreman Siburt underground for the purpose of inspecting several overcasts which Mr. Wise and Mr. Conner believed were in need of some work. He agreed that the work needed to be done, and men and materials were called in to install some cribs and a man door. A danger sign was hung on the first rail of the overcast and Mr. Wise and Mr. Conner left to continue on their inspection rounds. Mr. Omear remained in the area to instruct the men as to where the work was to be performed and after calling over the radio for a saw to be brought in he left to have a cup of coffee which was on the motor car used by one of the miners performing the work (Tr. 217-222).

Mr. Omear testified that while he was having coffee Mr. Wise and Mr. Conner arrived on a jeep and parked it some 45 feet from the area where the danger board had been posted. Mr. Conner was carrying the saw which he (Omear) asked to be brought in, and both Mr. Wise and Mr. Conner proceeded to walk beyond the danger sign. Mr. Omear then yelled at them and told them that they should not be beyond the danger sign. Mr. Conner left the saw in the area and immediately came out, but Mr. Wise stayed in for about six minutes and refused to come out. After he came out, Mr. Omear advised Mr. Wise that he was violating company policy as well as state and federal laws by walking beyond the danger sign and that possible disciplinary action would be taken against him. Mr. Wise advised Mr. Omear that as long as union people were working on the overcast he would stay in until he got ready to come out (Tr. 223-224).

Mr. Omear confirmed that Mr. Wise did not have his permission to go beyond the danger board to check on the work which was in progress. Had he asked, permission would have been granted and Mr. Omear would have gone in with Mr. Wise to show him what was being done and to insure that he was safe (Tr. 225). Upon leaving the mine, Mr. Omear telephoned state mine inspector Price who agreed that state law may have been violated. Mr. Omear then contacted higher mine management to determine the course of further action to be taken against Mr. Wise, and it was decided that Mr. Wise should be suspended for three days for going beyond the danger sign. Prior to this incident, Mr. Omear had never observed a safety committeeman go beyond a danger sign unless he accompanied them (Tr. 226-229).

On cross-examination, Mr. Omear stated that the prohibition against walking beyond a danger sign has been a policy at the Ireland for as long as he has been there, and while the policy is not in writing "it is a policy that we've lived with" (Tr. 230). Such policy is sometimes communicated verbally at meetings and sometimes its posted (Tr. 231). At one time all company policies dealing with safety matters were in a book published by the company but he has not seen it for the past five or six years (Tr. 233). With specific reference to crossing beyond a danger sign, Mr. Omear stated that while it is not in writing every coal miner knows that a danger board "means exactly what it says, you do not go beyond a danger board" (Tr. 234). This policy is generally communicated to the work force at weekly safety meetings and during annual retraining (Tr. 235).

Mr. Omear stated that the men performing the work in the overcast area were under his supervision, and that after he determined that the roof cribs were being installed in the right place for roof support and that the men understood his instructions, he left to use the radio to order a saw and to have a cup of coffee (Tr. 238). Mr. Omear confirmed that he told Mr. Wise three times to come out of the area where the work was being done, and he also confirmed that Mr. Conner came out immediately after leaving the saw and that Mr. Conner commented "you can't get me I was delivering a saw" (Tr. 241). He did not see Mr. Conner lean through the man door to observe the work going on and he indicated that Mr. Conner heeded the first warning that he gave to Mr. Wise and came out immediately without arguing the point (Tr. 242).

Mr. Omear stated that he and other members of mine management discussed the incident in question and determined that Mr. Wise had violated federal or state mining laws by crossing beyond the danger board in question, but he could not specify the specific section of the law he had in mind (Tr. 248). Mr. Omear could not state when the policy in question was last discussed with the safety committee, and he assumed everyone was aware of the policy. He also confirmed a past incident involving safety committeeman Bob Carney who reportedly passed under a danger board while in the company of a federal inspector who was conducting a mine inspection. Mr. Carney was not disciplined and he did not repeat the offense again (Tr. 252).

In response to bench questions, Mr. Omear stated that company policy dealing with employee sanctions for violations of safety rules is posted on the mine bulletin board and it is in the form of general work rules

(Tr. 255, 258). Mr. Omear confirmed that at the time he ordered Mr. Wise not to pass beyond the danger board, and during the time disciplinary action was being considered against Mr. Wise, he was aware of the fact that Mr. Wise had reported mine violations and made safety complaints to state mine inspectors. However, he denied that he was influenced by this in taking the action which was taken against Mr. Wise in this case (Tr. 264). He also confirmed that certain state mine violations which may subject him to individual personal assessments still have not been resolved (Tr. 270). In response to a question as to his assessment of Mr. Wise as a member of the safety committee, Mr. Omear responded as follows (Tr. 273):

> JUDGE KOUTRAS: Is he well intentioned?
>
> THE WITNESS: I don't--honestly, I don't believe he is, no.
>
> JUDGE KOUTRAS: Why do you say that?
>
> THE WITNESS: I don't believe he'd give you a fair shake or gives you a fair chance to take care of things inhouse without--I think his first thing out of the bag is to get the company, and the heck with it, you know, and that's just the way I feel about it. That's my opinion.

James Siburt testified that on July 10, 1981, he was employed as an acting shift foreman at the mine in question, and on that day he was escorting the mine safety committeemen Wise and Conner on their "end of vacation" safety inspection tour of the mine. Upon inspection of the one north section, Mr. Wise pointed out an overcast which was sagging and in need of attention, and Mr. Omear was called to the area. Mr. Omear agreed that work was required to correct the condition and he and Mr. Omear hung some danger signs. Mr. Siburt then left the area with Mr. Wise and Mr. Conner to examine another mine area and they were gone for about three hours. Upon returning to the one north section, they got off the jeep and Mr. Wise and Mr. Conner walked under and past the danger signs. Mr. Conner had a saw which he delivered to the crew doing the work and Mr. Wise looked in through the man door to observe the work which was being performed to correct the overcast condition. Mr. Omear asked Mr. Wise to come out from the area at least three times and Mr. Wise stated that he was "checking on his people". Mr. Siburt then left the area, and he stated he had no part in the decision to discipline Mr. Wise for going under the danger signs (Tr. 275-281).

On cross-examination, Mr. Siburt stated that in the past the company has had a policy concerning the violation of safety regulations by miners and he indicated that the initial training of a new miner includes the fact that no one is to go inby danger boards or roped-off roof supports. He had no idea as to how long the company policy has been in effect, did not know whether it was in writing, and had never seen it in writing.

He stated that everyone working underground knows that there is a policy against going beyond a danger board, and he knows of no company guidelines dealing with any discipline taken against miners for safety policy violations. He observed both Mr. Wise and Mr. Conner cross beyond the danger sign, but did not know who went in first and he confirmed that he heard Mr. Omear tell Mr. Wise to come out at least three times and Mr. Wise's response that he "was checking on his people". He also confirmed that Mr. Omear asked Mr. Wise if he had two-hundred and fifty-dollars to pay for walking under the danger boards (Tr. 281-289).

Mr. Siburt confirmed that he has passed beyond danger boards to check on mine conditions and to see that certain work is performed by the crew and that he did so on July 10, 1981. On these occasions, he did not have Mr. Omear's permission because he is certified by the State of West Virginia, and as a member of mine management is authorized to determine whether work to correct violations is being done properly. He also indicated that Mr. Wise is not certified by the State of West Virginia, and he is not aware of the fact that Mr. Wise has certification papers to conduct pre-shift, on-shift, or fire-boss inspections (Tr. 296-299).

State Mine Inspector Arthur Price was recalled and testified that when he spoke with Mr. Omear about Mr. Wise walking under a danger sign he referred him to Article 22-1-4 of the state mining code and advised him that "he may or may not have a case" and that he should check further with the Inspector-at-Large. Mr. Price also indicated that by walking beyond the danger sign Mr. Wise was in violation of the state fire-bossing articles which state that it is a violation for anyone to pass beyond a danger board once the area has been fire bossed and dangered off as a result of that fire boss inspection (Tr. 303-304). However, in his 39 years of mining experience, the general practice is for miners to respect a danger sign and not walk beyond it unless they are going in to correct the conditions (Tr. 305). Mr. Price also cited state mining provision 22-2-54 which requires mine operators, as well as employees, to insure that state mining laws are complied with. This law also requires the publication and posting of applicable mine laws in a conspicuous place at the mine and that they be made available to employees upon request (Tr. 307).

Mr. Price stated that he worked at the mine in question for 12 years before quitting in 1969 and going to work for the State of West Virginia Department of Mines in 1971. He also inspected the mine for four years and had a good working relationship with the safety committee as well as the company (Tr. 308).

The UMWA's Arguments

Mr. Wise's alleged violations of State and Federal mining laws

In its post-hearing brief, the UMWA argues that Consol's reliance on the ventilation provisions of section 303(d)(1) of the Act in support of its contention that Mr. Wise was not authorized to go inby the posted

danger signs in question is erroneous, and that this cited provision of the Act simply is inapplicable to the facts of this case because there is absolutely no evidence in the record to indicate that Mr. Wise had crossed the kind of "danger" sign contemplated in section 303(d)(1). The UMWA asserts that the incident in question occurred early in the morning, well after the time frame set out in section 303(d)(1) for pre-shift fire bossing, and that the respondent's reliance on this section is clearly misplaced. The UMWA points out that paragraphs (e) and (f) of section 303 contain a specific "carve out" for certain persons, which entitled those persons to enter an area of the mine from which all persons must be withdrawn, and that these paragraphs state in pertinent part:

> If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such condition to a safe area, except those persons referred to in section 104(d) of this Act, until such danger is abated. (Emphasis added).

The UMWA asserts that Section 104 of the Act is the provision which governs mine inspections by Federal inspectors, and that pursuant to the withdrawal order provisions of section 104(c), there are exceptions governing those persons who must be withdrawn from a mine area closed by a Federal inspector, namely:

> (1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;
>
> (2) any public official whose official duties require him to enter such area;
>
> (3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and
>
> (4) any consultant to any of the foregoing.

The UMWA maintains that Subparagraph (3) of section 104(c) is clearly designed to allow representatives of the miners or other persons accompanied by a representative of the miners to enter an area for which a withdrawal order has been issued when their presence is necessary for the investigation of the conditions described in the order. In support of this conclusion, the UMWA asserts that the legislative history bears out the fact that a miner and his representatives must play a key role in enforcement of the Act, and that section 104(c)(3) does just that, because it enables

representatives of miners to participate in the inspection of conditions cited in the various types of orders that can be issued under section 104. Citing the D.C. Circuit Court of Appeals decision in Phillips v. Interior Board of Mine Operations Appeals, 500 F. 2d 772 (D.C. Cir. 1974), the UMWA emphasizes the need for a liberal construction of the provision concerning discrimination, and maintains that liberal construction of section 105(c) (formerly section 110(b)) has been applied without question in an effort to effectuate the purpose of the Act.

Given the liberal construction of the Act, the UMWA states that Consol is unjustified in asserting that Mr. Wise violated section 303(d), especially when a more pertinent provision, section 104(c), is more applicable to the facts of this case. Surely argues the UMWA, had an inspector dangered off the area in question, Mr. Wise would be statutorily authorized to enter such area to insure that the union employees were working under safe conditions.

The UMWA does not take issue with the arguments made by Consol's counsel during the hearing (Tr. 156-157) that the representative of the miners must, in the judgment of the operator be qualified to make such mine examination. However, the UMWA maintains that by virtue of the 1981 Coal Wage Agreement, Mr. Wise is so qualified. In support of this conclusion, the UMWA has incorporated verbatim Article III, section (d), of the wage agreement dealing with the Mine Health and Safety Committee as part of its Brief. The pertinent portions of this section of the agreement are as follows:

> (1) At each mine there shall be a Mine Health and Safety Committee made up of miners employed at the mine who are qualified by mining experience or training and selected by the local union. The local union shall inform the Employer of the names of the Committee members. The Committee at all times shall be deemed to be acting within the scope of their employment in the mine within the meaning of the applicable workers' compensation law.
>
> (2) * * * * * *
>
> (3) The Mine Health and Safety Committee may inspect any portion of a mine and surface installations, dams or waste impoundments and gob piles connected therewith. If the Committee believes conditions found endanger the lives and bodies of the Employees, it shall report its findings and recommendations to the Employer. * * *
>
> (4) * * * * * *
>
> (5) * * * A Committee member shall not be suspended or discharged for his official actions as a Committee member. (Emphasis added).

The UMEA argues that the aforesaid contract provisions clearly indicate that Mr. Wise is qualified to make such mine examinations in the judgement of the operator as required by section 104(c), and for the respondent to argue that he is not so qualified in this particular instance violates the wage Agreement as well as the direct language of section 104(c)(3). In light of the specific language set out in 104(c)(3), the UMWA concludes that it cannot be reasoned that Mr. Wise was in violation of section 303(d) of the Act.

In response to Consol's contention that Mr. Wise was in violation of Chapter 22, Article 22-2-21 of the West Virginia Code when he passed inby the posted danger sign, the UMWA asserts that this argument is faulty simply because that State code provision is inapplicable to the facts in this case. Section 22-2-21 states in pertinent part:

> It shall be the duty of the fire boss, or a certified person acting as such, to prepare a danger signal (a separate signal for each shift) with red color at the mine entrance at the beginning of his shift or prior to his entering the mine to make his examination and, except for those persons already on assigned duty, no person except the mine owner, operator, or agent, and only then in case of necessity, shall pass beyond this danger signal until the mine has been examined by the fire boss or other certified person and the mine or certain parts thereof reported by him to be safe. When reported by him to be safe, the danger sign or color thereof shall be changed to indicate that the mine is safe in order that employees going on shift may begin work. . . .

The UMWA asserts that the cited State code provision relied on by Consol, like section 303(d) of the Federal Act, applies to the pre-shift fireboss examination required before miners may enter the mine at the beginning of the shift, and that it does not apply to the facts presented in this case. Furthermore, the UMWA cites West Virginia State Code Article 22-1-14, paragraph (c), which it asserts contains an exemption similar to that found in section 104(c) of the Federal Act, for groups of persons authorized to enter mine areas which have been closed for the purpose of insuring that dangerous conditions do in fact get corrected and that they are corrected in a proper manner. Paragraph (c) of the State code states:

> (c) The following persons shall not be required to the withdrawn from or prohibited from entering any area of the coal mine subject to an issue under this section:

(1) Any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the director, to eliminate the condition described in the order;

(2) Any public official whose official duties require him to enter such area;

(3) Any representative of the miner in such mine who is, in the judgment of the operator or an authorized representative of the director, qualified to make coal mine examinations or who is accompanied by such person and whose presence in cush area is necessary for the investigation of the conditions decribed in the order; and

(4) Any consultant to any of the foregoing.

With regard to Mr. Omear's testimony during the hearing (Tr. 226), that State Inspector Price agreed that Mr. Wise's action in going beyond the posted danger sign violated State law, the UMWA points out that when called in rebuttal, Mr. Price testified that he made no such assessment (Tr. 304), but simply stated that if one were to apply State Code Article 22-2-21, there would be a violation, but that he knew of no other condition which have made Mr. Wise's action a violation (Tr. 304-305).

In summary, the UMWA submits that Mr. Wise did not violate section 303(d) of the Federal Act or Article 22-2-21 of the West Virginia Code by going inby the danger board to check on the men abating the roof condition for which the area was dangered off, and that the reliance of Consol on these provisions is misplaced, especially in view of the existence of section 104(c) of the Federal Act and Article 22-1-14 of the Code of West Virginia, which more clearly and closely address the fact circumstances presented in this case.

Mr. Wise's alleged violation of company policy

The UMWA characterizes Consol's Employee Conduct Rules (exhibit C-5), as a "general outline of some rather common sense policies", but points out that they are devoid of any company policy concerning the proper conduct in regard to danger boards, and therefore should be given no probative value in determining whether Mr. Wise violated the asserted policy. The UMWA argues that neither Mr. Omear nor Mr. Siburt could state with any degree of certainty that a company policy regarding danger boards even existed at the Ireland Mine, (Transcript - Mr. Omear, Pages 230-236; Mr. Siburt, Pages 281-284), and that at best, each of these men hint to the fact that the company policy is synonymous with federal and state laws. To that extent, the UMWA submits that Mr. Wise violated no statutory provision of federal or state law.

Assuming that Consol can establish a viable policy regarding the crossing of posted danger boards, the UMWA nonetheless argues that any such policy must not be inconsistent with federal or state law and it cites the provisions of Article III, section (g) of the Wage Agreement and Chapter 22, Article 22-2-54 of the West Virginia Code in support of this proposition. Further, even though the Federal Mine Act contains no such provisions, the UMWA suggests that it is axiomatic that a company policy cannot conflict with state or federal law. Further, the UMWA asserts that had the danger board in question been posted by an MSHA inspector, Mr. Wise would fall into the category of individuals exempt from a total withdrawal, and that federal and state law are explicit on this point. The UMWA concludes that Consol cannot assert that since Mr. Omear posted the danger board, Mr. Wise can be refused entry into the area where union employees are engaged in abating the condition, and that this is especially true in light of the legislative policy favoring participation and cooperation by the miners in enforcing the act.

Finally, in analyzing whether Consol had a policy concerning danger boards, the UMWA suggests that I should strongly rely on the arbitration decision rendered in Mr. Wise's case. Since Consol has asserted that Mr. Wise violated company policy, and that such conduct is not protected under the Act, the UMWA maintains that, to that extent, the arbitrator's decision should be relied on in determining if such a policy existed or if Mr. Wise was insubordinate. Once such a determination is made, consideration should then be given to whether Mr. Wise's activity was protected under the Act, its legislative history, and the administrative and judicial decisions interpreting the Act and its history.

Whether Mr. Wise was engaged in protected activity when he went inby the danger board.

In support of its arguments that Mr. Wise was engaged in protected activity when the ventured inby the danger board in question, the UMWA cites the legislative history of the Act, and emphasizes that, in the enactment of section 105(c)(1), Congress was well aware that the active involvement of the miners in the enforcement of the law could only be obtained by providing these miners with protection from retaliation for their efforts. Citing Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), a case interpreting the 1969 Coal Act, the UMWA points out that in recognizing that the purpose of the statutory provision was to encourage the reporting of suspected violations of health and safety regulations, the Court refused to limit the scope of protection to the bare words contained in the statute.

The UMWA maintains that the record in this case indicates that Mr. Omear forbid Mr. Wise from entering an area of the mine for the purpose of observing compliance or non-compliance with safety and health standards. If such activitiy were to be ruled unprotected, the UMWA asserts that it would impede the ability of miner's representatives to participate in the enforcement of the Act, and would also provide Consol with an effective means of inhibiting safety activity in that in future situations where

a hazardous condition is pointed out to Consol, its management could put up its company danger board and prohibit safety committeemen from entering the area. Such a result, argues the UMWA, would be inconsistent with the purposes of the Act.

In support of its arguments that the Act should be liberally construed in favor of Mr. Wise, the UMWA cites Secretary of Labor, ex rel., Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, October 14, 1980. In Pasula, while the Act was silent on the right of a miner to refuse to work in hazardous conditions, the Commission relied on the legislative history in affirming the right of the miner. Just as the Act is silent on the right to refuse work, so too is it silent on the rights of Mr. Wise to enter the dangered off area. But the UMWA asserts that in order to effectuate the purposes of the Act, Mr. Wise's venturing inby the danger board must be held to be protected activity.

The UMWA argues that the importance of removing unnecessary restrictions on the ability of the miners' representative to engage in protected activity was recognized by the Commission in Local Union 1110 and Carney v. Consolidation Coal Company, 1 FMSHRC 388 (1979). In Carney, the Commission upheld Judge Broderick's decision striking down a company policy requiring safety committeemen to obtain permission before leaving their work area to perform their mine safety committeeman's duties. If, as the Commission has held in Carney, an employer cannot prevent a safety committeeman from leaving his work area to perform his official functions, the UMWA suggests that it would appear to be just as inherently discriminatory for an employer to interfere with the ability of the Safety Committees to enter a given area, and it submits that the Carney case is controlling and should be followed in Mr. Wise's case.

In distinguishing the Commission decisions in Maynard v. Standard Sign and Signal Company, 2 MSHC 1186 (1981), and Ross v. Monterey Coal Company, 2 MSHC 1300 (1981), from the facts in Mr. Wise's case, the UMWA asserts that in Maynard, the administrative law judge dismissed a complaint for failure to state a claim because the Act did not protect an employee for his failure to abate violations. A supervisor was fired because he had run coal prior to correcting cited violations as a result of his misunderstanding his orders from the superintendant. Although the case was dismissed, Maynard was allowed to amend his complaint so that it would state a cause of action.

In Ross, the UMWA asserts that the administrative law judge dismissed the complaint on the grounds that Ross had attempted to exercise his authority as a safety committeeman outside the employment content. He had no direct employment contact with either party committing the alleged discriminatory action. Since no question exists in regard to Mr. Wise's employment relationship with Consol, the UMWA concludes that the Ross holding is inapplicable.

Whether the disciplinary action taken by Consol was discriminatory and a violation of section 105(c) of the Act.

The UMWA concludes that if it is held that Mr. Wise engaged in protected activity on July 10, 1981 by going inby the danger board to check on the union employees abating the roof condition, the actions by Mr. Omear in suspending Mr. Wise amount to discrimination prohibited by the Act. Further, the UMWA asserts that the "dual motive" or "but for" test set out in Pasula, does not come into play, for Consol has not asserted that absent the protected activity, it would have suspended Mr. Wise, has not cited any other activity which could be asserted as an independent basis for Mr. Wise's suspension, but merely argues that Mr. Wise's activity of going inby the danger board is unprotected activity for which he can be disciplined. If the activity in question was protected, the UMWA concludes that the disciplinary action was unwarranted and discriminatory. If the activity was not protected, then the UMWA concedes that the disciplinary action was not discriminatory under the Act.

Summarizing its position in this case, the UMWA asserts that Mr. Wise's actions were protected activity under the Act for which he could not be disciplined, and to hold otherwise would effectively impede the ability of safety representatives to actively participate in the enforcement of the Act. Since the record clearly indicates that he was suspended only for going inby the danger board posted by Mr. Omear, such discipline constitutes discrimination under the Act for which Consol should be held accountable. The UMWA requests that a finding of discrimination be made, that a notice to that effect be posted at the Ireland Mine, that a fine be imposed on Consol, and that reasonable expenses and attorney's fees be assessed against Consol.

Respondent Consol's Arguments

Respondent prefaces its post-hearing arguments with a quotation from the Commission decision Pasula v. Consolidation Coal Company, 2 MSHC 1001, 1010, October 14, 1980, concerning the elements of a prima facie case under section 105(c) of the Act and the operator's defenses thereto as follows:

> We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. (Emphasis in original).

Whether Mr. Wise was engaged in protected activity on July 10, 1981, when he went by the danger board.

Consol concedes that Mr. Wise engaged in protected activity in filing complaints with the West Virginia Department of Mines, but submits that this activity is sufficiently divorced from the three-day suspension of which Mr. Wise complains so as not to form the basis of a prima facie case. Consol asserts that in this case Mr. Wise did not introduce any testimony that mine management had threatened or harrassed him on account of his safety activity prior to his suspension.

Consol submits that the crux of the case is whether it was proper for Consol to discipline Mr. Wise for going past a danger board and refusing to heed the order of mine Superintendent Omear to leave the dangered-off area once he had entered it. It is Consol's position that Mr. Wise violated state and federal law in ignoring the danger board and was insubordinate when he refused to leave the dangered-off area. Thus, Consol believes that the issue for decision is whether Mr. Wise was engaged in protected activity on July 10, 1981, when he went by the danger board.

In support of its contention that Mr. Wise violated the Federal Mine Act, Consol cites section 303(d)(1) of the Act, which specifically mentions "danger signs" in connection with the posting of such signs in mine areas which are found to be hazardous by those certified persons designated by the operator to conduct the preshift examination of the active workings of the mine. Once such an area is posted, the statute provides that:

> No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted.

Consol also cites other provisions of the Act which establish similar criteria as to who may enter a dangered-off mine area. As examples, Consol asserts that once an MSHA inspector issues a closure order pursuant to section 104 or 107 of the Act, section 104(c) provides that no one is permitted to enter the subject to the order except:

> (1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;
>
> (2) any public official whose official duties require him to enter such area;
>
> (3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make

such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and

(4) any consultant to any of the foregoing.

Consol argues that the complianants' suggestion that section 303(d)(1) of the Act is inapplicable in this case because Mr. Siburt and Mr. Omear were not making a preshift examination at the time the danger sign was posted is a very technical one, which if accepted, would contravene the policy of the Act.

Consol submits that a distinction should not be drawn between danger boards hung by federal inspectors in the course of a health and safety inspection, by firebosses on preshift and onshift examinations, and by certified persons such as Messrs. Siburt and Omear in the course of a contractually mandated safety run. In all of these cases, the danger board is serving the same purpose, i.e., to warn miners of a hazardous condition beyond the danger board and to stop them from going inby. Furthermore, Consol submits that if a miner is not present at the time the danger board is installed, he may not be able to tell whether it was posted by a federal inspector, a preshift or onshift examiner, or by another certified person so the proposed distinction sought by the union in this case would not be practical in the mine environment. Finally, Safety Committeeman Conner's testimony is revealing on this question. He testified that a federal inspector would have put a danger tag on the area, so Mr. Conner apparently saw no difference in a danger sign posted by a federal inspector as opposed to a certified examiner. (Tr. 129-130).

Consol maintains that since the danger signs in the case at hand were installed pursuant to an examination comparable to one made under § 303(d)(1) of the Act and since it contravenes the purpose of the Act and is also impractical to draw distinction based upon when and by whom the sign was hung, the question becomes whether Complainant Wise fell within one of those categories of persons who are permitted under the Act to go inby a danger board. Consol concludes that Mr. Wise was not an authorized representative of the Secretary or a State mine inspector, and that he admitted at the hearing that he did not seek authorization from Superintendent Omear to go inby the danger board. (Tr. 69)

Consol points out that Mr. Wise also filed a grievance with regard to his suspension pursuant to the National Bituminous Coal Wage Agreement of 1981, and that Aribrator Miles Ruben affirmed the grievance and ordered Consol to reimburse Mr. Wise for lost wages and expunge the suspension from his personnel records. Consol states that on the basis of Article III, Section (d)(3) of the Wage Agreement, Arbitrator Ruben found:

> It is of course true that no specific authorization was given by Management to the Grievant and the Chairman of the Mine Safety Committee, Mr. Conner, to enter the dangered-off area. However, a general, pre-existing authorization from Mine Management can be inferred from the provisions of the collective bargaining contract which gave members of the Safety Committee the right to inspect any portion of the mine when acting in pursuit of their official duties. (Page 16 of the Arbitration Award, Exh. C-2).

Consol maintains that the complainant's argument that the contractual provision found in Article III granted safety committeemen the authority to go inby posted danger boards should be rejected. Consol submits that Mr. Wise's argument, as well as the arbitrator's interpretation on this point, should not be accepted because the labor agreement provision in question does not refer to the federal and state laws regarding danger signs, and the arbitrator was required to draw an inference from the contract that Mr. Wise had authorization to go inby a danger board. However, Consol argues that I should not adopt the arbitrator's reasoning, and its supporting arguments follow.

First of all, Consol points out that section 303(d)(1), was not introduced into evidence at the arbitration hearing (footnote 3 on page 16 of the Arbitration Award). Since the arbitrator did not have the relevant portion of Section 303(d)(1) of the Act before him when he interpreted the labor agreement, his finding of preauthorization so far as federal law is concerned is erroneous. The arbitrator could not make an inference that Mr. Wise was authorized to go past a danger board when he (the arbitrator) was not informed of the scope of the authority set out in federal law. For this reason alone, Consol maintains that the arbitrator's reasoning should not be followed.

Furthermore, Consol maintains that the arbitrator's finding of preauthorization exceeds the authority established by section 303(d)(1). The arbitrator found that a safety committeeman had the right to inspect any portion of the mine, and because he had that right, he had the right to go past a danger board. However, Consol points out that under section 303(d)(1), ming management is permitted to allow persons (other than a federal or state inspector) to go inby a danger board to eliminate the hazardous condition. The right to inspect the mine is not equivalent to eliminating the hazardous condition. The right to inspect the mine permitted Messrs. Wise and Conner to make the safety run and to identify the hazardous condition that resulted in the posting of the danger signs in this case. Once the danger signs were posted, then the contractual right to inspect was qualified by the prohibition contained in federal law, and the safety committeemen were required to observe the danger board. At this point, the policy behind the contract and the Act had been served, i.e., miner participation in identifying hazardous conditions, and the management's right to direct the work force in correcting the conditions took precedence.

Consol cites the case of Ronnie R. Ross v. Monterey Coal Company, et al., VINC 78-38 (1979), where Administrative Law Judge Michels recognized that a safety committeeman's authority to inspect a mine is limited. In that case, Complainant Ross received a disciplinary letter for inspecting areas of the mine site where his employer was not working. Similarly, in this case, Consol maintains that it was proper for Consol to discipline Mr. Wise for going into an area where he was not aurhotized to travel.

Consol's disciplinary policy regarding danger boards.

Consol states that at the hearing, Complainant Wise, through his counsel, argued that it was unfair to discipline Mr. Wise because Consol did not have a written policy notifying its employees that they would be disciplined for going inby danger boards. Although Consol believes that this argument does not have any bearing on the question of whether Mr. Wise was engaged in protected activity when he went past the danger board, it presented the arguments which follow below.

Consol states that it does have a list of employee conduct rules posted at the Ireland Mine. Rule No. 1 notifies the employees that they will be disciplined for failing to observe safety regulations. At the hearing Mr. Wise admitted that he was aware of Consol's policy of disciplining employees for violating state and federal safety laws. (Tr. 59-60). Consol notes that Mr. Wise never introduced any testimony that the miners at Ireland Mine were unaware of the general prohibition in state and federal law against passing by danger signs. It is Consol's understanding that Mr. Wise contends that he was protected from discipline, not because the miners as a whole were not aware that they could not go past danger signs, but because he was empowered to do so as a safety committeeman. Consol does not understand Mr. Wise and the union to argue that any miner at Ireland Mine could have gone by the danger board at One North Section on July 10, 1981, and not have been held accountable for his action.

In concluding its arguments, Consol maintains that the issue in this case is whether Mr. Wise's going inby a danger board on July 10, 1981, was activity protected by the Act, and that it is Mr. Wise and the union that bear the ultimate burden of persuasion by a preponderance of evidence that a safety committeeman going inby a danger sign is protected activity. Consol anticipates that Mr. Wise and the Union may make two arguments:

(1) The danger signs were not posted pursuant to a § 303(d)(1) examination of the mine and, therefore, the prohibition against passing by a danger sign is inapplicable, and

(2) Even if § 303(d)(1) applies, Mr. Wise, as a safety committeeman, is not bound by the prohibition found in § 303(d)(1).

In response to these arguments, Consol asserts that it has demonstrated that the complainants first argument is a technical one that leads to absurd results and does not advance the policy of the Act. Their second argument ignores the specific authorization language of § 303(d)(1) which restricts the persons allowed to go by a danger board to those who are working on correcting the hazardous condition. Consol concludes that Mr. Wise fulfilled his role as a safety committeeman at Ireland by locating and identifying the hazardous condition, but after having done so, he overstepped his authority and entered a dangered-off area for which he could properly be disciplined.

Discussion

The crucial facts in this case are not in dispute. It seems clear to me that Mr. Wise did in fact walk inby a posted danger sign on July 10, 1981. It is also clear that when he was ordered to come out of the area at least three times by Mine Superintendent Omear, he chose to ignore those directives and came out after he was satisfied that his mission had been accomplished. Mr. Wise obviously believes that as a duly elected safety committeeman, he has a right to enter any area of the mine, including those areas that are dangered-off, for the purpose of insuring compliance with mine safety and health laws, as well as to insure the safety of miners while engaging in work connected with the correction and abatement of hazardous conditions brought to the attention of mine management. Conversely, while conceding that Mr. Wise has certain prerogatives in his capacity as a safety committeeman, including access to most areas of the mine for the purpose of conducting inspections to insure compliance with the law, Consol takes the position that simply serving as a committeeman does not give Mr. Wise carte-blanche authority to go wherever he pleases, and that his access to certain mine areas, particularly those that are dangered-off, is limited and restricted by state and federal law to those individuals specifically authorized to be there pursuant to those laws.

The crux of Consol's defense is that when Mr. Wise walked inby the posted danger sign he over-stepped his authority as a member of the mine safety committee, acted outside the scope of any "special status" which he may have enjoyed as a committeeman, and could therefore be held accountable for his actions. Recognizing the fact that the Act insulates Mr. Wise from reprisals by mine management for his safety activities, including acts of insubordination where it can be established that such insubordinate conduct was in fact protected activity, Consol takes the position that not only did Mr. Wise's action violate company policy, it also violated federal and state law and therefore could not be deemed to be protected activity under the Act.

As correctly pointed out by Consol, Mr. Wise does not contend that the disciplinary action taken against him was out of reprisal for his filing safety complaints with the State of West Virginia mining aurhorities.

Although there is some testimony that one or more of these complaints may have resulted in a personal assessment or fine against Mr. Omear under state law and regulations, the UMWA does not advance an argument that Mr. Omear, or any other mine management official, suspended Mr. Wise because of these complaints. Although the grievance record concerning Mr. Wise's grievance contains a reference to the Union's attempts to establish that Mr. Wise was suspended in retaliation for having filed safety complaints against company personnel (pg. 6, Exh. C-2), the arbitrator never reached that issue, and at page 20 of his decision he states as follows:

> * * * the Arbitrator finds that the Grievant in knowingly entering into a dangered-off area for the purpose of checking on the safety of the crew assigned to effect repairs, although in contravention of the directions of Superintendent Omear to quit the area, was nevertheless acting in his official capacity and protected against the suspension sanction.
>
> In light of the foregoing, the Arbitrator finds it unnecessary to consider the Union's contentions that the sanction violated the Federal Mine Safety and Health Act of 1977, as amended, and that it was imposed because of the Grievant's filing of complaints ov violations of the mine safety code of the State of West Virginia.

I am in agreement with Consol's view of the limited issue in this case; namely, whether Mr. Wise's entry into an area of the mine which had been "posted" or "dangered-off" was protected activity. The thrust of Mr. Wise's discrimination complaint throughout this proceedings is his belief that he has a right to go anywhere in the mine in his capacity as a committeeman, including areas that have been closed down by mine management, and he has not claimed, nor has he produced any evidence, to support any claim that the action taken against him by Consol was in retaliation for his filing of safety complaints. Nor has he advanced any arguments or evidence that mine management harrassed, threatened, or otherwise intimidated him for his safety activities.

There is no question that representatives of miners are afforded many rights and protections under the Act. They are free to request mine inspections or file complaints if they believe that a violation has occurred or dangerous conditions are present in the work environment. They are free to accompany mine inspectors on their inspection tours, at no loss of pay or other compensation. As miners, they are also free to refuse to work under unsafe conditions, and may leave their work area if they believe they are exposed to safety or health hazards. In addition, they are insulated from reprisals, intimidation, or harrassment by mine operators because of the exercise of these and other rights protected under the Act, and by the case law. In addition, pursuant to the existing Wage Agreement between miners and the industry, miners are assurred of a safe and healthful place to work, and the safety and health committees are afforded many rights, as well as responsibilities.

I recognize the validity and merits of the competing interests which cut across this entire proceeding. On the one hand, we have a safety committeeman who sees no limits to his authority as a safety committeeman. On the other hand, we have a mine operator who concedes that a safety committeeman has certain prerogatives under the Act, but nonetheless believes that management has the prerogative to manage and control its mine and the employees who work there. The crucial question presented after balancing these interests, is to decide which one outweighs the other in the context of the applicable law. In this regard, an examination of two relevant Commission decisions is in order.

The case of Local Union 1110 and Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979) (hereinafter "Carney"), concerned a safety committeeman who received three disciplinary letters of reprimand after several confrontations with mine management over his leaving his work area for the purpose of reporting safety violations and engaging in union business. He was charged with insubordination for failing to obtain management's permission before leaving his work area to perform duties as a safety committeeman. In affirming Judge Broderick's decision finding discrimination, the Commission, stated in pertinent part as follows at pg. 341 of its decision:

> * * * we concur in the judge's holding that the enforcement of the Company's "permission policy" violates section 110(b). The purpose of section 110(b) is to encourage communication between the miners, their representatives and the Secretary concerning possible dangers or violations. The Company's policy effectively impedes a miner's ability to contact the Secretary when alleged safety violations or dangers arise, a time when free access to the Secretary is most important. We therefore reject the Company's objections to the judge's order that the Company cease and desist from enforcing its policy.
>
> * * * we agree with Judge Broderick that issuance of the three letters of reprimand to Carney violated section 110(b) of the act. After voicing a safety complaint to his foreman, Carney left the mine section to contact MESA officials, through the chairman of the mine's Health and Safety Committee, to bring the safety dispute to MESA's attention and to obtain its view on the legality of the Company's safety practice.
>
> * * * Because Carney's activity was protected, and because the Company could not lawfully require him to obtain its permission before engaging in such activity, the first letter of reprimand was an act of discrimination. Further, the second and third

> letters were, as Judge Broderick found, "certainly related to the first letter and [were] issued in part at least because of the activity protected by section 110(b)." (Footnotes omitted).

In Carney, the Commission obviously recognized the fact that limiting a safety committeeman's free access to mine inspector's for the purpose of communicating real or alleged safety violations or dangerous conditions violated the intent of the anti-discrimination provisions of the Act that communication between the miners, their representatives and the Secretary be encouraged. Further, in his decision, Judge Broderick weighed the effect of mine management's "permission policy" and concluded that it severely limited the ability of miners to complain of hazards and violations during a working shift, by permitting only such complaints as mine management deems acceptable. Recognizing the fact that a contrary rule restricts management's ability to control production, Judge Broderick held that the health and safety of miners clearly outweighed production.

The UMWA argues that the importance of removing unnecessary restrictions on the ability of the miners' safety representatives to engage in protected activity was clearly recognized by the Commission in Carney. The UMWA maintains that if, as in Carney, an employer cannot prevent the safety committeeman from leaving his work area to perform his official functions, it would appear to be just as inherently discriminatory for an employer to interfere with the ability of the Safety Committees to enter a given area. The UMWA believes that the Carney holding is controlling in the instant case and that I should follow it.

Ronnie R. Ross, et al. v. Monterey Coal Company et al., 3 FMSHRC 1171; 2 BNA MSHC 1300 (May 11, 1981), concerned a safety committeeman who was reprimanded for inspecting a mine area where his employer was not conducting any work. With regard to Ross, it should be noted that the UMWA's factual statement of this decision is not totally accurate. Contrary to the UMWA's assertion in its brief that Mr. Ross had no direct employment contact with either party committing the alleged discrimination, and that he attempted to exercise his authority as a safety committeeman "outside the employment content" (UMWA brief, p. 24), the fact is that Mr. Ross was an employee of one of three respondent's against whom he filed his discrimination complaint. In Ross, Monterey Coal Company was the owner and developer of a coal mine. The underground portion of the mine development was completed and Monterey was mining coal. Construction of the mine development was completed and Monterey was mining coal. Construction of surface facilities and related activities were underway by several contractors, including the McNally-Pittsburgh Corporation, and Mr. Ross was employed by McNally as a carpenter. As a condition of employment at the mine site, the employees of each contractor were required to be members of the UMWA local union, and Mr. Ross was selected by McNally employees to serve as a health and safety committeeman.

During the course of an inspection tour of the project, Mr, Ross alleged that he had been abused and threatened by another contractor working at the site (Looking Glass Construction Company). Judge Michels

found that Monterey, like Looking Glass, was not the employer of Mr. Ross and none of their actions directly affected his employment or pay. He concluded that Monterey and Looking Glass had not discriminated against Mr. Ross, and at page 77 of his reported decision, 1 FMSHRC 77, April 1979, Judge Michels stated "There was no direct employment connection with respect to either party named in this charge." Therefore, it seems clear to me that Judge Michels' conclusion of "no employment connection" was clearly limited to the one charge of alleged harrassment lodged against Looking Glass and Monterey.

The second alleged act of discrimination in Ross concerned a letter delivered to Mr. Ross on November 30, 1977, by his employer McNally. The letter was the result of information which came to the attention of McNally that Mr. Ross was inspecting areas other than where McNally employees were working. These areas included Monterey's underground mine, as well as the Looking Glass areas which prompted the aforementioned charge of harrassment. The McNally letter advised Mr. Ross that unless he limited his duties as committeeman to the McNally work site, he would be suspended, subject to discharge. The entire text of the letter is set out in Judge Michels' decision, and is as follows:

> This is to advise you that your duties as Project Union Health and Safety Committeeman are limited exclusively to McNally Operations at the Monterey Coal Mine #2.
>
> In the event of your violating the above, you will be suspended-Subject to discharge.

With regard to the letter incident, Judge Michels concluded that since Mr. Ross was singled out to receive the letter, while other committeeman in approximately similar circumstances were not, he was discriminated against within the meaning of the Act. However, in addressing the question of whether the discrimination was motivated by or in retaliation for the reporting of alleged safety dangers or violations, Judge Michels observed that the letter was directed to Mr. Ross's safety inspections outside of McNally's area of operations, and that it did not limit inspections otherwise. Considering the 1974 Contract which governed McNally's relationship with its employees, Judge Michels ruled that limiting Mr. Ross' activities as a committeeman to inspections on the McNally site was not unreasonable and that the motive for the letter was to prevent Mr. Ross from inspecting off the McNally site, not to punish him for reporting asserted dangers or violations. Recognizing the fact that an employer may reasonably control the activities of its work force, Judge Michels concluded that Mr. Ross was disciplined for unauthorized activity, and that the letter presented to him was to prevent him from engaging in activity reasonably perceived by management to be unauthorized and was not in retaliation for reporting safety complaints. After finding no violation of the Act on the part of McNally, Judge Michels dismissed the case.

Findings and Conclusions

The first issue to be addressed in this case is whether Mr. Wise's refusal to leave the dangered off area in question after being directed to do so at least three times by Mr. Omear constituted insubordination warranting the disciplinary action taken against him. Assuming that the answer is in the affirmative, the next question is whether or not the refusal by Mr. Wise to leave the area when ordered to do so was based on some legitimate right bestowed on him by the Act to remain. In short, the question is whether or not Mr. Wise was engaged in some protected activity at the time he was asked to leave the area. If he was, then the charge of insubordination as the basis for the disciplinary action taken must fail, and Mr. Wise will prevail. If Mr. Wise was not engaged in protected activity, then I believe his refusal to obey direct orders from Mr. Omear constituted insubordinate conduct warranting the action taken against him.

Consol's arguments that Mr. Wise's conduct violated State and Federal mine safety laws is rejected. On the basis of the entire record adduced in this case I cannot conclude that Consol has established any such violations as a legitimate basis for supporting the disciplinary action taken against Mr. Wise. In my view, Consol's reliance on section 303(d)(1) of the Act is not supported by the record. That section specifically applies to the preshift "fireboss" examination required to be made by certified mine examiners. Once that examiner posts a "danger" sign, no one may pass except for those persons specifically designated by the law. While it is clear that Mr. Wise does not fall into any of the categories of "persons" enumerated in section 303(d)(1), it is also clear that there is no evidence that the posting of the area resulted from any firebossing examination by a certified mine examiner. I reach the same conclusion with respect to the cited Article 22-2-1 of the West Virginia Code.

The parties rely on the withdrawal order exceptions found in section 104(c) and (d) of the Act in support of their respective positions concerning Mr. Wise's asserted violation of this section of the Act. Consol takes the position that Mr. Wise does not fall within any of the exceptions noted in section 104(c), and concludes that he violated the Act when he went inby the danger board. Unfortunately, the parties failed to call any Federal inspectors as witnesses to testify on this question and they rely on their legal conclusions based on their interpretation of the language of the exceptions. However, I would venture a guess that if an MSHA inspector concluded that Mr. Wise did not fall within one of the categories of persons permitted to remain in an area subject to a withdrawal order, he would probably cite Consol for the violation for failure to withdraw Mr. Wise from the area in question.

The UMWA concedes that under subsection (3) of section 104(c), the operator has a say as to who may be qualified to make mine examinations under section 104(a). However, the UMWA concludes that pursuant to certain provisions in the 1981 Coal Wage Agreement Mr. Wise is so qualified

and that Consol is bound by these contract provisions. I have reviewed the cited contract provisions, but I cannot conclude that the fact that a committeeman selected by his union peers on the basis of his "mining experience or training" necessarily transforms him into a qualified or certified mine examiner for purposes of section 104 of the Act.

The term "qualified person" as defined by section 75.2(b) of Title 30, CFR is an individual designated by the operator to make tests and examinations required by Part 75 of the regulations. Further, the terms "qualified" and "certified" as they pertain to mine examinations by certain individuals are defined in various sections of Parts 75 and 77, Title 30, Code of Federal Regulations. Acceptance of the UMWA's theory could lead to the conclusion that anyone selected by a local union to serve as a safety committeeman is "qualified" or "certified" for the purposes of the Act simply because of his selection as a committeeman. Under the circumstances, I reject the UMWA's arguments that Mr. Wise comes within the exception found in section 104(c)(3) of the Act, and that this section authorized his presence in the dangered-off area in question.

I reject the UMWA's suggestion that the record in this case supports a conclusion that Consol tried to bar Mr. Wise's entry into an area which had been dangered off for the purpose of preventing him from observing compliance or noncompliance with safety standards. I do not view this case as one where a mine operator is attempting to conceal certain conditions or practices from a safety committeeman for the purposes of avoiding compliance with mandatory safety standards. In my view, the incident which sparked this controversy is a classic example of a labor-management confrontation challenging each others "turf".

With regard to any asserted violation of company policy by Mr. Wise, I do not believe it necessary to make any specific findings concerning the question as to whether company policy specifically prohibits miners from entering mine areas which have been dangered off because of hazardous conditions. In my view, anyone who needs to have this admonition put in writing has no business working in an underground coal mine. Regardless of any such written policy, the question here is whether Mr. Wise's disregard of direct orders from mine management to leave the area constituted insubordination warranting a three-day suspension.

During the course of the hearing in this case, both sides presented testimony regarding the question of miners crossing inby a mine area which had been dangered off. Mr. Wise testified that as a member of the safety committee he often passed beyond such posted areas during regular mine inspections. Mr. Omear stated that he never observed any committeeman go beyond such an area unless he had permission or was accompanied by a mine management representative. Safety committeeman Connor's testimony supports Mr. Omear's position. Although Mr. Connor stated that he had previously crossed beyond danger signs, he indicated that he was always accompanied by mine inspectors or company management representatives, and that in these instances he had management's permission to do so. Further,

there is a strong inference that Mr. Connor did not believe he had an absolute right to be in the area with Mr. Wise since he heeded Mr. Omear's admonition to leave and did so immediately. Mr. Connor's purported comment "you can't get me", was in obvious reference to the fact that Mr. Connor was carrying a saw which had been requested by Mr. Omear and supports a further inference that Mr. Connor believed he had a legitimate excuse for being in the area. Once the saw was delivered, he immediately withdrew.

In this case the conditions or practices which led to the posting of the danger board by Mr. Omear were initially discovered by Mr. Wise and the shift foreman during a routine safety run of the section. Once those conditions were called to the attention of management, Mr. Omear agreed, albeit after some debate, that the area should be closed and corrective action taken. Mr. Omear posted the area and proceeded to attend to the conditions by seeing to it that work began to correct the conditions in question. Mr. Omear was at the scene supervising and directing the work, and Mr. Wise conceded that the corrective action being taken by Mr. Omear was correct and proper. As a matter of fact, once the area was posted, Mr. Wise left the area to continue with his inspection rounds and was gone for several hours before returning, and while he was gone, work to abate the conditions progressed under the supervision of Mr. Omear, apparently without incident. At this point in time, mine management was directly responsible for the area and work being conducted there and had a legitimate right to direct the workforce. As a matter of fact, the primary obligation to correct any hazardous conditions in a mine lies with the operator. It is the operator who is faced with a mine closure or civil penalty assessments for noncompliance, not the union. It seems to me that once the hazardous conditions are called to management's attention, and since the compliance obligation lies with the operator, he should be permitted to go about his abatement business in an orderly and reasonable manner. Of course, should the operator refuse to correct the conditions, then the union has ample recourse to insure compliance.

On the facts of this case, it seems clear to me that Mr. Wise performed all of his duties as committeeman without interference from mine management. Once he discovered the conditions which he believed needed attention, management put the wheels in motion to insure that the conditions were corrected. Since management had the responsibility for correcting the conditions, I believe that management has the right to dictate the terms under which those corrections will be made. Here, Mr. Wise concedes that Mr. Omear was taking the appropriate corrective action. Had Mr. Wise had any question about this, I would assume that he would have attempted to remain in the area to supervise the work, rather than leaving for several hours to inspect other mine areas. Further, although Mr. Wise indicated that he had crossed beyond danger signs in the past, on cross-examination he conceded that he has also observed and respected such signs for fear that he might expose himself to hazards which may have been present in those areas. By the same token, I believe that he should also respect the right of mine management to protect him from those hazards, thereby reducing its liability in the event he were injured or killed while venturing into such areas without prior knowledge or approval.

After careful consideration of all of the arguments made by the parties in this case, I conclude and find that Mr. Omear's direct orders to Mr. Wise, made three times, to vacate and withdraw himself from the area which had been dangered off, were reasonable and proper, and that Mr. Wise's refusal to comply constituted insubordination. I further conclude and find that Mr. Wise's conduct in refusing to depart an area of the mine that had been dangered off for the purposes for correcting conditions called to mine management's attention was not protected activity under the Act. Once the conditions were called to mine management's attention, mine management then had responsibility and aurhority to correct the conditions and to direct the work force to insure that the job was done. Included in this authority was the discretion to determine who could assist them in this task. In the instant case, Mr. Wise simply took it upon himself to walk beyond a danger board without seeking mine management's permission. Had he asked and been refused, he may have been in a better position to litigate his case. Since he did not ask, I cannot conclude that management was wrong in suspending him for ignoring the mine superintendent's direct orders to leave the area. In my view, a contrary conclusion could lead to a situation where a safety committeeman, simply because he holds that position, could take it upon himself to walk into any dangered-off areas in a mine, thereby exposing himself to a multitude of hazards and dangers without the knowledge of mine management. Since mine management has the primary obligation under the law to insure compliance and to preclude any of its personnel being injured or killed by walking into these areas, I see nothing unreasonable in mine management's requiring that they be allowed to monitor and control these areas.

In view of the foregoing findings and conclusions, I conclude and find that the three-day suspension given Mr. Wise for insubordinate conduct was reasonable and proper in the circumstances, and that Consol did not discriminate against Mr. Wise. Accordingly, this case IS DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 19 1982

UNITED MINE WORKERS OF AMERICA,	:	Complaint of Discharge,
	:	Discrimination, or Interference
On behalf of	:	
DELMAR SHEPHERD,	:	Docket No. KENT 81-186-D
Complainant	:	
v.	:	Camp Underground Mine
	:	
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mary Lu Jordan, Esq., Washington, D.C., for Complainant; Thomas R. Gallagher, Esq., and Michael O. McKown, Esq., St. Louis, Missouri, for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant charges that Respondent's refusal to recall him to work at a job initially offered him constituted discrimination under the Act, because it was grounded on his need for additional training under State and Federal laws. The case was submitted for decision on a stipulated set of facts. Both parties have filed briefs.

FACTS

I accept the stipulations signed by counsel for both parties and filed in this case on March 10, 1982, together with the documents filed on July 13, 1982, pursuant to my request, as the facts on which this decision will be based.

Complainant Delmar Shepherd was employed by Respondent Peabody as a miner beginning in June 1981. He worked in an underground mine from June 23, 1971 to November 20, 1978. Thereafter, he worked in surface mines for Peabody.

From October 8, 1980 until he was laid off on November 18, 1980, he worked at Peabody's Alston Surface Mine. He was a member of the United Mine Workers of America which had a collective bargaining agreement with Peabody. The agreement provided that laid-off employees had the right to be recalled to work on the basis of seniority when jobs for which they were qualified became open at certain other Peabody Mines. Seniority is recognized as length of service and the ability to step into and perform the work of the job at the time the job is awarded.

On December 1, 1980, Respondent contacted Complainant and told him that on the basis of his seniority he was entitled to be recalled at one of 13 job openings available at the Camp Underground Mine. Complainant selected a job and was told that he would be notified when to report to work. Later the same day, Respondent called Complainant and informed him that none of the jobs would be made available to him because he would need additional training required for working in an underground mine by Federal and State law. He further stated that Respondent would not provide the training, but that Complainant would have to obtain it himself. Other miners with shorter lengths of service were recalled. Complainant lost wages and claims reimbursement therefor for the period from December 3, 1980 through January 20, 1981.

Respondent had an MSHA-approved training plan for training and retraining of underground miners effective at the time of the alleged discriminatory action. The plan provided a training program of from 6-1/2 to 11-3/4 hours for newly employed experienced miners. Part of the training was to be done at a company training center and part of it at the mine site. The Complainant, having worked in an underground mine from 1971 to November 20, 1978, was an experienced miner. 1/

Complainant was returned to work in the subject underground mine on June 11, 1981. Presumably he received the required training. The record does not indicate whether it was provided by Respondent or whether Complainant was paid while being trained.

1/ Although the stipulations are not specific in this regard, I am assuming that it was Respondent's position that Complainant required training as a newly employed experienced miner per 30 C.F.R. § 48.6 and not as a new miner per 30 C.F.R. § 48.5. The regulations in Part 48 were published in the Federal Register October 13, 1978, 43 FR 47459. In the absence of a specified effective date, they became effective 30 days thereafter or November 12, 1978. 5 U.S.C. § 553. According to the stipulations, Complainant was employed as an underground miner on that date and therefore was an "experienced miner." 30 C.F.R. § 48.2(b).

STATUTORY PROVISIONS

Section 104(c)(1) of the Mine Safety Act provides as follows:

> (c)(1) 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.

Section 115(a) of the Act provides in part: "Each operator of a . . . mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs * * *."

Section 115(b) of the Act provide in part: "Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training * * *."

REGULATORY PROVISIONS

30 C.F.R. § 48.2(b) provides in part:

> "Experienced miner" means a person who is employed as an underground miner, * * * on the effective date of these rules [November 12, 1978]; * * * or a person who has had at least 12 months experience working in an underground mine during the preceeding 3 years * * *.

30 C.F.R. § 48.3(a) provides in part: "Each operator of an underground mine shall have an MSHA approved plan containing programs for training new miners, training newly-employed experienced miners * * *."

30 C.F.R. § 58.6(a) provides: "A newly employed experienced miner shall receive and complete training in the program of instruction prescribed in this section before such miner is assigned to work duties."

ISSUE

Whether Respondent's refusal or failure to recall Complainant because he required additional training under the regulations constituted discrimination under the Act? Putting the issue differently, whether Respondent was required under the Act to recall Complainant for a job opening and to provide him the training required for that job?

CONCLUSIONS OF LAW

It is the responsibility of the mine operator to provide the training required under the Mine Act. The Act specifically states (Section 2) that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in the mines." Section 115 requires that mine operators have an approved health and safety training program, that the training shall be provided during normal working hours and that the miners shall be paid at their normal rate of compensation while undergoing such training.

On the basis of these provisions, Judge Morris ruled in Secretary/Bennett et al v. Emery Mining Corporation, 3 FMSHRC 2648 (1981), that a requirement that a job applicant obtain miner training at his own expense as a precondition of employment constitutes discrimination under the Mine Act. In the Emery case the Complainants underwent the required training at their own expense and on their own time and were thereafter hired by Emery. Judge Morris ordered reimbursement for the cost and expenses of the training and payment of wages for the time spent in the training program. I agree with Judge Morris' reasoning and his conclusions. However, the facts in the case before me are different. If two miners apply for a position in an underground mine, one of whom requires training and the other of whom does not, the operator does not violate the Act if he hires the latter.

If Complainant had obtained training on his own time and at his own expense, and then was hired by Respondent, the facts would be analogous to those in Emery, and I would hold that a violation of 105(c) was shown, because this would be an obvious attempt to shift the responsibility and cost of training from the mine operator, on whom the Act places it, to the miner. On the other hand, the Act does not require that, on the basis of seniority or otherwise, miners who require training must be hired or rehired rather than miners who do not require training. I assume that the miners who filled the job sought by Complainant in the subject mine, which miners "had a shorter length of service than Mr. Shepherd," did not require training.

It is not the function of the Commission to interpret the collective bargaining contract between Respondent and the United Mine Workers of America, and I venture no opinion as to whether Respondent's failure to recall Complainant violated the contract. Nor have we been given the responsibility of overseeing Respondent's hiring practices except as they may conflict with the Mine Act. I find no such conflict in the facts submittted to me in this case.

ORDER

Therefore, IT IS ORDERED that the complaint is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Ms. Mary Lu Jordan, Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, DC 20005

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 23 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA),	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No: KENT 81-162-D
On behalf of ROY LOGAN,	:	(PIKE CD 81-10)
Complainant	:	No. 2 Mine
v.	:	
BRIGHT COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: William F. Taylor, Esq., and Ralph D. York, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, and Michael G. Finnie, Special Investigator, MSHA, Pikeville, Kentucky, for Complainant;
Ralph G. Polly, Esq., and Gene Smallwood, Jr. Esq., Whitesburg, Kentucky, for Respondent.

Before: Judge Moore

This is a discrimination case and the principle issue is one of credibility. George Roy Logan says that on January 19, 1981, Superintendent Jack Collins told him to go under bad roof to set safety posts. He says that he told Jack Collins that he would go if Jack Collins or someone else would accompany him to assist, but that he would not go alone. He then says that Jack Collins told him "if you won't do that you might as well go on home and I'm going to get rid of you." Jack Collins admits that he fired George Roy Logan, but says he had not asked him to go under bad roof. He says that he fired Logan for threatening the foreman, failing to do his job of keeping the tailpiece clean, and mistreatment of the scoop when he was driving a scoop.

No one overheard the conversation of January 19, 1981, and both Roy Logan and Jack Collins gave their testimony in a straight-forward manner with no indication that I could detect of any hesitancy or signs of deceitfulness. From hearing the testimony of both, I have no way of knowing who was telling the truth, but credibility is the essential issue and must be resolved on

the basis of other instances and the surrounding circumstances. If either were willing to perjure himself with respect to some other incident involved in the case, I have to assume that he might be willing to perjure himself when testifying about the most crucial incident. In judging the credibility issue I must consider all of the aspects of this case.

At the outset is the discovery issue. At the request of Respondents, I ordered the government to produce any exculpatory information that might be contained in its files. The government did not deny that it had such material but instead resisted disclosure invoking the informers privilege, the executive privilege, and the so-called privilege involving the work product of an attorney. It did not properly invoke the executive privilege (even if it had, it would not have been pertinent) and Respondents were not seeking the work product of the government's attorney. They were seeking the information discovered by the government's investigating inspector which would have supported their contentions that there were ample reasons for firing Roy Logan other than an unlawful discrimination under the Act. I ruled that the informers privilege was also inapplicable because a witness who gave evidence favorable to the Respondent was not an informer. I ordered production of the exculpatory material, but the government refused to comply with the order. Prior to trial I issued a subpoena duces tecum requring the production of the information at the trial, but the government refused to comply with that subpoena. I then offered the Respondents the opportunity to seek court enforcement of the subpoena.

By letter of June 24, 1982 Respondent's attorney advises that both he and the U.S. Attorney decline to seek court enforcement on the ground that I had no authority to delegate subpoena enforcement to a private party. While I would not agree with that without seeing some authority I think the answer given by the U.S. Attorney begs the question. The delegation was not merely to a private party. It was to Mr. Polly "and to the United States Attorney..." If I can not delegate the authority to file an enforcement action to someone, then the authority is of little value because I can not appear in court as a litigant against a party appearing before me. The enforcement proceeding would be ancillary to the instant proceeding and in a sense I would be an advocate in a case over which I was presiding. I would have to recuse myself in order to enforce the subpoena.

Respondent's had asked to me to dismiss the case because of the government's refusal to produce the material, but I considered that too drastic a remedy in view of the fact that Mr. Logan was not being representd by his own counsel but by government counsel, and I did not wish to punish him for something government counsel did. At the trial, government counsel denied that they were representing Mr. Logan, but I think they were mistaken in this denial. They were representing Mr. Logan. I nevertheless refused to dismiss.

The most reasonable sanction I can impose is to assume that there is exculpatory material similar to the evidence produced by Respondents on defense in this case. I cannot assume any exculpatory evidence as to the key

issue of whether, on January 19, 1981, Respondent Jack Collins ordered Roy Logan to go under unsafe roof and discharged him when he refused to do so. But I will make assumptions adverse to the government with the respect to other phases of the evidence. I would like to emphasis that these assumptions could have been avoided if the government had denied existence of exculpatory information. If the government had offered to let me look at the material in camera I might have been able to see good reason why it should not be disclosed. No such offer was made, however, and I made no request that I be allowed to see the entire file.

Because of the credibility issue at the very heart of this proceeding, I allowed evidence to be introduced which, while not directly relevant to the events leading up to Mr. Logan's discharge might nevertheless bear on the credibility of the witnesses. One example of that type of evidence is the section 103(g) inspection that was made subsequent to Mr. Logan's firing. During the course of the discrimination investigation, a miner alleged to an inspector that unsafe conditions existed at the mine, and he requested an immediate inspection. The inspection was made and while a citation was issued, it was unrelated to the nine specific charges made by the miner in question. I find that there was nothing in the evidence concerning this inspection that would bear on the credibility of any of the witnesses. 1/

There were other post discharge events testified to which, as it turned out, do not have a bearing on the credibility issue herein. One such incident occured when Mr. Logan met Mr. Mike Joseph to exchange a company (Joseph Brothers) lamp and battery charger for Mr. Logan's final paycheck. There was a 22 rifle lying across either the trunk or the hood of Mr. Logan's car. But there was no evidence that would justify a finding that Mr. Logan was attempting to threaten Mr. Joseph with the rifle. I accept Mr. Logan's explanation that he and his brother had merely been "plinking" at tin cans and bottles in the river.

While Mr. Logan alleges that he was fired because of his refusal to work under bad top alone on January 19, 1981, Respondents allege that he was fired for a number of reasons including the manner in which he operated his scoop, including unsafe and reckless operation which damaged the scoop, insubordination, threats to a foreman, and failure to perform his job after he was taken off of the scoop. There was also an allegation that he took food from the other miners' lunch boxes, but whether this added to the other items as a part of the reason for Mr. Logan's discharge is unclear.

1/ During a colloquy concerning of the 103(g) inspection, I called counsel to the bench for an off-the-record discussion. I asked if Mr. Logan, in his deposition, had not already revealed himself as one who complained to MSHA about unsafe conditions and the lack of preshift examinations. Both Counsel agreed that the matters referred to in Mr. Logan's deposition were not the ones giving rise to the 103(g) inspection. Inasmuch as I do not know who made the complaint I cannnot use the results of the inspection as affecting the credibility of any witness.

On January 15, 1981, Mr. Paul Reid of Celtite Corporation conducted a pull test in Respondent's mine. While the pull test was not described in detail the idea is to pull out a roof bolt and see just how much force it takes to pull it out. There is disagreement as to what time of day the pull test was made, but all who testified as to the date agreed that it was January 15, 1981. Mr. Logan's immediate supervisor, foreman Scott Johnson, told Logan that he could watch the test if his tail piece area was clean. It is at this point that the versions of what took place differ. Roy Logan says that before the first part of the pull test was completed Scott Johnson came up to him and embarrassed him in front of his fellow workers by telling him to get back to work. Logan says he then threatened Johnson with words such as "I'll whip you before I leave" and said that several others should have heard his statement. This testimony by Logan was given in his deposition which was, without objection, made part of the record. At the trial, however, he said he sort of muttered the threat and did not intend anyone to hear it. While no one else at the pull test including Johnson, Collins, and several others, testified that they heard the threat, several heard either Collins or Johnson or both tell Logan to get back to work. According to Johnson and Collins the first part of the pull test was over. Johnson said that when they went to test the second bolt, a part of the testing equipment broke so there was no point in allowing anybody to remain because the pull test was then over, at least for that day. Scott Johnson testified that he had to tell Logan three times to get back to work. Willard Blair heard Johnson tell Logan to go back to work. He did not say how many times. Eugene Lewis a state mine inspector heard Jack Collins tell Logan to go back to work at least twice, but said that Logan just sat there. And Jack Collins said he told Logan to go back to work two times when the first test was over and that Scott Johnson told him to go back to work two times. The weight of the evidence is that if Logan went back to the tail piece to work, he did not do so when he was instructed by his two superiors to get back to work.

State Inspector Eugene Lewis testified that on the day of the pull test but prior thereto, he saw Roy Logan at the tail piece and Roy Logan told him that he was going to whip Scott Johnson. Later in the day, Lewis related that information to Jack Collins and Jack Collins at some unspecified time thereafter relayed the information to Scott Johnson. Both Scott Johnson and Jack Collins corroborate Mr. Lewis' version of the way the threat was communicated to Mr. Johnson. It is noted that Mr. Logan's statement at the trial, that he did not mean for anyone to hear him and sort of muttered the threat, is inconsistent with the statement in his deposition that four to six people probably heard him tell Johnson that he would whip him before he left.

The above incidents involving the pull test all took place January 15, 1981, the discharge took place on January 19, 1981. The rest of the incidents that will be considered took place at unspecified dates, either before January 15, or subsequent to the dischage on January 19. Scott Johnson testified that when Logan first came to work for Bright Coal Company, he was a very good scoop operator. He then began to slow down and appeared to avoid the foreman; that is, when the foreman was on the outside, Logan would be at

the face and when the foreman was in the mine, Logan would be broken down outside. Buford Stonic testified that Logan's scoop seemed to be broken down an awful lot. Jack Collins testified that Logan "tore up" his scoop all the time. Gears, universal joints and other items were constantly being over-stressed because of Logan's reckless driving. Levon Williams, a foreman at the other mine, said that Logan was sent to his mine at one time and managed to get his scoop stuck in an area sideways. Mr. Williams was uunable to explain clearly what happened but he thought it was deliberate and it took several hours to correct the matter. He left instructions that Logan should not be sent to his section again. Although both scoops in the mine were fairly new, Logan had the newest one, and according to Mr. Collins, the other scoop driver had no trouble with his scoop. It was just Logan's scoop that broke down all the time.

Another incident that is alleged to have occurred at an unspecified time (which Mr. Logan denies), is a near accident involving the other scoop driver. The other scoop driver, Jim Cornett, said that he was driving the scoop underground when Roy Logan who had been engaged in some hazardous horse play jumped out in front of Cornett's scoop. He considered it very fortunate that he did not run over Logan. He related this incident to Jack Collins when he saw him. Jack Collins testified that Jim Cornett had almost run over Logan while Logan was asleep and that after hearing about it, he went back down into the face area and found Logan asleep. Mr. Cornett did not see Logan asleep nor has he seen anyone asleep in the mines although he had heard, he thinks from Jack Collins that Logan had been asleep. At his deposition Logan denied both allegations although he did not present any rebuttal testimony at the trial. There were other predischarge events testified to by Mr. Logan during the course of his deposition, but they will be considered later.

Mr. Logan testified, both in his deposition and at the trial, that on the day of the firing, January 19, 1981, after the shift was over, it was decided by Mr. Jim Hogg that Logan could ride to and from work with Mr. Jack Collins. Logan said he put his knee pads in Collins' Bronco expecting to be picked up the next morning at a store between his house and the mine. He says the next morning he was at the store which had been the agreed meeting place and that Mr. Collins drove right on by. Mr. Collins denies that there was an arrangement to pick up Mr. Logan. Mr. Jim Hogg was on the stand at the trial but nobody bothered to ask him whether he had been a party to any arrangement whereby Jack Collins would pick up Roy Logan on the day after he had been fired.

Roy Logan says that on the evening of January 20 he learned indirectly from his brother that he had been fired and that he phoned Scott Johnson and Jack Collins to ask about it. He said Jack Collins denied any knowledge and suggested that he call Jim Hogg. He said when he called Jim Hogg, Jim suggested that he call Jack Collins and that when he again called Jack Collins, Jack told him he had been fired. Scott Johnson, testified that Mr. Logan had called him and that he, Scott Johnson, had said he knew nothing about the firing. Mr. Collins testified that Logan called him to try to get his job back and that when he refused, Logan threatened him with such words

as "your time is coming" and added "I know where you live and I know where your children go to school." Logan denies making the statement about the children although he concedes saying something about "your time is coming". Jack Collins said that he and his wife and daughter were shopping in a store later when Logan came up and called him a "son-of-a-bitch" in front of his family. He said he took Logan out of the store and knocked him down. Logan denies all of this.

After Logan was fired from Bright Coal Company, he went to work for Joseph Brothers as a scoop operator. After a short time, Charles Joseph fired him because he was damaging the equipment with his reckless driving. Mike Joseph corroborated the fact that Logan could not keep the scoop running because he was too rough on the equipment. They even thought Logan deliberately let the air out of the tires to avoid work. Logan denied that he had been fired but during the course of his deposition he did say that it was almost the same as being fired. He said that Joseph Brothers had laid off the second shift but let the others continue working anyway. He nevertheless denied being directly fired. Mike Joseph said he fired him.

Near the end of the trial, counsel for Respondents offered preshift examination reports to show that the required examinations had in fact been made. Government counsel objected on the grounds that they were not relevant because the government had at no time charged or contended that the proper preshift examinations were not being made. When counsel for Respondents asked if the government was abandoning its claim that proper preshift examinations were not made, government counsel stated that he was not abandoning the contention, because he had not made it in the first place. The government was simply not contending that there was any flaw in Respondent's preshift examination procedures. At Mr. Logan's deposition, however, he made quite a point of the fact that proper preshift examinations were not being made. He said they were never made and that he had argued with Scott Johnson about not making them. He alleged that neither Jack Collins nor Scott Johnson ever went into the mine before Logan himself went in. Johnson would sometimes come in after they started working and put his initials in places, but he was faking the preshift examination according to Logan. He even complained to Jack Collins about Logan not making the preshift but Collins said there wasn't any point in making one. Logan stated that the only time Johnson would mark anyplace on the roof with his initials was when he had to come up to the face for some other reason and it was in no way a preshift examination. He also said that he complained to the MSHA inspector's about the failure of the company to make preshift examinations. He also mentioned a time prior to the discharge and pull test when Jack Collins asked him to go under what he considered bad roof to rock dust. He refused to do so.

All of the above would tend to establish a very poor policy on Respondents' part regarding mine safety. All would have been in support of a discriminatory discharge. None of these items were brought forth during the trial, however. None of the miners who testified alleged that they had been asked to work in unsafe conditions, none mentioned the failure of Respondents' to make preshift examinations, and Mr. Logan did not testify at the trial

concerning these matters. In my opinion, the circumstances give rise to the inference that the government does not believe the sworn statements of Mr. Logan regarding these matters. If the government had information tending to disprove the statements of Mr. Logan, it was obliged, under Brady v. Maryland 273 U.S. 83 (1963), to disclose that information. Since it has neither denied that it has such information, nor disclosed such information to Respondents, I am making the assumption that it has such information.

I make the further inference that if Mr. Logan made misstatements under oath as to the items referred to above, he may well have made similar misstatements under oath as to the principle issue herein, i.e., why he was fired. I have no similar evidence that would indicate that Mr. Collins may have made misstatements under oath.

Considering the inferences that I have made, it is obvious that the government has failed to satisfy its burden of proof that Mr. Logan was discharged because he refused to work under unsafe roof. I therefore render judgment for the defendants Bright Coal Company and Jack Collins and the case is DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: Certified Mail

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUL 23 1982

WILLIAM A. HARO, Complainant, v. MAGMA COPPER COMPANY, Respondent.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. WEST 80-482-DM MD 80-26 MINE: San Manuel Division

DECISION AND ORDER

Appearances:

Thomas G. Martin, Esq.
1601 N. Stone Avenue
Tucson, Arizona 85705
For the Complainant

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

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

Complainant, William A. Haro, filed a complaint against Respondent, Magma Copper Company alleging that on August 24, 1979, he was suspended for five days for alleged insubordination, and that on November 16, 1979, he received a reprimand when he allegedly left his work area without permission. Haro alleges that the five day suspension and reprimand were administered against him by the respondent in retaliation for Haro having exercised his rights which were protected pursuant to section 105(c)(1) 1/ of the Federal Mine Safety and Health Act of 1977 (hereinafter the "Act").

1/ Section 105(c)(1) reads in pertinent part "No person shall ... discriminate against ... any miner ... because such miner ... has ... made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation in a ... mine ..."

FINDINGS OF FACT

The respondent, Magma Copper Company, operates an underground copper mine, mill, smelter, refinery and rod plant at San Manuel, Arizona. Several years prior to 1979, respondent had initiated a six point safety program. The safety program refers to a six point check list which is to be completed by each employee and his supervisor. After the safety slip is filled out each day by the employee, it is given to his supervisor. Approximately 1500 to 1600 employees fill out the safety slips daily. Six questions must be checked on each slip, however, only the first three questions are relevant in this proceeding. The first three questions are as follows:

	YES	NO
1. Check entrance to place of work?		
2. Are equipment and working area in good order?		
3. Is work assignment understood?		

On May 19, 1979 when Haro filled out his safety slip, he checked question No. 1 "No" because he had observed that there were splinters in the shower room benches and that the benches should be sanded and painted. Haro's supervisors explained to him that the first question referred to Haro's actual work place, and that for unsafe conditions outside Haro's work area a notation should be made in the "comments" section at the bottom of the safety slip. Haro believed that the entrance to his place of work included the shower room because that was his first entrance to the job where Haro put on his work clothes. Haro informed the mechanical general foreman that unless Haro was allowed "freedom of choice" on filling out the safety slips he would not fill them out any more. He stated that his decision was not subject for negotiation. Haro also felt he was being coerced as to what the meaning of immediate work area meant. Haro's supervisor informed him that he was expected to fill out the safety slips, and no further action was taken in regard to this incident. On May 25, 1979, Haro was informed that the shower room benches had been sanded and painted.

On August 16, 1979, Haro again marked "no" on question No. 1 on the safety slip. Haro testified that in his opinion his entrance to his work place was unsafe because respondent would not allow Haro to apply his craft as a journeyman mechanic with respect to the welding of concrete pots used in the underground mine department. Haro had observed the welding work being done on the concrete pots by certified welders, and Haro believed that it was unsafe. Haro had further concluded that respondent was limiting Haro's abilities to perform his duties, and respondent was not letting Haro comply with his "specified requirements." Haro's supervisor, Mr. Hamilton, later informed Haro that Haro was a mechanic, not a welder, and if Haro did not like how things were being done, to get another job.

On August 16, 1979, Haro also marked "no" to question No. 2 on the safety slip in regard to whether the equipment in the area was in good working order. Haro marked the slip "no" because the overhead crane in the surface car shop could not be used and had not been repaired. The crane had been taken out of service approximately one month before, on July 24, 1979, and the air lines to it had been disconnected and the control box "tagged out". This action had been taken after an MSHA inspector had inspected the crane on July 24, 1979, at the request of Haro. When questioned by Mr. Hamilton about Haro's mark "no" on the safety slip, Haro acknowledged that the overhead crane was out of service, but Haro stated that he could climb to the roof of the shop, reconnect the air hoses, and thus use the crane. Hamilton told Haro that if Haro did that, he would be in violation of a direct order given to everyone in the shop in that the crane was tagged out of service.

As to question No. 3 on the safety slip, whether the work assignment was understood, Haro had marked it "no" on August 16, 1979, because Haro did not understand the work being done by the welders on the concrete pots. Hamilton explained to Haro that Haro was a mechanic, not a welder, and that there was no need for Haro to understand any weld repairs being done within Haro's shop.

On August 22, 1979, Haro was summoned by Mr. Hamilton, the mechanical general foreman, to discuss the method Haro had used to fill out the safety slip on August 16, 1979. Mr. Hamilton concluded the meeting by explaining to Haro that respondent's expectations in regard to the safety slips had now been explained to Haro and that he could either comply with the program or look for work elsewhere.

On the next day, August 23, 1979, Hamilton discovered that Haro had turned in his safety slip with the first three questions left unanswered. Hamilton sent Haro's immediate supervisor to Haro in order to have him fill it out. The supervisor returned and told Hamilton that Haro had refused to fill it out, and that Haro had said if Hamilton wanted it filled out, then Hamilton could do it himself. At 4:25 p.m., Hamilton ordered Haro brought to his office and when Haro arrived, Hamilton asked Haro why some of the questions on the safety slip had been left unanswered. Haro replied, that it had slipped his mind, or he had forgotten. Haro than took a pencil from his pocket, checked the three unanswered questions "yes", and tossed the safety slip on a chair. Haro left work at 4:30 p.m.

Mr. Hamilton did not believe that Haro had forgotten to fill out the safety slip, but that Haro had refused a direct order as to how to fill it out. Hamilton contacted his supervisor, explained what had occurred, and recommended that Haro be fired for insubordination. However, the final decision was that Haro be given a five day disciplinary layoff commencing August 24, 1979, for insubordination. The notice to Haro gave the explanation that the layoff was for "failure to comply with a direct order concerning six point safety slip." Mr. Hamilton's supervisor testified that Haro was the only employee who had refused to fill out a safety slip in compliance with instructions.

Haro filed a grievance pursuant to the union contract on August 16, 1979, alleging that "Mr. Hamilton was forcing me against my will in filling out safety slips and was doing it through coercion." On August 22, 1979, Haro filed a grievance because Haro concluded that he was unable to leave his work area during lunch hour and felt that he should, therefore, be paid for his lunch hour.

On November 16, 1979, Haro received a written warning for being away from his work area. During the lunch period Haro had left his work area to file a second step proceeding in a grievance that Haro and another miner had filed previously. Allegedly, Haro had not asked the permission of his supervisor in order to leave his authorized work area during the lunch period to make the filing at the Administration Building.

During the three years prior to August, 1979, Haro had filed approximately 20 grievances against respondent and had also filed two "discrimination" complaints against respondent for alleged violations of section 105(c)(1) of the Act. These complaints were pending at the time Haro was suspended for insubordination.

ISSUES

The issues in this proceeding as agreed to by counsel for Haro and counsel for the respondent were whether or not the discipline which was administered to Haro regarding the five day disciplinary layoff on August 24, 1979, for insubordination and the subsequent reprimand on November 16, 1979, for leaving the work place were done in accordance with legitimate company policies, or whether these disciplines were pretextual and contrary to section 105(c)(1) of the Act.

DISCUSSION

Haro has the burden of showing that he engaged in protected activity and that his suspension and reprimand were motivated in part by such protected activity. The Secretary of Labor, on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980).

Was Haro suspended for five days commencing August 24, 1979, because he had made complaints in regard to alleged dangers or safety or health violations, and did Haro receive the reprimand on November 16, 1979, for the same reasons?

Counsel for Haro contends that because of Haro's complaints to MSHA in July 1979, which resulted in the inspection of the overhead crane on July 24, 1979, and Haro's history of resorting to MSHA assistance, respondent took revenge and discriminated against Haro by suspending him for five days for alleged insubordination; and, that for the same reasons respondent reprimanded Haro for leaving his work area on November 16, 1979, without permission, in order to file a second step of a grievance. Thus, Haro

claims that the protected activity in which he engaged consisted of having made safety complaints to MSHA and that because of that activity protected by the Act, respondent retaliated against Haro. The facts do not bear out this contention.

According to the testimony of Haro he was in disagreement as to the manner in which the respondent required him to fill out safety slips. On May 19, 1979, Haro marked "no" to question No. 1 which stated "Check entrance to place of work?" Because he disagreed with respondent's interpretation as to the location of his "place of work." Although Haro may have believed that the splinters on the shower room benches were a danger or health or safety violation, the point he raised was that he was coerced into filling out the safety slips to show that the entrance to "place of work" was the immediate work place of the miner, whereas Haro believed it to be the entrance to the mine property where he was first subject to orders by a supervisor. Thus, there was no protected activity involved in this occurrence.

On August 16, 1979, when Haro again marked "no" to question No. 1 on the safety slip there was no showing by Haro that he was complaining of an alleged danger or safety or health violation. Haro testified that his entrance to his work place was unsafe because respondent would not allow Haro to apply his craft as a journeyman mechanic with respect to the welding of concrete pots.

At the request of Haro an MSHA inspector inspected the overhead crane in the car shop on July 24, 1979. As a result of that inspection, the crane was taken out of service due to certain deficiencies. A supervisor "disabled" the crane so that it could not be operated. He had the crane moved to the end of the building, parked, and unhooked it from its air supply, and the controlling mechanism was "tagged". The crane was not put back into operation until February 25, 1981, according to Haro's testimony. Although the evidence was unclear as to what the alleged danger consisted of, Haro's action in calling MSHA was protected activity. However, there is no inference from the evidence that the suspension of Haro on August 24, 1979, or the reprimand on November 16, 1979, was motivated in any part by that protected activity.

On August 16, 1979, Haro marked "no" to question No. 2 on the safety slip. The question was "Are equipment and working area in good order?" Haro testified that he had been marking "no" to that question because he was unable to obtain an answer from management as to when the overhead crane would be repaired. This complaint was not activity protected by the Act. Since the crane had already been "tagged out" of service for approximately a month, its presence could hardly be called a possible danger or safety or health violation.

On the same date, August 16, 1979, there was no protected activity in regard to Haro's answering question No. 3 "no", that the work assignment

was not understood. Haro testified that he did not agree with the way the concrete pots were welded. He was not a welder, but was a mechanic who worked on maintaining the undercarriage of the rail cars on which the concrete pots were placed. There was no substantial evidence to show that Haro was making notification of an alleged danger or safety or health violation in regard to the method used to weld concrete pots.

There is no evidence that the reprimand given to Haro on November 16, 1979, when he left his work area without permission in order to file the second step of a grievance was motivated in any part by any protected activity. The filing of a second step in the grievance procedure was not shown to be in any way related to notification of an alleged danger or safety or health violation.

The Act protects the miner when he makes notification of an alleged danger or safety or health violation. Protected activity does not consist of allowing Haro to fill out the safety slips in any manner that he may have felt was the proper way. The manner in which the safety slip was required to be filled out was respondent's prerogative. Although the method may have limited Haro's "freedom of choice", it was, nevertheless, the legitimate exercise of a managerial right of the respondent.

Substantial evidence is convincing that Haro was suspended and reprimanded because respondent decided that Haro was insubordinate and failed to follow company policies in filling out safety slips, and also that Haro left his work area without permission of a supervisor. Respondent's decision was not an unreasonable one based on the evidence.

CONCLUSION

I find that the complainant, William A. Haro, has failed to sustain his burden of showing that his five day suspension and reprimand were motivated in any part by protected activity.

ORDER

The complaint is dismissed.

Jon D. Boltz
Administrative Law Judge

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 23 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 82-68
	:	A.C. No. 42-00081-03032 V
v.	:	
	:	Docket No. WEST 82-69
CO-OP MINING COMPANY, Respondent	:	A.C. No. 42-00081-03033 V
	:	
	:	Docket No. WEST 82-101
	:	A.C. No. 42-00081-03034
	:	
	:	Co-op Mine

DECISION

Appearances: Katherine Vigil, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon petitions for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," in which the Secretary has proposed penalties against the Co-op Mining Company (Co-op) of $1,094 for three violations of mandatory standards. The general issues are whether the Co-op Mining Company (Co-op) has violated the regulations as alleged in the petitions and, if so, whether the violations were "significant and substantial." Appropriate civil penalties must also be assessed for any violations found. Hearings in these cases were held on May 13, 1982.

Docket No. WEST 82-68 - Order No. 1023129

The validity of Order No. 1023129, issued under section 104(d)(1) of the Act is not in itself at issue in this civil penalty proceeding, but only the violation charged therein. Secretary v. Wolf Creek Collieries Company, PIKE 78-70-P (March 26, 1979); Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (October 1979).

The order alleges a violation of the mandatory standard at 30 CFR section 75.305. That standard provides in relevant part as follows:

> "In addition to the preshift and daily examinations required by this subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and, insofar as safety considerations permit, abandoned areas. * * * A record of these examinations, tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons."

The Order reads as follows:

> There was no evidence of the weekly examinations of the return aircourse or intake and the book provided on the surface for this purpose was not filled out for the week of 8/18/81 and 8/26/81 and 9/2/81. Thus, the last examination of intake and return in its entirety was preformed [sic] on 8/12/81.

The order appears to charge two separate violations of the cited standard, i.e. (1) a failure to perform the weekly examinations and (2) a failure to record such examinations. The operator conceded at hearing that the entries required by the cited standard had not been made in the examination books. The violation of that part of the standard is therefore proven as charged. Whether I find that the required inspections had nevertheless been made depends on my determination of the credibility of the witnesses. MSHA coal mine inspector John Turner testified at hearing that the examination book indeed did not have entries corresponding to weekly examinations required for the three week period August 15, 1981, through September 2, 1981. When Turner had shown the examination book to section foreman Kevin Peterson, Peterson acknowledged that the entries had not been made. Peterson, in fact, never claimed that the inspections had been made.

Mine Superintendent Bill Stoddard testified that shortly before the MSHA inspection here at issue, he had assigned maintenance foreman Clyde White to perform the required weekly inspections. White reportedly told Stoddard that he had performed all of the required inspections, but merely failed to enter them into the designated book and failed to place his initials in the return aircourse as required by the cited standard. According to Stoddard, White also said that he had reported the results of his inspections to another foreman, Ken Defa, and that he assumed Defa was making the necessary book entries and was placing his (Defa's) initials in the return aircourse even though Defa had not performed the inspections.

Neither White nor Defa appeared at hearing to testify concerning these matters and no reason was given for their non-appearance. The statements attributed to them were, therefore, not given under oath nor subjected to the scrutiny of cross examination. Under all the circumstances, I can accord but little weight to this self-serving hearsay. On the other hand, it may reasonably be inferred from the absence of the required entries in the examination book and from the absence of an inspector's initials in the return aircourse that the required inspections had never been made. The violations have accordingly been proven as charged.

Whether these violations were "significant and substantial", however, depends upon whether they could be a major cause of a danger to safety or health and whether there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). The test essentially involves two considerations: (1) the probability of resulting injury, and (2) the seriousness of the resulting injury.

If the weekly examinations had actually been performed here and the only violation was the failure to record those examinations, then that violation would undoubtedly not have been "significant and substantial". That, however, is not the case. According to Inspector Turner, other required inspections made at the Co-op Mine on a daily basis would cover all areas but the return entries. Only the weekly exam required by the cited standard provides for inspection of the return entry. Moreover, there is no dispute that the weekly examination of the return entry could lead to discovery of roof falls that might hinder ventilation of the working areas of the mine, defective air stoppings, and coal

dust and methane. Although methane has never been detected at the cited mine and inadequate ventilation through the return entry can be detected by other inspections and tests such as inspection of the exhaust fan chart, and the ventilation and methane tests made during pre-shift examinations and every 20 minutes during production, these factors do not in my opinion detract from the significance of the weekly inspection. Clearly, if these other inspections were handled in as negligent a manner as the weekly inspections, there is a good chance that the extremely hazardous conditions described by the inspector could escape undetected. If accumulations of float coal dust remain undetected, there is no disagreement that the risk of an explosion and resultant serious injury or death to the eight miners ordinarily working underground is greatly increased. Accordingly, I find that the violation was "significant and substantial" and constituted a serious hazard.

I find also that the operator was negligent in failing over a rather long period of time to see that the inspections required by the cited standard were being performed. In determining the amount of penalty herein, I have also taken into consideration that the operator had an annual production of 141,000 tons of coal and had 20 employees. It also had a history of 104 violations over a recent 2-year period. Under the circumstances, I find that a penalty of $500 is appropriate.

Docket No. WEST 82-69

At hearing, the parties moved for approval of a settlement agreement requesting a reduction in proposed penalties from $300 to $150. The parties provided sufficient information at hearing from which I determined that the proposed settlement was appropriate under the criteria set forth in section 110(i) of the Act. The motion for approval of settlement was accordingly granted.

Docket No. WEST 82-101

At hearing, Co-op requested to withdraw its Answer and agreed to pay the proposed penalty of $44. Under the circumstances, permission to withdraw was granted and a default decision entered.

Order

The Co-op Mining Company is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

Docket No. WEST 82-68 - $500

Docket No. WEST 82-69 - $150

Docket No. WEST 82-101 - $ 44

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

Carl E. Kingston, Esq., Co-op Mining Company, 53 West Angelo Avenue, P.O. Box 15809, Salt Lake City, UT 84115

Katherine Vigil, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 26 1982

SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceedings
	:	Docket No. LAKE 80-363-M AC No. 12-00109-050061
v.	:	Docket No. LAKE 80-364-M AC No. 12-00109-05007
SELLERSBURG STONE COMPANY, Respondent	:	

DECISION

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor
U.S. Department of Labor, for Petitioner
Edwin S. Sedwick, Esq., for Respondent

Before: Judge William Fauver

These consolidated proceedings were brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for assessment of civil penalties for alleged violations of mandatory safety standards. The case was heard at Louisville, Kentucky.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent operated an open-pit, multiple-bench, crushed limestone operation in Clark County, Indiana; its products were regularly produced for sales or use in or substantially affecting interstate commerce.

2. After material was blasted from the side of the quarry ("primary blasting"), a frontend loader was used to gather boulders that were too large to go through the stone-crusher. These were moved to the floor of the quarry where they were exploded by "secondary blasting."

3. "Secondary blasting" involved: a) drilling a hole into a boulder with a jackhammer drill; the hole was about 1 inch x 18 inches; b) loading the hole with a 1-inch x 4-inch stick of dynamite; adding a primer cord; and packing the hole with fine stones; and c) detonating the dynamite, in blasts of about 20 boulders at a time. The boulders were piled or grouped in a rather close cluster for drilling and blasting.

4. In secondary blasting, at times a dynamite charge would not explode. After the blast, the standard safe practice in the industry was to inspect all boulders remaining to see whether any contained undertonated dynamite, and this inspection required turning the boulder over to drill all sides for a drill hole. However, Respondent did not follow the practice of turning boulders over, and relied upon visual inspection of the top and sides of a boulder.

5. In secondary blasting, at various times some boulders would be turned over by the blast so that if a boulder were unexploded the drill hole might be on the bottom and not detectable unless the boulder was turned over for visual inspection.

6. The boulders were about two to four feet in diameter, and usually the drill hole did not exit, so that there would be only one hole visible on a boulder.

7. On December 13, 1979, two men were assigned to do secondary blasting. Carl Sparrow, the blaster, had about four or five months experience in blasting and David Hooper, the driller, had about three months experience. Neither was carefully or well trained in the performance of his duties.

(a) That morning they inspected about 20 boulders; Hooper drilled them and Sparrow loaded them with dynamite and primer cord. At times Hooper helped pack or load a hole.

(b) They set off a blast of about 20 boulders, and went to lunch. When they returned, Sparrow worked around his truck and Hooper started inspecting and drilling boulders. The first boulder he inspected had no visible drill hole, but he could not see the bottom. The boulder was about four feet in diameter and too heavy to turn over without equipment, such as a frontend loader. Respondent had such equipment, but did not use it or make it available for turning over boulders for inspection. He started drilling a hole. When he was about halfway through the boulder it exploded. Hooper received permanent disabling injuries, including loss of the sight of one eye and a crippled leg.

(c) Respondent did not preserve the accident site; after Hooper was taken to the hospital, all evidence of the accident was removed or disturbed and normal mining was resumed.

(d) Respondent did not report the accident to MSHA by telephone or by other prompt means. Its first notice to MSHA was a Form 70001, mailed to MSHA's Vincennes, Indiana subdistrict office on January 2, 1980.

DISCUSSION WITH FURTHER FINDINGS

The Secretary has alleged three violations. The first citation charges a violation of 30 CFR § 56.6106, which provides:

> Faces and muck piles shall be examined by a competent person for undetonated explosives or blasting agents and any undetonated explosives or blasting agents found shall be disposed of safely.

Respondent did not properly examine the muck pile after secondary blasting, because after such blasting it drilled boulders without turning them over to examine each boulder for a dynamite drill hole on the bottom of the boulder. This failure was contrary to standard safe practice in the industry, and violated 30 CFR § 56.6106. Respondent's practice constituted gross negligence and a grave risk of drilling into a dynamite charge because the driller would not know whether a boulder had a dynamite charge that had failed to fire. I reject Respondent's evidence to the effect that the blast of a boulder could not move nearby boulders or turn them over. I also reject Sparrow's testimony that he had found a drill hole in the boulder that exploded and injured Hooper, and that he had ordered Hooper not to drill into that boulder. I credit Hooper's account of the facts and accident, including the fact that he had inspected the boulder before drilling and found no drill hole, that he drilled nearly halfway through the boulder when it exploded, that often boulders were piled on one another and a secondary blast moved boulders around and over.

This was a most serious violation resulting from gross negligence.

The second citation alleges a violation of 30 CFR § 50.12, which provides:

> Unless granted permission by an MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

This regulation implements § 103(j) of the Act, which states in applicable part:

> In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof.

No effort was made to preserve the accident site. The jackhammer and air compressor were removed and normal blasting operations were resumed. Nothing was left to indicate that an accident had happened. The investigators could not tell where the accident occurred, the actual number of rocks involved, the location of the accidental blast in relationship to the planned blast, the location of the jackhammer and air compressor, etc. MSHA's permission was not obtained to alter the accident site, nor was there a need to alter the site to recover Mr. Hooper or to avoid destruction of mining equipment. No imminent danger existed after the explosion. Respondent's conduct violated 30 CFR § 50.12, and by the exercise of reasonable care this violation could have been avoided. Respondent was therefore negligent.

This was a serious violation. Failure to preserve the accident site hindered MSHA's function of investigating the cause of the accident and of identitying and recommending steps to prevent or avoid a similar accident.

The third citation charges a violation of 30 CFR § 50.10, which provides:

> If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, collect at (202) 783-5582.

This provision reasonably implies that an operator is required immediately to telephone or use other prompt means, e.g., a telegram, to notify the MSHA District or Subdistrict Office.

Notice by mail involves a substantial delay in contacting MSHA. MSHA Form 7000-1 is a separate and independent reporting requirement. The information on that form is used for different purposes than the notification required under § 50.10. Respondent violated § 50.10 by failing to telephone or at least telegraph the proper MSHA office on the day of the accident. A violation of this kind has a serious effect on MSHA's ability to conduct an effective investigation. The accounts of witnesses in this case involved a number of contradictions, which the inspectors were impeded in resolving primarily because they were unable to investigate the incident in a timely fashion. This violation resulted from management's negligence.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding.

2. On December 13, 1979, Respondent violated 30 CFR § 56.6-106 as alleged in Citation No. 36811. Based upon the statutory criteria for assessing a civil penalty, Respondent is assessed a penalty of $7,500 for this violation.

3. On December 13, 1979, Respondent violated 30 CFR § 50.12 as alleged in Citation No. 367185 as modified. Based upon the statutory criteria for assessing a civil penalty, Respondent is assessed a penalty of $1,000 for this violation.

4. On December 13, 1979, Respondent violated 30 CFR § 50.10 as alleged in Citation No. 366810 as modified. Based upon the statutory criteria for assessing a civil penalty, Respondent is assessed a penalty of $1,000 for this violation.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the Secretary of Labor the above-assessed civil penalties, in the total amount of $9,500.00, within 30 days from the date of this decision.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

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Edwin S. Sedwick, Esq., 100 Heritage Bldg., Sellersburg, IN 47172

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WADE G. TEETS, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. WEVA 82-153-D
EASTERN ASSOCIATED COAL CORPORATION, Respondent	:	Federal No. 1 Mine

DEFAULT DECISION

The complaint in the above-entitled proceeding was filed on February 8, 1982, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. Inasmuch as the complaint was filed without benefit of legal advice, I wrote a letter to complainant on March 18, 1982, explaining to him the procedures which would be used in holding a hearing and deciding the issues raised by his complaint. The letter also requested that complainant notify me by May 20, 1982, whether he expected to obtain an attorney to represent him at the hearing. The letter emphasized that it was necessary for him to decide before the case was set for hearing whether he intended to obtain an attorney so that the hearing would not be delayed after a date for the hearing had been scheduled in a formal notice of hearing. The letter also explained to complainant that it would be necessary for him to answer the questions or interrogatories served upon him by respondent's attorney and explained the procedures he should follow in the event he wished to ask questions of respondent's personnel. Finally, the letter advised complainant that if he failed to respond to my request as to whether he expected to obtain an attorney, that he would receive a show-cause order requiring him to explain in writing why he should not be found to be in default and why his complaint should not be dismissed.

A return receipt shows that complainant received my letter on March 22, 1982, but complainant did not reply in any way to the letter of March 18, 1982. Therefore, on July 1, 1982, a show-cause order was issued requiring complainant to explain in writing by July 20, 1982, why he should not be found to be in default and why his complaint should not be dismissed for failure to reply to my request of March 18, 1982. The return receipt shows that complainant received the show-cause order on July 6, 1982, but complainant has submitted no response to the show-cause order.

Counsel for respondent filed on July 6, 1982, a motion for sanctions pursuant to Federal Rule of Civil Procedure 37(d) and 29 C.F.R. § 2700.1. Federal Rule 37(d) provides in pertinent part as follows:

> (d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify

> on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, * * * the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.
>
> The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

The motion for sanctions correctly states that respondent duly filed interrogatories on complainant and obtained an order for leave to initiate discovery after expiration of the 20-day period provided for in section 2700.55(a) because the complaint in this proceeding was not served on respondent until March 3, 1982, although it had been filed with the Commission on February 8, 1982. Respondent's counsel then asked complainant to provide a date for taking his deposition. When complainant failed to respond to that request, respondent scheduled the deposition for April 29, 1982. That date was changed to May 6, 1982, after complainant's wife advised respondent's counsel that complainant was sick and unable to be present on April 29. Complainant's wife thereafter advised respondent's counsel that complainant would not be well enough to attend the deposition rescheduled for May 6. The time for completion of discovery was consented to by complainant and I issued an order on May 18, 1982, extending the time for completion of discovery to June 30, 1982. A new date of June 8, 1982, was set for the deposition and complainant was served with a notice of deposition.

The motion for sanctions further states that respondent's counsel traveled by automobile from Pittsburgh, Pennsylvania, to Fairmont, West Virginia, for taking complainant's deposition. A court reporter also appeared at Fairmont on June 8, 1982, in order to record the deposition, but complainant failed to appear. The motion therefore requests that complainant be required to pay the expenses of the court reporter, the mileage fees, and attorney's fees, or a total of $439.75, incurred by respondent in its fruitless attempt to take complainant's deposition.

Complainant has filed no answer in reply to respondent's motion for sanctions.

Rule 37(d) provides that a judge may require a party to pay the expenses associated with failure to appear at an appointed place for taking of a deposition if the judge elects not to take the action provided for

under Rule 37(b)(2), paragraphs (A), (B), or (C). Paragraph (C) provides that a judge, for failure of a party to appear at a deposition, may issue:

> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

Although complainant did finally appear on June 22, 1982, for the purpose of giving a deposition in connection with the issues raised in this proceeding, respondent's counsel has filed copies of two different letters, the last one having been filed on July 21, 1982, in a futile attempt to persuade complainant to check the deposition for errors and return a signed copy of it to respondent's attorney.

Section 2700.63 provides that when a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal. As indicated above, a show-cause order was duly directed to complainant on July 1, 1982, requesting that he explain why he should not be found to be in default for failure to comply with my request of March 18, 1982, to the effect that he advise me as to whether he intended to obtain an attorney to represent him in this proceeding. He has at no time replied to any of my requests for information and he has been uncooperative in providing the information properly requested by respondent's counsel under the Commission's discovery procedures.

Section 2700.1 of the Commission's rules provides that a judge may be guided by the Federal Rules of Civil Procedure on procedural matters not regulated by the Commission's rules. I believe that complainant's failure to appear at the place scheduled for his deposition after respondent's attorney had already rescheduled the time for the deposition on two previous dates should also be considered as a ground for finding complainant in default. I find complainant to be in default pursuant to section 2700.63(a) of the Commission's Rules and Rule 37(b)(2), paragraph (C), of the Federal Rules of Civil Procedure.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

(A) The motion for sanctions filed on July 6, 1982, is granted, but the relief given is granted under Federal Rule 37(b)(2), paragraph (C), instead of the alternative relief requested by respondent of ordering complainant to pay the cost of the deposition pursuant to Rule 37(d).

(B) The complaint filed in Docket No. WEVA 82-153-D is dismissed.

Richard C. Steffey

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

Distribution:

Mr. Wade G. Teets, Route 1, Box 148, Fairmont, WV 26554 (Certified Mail)

R. Henry Moore, Esq., Attorney for Eastern Associated Coal Corp., Rose, Schmidt, Dixon & Hasley, 900 Oliver Building, Pittsburgh, PA 15222-5369 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 28 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. YORK 81-67-M
	:	A.C. No. 18-00481-05007
v.	:	
	:	Docket No. YORK 82-5-M
A. H. SMITH, Respondent	:	A.C. No. 18-00481-05008
	:	Brandywine Pits and Plant

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;
Wheeler Green, Branchville, Maryland for Respondent

Before: Judge Melick

These 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. section 801, et seq., the "Act," alleging violations of mandatory health and safety standards. The general issues are whether A.H. Smith (Smith) has violated the regulations as alleged in the petitions filed herein, and, if so, whether those violations are "significant and substantial". An appropriate civil penalty must also be assessed for any violation found.

Contested Citations

Citation No. 302475 charges a violation of the mandatory standard at 30 C.F.R. section 56.5-50, specifically alleging that the noise level around the operator of the "clam" shovel was 189% of the permissible limit. According to the charges, neither feasible engineering nor feasible administrative controls were being used to reduce the level of noise to eliminate the need for personal hearing protection. The citation was issued on July 19, 1978, and the operator was initially given until September 20, 1978, to abate the condition. Further extensions were granted as follows: (1) on February 1, 1979, an extension was granted to April 18, 1979, on the grounds that sound absorption material had been ordered by the operator but had not yet arrived; (2) on May 2, 1979, an extension was given to July 10, 1979, because the sound

aborption material had still not arrived; (3) on August 1, 1979, an extension was granted to August 21, 1979, after a noise survey performed on July 31, 1979, showed that the noise level around the operator of the cited shovel was 196% of the permissible limit (at the time of that survey, a sound barrier curtain had been installed but apparently had not been installed tightly against the ceiling and walls of the cab); (4) on February 6, 1980, an extension was granted to March 26, 1980, because the plant had been shut down and the inspector was therefore unable to perform a noise survey; (5) on June 4, 1980, an extension was granted to July 3, 1980, because the shovel had broken down and the noise survey could not be completed.

Precisely one year later, on June 4, 1981, a section 104(b) withdrawal order 1/ was issued (Order No. 312018). The order provided as follows:

> "No apparent effort was made by the operator to reduce the noise level of the Manitowac clam shovel in order to eliminate the need for hearing protection on five previous attempts to survey this machine. It either broke down early in the survey or was not running at all during an inspection of this plant. The operator had insulated curtains installed on the shovel but they were not being used. The noise level on the shovel was 192% of the permissible limit at 5 hours of the survey when this machine went out of service again. Ear plugs [sic] worn by operator of shovel.

Four days later, on June 8, 1981, the withdrawal order was modified after the soundproof curtains were reinstalled by the operator and a muffler was placed over the exhaust. A sound level meter indicated a reduction in noise levels from "102 dBA's to 92 dBA's". Additional controls were accordingly required to bring the noise level to within permissible limits. No subsequent action has apparently been taken on this equipment as the operator has withdrawn it from service.

There is no dispute in this case that the cited Manitowac shovel emanated noise levels above those permitted by the cited regulation, and indeed, that the shovel emanated noise when first cited at 189% of the permissible level. Smith's principal defense rests upon the language of the cited regulation which provides in part as follows:

1/ Withdrawal orders may be issued pursuant to section 104(b) of the Act after a violation has been cited under section 104(a) and has not thereafter been time abated. The validity of the section 104(b) withdrawal order is not in itself at issue in this civil penalty proceeding. Insofar as the order concerned a failure to abate the cited violation, however, it may be relevant evidence under section 110(i) of the Act in determining the amount of any penalty that may be imposed.

> When employees' exposure exceeds that listed * * *, feasible administrative or engineering control 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.

MSHA contends that feasible engineering and administrative controls did exist and the operator failed to implement them. Smith maintains, on the other hand, that the proposed administrative and engineering controls were not, and are not now, feasible, emphasizing that such controls are not economically viable under the circumstances.

As I observed in Secretary of Labor v. Callanan Industries, Inc., 3 FMSHRC 168, pet. for rev. granted February 18, 1981.

> The term "feasible" as used in a similar noise standard promulgated in regulations under the Occupational Safety and Health Act (29 CFR section 1910.95(b)(1)) has been judicially construed to include economic feasibility. RMI Company v. Secretary of Labor, et al., 594 F.2d 566 (6th Cir. 1979); Turner Company v. Secretary of Labor, 561 F.2d 82 (7th Cir. 1977). In determining such feasibility, the court in RMI approved of the cost-benefit analysis employed by the Occupational Safety and Health Review Commission (OSHRC) in the case of Continental Can Company, 1966 through 1967 CCH OSHD ¶21,009 4 BNA OSHC 1541 (1976). The OSHRC stated therein that the standard should be interpreted to require those engineering and administrative controls which are economically as well as technically feasible. Controls may be economically feasible even though they are expensive and increase production costs. But they will not be required without regard to the costs which must be incurred and the benefits they will achieve.

In determining whether controls are economically feasible, all the relevant costs and benefit factors must be weighed. [Citations omitted.] In setting forth a general test to be followed in determining economic feasiblity, the court in RMI stated as follows:

> The benefits to employees should weigh heavier on the scale than the cost to employers. Controls will not necessarily be economically infeasible merely because they are expensive. But neither will controls necessarily be economically feasible merely because the employer can easily (or otherwise) afford them. In order to justify the expenditure, there must be a reasonable assurance that there will be an appreciable and corresponding improvement in working conditions. The determination of how the cost benefit balance tips in any given case must necessarily be made on an ad hoc basis. We do not today prescribe any rigid

formula for conducting such analysis. We only insist that the Secretary and the OSHRC on review, weigh the costs of compliance against the benefits expected to be achieved thereby in order to determine whether the proposed remedy is economically feasible. RMI, supra at pages 572-573. [See also Samson Paper Bag Co., 8 BNA OSHC 1515, 1980 CCH OSHD ¶ 24,555 (No. 76-222, 1980)].

Just as in the Callanan case, I find in this case that the test applied by the OSHRC to essentially the same regulatory standard is relevant and reasonable and, in the the absence of precedent from the Mine Safety and Health Review Commission, I apply that test to the facts of this case. As I also observed in the Callanan case, the Federal Circuit Court in the RMI decision, again citing OSHRC decisions on point, also concluded that the Secretary has the burden of proving both the technologic and economic feasibility of the proposed controls and of showing that a violation of the noise standard has occurred. RMI, supra at page 574, Anaconda Aluminum Co., 9 BNA OSHC 1960, 1981 CCH OSHD ¶ 25,300 (No. 13102, 1981). See also Administrative Procedure Act, section 7(d), 5 U.S.C. section 566(d) and Diebold, Inc. v. Marshall, 585 F.2d 1327, 1333 (6th Circuit 1978). I find similarly in this case that MSHA has that burden here.

The precise question before me, then, is whether MSHA has met its burden of proving the feasibility of the controls proposed in this case. I find that it has. MSHA specialist John Radomski testified at hearing in this regard that, based on his experience with many shovels similar to the Manitowac clam shovel here cited, noise reduction in the cab area of such shovels can easily and economically be attained by installing a sound barrier between the motor and cab area and by installing safety glass or plexiglass windows in the cab. Radomski testified that he knew of several diesel shovels under similar circumstances that had been brought into compliance with the noise standard by the installation of a sound barrier alone. According to Radomski, for $100 or less the operator could have constructed his own barrier made of plywood and soundproof material or, for $400 to $500, the operator could have purchased an installed prefabricated sound barrier curtain. Prefabricated curtains were then available on the market and at the time the citation was issued Radomski provided Mine Superintendent Dennis Critchley with the name and address of a company producing such curtains. Radomski also concluded that it would cost $100 to $200 to install safety glass in the windows of the cited shovel. Finally, Radomski concluded that if the sound proof barrier and safety glass windows were not sufficient to bring the shovel into compliance, most certainly the addition of a muffler costing from $50 to $100 (installed cost) would bring the shovel into compliance. According to Radomski's calculations based on 1978 cost estimates, the operator could have brought the cited shovel into compliance with the cited standard for $600 or less.

By way of defense the operator argues that the actual cost of the sound proofing material alone was $948.70. While the operator does not challenge

the cost estimates cited by Inspector Radomski for the purchase and installation of safety glass and a muffler, it nevertheless maintains that the proposed engineering controls were economically infeasible. I disagree. Even assuming, as the operator contends, that the soundproofing material cost $948.70, and that a muffler would cost $100, safety glass, $200, and additional labor costs, $150, I do not find this economic burden unreasonable to bring the cited shovel into compliance. In reaching this conclusion, I find from the uncontradicted testimony of Inspector Radomski that other similar shovels have been brought into compliance with similar or even less modification. Accordingly, I find on the facts of this case ample assurance that there would be full compliance with the standard resulting from a relatively modest outlay of financial resources.

I find, in addition, that the administrative controls proposed by MSHA were also feasible. Based on his analysis of the noise level, Inspector Radomsky concluded that the cited shovel could be operated in compliance with the standard by utilizing two shovel operators, each on a four hour shift. According to Radomski, the operator of the cited shovel was then being paid less than $5 an hour, although the normal pay for that job was then between $7 and $10 an hour. He observed that Smith also employed other skilled workers such as truck drivers, front end loaders, and two other shovel operators. Industry pay scale for loader operators was then from $7 to $9 an hour. Within this framework it appears that other multiskilled workers then employed by Smith or newly hired could have been rotated to work the cited shovel on four-hour shifts and to operate other equipment for the remainder of their shift without any additional cost (or with only minimal additional cost) to the mine operator. Under all the circumstances, I find that the Secretary has carried his burden of proving the violation of the standard at 30 CFR section 56.50(b) as alleged. Anaconda Aluminum Co., supra.

Whether that violation was "significant and substantial" depends on whether that violation could be a major cause of a danger to safety or health and whether there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). In this regard, Inspector Radomski testified that the exposure of the shovel operator to the level of noise cited would result in hearing loss over a period of time. He admitted that he did not know how long such an exposure would be required to result in hearing loss but speculated that it would be more than five years continuously. No scientific or medical evidence was produced to substantiate Radomski's testimony in an area that indeed requires some specialized expertise. The inspector's testimony in this regard is particularly inadequate in light of the evidence that the shovel operator was apparently wearing personal hearing protection. In light of this, and the rather speculative testimony offered, I cannot properly assess the probabilities. I do not find therefore that the evidence as presented in this case is sufficient to demonstrate that the cited violation was "significant and substantial" under the National Gypsum test. For the same reasons, I do not find sufficient evidence to establish a high level of gravity.

I do find, however, that the operator was negligent in regard to this violation in failing to conduct its own noise survey on equipment that, based upon the undisputed noise levels found, must obviously have been emanating excessively high noise levels. Also significant in this case is the lack of good faith shown by the operator herein in failing to achieve compliance after notification of the violation. The citation was issued on July 19, 1978, and the violation still had not been abated nearly three years later when the section 104(b) withdrawal order was issued on June 4, 1981. While Smith did apparently purchase over $900 in noise abatement material during this time, it did not put forth a genuine effort to properly install that material. In determining the amount of penalty, I have also considered the operator's previous history of seventeen violations and that the operator is small in size. No evidence has been submitted to indicate that the operator would be unable to pay the penalties here assessed. Under all the circumstances, I find that a penalty of $300 is appropriate for the violation.

Citation No. 311781 alleges a violation of the mandatory safety standard at 30 C.F.R. section 56.9-3. The citation alleges as follows:

> Both accuators [sic] on the rear wheels of the 980-B F.E.L. were not working. When running the F.E.L. at normal rate of speed, the loader traveled a distance of 8 feet to 10 feet before coming to a stop. This test was conducted on a flat surface.

The cited standard provides only that "powered mobile equipment shall be provided with adequate brakes". As I stated in the case of Secretary v. Concrete Materials, Inc. 2 FMSHRC 3105 (1980):

> The language of the cited standard, i.e., that "powered mobile equipment shall be provided with adequate brakes," indeed does not afford any concrete guidance as to what is to be considered "adequate brakes." A regulation without ascertainable standards, like this one, does not provide constitutionally adequate warning to an operator unless read to penalize only conduct or conditions unacceptable in light of the common understanding and experience of those working in the industry. Cape and Vineyard Division of the New Bedford Gas and Edison Light Company v. OSHRC, 512 F.2d 1148 (1st Cir. 1975); National Dairy Corporation, supra, United States v. Petrillo, 332 U.S. 1, 67th S.Ct. 1538, 91 L.Ed. 1877 (1947). Unless the operator has actual knowledge that a condition or practice is hazardous, the test is whether a reasonably prudent man familiar with the circumstances of the industry would have protected against the hazard. Cape and Vineyard, supra. The reasonably prudent man has recently been defined as a "conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable." General Dynamics Corporation, Quincy Shipbuilding Division v. OSHRC, 599 F.2d 453 (1st Cir. 1979).

The initial question before me, then, is whether Smith knew that the operation of the front end loader with brakes in the cited condition would be hazardous or whether a conscientious safety expert would have protected against the brake conditions existing here because they presented a reasonably foreseeable hazard. The undisputed testimony of MSHA inspector Walter McGinn was that the brake actuators for the rear wheels of the cited front end loader were simply not working. He observed that the operator of the front end loader was not even bothering to apply his brakes but was using the reverse gear to stop. The machine operator admitted to McGinn that the brakes were not working. In a test the front end loader was driven at a "normal rate of speed" which was not more than five miles per hour. Inspector McGinn observed that the vehicle continued to travel some 8 to 10 feet after application of its brakes. According to McGinn, the loader should have stopped within one foot under the conditions of the test. When McGinn returned to abate the violation two weeks later, he observed that new brake actuators had been installed on the rear wheels, that the brakes functioned properly, and that the vehicle stopped "right away" upon application of the brakes. Within this framework of evidence, it is clear Smith had sufficient knowledge that the brakes on the cited front end loader were not "adequate" in the context of the cited standard. I also conclude that Smith, and any conscientious safety expert, would have recognized the hazardous nature of the brakes in the cited condition.

The essentially undisputed testimony of Inspector McGinn, noted above, also provides ample proof of the violation. I further find that Smith was negligent in allowing this equipment to continue operating with defective brakes, a condition admittedly known to the machine operator. I find, moreover, that the hazard presented by the defective brakes was serious. It is undisputed that at the time McGinn issued the citation, there were three vehicles in the area of the front end loader and that the three drivers were walking about in the same general vicinity. Under the circumstances, I find that injuries of a serious nature were likely to occur. The violation was accordingly also "significant and substantial." Secretary v. Cement Division National Gypsum Company, Supra., 3 FMSHRC 822. Under the circumstances and considering the criteria under Secion 110(i) of the Act, I find that a penalty of $150 is appropriate for the violation.

Settlement Motion

Prior to hearings in these cases, the Secretary filed a motion for approval of a settlement agreement with respect to eight of the nine citations set forth in Docket No. YORK 81-67-M. The Secretary had initially proposed penalties of $738 for those eight violations. A reduction in penalties to $506 was proposed. I have considered the representations and documentation submitted in connection with the motion and I conclude that the proferred settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly, the motion for approval of settlement is granted.

ORDER

Docket No. YORK 81-67-M

It is ORDERED that Respondent, A. H. Smith, pay a penalty of $906 within 30 days of the date of this decision.

Docket No. YORK 82-5-M

It is ORDERED that Respondent, A. H. Smith, pay a penalty of $150 within 30 days of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution (by certified mail):

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

Wheeler Greene, A. H. Smith, Branchville, MD 20740

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 29 1982

SECRETARY OF LABOR ON BEHALF OF DANNY H. BRYANT, Complainant	:	Complaint of Discrimination
	:	Docket No. VA 80-162-D
v.	:	
CLINCHFIELD COAL COMPANY, Respondent	:	Judge Kennedy

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DANNY H. BRYANT, Complainant	:	Complaint of Discrimination Docket No. VA 80-162-D
v.	:	
CLINCHFIELD COAL COMPANY, Respondent	:	

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Complainant;
W. Challen Walling, Esq., Penn, Stuart, Eskridge and Jones, Bristol, Virginia, and Paul R. Thomson, Jr., Esq., The Pittston Coal Co. Group, Lebanon, Virginia, for Respondent.

Before: Judge Kennedy

STATEMENT OF THE CASE

The captioned complaint against reprisal presents the novel question of whether a miner's declared lack of competence and fitness to perform a temporary work assignment is a protected activity under section 105(c)(1) of the Mine Safety Law. The operator considered the miner's conduct a transparent attempt to shirk an onerous and distasteful work assignment, charged him with insubordination and suspended him with notice of intent to discharge.

Thereafter, the miner allegedly instigated a wildcat strike and the matter went to grievance and arbitration under the National Bituminous Coal Wage Agreement of 1978. The arbitrator found the miner's explanation for why he was too sick to work unconvincing. He further found the circumstantial evidence was persuasive of the fact that the miner encouraged and instigated a wildcat strike in support of his grievance. These combined instances of misconduct, he concluded, were just cause for the miner's discharge.

While the matter was in arbitration, the miner filed a complaint for reprisal (discrimination) with the Department of Labor. After a field investigation, the Office of the Solicitor concurred in MSHA's finding that the miner's refusal to accept the temporary work assignment was a protected activity. Subsequently, a complaint alledging unlawful discharge and seeking reinstatement and back pay was filed by the Secretary with the Commission. The complaint charged the miner was suspended with intent to discharge for both an antecedent and an immediate refusal to work. The operator denied the charges and raised as a plea in bar the miner's violation of his no-strike pledge and failure to mitigate damages. See, Ford Motor Co. v. EEOC, _____ U.S._____, decided June 28, 1982; Metric Constructors, Inc., 4 FMSHRC 791, 804-805 (1982). The Secretary's reponse was a denial that the miner instigated a wildcat strike.

After extensive pretrial and discovery, the matter came on for an evidentiary hearing in Abingdon, Virginia on December 7, 8, and 9, 1981. The record was closed and the case submitted on April 1, 1982.

ISSUES PRESENTED

1. Whether a miner's discharge for refusal to accept a temporary work assignment was a pretext for firing him for antecedent protected activity.

2. Whether a miner's refusal to accept a temporary assignment on the ground that performance of the task might impair his health is a protected activity under section 105(c)(1) of the Mine Act, in the absence of a showing of a causal relation between a mine health or safety hazard and the refusal to work.

3. Whether upon a showing that a miner had mixed motives in refusing work assignments, the Secretary had the burden of persuasively showing that the true motives for claimed protected refusals to work were untainted by impermissible motives.

4. Whether a miner's post-refusal conduct created an independent ground and constituted just cause for his discharge, because it amounted to an illegal instigation of a wildcat strike.

5. Whether the Secretary carried his burden of persuasion on the issues of (1) protected activity and (2) the discriminatory motive for the miner's discharge.

FINDINGS OF FACT

Management Animus

Complainant, Danny Bryant, was first employed by the Pittston Company at its Kentland-Elkhorn Mine in Mouthcard, Kentucky in March 1975. Starting as a general inside, Mr. Bryant advanced to motor switchman and later to repairman. Although his formal education stopped at the sixth grade, Danny learned quickly and was considered a good and diligent worker. So good, in fact, that during the latter half of 1978 he persuaded Lloyd White, Manager of the Birchfield Division of the Clinchfield Coal Company, another subsidiary of Pittston, to obtain a waiver of the company policy against intercompany transfers without a break in service. As a result, around the middle of February 1979, Bryant was able to transfer to Pittston's Pilgrim Mine 1/ which was located just six miles from his new home in Wise, Virginia with a minimal break in service and loss of income.

The function of a repairman is to perform electrical, mechanical and hydraulic repairs on all types of mining equipment. Much of the work was performed above ground in the repair shop which was warm and dry but frequently involved working underground to repair equipment in the low coal (32 to 36 inches) of the Pilgrim Mine. In the winter of 1980, this required a miner to work in a cold, damp, dusty, physically demanding and restricted underground environment.

1/ The Pilgrim was a UMWA mine. In August 1981 Pittston closed the mine and turned it over to a contract operator.

As a Mine Safety Committeeman, and as a safety conscious worker, Bryant on several occasions during 1979 found himself at odds with management over conditions and practices which he questioned as unsafe or unwise. 2/ With respect to these incidents, only one of which played any part in Bryant's challenged discharge, the Solicitor has sought in retrospect to magnify the importance of expected and normal tensions and disagreements over safety between a mine safety committeeman and management. The claim that these incidents considered either singly or in the aggregate resulted in a "grudge" or management "animus" against Bryant and a determination to "get him" I view as overblown. This trial judge takes notice of the fact that safety committeemen, like other enforcement officials who do their job, are seldom candidates for popularity awards by management. Mr. Bryant understood this, and, prior to his discharge, thought little of it. For example, Mr. Bryant testified that even when he was warned that his activities were incurring the displeasure of the evening shift foreman, Cecil Blevins, he did not give it "much consideration" and at the first opportunity transferred from the third (hootowl) shift to Mr. Blevins's evening (4 to 12) shift.

A searching review of the record reveals no convincing evidence that Lloyd White, who was responsible both for hiring and discharging Mr. Bryant harbored any secret or overt animus against Danny for reporting safety infractions. He did consider serious and unjustified the hazing of Mr. Tate, a maintenance foreman and Danny's immediate supervisor which

2/ Bryant was also Chairman of the Mine Committee which meant that he had to represent miners in the presentation of grievances against management.

resulted in a disruption of the work effort by Mr. Bryant on June 1, 1979. The effort to establish this as part of a bona fide protected activity and the "real motive" for Mr. Bryant's challenged discharge for insubordination and instigation of a wildcat strike in March 1980, I find unpersuasive.

Though by the time he left, Danny's feisty combativeness had earned him a reputation as a "troublemaker," there is no basis on this record for imputing to management generally or to Mr. White in particular a pervasive resentment against Danny that resulted in an attempt to set him up or to discharge him under the cover of a legal pretext. The Secretary's attempt to supply by assertion the deficiency in his proof is unconvincing. 3/

3/ Because of his involvement with the circumstances that led to Mr. Bryant's discharge and his departure from the Pilgrim Mine under a cloud shortly after Mr. Bryant, Henry Canady's testimony must be heavily discounted. Mr. Canady was the maintenance foreman on the evening shift and Mr. Bryant's close friend and supervisor at the time of the challenged discharge on March 7, 1980. Mr. Canady's uncorroborated, anecdotal testimony concerning the single occasion when he was allegedly privy to an incident in which he claimed management was displeased with Bryant's report of an unsafe condition hardly establishes a predisposition on the part of Lloyd White or any other member of management to "get" Bryant for carrying out his duties as a safety committeeman. Mr. Canady's testimony reveals that he, not Bryant, was primarily responsible for the ten minute delay required to correct a fault in the braking system of a locomotive. His testimony further reveals that he was not asked to single out Bryant for an adverse personnel report on this incident but had merely been instructed to make a report on any miner whom he believed occasioned an unnecessary disruption in operations or conducted himself in a manner inimical to good order and discipline. As Mr. Canady admitted, an adverse report was never made on the incident because he considered himself responsible for the brief work stoppage. A second incident, attributable to a misunderstanding of some directions Mr. Canady gave for the utilization of company property, did not involve a safety complaint and resulted in a complete exoneration of Mr. Bryant of any charge of wrongdoing or troublemaking. Mr. Canady's credibility was further seriously impugned by his admission that he failed to intercede with management on Danny's behalf on March 7, 1980 at a time when such intercession might have persuaded Mr. White that Danny was not a malingerer.

The Solicitor's has urged sweeping conclusions on the basis of recitations of atypical and inapt examples. This is no substitute for substantial evidence, the standard by which I must be guided. Section 7(c) of the APA, requires that I measure both the qualitative and quantitative sufficiency of the evidence in determining whether the Secretary has met his burden of persuasion by a preponderance of the reliable, probative and substantial evidence. Steadman v. SEC, 450 U.S. 91 (1980); Charlton v. FTC, 543 F.2d 903, 907 (D.C. Cir. 1976).

It is not enough that viewed in isolation the Secretary may have adduced "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" because at the trial level where the evidence is pro and con, the judge sitting as trier of fact must evaluate the credibility and weight of the evidence and must decide in accordance with the preponderance of the reliable, probative and substantial evidence in the record considered as a whole. Steadman, supra, 78; Charlton, supra, 907. Thus, only where reliable and probative evidence preponderates in favor of the existence of a challenged fact, such as the state of mind of management or its individual members, will the Secretary meet his burden of persuasion. This does not mean proof to a certainty. Proof by a preponderance means only that proof which leads the trier of fact to find the existence of a contested fact is more probable than its nonexistence. McCormick, Evidence, 794 (2d ed. 1972). This burden is not met, however, by evidence which creates no more than a suspicion of the existence of a predisposition to fire Mr. Bryant for reporting safety infractions.

The Incident With the Julie Car

The Julie car is a three wheeled, rubber tired personnel carrier that was used at the Pilgrim Mine to transport repairmen and mechanics from the surface to areas of the underground mine where machinery maintenance work was required.

On June 1, 1979, some nine months before the date of Mr. Bryant's discharge, Mr. Bryant instigated a work stoppage that involved himself and two other members of his maintenance crew that lasted approximately on hour. The grounds for the stoppage were (1) that the Julie car did not have a fire extinguisher and when this was found and provided that (2) the Julie car did not have a jack and jackbar and when this was provided that (3) Mr. Bryant and the other two miners did not have their safety glasses with them. When Delmar Tate, the maintenance foreman, finally borrowed some glasses from the desks or lockers of other foreman, Mr. Bryant and the other two miners proceeded to their work stations and Mr. Tate filed a complaint of their conduct with Lloyd White, the division manager.

This all occurred on the third or hootowl shift. At 7:00 a.m. the following morning Mr. White held a meeting with Mr. Tate, Mr. Bryant and the two other miners involved. The miners were provided with a union representative. A transcript of most of what transpired was provided for the record as RX-16. This was supplemented by testimony from Mr. White, Mr. Bryant and one of the miners involved, Mr. Robert Stair.

The Secretary claims this incident created in the mind of Lloyd White and other members of the mine management team an abiding animus

toward Bryant for the exercise of rights guaranteed and protected under the Act and that but for this animus Mr. White would not have discharged Mr. Bryant for refusing to accept a work assignment on March 7, 1980.

The operator claims the work stoppage was inspired by a personal dislike or resentment on the part of Mr. Bryant toward the maintenance foreman, Delmar Tate. The operator contends the claim that the Julie car incident was justified by the exercise of rights guaranteed under the Act was a pretext for a concerted effort to undermine Mr. Tate's supervisory authority and to embarrass and humiliate him in the eyes of the other miners and members of management.

I find it more probable than not that Mr. Bryant's motive for the work stoppage was, in fact, mixed, and stemmed from (1) his resentment over his recent transfer by Mr. Tate from the Mains to the 1 Right Section, (2) his ambition to be a safety committeeman, and (3) his desire to embarrass Mr. Tate. I conclude that while Mr. Bryant's reporting the absence of a fire extinguisher was protected, it was not grounds for prolonging a work stoppage while Mr. Tate was made to chase down a jack, jackbar and safety glasses.

What are the operative facts and reasonable inferences that support these findings?

The Pilgrim Mine was a two section low coal mine. Delmar Tate, whom we must view through the prism of others perceptions, was maintenance foreman on the third shift, the shift to which Bryant was assigned on June 1, 1979. As maintenance foreman on the third shift, Tate had

responsibility for maintenance work on both the 1 Right Section and the Mains Section where Bryant worked. Tate, while not unpopular, did not easily command obedience from the contract miners. He had trouble maintaining discipline among the members of his maintenance crews, especially the crew on the 1 Right Section. Tate's recent promotion from general inside to maintenance foreman was resented by Bryant who felt that Joey Stapleton, a close friend of Bryant's should have had the promotion. Bryant himself had a hidden agenda in that he was preparing to run for the office of mine safety committeeman and wished to impress his peers with his ability to stand up to management on safety issues.

Approximately a week before the incident with the Julie car, Tate announced that the maintenance crew on the Mains Section, including Bryant, Robert Stair and Scott Parrott, would be transferred to the 1 Right Section. The miners resented this because they felt they had been doing a good job on the Mains Section. Tate did not deny this but because of his difficulty with the crew on the 1 Right Section he and his supervisors, including Lloyd White, felt the better crew should be assigned to the 1 Right Section in an effort to get maintenance and repair work done and production up. 4/

Bryant, Stair and Parrott rebelled at the idea of having to correct the work of the crew on the 1 Right Section. They blamed the problem on Tate's inability to get work out of the other crew. They did not think they should be called upon to cover up for his lack of leadership and that if he could not hack it he ought to get off the hill.

4/ The mine was a marginal producer and its continued operation was in a probationary status.

Thus, when Delmar Tate ordered Bryant and the others to take a Julie car underground to repair a bearing on a tail piece on June 1, 1979, Bryant thought he saw an opportunity to engage in some protected activity at Tate's expense. Bryant claimed he initially led the refusal to obey Tate's order because the personnel carrier was not equipped with a jack and jackbar as required by 30 C.F.R. 75.1403-6(b)(1); that when this was provided by Tate the refusal was repeated because the carrier had no fire extinguisher as required by 30 C.F.R. 75.1100-2(d); and that when Tate searched for and found an extinguisher Bryant still refused to budge because he and the other two miners did not have safety glasses to wear while operating the carrier as required by 30 C.F.R. 1403-7(e). 5/

The Jack and Jackbar

Under close questioning, Bryant for the first time admitted the personnel carrier involved in the June 1 incident was a Julie car, a three wheeled rubber tired vehicle and not a "railrunner" or track mounted vehicle. 6/ Bryant further admitted that under the law and the mandatory

5/ At the prehearing conference, it was stipulated this was the principal, if not the sole, incident of antecedent protected activity claimed to support a showing of animus toward Bryant because of safety complaints. As previously indicated, there is no substantial evidence to support the view that other complaints played any significant or adverse role in management's attitude toward Bryant.

6/ Up to this point there had been some "confusion" of this incident with another incident involving the absence of a jack and jackbar that occurred in August 1979. This was shortly before Mr. Bryant transferred, at his request, to the evening shift. This incident resulted from Mr. Bryant's activity as a safety committeeman--a position to which he was elected after the June 1 incident. It did not involve a refusal to work. Mr. Bryant merely reported the absence of a jack and jackbar on a track mounted (railrunner) personnel carrier to Mr. Tate. When an operative jack could not be found, management delayed the third shift mantrip

standard a jack and jackbar are required only on track mounted personnel carriers. He claimed this was immaterial to his conduct because it was company policy to require jacks and jackbars on "all" personnel carriers, not just on the railrunners. Assuming that was true, the fact remains that the absence of such equipment on a rubber tired vehicle does not affect its operational safety nor is its presence mandated by the Mine Safety Law. 7/ Mr. Bryant, as an experienced miner, knew that the principal function of a jack and jackbar is to assist in remounting a track mounted carrier that has derailed. That it might be useful for other purposes such as lifting track or changing a tire may have been relevant to the company policy but is not probative of the reasonableness of Mr. Bryant's refusal to operate the Julie car. I find Mr. Bryant's knowledge that a jack and jackbar are not required is probative of the lack of sincerity and honesty of his belief that the absence of this equipment created a

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fn. 6 (continued)
for two hours. During this time Cecil Blevins, mine foreman on the second or evening shift, stayed over and went underground to find a workable jack. Because there were two railrunners the requirement of the safety standard was not met, but Bryant agreed they could proceed inside by keeping the two carriers close together. On their way in, Delmar told Danny he might want to reconsider transferring to Mr. Blevins's shift because the incident angered Mr. Blevins and Delmar thought Cecil might hold it against Danny and might even try to discharge him. Bryant said he didn't give Tate's advise much consideration and went ahead with his transfer.

7/ Section 314(b) of the Act, 30 C.F.R. 75.1403, authorizes issuance of safeguard notices against hazards connected with the transportation of men and materials. Until such a notice is issued, the regulatory criteria set forth at 30 C.F.R. 1403-2 through 75.1403-11 are not applicable or enforceable. The Secretary failed to prove that safeguard notices relating to the transportation of men ever issued to this mine. Since the law did not authorize such a notice for the Julie car and since the Secretary's effort to impeach Mr. Bryant on this point was unpersuasive, I am constrained to find that a jack and jackbar were not required on the Julie car.

hazard of sufficient gravity to justify the initiation or prolongation of his June 1 work stoppage. For these reasons, I conclude Mr. Bryant's refusal to operate the Julie car in the absence of a jack and jackbar (1) did not justify his work stoppage on June 1, (2) was not a protected activity because the absence of this equipment resulted in no preceptible hazard, and (3) merited criticism by management.

The Fire Extinguisher

There is no dispute about the fact that portable fire extinguishers are required on all personnel carriers, 30 C.F.R. 75.1100-2(d), and that the Julie car in question did not have one on the third shift on June 1, 1979. Nevertheless, to justify a work stoppage in the face of a hazard that presented no clear and present danger, there must be a persuasive showing that the miner had a good faith i.e., honest belief that a recognizable hazard existed 8/ and that belief must be validated by a showing that the miner's perception of the hazard, including the affirmative, self-help taken to abate it, was "reasonable under the circumstances." Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 802, 810-812 (1981). Where a protected activity is inextricably intertwined with an unprotected refusal to work an inference of management hostility toward miners who exercise rights guaranteed under the Act is not shown by evidence that the miners involved were merely admonished to

8/ Neither the Commission nor the courts have yet decided the level of severity, seriousness or imminence that a mine hazard must present to justify a miner's refusal to work. Consolidation Coal Company v. Marshall (Pasula), 633 F.2d 1221, 1226 (C.A. 3, 1981) (dissenting opinion).

mend their ways. 9/ An unlawful motive for an employer's conduct may not be inferred if it would be just as reasonable to infer a lawful motive. CCH Labor Law Reports Par. 4095. There is no more elemental cause for "dressing down" an employee than conduct so flagrant it threatens an employer's ability to maintain order and respect in the conduct of his business. American Tel. & Tel. Co., v. NLRB, 521 F.2d 1159 (2d Cir. 1975); NLRB v. IBEW Local 1229, 346 U.S. 464 (1953).

When considered in the light most favorable to the Secretary I find the evidence as to the fire extinguisher insufficient to establish a discriminatory motive for the challenged discharge of March 7, 1980.

Even if I assume, as I do, that a brief work stoppage was justified by the absence of the portable fire extinguisher I find that the miners overracted and that their real intent or motive was not as much a concern for their safety as to haze Mr. Tate.

The Safety Glasses

Generally speaking where a notice to provide safeguard has issued, safety glasses are to be worn by all persons being transported in open-type personnel carriers, including Julie cars. 30 C.F.R. 1403-7(e). 10/

9/ The Commission and the Supreme Court have recognized that the unreasonable, irrational or irresponsible exercise of rights conferred by the Act are not deserving of statutory protection. Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 385-386 (1973); Robinette, supra at 811-812.

10/ There was no showing that such a notice had ever issued. The operator made no point of this, however, and seemed to assume the requirement applied.

The record shows that two pairs of such glasses were furnished to each miner when he was hired. 11/ Messrs. Stair and Parrott did not deny this. Mr. Stair said he repeatedly lost his glasses and sometimes asked for a replacement but admitted he and the other miners regularly rode the mantrips without wearing their safety glasses even when they had them.

In any event, there is no dispute about the fact that Messrs. Bryant, Stair and Parrott reported for work on the third shift on June 1, 1979 without their protective glasses. There is also no dispute about the fact that after Mr. Tate provided a portable fire extinguisher and a jack and jackbar the three miners led by Mr. Bryant seized on the absence of their glasses as yet another excuse for prolonging their refusal to work and to harrass Mr. Tate.

On balance, I find Mr. Bryant's refusal to ride the Julie car without safety glasses stemmed from his own misconduct and was not based on a good faith belief that he would be exposed to a safety hazard of a severity sufficient to justify prolongation of his work stoppage. Mr. Bryant's claim that on June 1 he suddenly perceived a hazard he had ignored for the four months he had ridden the Julie car without glasses is at war with the Secretary's claim that Mr. Bryant had a good faith reasonable belief

11/ Mr. Bryant, who worked in another Pittston mine before coming to the Pilgrim Mine, claimed he was not furnished new glasses when he transferred but did not claim he was never furnished safety glasses or that he ever requested his original issue glasses be replaced from the time of his reemployment at the Pilgrim Mine in February 1979 to the time of the June 1 Julie car incident. He admitted he was furnished with prescription safety glasses later in June 1979.

that a realistic hazard existed. In Robinette, supra, the Commission held that "protected activity loses its otherwise protected character if pursued in an opprobrious manner." Id. at 817.

As noted, immediately after he satisfied the demands made by Messrs. Bryant, Stair and Parrott for a jack, jackbar, portable fire extinguisher and safety glasses, and they proceeded to their work assignment, Mr. Tate reported the incident to Mr. White the division manager and complained that he felt the miners harbored an ill-will toward him and were trying to harrass him because of their dissatisfaction with the change in their shift assignments (Tr. 437-455). Mr. White instructed Tate to have the three miners report to him at 7:00 a.m. in the morning.

The June 1 Meeting

At the 7:00 a.m. meeting Mr. White warned the miners they were skating on thin ice in acting as they did toward Mr. Tate and assured them he was not going to "let contract people run a boss off." The tone of the meeting was neither hostile nor threatening. It was a firm and temperate statement of top management's determination to back Delmar Tate and to put Mr. Bryant on notice that his conduct was considered insubordinate, irresponsible and unjustified by the circumstances.

I am persuaded that as a result of the June 1 incident, Mr. White was not prepared to tolerate any refusal to work by Mr. Bryant that was not a responsible reaction to a clearly perceived hazard. I find the admonition or warning was not an unlawful discrimination or retaliation but an appropriate management response to Mr. Bryant's irresponsible hazing of Mr. Tate.

I am also satisfied it was this resistance to accepting management's decisions on work assignments that tied this incident in Mr. White's mind to Mr. Bryant's refusal to accept the order to set jacks in March 1980.

When viewed objectively and dispassionately, I find in Mr. White's admonishment of the miners over the Julie car incident nothing more sinister than a healthy, adversarial exchange of views on the appropriate roles of management and labor in the management of the mine and in achieving compliance with the mandatory safety standards. Certainly, Messrs. Bryant, Stair and Parrott made their point, which was that management's level of safety consciousness left much to be desired and was in need of improvement. Mr. White indicated he understood, if he did not fully appreciate, this point but made clear that unnecessary disruption in the work effort and harrassment of supervisors in the name of marginal or irresponsible safety complaints would not and could not be tolerated.

Insofar as Mr. Bryant was concerned, the incident did nothing to deter his commendable zeal for safety. He went on to win election as a safety committeeman and in August did not hesitate to challenge management's failure to provide jacks and jackbars on the railrunners, a complaint that resulted in shutting down operations for two hours. This complaint which management treated as responsible resulted in no discernible retaliation or animus by Mr. White or any other member of management. 12/

12/ The propriety and certainly the legality of Mr. White's conduct I judge by whether it had the effect of chilling the exercise of rights guaranteed Mr. Bryant under the Act. Mr. Bryant said it did not

In conclusion, I find that because of (1) the ulterior motives involved in Mr. Bryant's conduct with respect to the Julie car incident; (2) the fact that much, if not all, of the allegedly protected activity was clearly unprotected; and (3) management's reasonable and temperate reaction, the Secretary has failed to carry his burden of persuasion on the issue of antecedent management animus toward Mr. Bryant for making safety complaints or the harboring of a secret intent to discharge him at the earliest opportunity for making such complaints.

Were it not for the fact that on March 7, 1980, Lloyd White cited the June 1979 incident as another instance of Bryant's insubordinate attitude, the Julie car matter would have to be dismissed as too remote to be considered of any probative value. Compare Santistevan v. C.F. & I. Corporation, 2 FMSHRC 1710, 1717, 1 BNA MSHC 2524 (1980), petition for discretionary review dismissed September 23, 1980.

Bryant's Refusal To Set Jacks

The events leading up to Danny Bryant's refusal to set jacks on March 7, 1980, began around February 25. After a three week absence due to an

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fn. 12 (continued)
and his actions confirmed this. In fact, he said he knew of no action before his discharge of March 7, 1980 that he considered discriminatory. Obviously, the admonition and warning of June 1 did nothing to deter Mr. Bryant from asserting a right to refuse work on March 7, 1980. In the face of this hard evidence, I cannot accept the Secretary's claim that Mr. White's action on June 1 was an unlawful attempt to coerce or intimidate the miners in the exercise of rights guaranteed under the Act.

injury, 13/ Danny had run out of paid sick leave and vacation days and badly needed to return to work. The difficulty was that he did not feel he was well enough to work or to perform his normal work assignment as a classified repairman. This problem was overcome when he persuaded Henry Canady, his immediate supervisor and the maintenance foreman on the second shift to allow him to return to work on a "light duty" basis. 14/ According to Danny and Mr. Canady, this meant Mr. Canady would cover for Danny and protect Danny from assignment to any strenuous tasks by doing them himself

13/ Around the end of January 1980, Bryant cut three fingers of his left hand. He was on sick leave as a result of this injury from Feburary 1 through February 15. He was treated for his injury and a cold by Dr. Bausch at the Wise Clinic, Wise, Virginia. On February 15, Dr. Bausch found Bryant sufficiently recovered to return to work and gave him an unrestricted work slip that allowed him to return to work on Monday, February 18, 1980. Instead of going to work, Bryant laid out on paid leave and on Wednesday, February 20, went to the emergency room at the Norton Community Hospital complaining of a cold, sore throat and coughing. As a result of a blood test and diagnosis made by Dr. Fonesca, the doctor on duty, it was determined that Mr. Bryant had a virus infection of his pharynx but that he was not too sick to work. On Friday, February 22, the doctor prescribed an antibiotic for the condition that was to be taken four times a day for two weeks. Mr. Bryant began taking his prescription on Saturday, February 23, 1980 and returned to work on an unrestricted basis the following Monday, February 25. Dr. Fonesca's final diagnosis was that Mr. Bryant had mycoplasma pharyngitis or a viral infection of the pharynx. According to Dr. Fonesca, Mr. Bryant's X-Ray showed his lungs were clear and his heart normal. He was not running a temperature and did not have bronchitis or pneumonia. Mr. Bryant did not seek further medical attention until the evening of March 7, 1980, the day he was suspended with intent to discharge for shirking work as a jack setter. Mr. Bryant did not ask that any of his absence during the week of February 18 be excused for illness and returned to work under the unrestricted permit issued by Dr. Bausch on February 15, 1980.

14/ Even though Dr. Fonesca found no evidence of pneumonia or of an intestinal tract problem, Danny convinced Mr. Canady he had walking pneumonia and was suffering from a stomach ulcer. Mr. Canady admitted the only physical evidence of illness he noticed, however, was that Danny had a cough and seemed to break out in a sweat any time he was asked to exert himself.

or assigning the work to others. Danny would only be expected to "piddle around" at light tasks in the warm, dry, fresh air of the well-illuminated repair shop and would not be asked to go underground to work in the cold, cramped, wet and dusty environment of a 32 to 36 inch low coal seam.

Bryant's return to work on February 25, 1980 was unremarked by top management, which was unaware of the arrangement for "light duty" worked out between Canady and Bryant. Canady, Joey Stapleton and the other miners friendly to Bryant managed to cover for him on the underground tasks so that he was able to work at the lighter tasks in the relative comfort of the repair shop. Bryant testified that it was during this or the following week that his stomach began to act up so that he was, or so he claimed, seldom able to eat his onshift dinner.

There was nothing in the records of Dr. Fonesca's examinations and testing to corroborate Bryant's statement that he had complained of stomach trouble as early as February 20 to 22. Prior to March 12, 1980 Dr. Fonesca did not treat Bryant for any disorder of his gastrointestinal tract. 15/ As a result of Bryant's complaints he was treated prior to March 7, 1980 only for a sore throat or what the doctor called mycoplasma pharyngitis, a viral infection of the pharynx. Despite this, Bryant convinced himself and Henry Canady that he had a stomach and lower respiratory condition during the period of February 25 to March 7 that precluded assigning him to perform tasks in the underground low coal environment.

15/ Dr. Fonesca testified that prior to March 7 he treated Bryant only for an infection of his upper respiratory tract.

All proceeded smoothly and quietly except that Bryant took a paid vacation day on Friday, February 29. He rested and attempted to recuperate over the weekend, or so he said. I assume he continued to take his prescription for pharyngitis. He did not seek medical attention for either of his claimed stomach or lower respiratory disorders. On Monday March 3, 1980, he again returned to work on a "light duty" basis as per his arrangement with Henry Canady. Bryant pointed out that this was a "personal" arrangement between him and Henry. He did not consider it a favor extended by the company. In fact, he knew or should have known the arrangement was not sanctioned by company policy. Bryant, however, had no qualms of conscience. He believed that as long as Henry Canady was satisfied the company had no just complaint of the "light work" arrangement.

The work week that began March 3 went without incident until Friday March 7, 1980. That was the day before Danny finished taking the prescription for pharyngitis given him two weeks before by Dr. Fonesca. On arising, Danny did not feel any the worse for the wear and maybe a little better than he had for the last two weeks. He certainly did not consider himself in need of medical attention and did not seek such attention. His wife packed his dinner and he went to work expecting, as he said, to pull the usual light shift.

When he arrived at the mine, sometime between 3:30 and 4:00 o'clock he changed into his work clothes, including his hard hat and cap lamp and went to the repair shop. There he met Henry Canady who told him they were going to have to go underground to transport and install a 5 ton power center on the Union (Unit) #1 section. He told Bryant he

would also have to help remove and reinstall a considerable amount of brattice curtain. According to Henry, Danny was not expected to do anything strenuous because Henry was under the impression Danny was still recovering from a bout with pneumonia and an intestinal disorder. This, of course, was not true. But Henry, if he is to be believed, did not know the truth. In any event, he planned to assign Danny to operate the locomotive to pull the transformer into place and to help him make the final electrical connections.

The "light work" arrangement was rudely interrupted when Cecil Blevins, the evening shift mine foreman, suddenly appeared in the repair shop and told Danny Bryant he was needed to set jacks on the Wilcox miner on the Union 1 section because two faceman had failed to report for work on the evening shift. 16/ Joey Stapleton, a belt examiner, was also assigned to work out of classification. 17/ Stapleton was assigned to run the bridge conveyor, which also involved jack setting. He made no complaint about his assignment.

Bryant, who said he was shocked at this turn of events voiced no protest to Blevins who thought he had accepted the assignment. Instead when Blevins left Bryant immediately turned to Canady who, if he is to be believed, was also shocked but also voiced no complaint. Canady

16/ These instructions came from Tom White, the day shift mine foreman, not Lloyd White, the division manager.

17/ Temporary assignment out of classification is authorized under the miners' collective bargaining agreement.

testified he was convinced Bryant was in such bad physical condition that performance of the assignment might kill him. He speculated that this might result from exposure of Bryant's lungs to the dust and water encountered in face work or from the sheer physical exertion involved in setting jacks in low coal, or both. Bryant reminded Canady of his weakened physical condition attributable, he claimed, to a bout with pneumonia that had left him with fluid and congestion in his lungs. 18/ I find it of more than passing significance that Canady, who was responsible for Bryant's claimed predicament, 19/ shrank from the opportunity to present on behalf of Bryant his claimed belief that Bryant was too sick to do anything but light work in the repair shop. Instead, Henry's advice to Danny was to protest Blevins's and Tom White's instructions to their superiors, Lewis Blevins, the mine superintendent and Lloyd White the division manager. Bryant did not follow Henry's advice. He took his protest to Henry's superior, Bud Kilbourne, the chief electrician.

18/ There was no support in Bryant's medical history for the claim that he was recovering from pneumonia or any other lung condition. Dr. Fonesca's X-Rays showed Mr. Bryant's lungs were clear on February 22, 1980, just two weeks before. In the interim there had been no diagnosis or treatment for pneumonia or any other lower respiratory condition. Dr. Fonesca's examination of Bryant on March 7, 1980 disclosed he had "recovered" from his pharyngitis and had no respiratory infection.

19/ In allowing Bryant to work "light" and covering for him, Canady violated company policy. While the company may have permitted men in the final stages of recuperation from injuries to return to work early at assignments they were fully capable of performing, it did not allow supervisors to encourage men who merely claimed they were ill to malinger on the job at company expense.

Bryant heatedly told Kilbourne that he did not think he should have to set jacks because he was a maintenance employee. He further stated he had "busted his ass" for Clinchfield and this was "the thanks he got--it was like putting a man in a mudhole." Kilbourne thought Bryant had a big "chip on his shoulder." Bryant seemed to feel that the company was "trying to run over the top of him." Kilbourne tried to explain to Bryant that they were short-handed and that because the mine was on probation they needed to run coal or take the risk of being shut down. He told Bryant several times that the only work for him that afternoon was setting jacks and that in effect he could take it or leave it. Kilbourne did not attempt to physically restrain Bryant or force him to set jacks. On the other hand, Kilbourne did not tell Bryant he was released and "free to go home." When Bryant complained he was too sick to set jacks, Kilbourne did not believe him because the very vigor of his attack seemed to belie his claim of physical weakness.

While the altercation was going on between Bryant and Kilbourne, Tom White told Lloyd White, who was concerned over the low productivity of the mine, that Bryant's refusal to work on the production section meant it would have to be idled. As he approached Kilbourne's office, Lloyd White overheard Bryant's remarks about this was "the thanks he got for busting his ass and being put in a mudhole." He also heard Bryant say he had been sick for two weeks and didn't feel like setting jacks. As Bryant turned to leave the room, both White and Lewis Blevins arrived on the scene and Blevins asked what was going on. Bryant restated his position. He, Blevins and White argued, rather excitedly, over Bryant's

claim that he deserved better than to be sent to set jacks in the mud-hole that was the Union 1 section. Blevins and White backed up Kilbourne and Tom White and made clear to Bryant that if he persisted in his refusal to work on the section he could expect disciplinary action. Bryant, who by this time felt they were ganging up on him, said he was going to the bathhouse to change and go see a doctor. He said he would return with proof that he was too sick to work. He also offered to take White with him, an offer that White declined because he did not believe Danny was sick. According to Bryant, this exchange with management was the first time he felt he was being harrassed for making a complaint about working conditions.

Bryant took a shower and changed into his street clothes. He told some of the day shift miners, including Harlan Hall, who also had had a disciplinary discharge, about his run-in with White. In the meantime, Lloyd White, Tom White and Lewis and Cecil Blevins tried to realign the work crews so that at least one of the production sections could run coal. Before a final decision was made on how to operate, Lloyd White told Cecil Blevins to go to the bathhouse and once again order Bryant to set jacks. If Bryant still refused, Blevins was to tell him to report to White before he went home. Cecil Blevins did as instructed and when Bryant again refused an order to set jacks Blevins told him to report to Lloyd White, which Bryant did. Bryant said that at this point he felt he was being unnecessarily harrassed and that they should have taken his word for the fact that he felt too weak to set jacks. He felt management was just out

to punish and demean 20/ him but he did not feel he was being punished for pulling "light duty." 21/

When Bryant reported to Lloyd White, White gave him a direct order to proceed to the Union #1 section to set jacks on the Wilcox miner. When Bryant again, and for the third time, refused the order, 22/ White said he wanted to go on the record and directed the mine clerk, Sharon Blevins, to turn on the recorder. A transcript of what transpired thereafter shows that Bryant immediately demanded that James Nichols, a mine committeeman, be called out to represent him. White complied with this request and Nichols was called out from his underground assignment as a miner operator on the Union #1 section.

20/ Jack setting on a Wilcox miner in low coal is considered an unskilled, common labor job. To have accepted such work without protest would have humiliated Bryant in the eyes of his peers. He felt he could not afford to let management "run over" his self esteem and still retain the respect of the contract miners.

21/ Top management was apparently unaware of the extent of Mr. Bryant's "light work" assignment on March 7, 1980. In fact, during the course of the discussion Bryant told Lloyd White he was willing and able to perform his duties as a repairman. Since White did not understand this was confined to "light, outside work" this admission, he felt, only served to confirm his belief that Bryant was not too sick to work at the temporary assignment. There was no charge that a discriminatory intent was to be inferred from the fact that Bryant instead of some other miner was assigned a difficult, dangerous and dirty job. The evidence shows no other miner was readily available. Even if one were available, I can find nothing in the statute that mandates giving preferential treatment to safety activists. Section 105(c) was not intended to diminish traditional management prerogatives.

22/ The record shows that Bryant was twice ordered to set jacks by Cecil Blevins, once in the repair shop and once in the bathhouse. The third order came from Lloyd White. In addition, the Chief Electrician twice told Bryant that the only work for him was setting jacks which Kilbourne and White considered tantamount to an order to set jacks.

White explained for the record that Bryant had been directed to work as a jack setter because they were short handed--only eleven men including Delmar Tate the section foreman were available and they needed twelve, six on each section, to run coal. He also pointed out that the mine was on probation because of its low productivity and that they had to run coal or risk being shut down. He then summarized the earlier discussions between management and Bryant. Bryant then stated his position. A review of this contemporaneous recital and the testimony at the hearing shows that Bryant declined the jack setting assignment because: (1) he felt it was demeaning, scut work--the kind of work that a highly paid, skilled repairman should not have to do, especially one who had given a 100% effort and who had been willing to risk his health by coming to work sick; (2) because he claimed to be seriously ill--Bryant claimed to have an infection of the bronchial tubes, severe stomach pains and nausea, and an inability to digest his food. In his recorded conversation with White he claimed his stomach "was tore all to pieces" and "was killing me." He said he thought he had "pneumonia or the flu or something." As previously noted, Henry Canady thought Bryant was just getting over pneumonia and was willing to believe Bryant was too sick to do anything but "light work." 23/ Lloyd White told Bryant he did not believe he was sick because he did not look or act like he was in pain or nauseated. To most of those who saw

23/ According to Henry this did not exclude working underground. Bryant, on the other hand, said that if Canady had asked him to do maintenance work underground "I would probably have went to the doctor." Bryant at first denied but when confronted with his earlier testimony admitted that Canady expected him to help install a 5 ton power center underground the same day Bryant refused to set jacks.

him he looked perfectly normal. Even those who professed to believe he was too sick to set jacks refrained from offering to take his place at the job. Lloyd White, Lewis and Cecil Blevins, Tom White and Bud Kilbourne, all of whom carefully observed Bryant, thought he was not too sick to set jacks that day. Bryant said he would prove he was sick because he was going to the doctor immediately, even offered to take them with him, and would return with a doctor's slip excusing him from work. Although Bryant returned to the mine on the following Monday, he did not produce a slip from the doctor attesting to his condition. Lloyd White testified that if Bryant had brought in a medical excuse on Monday March 10, justifying his refusal of Friday, March 7 he would not have discharged Bryant. It was the consensus of management that Bryant was "faking" his illness to avoid an onerous work assignment.

In a statement which I find revealing as to his true motivation, Bryant repeatedly said he did not want to set jacks because he was "a classified repairman and I just didn't feel like setting those jacks." This refrain when considered together with Bryant's statement that the only time he tried to set jacks he suffered a "fright" over the personal danger involved disclosed a phobia about the job that was possibly disqualifying but which Bryant obviously did not wish to demonstrate to his employer or his peers. 24/ To cloak his mental reservations, Bryant took the position

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24/ Bryant's fear of setting jacks was revealed in the following colloquies:

> Judge Kennedy: Well, why wouldn't you be able to set jacks in the condition you were in?
>
> Bryant: Well, on account of the breathing problem I had, and my stomach was bothering me, and also Mr. Morgan, like I said, removed me from jack setting one time and told me personally it was dangerous and, you know, he inflicted a fright upon me on this, you know.

that the hazard was to his physical health which he claimed would worsen if he attempted to perform the jack setting assignment. He admitted that had he demonstrated at the face an inability to do the job the operator would have relieved him of the task.

Another reason Bryant gave for being excused from the jack setting assignment was the fact that he had never been given new task training or shown how to accomplish the job. This objection was without merit. Jack setting is a low skill job that simply involves the repetition of the motions involved in setting 40-pound jacks from 30 to 60 times a shift. 25/ Aside from his mental reservations, Bryant was fully capable of mastering the

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fn. 24 (continued)

Judge Kennedy: You were afraid of setting jacks, weren't you?

Bryant: Up to an extent, without any training; yes sir.
Tr. 131

Judge Kennedy: So is it your testimony that you would be happy to go underground tomorrow and work as a jack-setter for the next 10 years.

Bryant: If I went back to work for Clinchfield I wouldn't care to set their jacks, but I would take a repairman's job again.

Judge Kennedy: You wouldn't care to set jacks?

Bryant: No, sir.

Judge Kennedy: Why not?

Bryant: Well, I'm not sick; I'm not physically sick. I feel I'm able to do it, but I wouldn't care to. I would have went that night if I hadn't been sick; yes, sir I would have been more than glad to went.
Tr. 115

25/ While jack setting is a low skill job, it is also very dangerous because so much of the work, which is done in low coal (32 to 36 inches), is often done under unprotected roof in a noisy, dusty, extremely damp

simple, if arduous and dangerous, physical tasks involved. 26/ The law permits and Lloyd White offered to give Bryant the necessary supervised task training required to qualify him as a jack setter. 30 C.F.R. 48.7(c); National Industrial Sand Assn. v. Marshall, 1 MSHC 2033, 2051-52; 601 F.2d 689 (3d Cir. 1979). Since new task training cannot be given when the miner refuses the task, the operator could not have discriminated by failing to give training that was refused.

In summary, I find that Bryant's refusal was based on his mental attitude toward, i.e., distaste for and fear of, the task as much, if not more, than his physical condition. Nor, as we shall see, was his physical condition as bad as he claimed. What I find most significant, however, is that Bryant never claimed that, aside from his own physical condition, there was any danger or hazard in the mine or on the Union 1 section which justified his refusal to work. Bryant emphasized that the only hazardous condition he was concerned about was his "health" or present physical condition, which he felt would be worsened by the conditions normally encountered on the production section.

Fear Of The Job

Before reaching the question of whether a miner's refusal to work because of a claimed physical condition is, standing alone, a protected

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fn. 25 (continued)
environment. Communication depends almost entirely on signals with the miner's head lamps. If a jack is not properly set, it can pull loose and become a lethal missile.

26/ As Bryant repeatedly said, he knew in his own mind that if he tried to set jacks that day he would fail. He attributed this to his physical condition and not to his mind set. Bryant was most reluctant to perform any task that involved working at the face.

activity, I must also consider whether a miner's refusal to perform an assigned task solely on the ground that his mental condition is such that he is fearful of performing it safely is a protected activity. The undisputed facts here show that there was no condition or circumstance on the Union #1 section itself which constituted a hazardous 27/ condition. Such hazard as existed was in the person of Bryant himself.

Because the reasonableness of a fear can only be validated by a consideration of the gravity of the specific hazard addressed, a generalized fear of the job, unrelated to any condition or hazard actually confronting the miner, is too subjective to evaluate.

Consequently fear on the part of an otherwise healthy miner of performance of a risky or dangerous task regularly performed by other miners is not, standing alone, a protected justification for refusing to attempt

27/ By this I mean a condition affecting health or safety that exceeds the hazards normally incident to and generally accepted in the mining of coal. Underground mining is not inherently dangerous but is singularly unforgiving of carelessness, negligence or relaxation of the federal enforcement effort. Recent Congressional hearings on the mine disasters that occurred last December and January attest to the fact that an enfeeblement of the Federal enforcement effort is inevitably attended by a sharp increase in deaths and disabling injuries. Overall coal mine fatalities jumped a dramatic 51% in the first three months of 1982--43 fatalities during that time period compared to 22 fatalities during the first three months of 1981. Fatalities attributable to roof falls doubled during the first six months of 1982--from 9 in 1981 to 29 in 1982. The evidence strongly suggests the soaring accident rate to which Stapleton testified was the result of shortcutting and failure to follow safe work practices. Because the Mine Safety Committee failed to document its complaints, the evidence is too sparse to establish what management's overall attitude was on safety, or what part that attitude, if any, played in Bryant's fear of the jack setting job.

to perform the task. Pilot Coal Company, 2 FMSHRC 504, 1 BNA, MSHC 2363 (1980); Kaiser Cement Company, 4 FMSHRC 82 (1982).

To justify a refusal to make an attempt to perform a classified assignment, a miner must be able to point to a condition or practice in the mine that can be said to have induced a good faith, reasonable fear that performance of the rejected task will require the assumption of a recognizable risk not normally encountered. 28/ Duncan v. T. K. Jessup, Inc., 3 FMSHRC 1800 (1981); Boone v. Rebel Coal Co., 3 FMSHRC 1707 (1981); Adkins v. Deskins Branch Coal Co., 2 FMSHRC 2803, 2 BNA, MSHC 1023 (1980); Victor McCoy v. Crescent Coal Company, 3 FMSHRC 2211 (1981).

Impaired Physical Condition

What are the facts with respect to Bryant's claim that his physical condition, standing alone, justified his refusal to set jacks. As we have seen, when Bryant set out for work on March 7 he has just finished taking the antibiotic prescribed for his sore throat and laryngitis. According to his doctor, he was fully "recovered." He said he was feeling run down but not too weak to work. He was not running a temperature and had no plans to seek medical attention.

When he arrived at the mine he changed into his work clothes and reported to Henry Canady who told him they were going underground to install a power center on the Union #1 section. Henry expected Danny

28/ See Note 27, supra.

to operate the locomotive and tractor required to move the transformer onto the section. He also expected Danny to help him connect 1,000 feet of high voltage cable to the power center and to remove and reinstall brattice curtain that would have to be taken down to make the installation. Bryant voiced no objection to performing this work which would take him underground into the 32 to 36 inch coal and would require considerable physical activity in the same bent over position that would be required to set jacks. 29/ Jack setters and timbermen usually work on their hands and knees in low coal or squat and crab around on their haunches.

As we have seen, after Bryant refused Lloyd White's order to set jacks, White directed that Bryant be suspended with intent to discharge for repeated insubordination in accordance with the applicable provisions of the collective bargaining agreement. White's position was: "I am not going to get into a situation here or anywhere else to where if I give a man a job to do that he doesn't want to do and he can just simply say I am sick and that is it." RX-5, p. 6.

Thereafter, Bryant, accompanied by his wife, was seen by Dr. Fonesca in the emergency room of the Norton Community Hospital at 6:39 p.m., the evening of March 7, 1980. According to the emergency room record he came in ambulatory complaining of a sore throat and nausea. The admitting nurse did not record that he was suffering abdominal pain. He was not running

29/ Bryant's willingness to perform work for Canady conflicts with his statement to White that "if we was working outside I could make it, but if I had to go inside, even on maintenance, I would probably have went to the doctor." (RX-5, p. 10).

a temperature. Bryant complained to the doctor of discomfort in his stomach which led the doctor to believe he was suffering from gastritis or an inflammation of the stomach tissues due to hyperacidity. Since this condition was consistent with the symptoms associated with peptic ulcer disease, Dr. Fonesca ordered a G.I. Series for Monday morning, March 10, 1980. Because Bryant's condition was as consistent with a benign or temporary stomach upset as with peptic ulcer disease including reflux esophagitis, the doctor wanted to run the tests necessary to allow him to "rule out," i.e., prove or disprove the existence of the suspected condition. He did not deem it necessary to prescribe any medication as Bryant did not appear to be suffering from any severe or disabling pain. In fact, he did not even suggest that Bryant take a dose of Pepto Bismol or any other antacid to relieve his claimed stomach disorder. The doctor released Bryant and told him to return Monday, March 10 for a barium treatment and X-Ray of his upper gastrointestinal tract. 30/

On Monday morning Bryant returned for his G.I. Series. Dr. Straughan, the doctor who performed the series, noted on his clinical report that Dr. Fonesca wanted him to "Check for reflux" and to "rule out peptic ulcer disease." RX-13. The G.I. Series disclosed Mr. Bryant had an inflammation of the lower stomach or antrum which is the area of the gastrointestinal tract where the lower stomach enters the duodenum or small bowel. There was no indication of an inflammation of the upper digestive tract, or reflux esophagitis, which is caused by a back flow of hydrochloric

30/ Bryant did not ask the doctor for a statement he could take to Lloyd White showing he was too sick to work that day.

acid from the stomach into the esophagus, or of peptic ulcer disease. Thus, Dr. Fonesca's suspicion as to reflux esophagitis and/or peptic ulcer disease was not borne out by the G.I. Series. 31/

Except for a sore throat, Bryant did not complain to the doctor of any problem with his respiratory tract although he had just told the mine managers one reason he could not work in the dust and dampness of the face area was because he had fluid in his lungs and a bronchial infection. Dr. Fonesca said his examination of Bryant disclosed that the infection of his pharenyx had "improved" to the point he could be considered "recovered." 32/

The final diagnosis of Mr. Bryant's condition was that on March 7, 10 and 12, 1980, he was suffering from a disorder in his antrum and duodenum, i.e., "Antral gastritis and duodenitis." The abnormal condition was described as "hyperactivity" in the antrum and duodenum with swelling of the "bulb and postbulbar region," which is the area where the two tracts are joined. Bryant's problem was in the lower digestive tract, not the upper digestive tract as the doctor originally suspected.

31/ It is to be remembered that on March 7, 1980, Bryant was seeking not only medical attention but also support of his claim that setting jacks in low coal would worsen his physical condition. Dr. Fonesca said he suspected a reflux or inflammation of the upper digestive tract because Bryant told him he felt nauseated and that bending over was painful. Bryant, of course, had just come from his argument with White over whether the claimed pain in his stomach would worsen if he was required to set jacks in low coal.

32/ Dr. Fonesca thought Bryant's scratchy throat condition was a residual effect of the pharyngitis but required no further medication.

When, as directed, Bryant returned to see Dr. Fonesca on Wednesday, March 12, 1980, the doctor, on the basis of the clinical evidence and his physical diagnosis, ruled out peptic ulcer disease or reflux esophagitis as the cause of Bryant's stomach disorder. He accepted the clinical evidence as establishing the disorder was antral gastritis and duodenitis (colonitis) and prescribed (1) Librex, a tranquilizer to relieve Mr. Bryant's stress and reduce the hyperactivity of the duodenum, 33/ (2) Tagamet, a drug which blocks the passage of acid-stimulating impulses down the main nerve (the vagus nerve) to the parietal cells which produce hydrochloric acid and pepsin, and (3) Mylanta, an antacid, to neutralize the hydrochloric acid in Mr. Bryant's stomach.

Dr. Fonesca then discharged Bryant with a return to work slip that put no restrictions on the type of work he could perform. 34/ He told Bryant to return for a checkup with him in a month. Bryant never did this.

If Bryant had severe abdominal pain or disabling cramps on March 7, it was not apparent from his physical appearance or actions. Even Henry

33/ Joey Stapleton said that recent layoffs had required that fewer men had to do more work, often out of their primary classification, and this had created unrest, stress and tension in the workforce. In addition, in January 1980, Clinchfield had announced it might have to close the mine because of low productivity, so people were worried about keeping their jobs.

34/ Dr. Fonesca testified he thought he told Bryant he was not to work underground and was to do only "light work." On cross-examination, however, the doctor admitted this was only a "guess" on his part. He was never confronted with his signed statement of March 12, 1980, which shows he put no limitations on the work Bryant could perform. Ex. 3, RX-26.

Canady, one of his most sympathetic supporters, said that for the two weeks he worked light he observed only a cough and a tendency to break out in a sweat when Bryant exerted himself. 35/ Even to the practiced eye of Dr. Fonesca, Danny did not look sick when he saw him on March 7. There were certainly no "objective manifestations" of pain that a layman could detect from observing Mr. Bryant. Pain, unless severe or disabling, is highly subjective, the doctor said. The doctor said it was obvious that Mr. Bryant was not suffering disabling pain and that he, himself, could not say whether Mr. Bryant's pain was moderate or severe. No record was made of the severity of the pain complained of on March 7. On March 12, the clinical record shows only that Bryant complained of generalized abdominal pain. Since Dr. Fonesca prescribed no analgesic, not even an antacid, to relieve the claimed discomfort on March 7, and since Dr. Straughan's clinical report of March 10 did not characterize the severity of the inflammation noted, I find the inflammation noted was not causing Mr. Bryant severe pain. 36/

Although Danny Bryant told Lloyd White on March 7 he was going to the doctor to obtain proof that he was too sick to work as a jack setter, he never obtained such a statement. The statement of findings and unrestricted return to work slip Dr. Fonesca gave him on March 12 were

35/ Joey Stapleton, the other repairman assigned to set jacks, testified Bryant told him he had been ill. Because of this and the fact that Danny was working light he assumed Danny was ill. He was not asked whether Danny looked or acted sick on March 7.

36/ Five days elapsed between the time Dr. Fonesca saw Mr. Bryant on March 7 and the time he prescribed medicine for his condition on March 12. I cannot believe a doctor would permit a patient to suffer severe abdominal pain for five days when a mild antacid could have done much to ease it.

first produced by his union representative at the arbitration hearing held on April 5, 1980.

I find (1) that on March 7 Mr. Bryant was suffering from the same condition diagnosed on March 12, namely a mildly painful inflammation of the lower stomach and duodenum and (2) that despite the existence of this condition the doctor proffered and Danny accepted without protest an unrestricted return to work slip. Based on the clinical evidence and the doctor's contemporaneous actions, I conclude Mr. Bryant failed to prove by a preponderance of the evidence that he was unfit to attempt to set jacks on March 7, 1980. 37/

The Post Hoc Medical Evidence

After March 12, Dr. Fonesca did not see Mr. Bryant again until July 31, 1980. Dr. Fonesca's clinical notes show Mr. Bryant was complaining of a sharp, burning pain in the upper abdominal area about a half hour after eating. Dr. Fonesca found some tenderness in the upper abdomen but was also concerned that Bryant seemed anxious, tense and depressed. Bryant told him that about a week before, when he was hospitalized for an acute muscular strain, 38/ a Dr. Miranda performed a gastroscopy on him and told him to take Maalox, a nonprescription

37/ The most probative evidence of Dr. Fonesca's state of mind and diagnosis of Bryant's physical condition is to be found in his contemporaneous clinical notes and in his statement of findings. These documents convincingly refute the Secretary's claim that "Based on his examination of Bryant on March 7, 1980, Dr. Fonesca diagnosed a micro-plasmic (sic) infection of the pharynx and possible reflux esophagitis, a stomach condition which is aggravated by bending." Secretary's Br. p. 17.

38/ In June 1980, Bryant went to work for the Paramount Coal Company.

antacid, for his stomach condition. Dr. Fonesca told his secretary to obtain a copy of Dr. Miranda's gastroscopy report, and in the meantime prescribed the same tranquilizer, Librex, and cimetidine, Tagamet. He told Bryant to return on Monday, August 4.

By the time Bryant returned, Dr. Fonesca had reviewed Dr. Miranda's gastroscopy report which disclosed Bryant had "moderate to severe gastritis" and a "small hiatal hernia with minimal esophagitis." 39/ (JX-2, p. 3). Although Dr. Miranda's report did not say Mr. Bryant had "reflux," Dr. Fonesca interpreted the finding of "minimal esophagitis" as clinical support for a suspicion he said he had as early as March 7, that Mr. Bryant had reflux esophagitis. 40/ He continued Mr. Bryant on Tagamet for his acid indigestion, and prescribed antacids for Mr. Bryant's heartburn and sour stomach. He found Mr. Bryant recovered after four weeks of treatment.

In response to the question whether an individual in Bryant's claimed physical condition on March 7, 1980 could set jacks, Dr. Fonesca said he did not think so because Bryant "was having pain, and he was having respiratory symptoms." This was a reference to Mr. Bryant's pharyngitis which the doctor later admitted was "improved" to the point in March that no further treatment was indicated and which in his statement of

39/ It was agreed that, standing alone, a hiatal hernia would not have justified Bryant's refusal to set jacks on March 7, 1980 (Tr. 397-398).

40/ Dr. Fonesca chose to ignore the fact that his findings and those of Dr. Straughan "ruled out" reflux in March 1980 as the condition causing Mr. Bryant's claimed discomfort.

findings, which he gave to Bryant on March 12, he described Mr. Bryant as "recovered." 41/

There is nothing in the clinical evidence--that is in the evidence based upon the actual observations and tests conducted by Doctors Fonesca and Straughan on March 7, 10, or 12--to support the view that either doctor was concerned during that period with a "respiratory condition." If Dr. Fonesca was truly concerned during that period with a respiratory condition that might worsen if Mr. Bryant worked underground, why did he certify Mr. Bryant was "recovered" from the condition and give him an unrestricted return to work slip on March 12. 42/ I conclude that in his zeal to assist Mr. Bryant and the Secretary's case, Dr. Fonesca expressed a professional concern at the hearing that did not, in fact, exist on March 7 or 12, 1980.

Dr. Fonesca also suggested that on March 7, Mr. Bryant was unfit because of a pain that "was manifested by a burning sensation and nagging

41/ This statement was, I find, the most definitive and objective evidence of Mr. Bryant's condition on March 7. It stated:

TO WHOM IT MAY CONCERN:

Danny Bryant was seen first by me at Norton Community Hospital Emergency Room on 2/20/80 with complaints of a rattle in his chest and sore throat. Evaluation and studies revealed he had mycoplasma pharyngitis for which he was treated and recovered. The next time I saw him was on 3/7/80 with symptoms consistent with peptic ulcer disease. Contrast studies of his upper GI tract revealed antral gastritis and duodenitis and he was started on treatment. RX-15; Tr. 365.

42/ Concern over a respiratory condition was also inconsistent with Mr. Bryant's willingness to work underground with Mr. Canady to install the power center.

pain over his abdomen" which indicated reflux. These were symptoms which the clinical evidence shows were not manifest until Dr. Fonesca examined Bryant on July 31, 1980. Because of this the doctor was asked whether there was any "objective manifestation" of pain or discomfort on March 7. The doctor's reply was a dissertation on the subjectivity of pain that concluded with an admission that the answer to my question was "none," and certainly none discernable to a layman, because on March 7 Danny did not appear to be "suffering," at least "not very much." Tr. 364-365. Dr. Fonesca said that the only way he could have determined the condition of Bryant's gastrointestinal tract with any degree of certainty in March 1980 was to perform a gastroscopy which he did not do. 43/ Furthermore, the clinical evidence shows that when Dr. Miranda did a gastroscopy on July 24, 1980 some five months later he did not find "reflux esophagitis" merely "minimal esophagitis" a much less severe condition. The record shows Dr. Fonesca never had any clinical evidence of reflux.

Dr. Fonesca's medical opinion on Bryant's fitness to set jacks as expressed at the hearing can be accorded little weight. Not only is it contrary to the weight of the clinical evidence it is also contrary to his release of Bryant to return to work without limitation on March 12. Dr. Fonesca's medical opinion was based on the assumption that Bryant was suffering from two conditions that did not exist on March 7, namely a lower respiratory tract infection and reflux esophagitis. Dr. Fonesca

43/ Dr. Fonesca said that while the tests performed by Dr. Straughan in March would not necessarily rule out reflux, only a gastroscopy could do that, he did not insist that a gastroscopy be performed in March.

was willing to assume that what Dr. Miranda found in July "minimal esophagitis" existed in March and that it supported his findings, without further clinical observation, on August 4 that the condition was reflux, which he suspected in March but had ruled out. To assume Bryant had reflux in March because Dr. Fonesca diagnosed it in August is to engage in the most egregious post hoc propter hoc reasoning and flies directly in the face of the clinical evidence which supports at best a finding that Bryant had "minimal esophagitis" in July. 44/ As Dr. Fonesca admitted, the symptoms for gastritis are different from those for reflux and in March the clinical evidence supported only a finding of gastritis or acid indigestion and not reflux. This was why Bryant was not treated for reflux in March.

On balance, I am impelled to the conclusion that Dr. Fonesca did not believe Bryant's acid indigestion made him unfit to set jacks on March 7. If he did he would certainly have said so, and would not have been driven to include symptoms which he had ruled out in March and for which he had only tenuous support in July and August.

Further, if Bryant actually had the serious, chronic, respiratory and gastrointestinal track infections he alleged, it is my opinion that his refusal to work would not be protected. Any claim of protected activity that is not grounded on an alleged violation of a health or safety standard or which does not result from some hazardous condition or practice existing in the mine environment for which the operator is responsible falls without the penumbra of the statute. Kaestner v. Colorado Westmoreland, Inc., 3 FMSHRC 1994 (1981).

44/ Post hoc reason is the logical fallacy of thinking that a symptom or condition found to exist in August was the cause of Bryant's discomfort in March.

I do not believe a miner can, consistent with the good faith, reasonable belief requirement, present himself as ready, willing and able to work in accordance with the terms of the collective bargaining agreement and at the same time claim a protected right to refuse that work because of his impaired physical condition, even if his position is thereafter supported by sound medical opinion. 45/ I do not believe that in enacting the Mine Safety Law Congress intended to turn management's responsibility for disciplining the workforce over to the medical or legal professions.

The Wildcat Strike

Having found that Bryant's discharge for refusing to set jacks was not a protected activity or a pretext for retaliating against an antecedent protected activity, it becomes necessary, in the event the Commission disagrees, to consider the operator's failsafe defense, namely that Bryant in reprisal for his discharge instigated a wildcat strike that justified his disciplinary discharge. I say it becomes necessary because neither the Commission nor the courts have definitively indicated the extent to which the Commission may substitute its judgement of the facts and credibility

45/ I think we might all agree that a miner whose physical condition is impaired by the use of drugs, including alcohol, might refuse to work because of his impaired physical condition and that a doctor might well agree that for him to work would be unsafe or detrimental to his health. But I also think we would all agree that such a refusal to work was not protected and that the operator would have just cause to discipline the miner. The analogy to the present case is that if Danny Bryant is to be believed he knew he was too sick to perform to the contract for at least two weeks before he refused the assignment to set jacks but did not seek to remedy his condition until after his suspension. Under the circumstances, Danny's degree of culpability in presenting himself for work on March 7 was not that much different from the miner caught drinking or using drugs or just sleeping it off on the job. On the other hand, fatigue, illness or injuries suffered on the job that affect a miner's ability to continue to perform his normal work tasks safely may well justify a refusal to work. Whether such a refusal is a protected activity is not presented by this record.

of the witnesses for that of the trial judge. Because the determinations of protected activity and discriminatory motive are pure questions of fact the Commission may not have authority to substitute its evaluation of the evidence for that of the trial judge. 46/ Pullman-Standard v. Swint, _____ U.S. _____; 50 L. W. 4425, 4429 (1982). In view of the uncertainty in this area of the law, however, I deem it judicious to set forth my findings on this issue also. 47/

46/ Under the substantial evidence standard, which I understand governs the Commission's review of the trial judge's factual findings, the reviewing body may not "displace the [trier of fact's] choice between two fairly conflicting views, even though the [reviewing body] would have justifiably made a different choice had the matter been before it de novo." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1950). Findings of fact may only be overturned if a reviewing authority "cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes." Id. As the Court has recently noted, under the substantial evidence test, the reviewing authority may not "weigh the evidence" but may only determine whether on the record considered as a whole the evidence is sufficient to support the trial tribunal's findings and conclusions. Steadman v. SEC, 450 U.S. 91, 99, and n. 20 (1981). Where Congress has prescribed a standard of administrative or judicial review, the Commission and the courts must, of course, abide by it. Id. 94-95.

47/ Under Section 7(c) of the APA, the trial judge resolves contested issues of fact by the preponderance of the evidence rule. Under section 113(d) of the Mine Safety Law, the Commission reviews the trial judge's findings under the substantial evidence rule. Secretary v. Kenny Richardson, 3 FMSHRC 8, 12, n. 7 (1981). Consequently, it would appear that a trial judge's findings, especially those on credibility, are to be accorded greater weight under the Mine Safety Law than under the APA. Under the latter, the agency is not required to accept the trial judge's findings because the agency on appeal determines the matter de novo. The language and legislative history of the Mine Safety Law make clear that Congress intended the trial tribunal be accorded greater freedom to find facts including those based on impressions of credibility gleaned from demeanor, to the end that findings reflect either belief or disbelief of any particular testimony. I understand that to mean that in reviewing, as it does, a dead record, the Commission must accord considerable deference to the "lost demeanor" evidence that was available only to the trial judge. Labor Board v. Walton Mfg. Co., 369 U.S. 404 (1962); Alford v. Am. Bridge Division, 642 F.2d 807, 809 (5th Cir. 1981); Dir. Wkrs' Comp., Etc. v. Bethelem Steel Corp., 620 F.2d 60, 63-64 (5th Cir. 1980); Atlantic & Gulf Stevedores v. Director, Etc., 542 F.2d 602 (3rd Cir. 1976).

Word of Bryant's suspension with intent to discharge spread quickly among the miners on the second shift on Friday evening, March 7. The men's mood turned sour and by the time the shift ended Joey Stapleton was satisfied there would be a sympathy strike for Danny on Monday. Stapleton was so sure of his reading of the collective intent that he determined to take a vacation day on Monday so he would be paid despite the anticipated strike (Tr. 262-267). Stapleton, whom I credit with considerable insight, testified the suspension of Bryant was the "catalyst" that triggered festering discontent among the rank-and-file miners over the way they were being treated by management.

In the Spring of 1980 the Pilgrim Mine was a paradigm of all that troubles labor relations in the mining industry. Working short-handed when combined with the push for production created considerable stress and tension (Tr. 267).

Morale was very low due, among other things, to recent and prospective layoffs, Lloyd White's efforts to curb absenteeism and increase production, a soaring accident rate, 48/ working men out of their classification without new task training, complaints of unsafe mining practices, 49/ and, of course, work slow-downs and stoppages.

48/ On March 5, 1980, Lewis Reed was seriously injured when the chain came off the drive clutch of the bridge conveyor. The injury occurred because he was required to operate the machine with the guard off the drive clutch chain. Stapleton said after they took Reed to the hospital Cecil Blevins, the mine foreman, ordered him to operate the bridge conveyor for the rest of the shift without a guard even though he had received no new task training for the job.

49/ George Johnson, President of the UMWA Local, said he was receiving and transmitting safety complaints regularly to the company safety inspector, Mutt Townes. Some of these involved running the Wilcox miner

In addition to the causes for discontent over alleged mistreatment, traditional cultural ties and class loyalty dictated the miners show solidarity and support for a popular brother and leader like Bryant against what the miners viewed as the oppressive and burdensome policies of the company and Lloyd White. Don Kennedy, the company's labor relations manager, indicated Bryant would not have to solicit or persuade his brothers to come to his support. It was common knowledge that they would even if it hurt him and them more than the "bosses." The U.M.W.B.C.O.A. Arbitration Review Board has taken "judicial notice" of the fact that "one man, known to be a member of the Union and about whom information is gained that he has a grievance, can and does furnish ample signal to cause a work stoppage." Under the collective bargaining agreement's arbitration procedure such circumstances create a rebuttal inference or presumption of unlawful picketing or strike instigation that shifts the burden of persuasion to the miner in the event of a sympathy strike. 50/

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fn. 49 (continued)
without water to suppress the dust. Others involved setting jacks and pinning under unsupported roof. According to Johnson, whose classification was jack setter, he was not supposed to set jacks under unsupported roof, "but there is no way you can run a Wilcox without it." Bryant complained about being required to perform welding without a methane spotter and Lewis Blevins, the mine superintendent, said they were so short-handed on March 7 that "to work both sections we couldn't do any bolting of the roof during the shift." In May 1980, two months after Bryant's discharge, Lewis Blevins quit his job because he found it impossible to "get the mine straightened out" and "to producing good coal" due to absenteeism and strikes. Henry Canady quit the mine in April over a dispute concerning the use of alcoholic beverages on mine property and later in the year Lloyd and Tom White, among others, were indicted for alleged criminal violations of the Mine Safety Law. In December 1980, Clinchfield pleaded guilty to four counts of violating the Mine Safety Law and paid a fine of $100,000.

50/ Thus, under the "law of the shop" a miner is presumed guilty until he proves his innocence.

ARB, Decision 108, issued October 10, 1977, at 16-17. The Arbitration Review Board further held that in view of the "Miners' traditional willingness to shut down mines in supposed aid of fellow Miners" even informational picketing as distinguished from work stoppage picketing "cannot realistically be viewed as the exercise of constitutionally protected freedom of speech and must be viewed, instead, as a contractually improper act of work-stoppage inducement." Id. at 21.

The significance of the conventional wisdom for this case is that both Danny Bryant, the complainant, and Don Kennedy, the company labor relations manager, agreed that whether or not Bryant did anything other than provoke his suspension on Friday, March 7, 1980, he would surely be discharged for instigating a wildcat strike if the miners walked out on Monday (Tr. 165-166, 168, 173-175; RX-18, p. 40; 183, 658-159).

While Bryant had ample opportunity to advise and consult with his brothers on Friday and over the weekend, his testimony, if it is to be believed, was that he talked to no one except, I assume, his wife about his suspension. 51/ Dr. Fonesca indicated much of the stress, hyperactivity and agitation observed in Bryant that day may have been attributable to his suspension and prospective unemployment.

51/ Henry Canady contradicted Bryant stating that after Bryant was suspended on Friday afternoon he came back to the repair shop and announced that "he was fired. It was over" (Tr. 251). Henry told Joey Stapleton what had happened when Joey came out to make his belt examiner's report. The word spread quickly and according to Stapleton before the shift was over all the miners knew of the disciplinary action taken against Danny (Tr. 264). Scott Parrott, a maintenance man, told George Johnson, President of the Local, "about Danny getting fired" when Scott came up on the working section Friday night (Tr. 313).

After Bryant was suspended and before he talked to Canady, he and Nichols conferred briefly in the bathhouse about their next step. It was agreed that Danny would carry his grievance to the second stage and that Nichols would contact the District 28 representative about when to schedule the second stage meeting. Over the weekend or on Monday, James Nichols contacted the District 28 representative, Ken Holbrook, and the latter talked to Don Kennedy, the company representative. They arranged to hold the second stage meeting on Tuesday, March 11, 1980 at 2:30 p.m., at the mine site. Bryant never denied that he knew about this arrangement.

Management was encouraged to think the miners might not support Bryant when the third or hoot-owl shift reported for work without incident on Sunday night. The situation was tense, however, and the tension rose further when the day shift also reported for work at 7:30 a.m., Monday morning, March 10, 1980.

This was the morning Bryant had his G.I. Series with Dr. Straughan at the Norton Community Hospital. By this time, Danny was convinced, as he said he was from the beginning, that management was out to "punish" him and that he would not prevail in his appeal of the suspension under the arbitration procedure. 52/ When he returned home from the hospital,

52/ Indicative of Bryant's mood was the fact that he filed his discrimination complaint with MSHA on Friday, March 14, 1980, three days before the second stage meeting. The thrust of Bryant's initial complaint was that the assignment to set jacks was in retaliation for his refusal to operate the Julie car without a jack, jackbar and fire extinguisher in June 1979. He was convinced in his own mind that management picked him to do a dirty job when it could just as well have assigned it to someone else, such as the roof bolter Charlie Webb, because White wanted to "harrass" and "punish" him. White may well have wanted to make an example

around noon, Danny called the mine office and talked to Sharon Blevins, the mine clerk. He told her to tell Lewis Blevins he wanted to come by and turn in his tools and pick up his clothes. 53/ Sharon told him he would have to call back around 2:00 p.m. because Lewis was underground.

Danny waited until 2 or 2:15 p.m. to call back. In the meantime, Lewis Blevins called Lloyd White who was at another mine and asked for instructions on Danny's request. White told Blevins to tell Danny not to come to the mine until after the evening shift went underground which would be sometime between 4:00 and 4:30 p.m.

White said if he came earlier and the men struck it would be bad for Bryant's case because then he would also be charged with instigating a work stoppage. When Danny called, Lewis Blevins conveyed White's instructions. 54/

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fn. 52 (continued)
of Bryant but it was not because of any protected activity. White felt he had to assert his authority or risk losing control over his workforce. Bryant, on the other hand, felt he was being unnecessarily demeaned and seized upon his claimed illness and lack of new task training as an excuse for his resentment over being "singled out" for the dirty work. Since new task training cannot take place if a miner refuses to accept the assignment where the training is to be given, Bryant's anticipatory refusal was obviously not a protected "affirmative action."

53/ This action was the first overt indication or "signal" of Danny's concern over the outcome of the pending arbitration case. This may have stemmed from his failure to obtain a timely excuse due to illness from Dr. Fonesca.

54/ At the hearing much was made over whether Blevins told Bryant not to come until after 4:00 p.m. or 4:30 p.m. It is undisputed that Bryant appeared at the bathhouse at five minutes to 4 on the excuse that he was looking for Nichols to sign his grievance. Bryant knew, of course, that if the men struck he would be held accountable regardless of what he did or did not do to foment a work stoppage. Bryant, Don Kennedy, Lewis Blevins and others confirmed that this is the tradition in the coalfields. Thus, everyone agreed that it was "common knowledge" that if a union member,

Bryant then asked for James Nichols' phone number and Lewis put Sharon on the line. He told Sharon and Lewis that he needed to meet with James Nichols, his mine committeeman, that afternoon so that he could sign his grievance and thereby preserve his right to arbitration of his dispute with Lloyd White.

I find it impossible to credit Bryant's version of why he needed to meet James Nichols before he went underground on the afternoon of Monday, March 10, 1980. The record shows that on Friday, March 7, at the conclusion of the suspension hearing it was agreed by all present, including Bryant that the 48 hour limitation on holding a second stage meeting was waived because of the intervening weekend (RX-5, p. 11). It also shows that by Monday, March 10, Nichols had spoken with Ken Holbrook, the Union's District 28 representative and that the latter had agreed with Don Kennedy, the operator's labor relations manager, to extend the time for the second stage meeting to 2:30 p.m., Tuesday, March 11, 1980 (RX-18, p. 3).

Under the collective bargaining agreement, there was no need for Bryant to sign a request for formal arbitration until the time of the

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fn. 54 (continued)
and especially a union leader, is suspended with intent to discharge, there will almost "automatically" be a work stoppage and management will retaliate by charging the miner with instigating a wildcat strike. The miner will then have to assume the all but impossible burden of proving he did not provoke the strike and when he fails, as he almost invariably does, the arbitrator will uphold the imposition of a disciplinary discharge, the industrial equivalent of capital punishment. The Arbitration Review Board feels these draconian measures are needed to force the miners to honor the obligation to arbitrate these disputes and enforce the no-strike provision of the collective bargaining agreement.

second stage meeting (RX-29, Art. XXIV(d)). Bryant had not elected to go to immediate arbitration and knew the second stage meeting which he had requested was set for Tuesday, March 11. 55/ Furthermore, whether or not a second stage meeting was held, the collective bargaining agreement guaranteed Bryant five days from the date the suspension notice issued to file a formal request for arbitration (RX-29, Art. XXIV(d)). Bryant testified that on Monday afternoon he was only on the third day of the five days allowed to file his request for arbitration. 56/

Bryant made no effort, according to him, to reach Nichols over the weekend or at any time Monday prior to the time Lewis Blevins warned him against doing anything that might be construed as a signal for a sympathy strike. It was only at that point that Bryant determined he had to seek Nichols that afternoon and, if necessary, on the mine site.

I find that Bryant who was Chairman of the Mine Committee and who was advised and represented throughout the grievance and arbitration proceedings by a knowledgeable District 28 representative knew or should have known there was no urgent need for him to meet with James Nichols to sign a request for arbitration before Nichols went underground with the second shift at 4:00 p.m., Monday March 10, 1980. I further find that his claimed

55/ Because of the work stoppage that occurred on Monday afternoon, this meeting was postponed until Monday, March 17.

56/ Since the suspension notice issued at 4:00 p.m., Friday, March 7, 1980 Bryant had until 4:00 p.m., Wednesday, March 12, 1980 to file his formal grievance and request for arbitration by an umpire. Bryant knew, of course, that if there was a strike management would refuse to go forward with the second stage meeting until the men returned to work. He also knew that this would automatically toll the running of the five day period.

need to see Nichols was an ingenious, if nevertheless manufactured, excuse or pretext for violating the instructions against being at the mine site Monday afternoon before the evening shift went underground.

After Bryant spoke to Lewis and Sharon Blevins he called James Nichols at his mother-in-law's house in Jenkins, Kentucky. This was around 2:30 p.m., Monday, March 10, 1980. At that time he was told James had already left for work. 57/

According to Bryant, he left home imediately to try to intercept Nichols before he arrived at the mine. The undisputed evidence shows that James Nichols and Henry Canady were the only two miners on the evening shift who used the Bold Camp Road, State Route #633, to approach the mine access road from the north (RX-31). All the others, including Danny Bryant, came in from roads that fed into Bold Camp Road from the south and then right off that into the mine access road.

When Danny started from his home in Wise, Virginia to catch Nichols he took Route #23 north to Pound, Virginia and thereby bypassed the mine access road off Route #633. At Pound, he turned on to the Bold Camp Road

57/ James Nichols said he left home around 2:30 p.m., Monday afternoon to meet with Holbrook at the District 28 office in St. Paul, Virginia. After he finished talking to Holbrook about Danny's grievance, he left St. Paul on his motorcycle and arrived at the mine access road from the south--coming up the hill around 3:30 p.m. He denied seeing Danny who by this time was waiting for him halfway up the hill at the wide spot above the mine access road. The first time he remembered seeing Danny was in the bathhouse about a half hour to forty-five minutes after the men struck. Bryant denied seeing Nichols at all that day. I find it significant that Bryant seemed to lose all interest in finding Nichols after the strike occurred.

at Singleton's Department Store and headed south. He believed he was ahead of Nichols who would, he thought, be coming down through Pound from Jenkins which is north of Pound on Route #23. The mine access road is seven or eight miles south of Pound. Bryant was in his jeep and had his young son with him. Although he was confident he was ahead of Nichols, he did not stop along the road away from the mine but, while he watched for Nichols in his rear view mirror, he continued to drive south until he reached a wide spot in the road about 100 feet off mine property and approximately 500 to 1,000 feet above the mine access road. When he stopped his vehicle it was about 3:15 p.m. He and his son got out and stood beside the road looking, he said, for Nichols. The wide spot where Bryant stopped was on the downslope of the hill above the mine access road. The Bold Camp Road ran on down the hill to the point where it intersected the mine access road. Vehicles approaching from the south could see the spot where Danny was standing and he could see them.

Danny claimed that he could not be seen by miners in the parking lot or mine office but never denied that he could be seen by miners approaching from the south on the Bold Camp Road. Harlan Hall a union miner who worked the day shift was called as a witness by Danny's Union representative, Ken Holbrook, at the second stage meeting on Monday, March 17, 1980. Mr. Hall said he was familiar with the wide spot in the road where Danny parked because "I was parked up there when I was off the other time I was discharged" (RX-18, p. 48). At the arbitration hearing, Lewis Blevins testified that Hall's discharge also resulted in a wildcat strike (RX-26, p. 139). Larry Boggs, a union miner and a member of Bryant's Mine Committee,

further testified that from the wide spot in the road, "Yes, you can see cars coming up the hill" (RX-18, p. 51). The MSHA investigator confirmed that anyone with prior knowledge of the existence of the spot where Danny stopped and who looked would have been able to see Bryant.

At the time Bryant and his son dismounted from the jeep and stood beside the road, the other miners on the evening shift were approaching the mine access road from down the hill. James Nichols came up the hill and turned into the access road sometime between 3:30 and 3:45 p.m. Henry Canady also passed the spot where Bryant was standing with his son sometime between 3:15 and 3:30. Henry denied seeing Danny and Danny denied seeing Henry. Bryant did admit he saw Lloyd White pass on his way to the mine office around 3:30 p.m.

Upon arriving at the mine office, White told Lewis Blevins he saw Bryant beside the road about a 100 feet off mine property. White told Blevins that if there was a work stoppage he wanted to add a charge of instigating a strike to Bryant's notice of suspension.

Most of the miners on the evening or second shift, Danny's shift, arrived for work around 3:30 p.m. Apparently the miners had decided on their course of action before they arrived. In any event, around 3:45 p.m. the evening shift miners led by George Johnson, the President of the Local, approached Lloyd White and Lewis Blevins in the mine office and told White a "majority of the men voted to stay off from work until [White] brought Danny back to work." Lloyd White declined the demand

stating the matter was now the subject of a grievance and until that was settled the best thing they could do for Danny was to let the arbitration take its course. If Danny was reinstated, he would get back pay, but if they called a strike they and he would both be the losers. The miners then walked off the hill and did not return until Friday, March 14, 1980.

I find a preponderance of the evidence establishes that the sympathy strike of March 10 to 13, 1980 at the Pilgrim Mine was to protest the suspension of Danny Bryant and to put economic pressure on the operator to reinstate Bryant. 58/

In the meantime, Danny accompanied by his son decided to drive to the mine office. They arrived at the bathhouse, which was in the same building, about five minutes to four. While I find it incredible, Bryant said that by that time the entire evening shift had left. The only person he saw, he said, was Harlan Hall of the day shift who told him the evening shift had struck and left. Later he admitted he also saw Larry Boggs the day shift mine committeeman who accompanied him when White called him in to tell him that a charge of instigation was being added to the charges against him. He said he did not see James Nichols and did not inquire as to his whereabouts. 59/

58/ As a result of the four day stoppage, the operator claims it lost 2,150 tons of coal production.

59/ Nichols contradicted this at the second stage meeting. He said he saw Bryant in the bathhouse about 30 to 45 minutes after the mine was struck. Nichols was subpoened by counsel for the Secretary but the subpoena was never served and, despite repeated assurances by counsel, Nichols was never produced. The trial tribunal was thus deprived of an opportunity to test Bryant's version of why he needed to see Nichols on March 10

At the arbitration hearing, Lewis Blevins testified, without contradiction, that on the afternoon of Tuesday, March 11, 1980, the entire Mine Committee consisting of Bryant, Nichols and Boggs accompanied by George Johnson the president of the Local came to his office and again told him a majority of the miners had voted to strike until management put Danny back to work (RX-26, p. 136; RX-4, p. 4). Bryant gave no indication that he was not present when the vote was taken or that he did not concur in his brothers' action.

I find that with the possible exception of Joey Stapleton, Bryant and the other miner witnesses who testified seriously undermined their credibility by their understandable 60/ but nevertheless transparent attempts to stonewall and disinform the trial tribunal over Danny's and the Local Union's involvement in the sympathy strike. 61/

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fn. 59 (continued)
against Nichols's version. The record shows that on Tuesday, March 11, 1980, Bryant went with Nichols and others to see Lewis Blevins about the second stage meeting and to file Bryant's grievance. At that time, Bryant apparently signed a request for arbitration dated March 11. When Blevins told them management would not meet with them until the strike ended, they took the document back. It was redated on March 17, when the second stage meeting actually occurred.

60/ Until the Supreme Court's decision in Complete Auto Transit, Inc. v. Reis, 451 U.S. 401 (1981), it was not clear to what extent union members who participated in a wildcat strike might be held personally liable in damages to their employer. And while most local unions are judgment proof, they are not immune from damage suits occasioned by wildcat strikes.

61/ For example, George Johnson, the president of the Local, could not remember why the miners decided to walk off the hill that day, even though he admitted to the MSHA investigator that he demanded management put Danny Bryant back to work as the price of settling the strike.

My conclusion, which is congruent with that of the arbitrator, is that Bryant's excuse for stationing himself beside the public road at a point where he could see and be seen by miners entering the mine access road was a mere pretext or cover for picketing the mine and a mute plea for support from his brothers. It was also a silent pledge of solidarity from Danny to his brothers who were doing only what he knew they had to do.

I find it unrewarding to attempt to draw any metaphysical distinction over whether Danny actively fomented the strike or was merely an interested bystander. Under the circumstances, his presence on the road was not a protected activity. His participation in the vote and the carrying of the message to Blevins on Tuesday is convincing evidence of his conscious strike activity. Nor do I find Danny's responsibility was in any way lessened because of the tradition among the miners which made the strike inevitable. Whether the miners struck only because of their loyalty to Danny or also because they had little or no faith in the fairness or equity of the arbitration system or for other reasons lost in the mists of tradition and memory I need not determine.

My conclusions are, therefore, that Danny did picket and otherwise help instigate the strike of March 10, 1980; that management was justified in charging him with instigating the strike; and that the arbitrator was correct in finding him guilty of that charge. 62/

62/ A full immersion in this record is persuasive of the fact that a majority of the miners at the Pilgrim Mine felt, as miners have for eons, that the only way to redress their sense of outrage over what they perceived as a rank injustice to Bryant was to take direct action and

I further conclude that but for Danny's overt picketing before the sympathy strike he would not have been discharged. 63/

Legality of the Wildcat Strike

Implicit in the arbitrator's finding that instigation of the wildcat strike of March 10 was "just cause" for Bryant's discharge is a finding that the wildcat strike was illegal. Indeed, the Secretary has not contended that instigation of a strike is a protected activity. His focus was on sustaining Danny's exculpatory excuse for standing beside the public road. My finding, as well as that of the arbitrator, is that the reasons given for Bryant being there were not convincing. 64/

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fn. 62 (continued)
shut down the mine. I reject the idea that the strike was the result of some arcane signal that Bryant sent to his brothers. Their support, he firmly believed, could not help him. Yet he wanted and needed it. Their action and his sprang from a deep well of resentment over the way the workforce was being treated. This was the same resentment toward what was perceived as management's callous disregard for human dignity that caused Bryant to rebel against the assignment to set jacks in the first place. For whatever reason, Lloyd White was driving his workforce to the breaking point. Maybe it was the insatiable push for production. Maybe it was the sloth and intransigence of the workforce. The reaction on both sides was a conditioned overreaction. The roles seemed preordained, Pavlovian and almost trance like. It has been difficult to separate the legal rights from the legal wrongs in this minor tragedy in human and labor relations. Everyone seems to have been as much a victim as a villain.

63/ The arbitrator found that standing alone, the refusal to work on March 7, 1980 did not merit a disciplinary discharge. He concluded that it was the "misconduct of March 7 . . . combined with his [Bryant's] inducing a wildcat strike on March 10" that was "just cause for the discharge" (RX-7, p. 8).

64/ Generally, the law recognizes that intention or purpose can be ascertained either from verbal or nonverbal conduct of a party. The simplest proof is where the actor admits he consciously intended his conduct to produce the result it did.

The more usual situation is where intention must be inferred from a person's conduct. Under the circumstances of this case, the trial

My research leads me to conclude Bryant's conduct was a clear violation of the implied no-strike and compulsory arbitration clauses of the National Bituminous Coal Wage Agreement of 1978, the agreement in effect on March 10, 1980 and to which as a member of the union he was a party. 65/

In Gateway Coal Company v. Mine Workers, 414 U.S. 368 (1974), the Supreme Court held the broad, compulsory arbitration provision of the 1968 National Bituminous Coal Wage Agreement required the arbitration of safety disputes and based on the well known presumption of arbitrability enunciated in the Steelworkers Trilogy implied a no-strike obligation on the part of the Union and its members "coterminus" with the arbitration provision. The Mine Workers Union had called a work stoppage in the Gateway mine, alleging that hazardous working conditions were created by the presence of two foremen, responsible for keeping ventilation records. These miners had recently been convicted of falsely preparing records so as to indicate no inadequacy in the ventilation. Although the 1968 Wage Agreement provided for the arbitration of "any local trouble of any kind arising at the mine," it contained no explicit

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fn. 64 (continued)
judge has evaluated the degree of probability that Bryant's presence beside a road at a point visible to miners approaching the mine access road contributed to the occurrence of the strike. Because of the high degree of probability that such presence or picketing would result in a strike, the trial judge has inferred that inducing such a strike was Bryant's intent or purpose in being there.

65/ The National Bituminous Coal Wage Agreement of 1978 runs between each signatory employer and the International Union "on behalf of each member thereof" (RX-29, Art. I).

no-strike clause. The Court, after holding that the safety dispute was subject to arbitration, concluded it was proper to imply a no-strike obligation.

Shortly after the Gateway decision, Article III(p) was added to the National Bituminous Coal Wage Agreement. This section specifically provides for the arbitration of "Health or Safety Disputes" (RX-29, p. 25). There seems to be no question but that Danny Bryant was under a commitment not to strike or to picket to induce a sympathy strike over a health or safety dispute. U.S. Steel Corp. v. United Mine Wkrs. of America, 593 F.2d 201 (3d Cir. 1970); Cedar Coal Company v. United Mine Workers, 560 F.2d 1153 (4th Cir. 1977). As these decisions make clear, a sympathy strike over an arbitrable dispute is not sheltered by the Supreme Court's decision in Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976).

It is true, of course, that section 105(c) of the Mine Safety Law confers on miners such as Danny Bryant specific substantive rights that are not subject to the contractual dispute-resolution procedures of the Wage Agreement. Pasula v. Consolidation Coal Co., 2 MSHC 1001, 1007 (1980) (Arbitral findings even those perfectly congruent with issues before the Commission are not binding on the Commission), affirmed on this ground, reversed on other grounds Consolidation Coal Company v. Marshall, 663 F.2d 1211, 1218-1219 (3d Cir. 1981). Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974). But the fact that rights guaranteed individual miners under the anti-reprisal provisions of the Mine Safety Law are "nonwaivable" and therefore

not subject to compulsory arbitration does not mean that in the exercise of such rights a miner or his local union may violate with impunity their no-strike pledge. Emporium Capwell Co. v. Western Addition Community Org. 420 50, 70-73 (1975).

In Emporium Capwell, the Court held that concerted activity in support of an arbitrable grievance is unprotected and renders the participants susceptible to discharge. Such activity which includes picketing is considered a prohibited resort to self-help and economic coercion because it contravenes the orderly disputes settlement process contemplated by the NLRA and the arbitration provisions of the collective bargaining agreement. Id. note 12 and accompanying text. Nor does the strong congressional policy of protecting miners from operators' reprisals in the exercise of rights guaranteed under the Mine Safety Law sanction violations of the no-strike pledge. The Court in Emporium Capwell rejected the claim that in order to give full sway to the anti-retaliation provisions of Title VII of the Civil Rights Act picketing and other concerted activity to protest racially discriminatory employment practices must be recognized as a protected activity under sections 7 and 8 of the National Labor Relations Act. The Court noted:

> Even assuming that ¶704(a) protects employees' picketing and instituting a consumer boycott of their employer, the same conduct is not necessarily entitled to affirmative protection from the NLRA. Under the scheme of that Act, conduct which is not protected concerted activity may lawfully form the basis for the participants discharge. That does not mean that the discharge is immune from attack on other statutory grounds in an appropriate case. If the discharges in these cases are violative of ¶704(a) of Title VII, the remedial provisions of that title provide the means by which [complainants] may recover their jobs with back pay. Id. 71-72.

Picketing to induce a wildcat sympathy strike where the underlying dispute is over a preexisting health or safety problem even where it involves a protected refusal to work is not, therefore, a protected activity under either the National Labor Relations Act or the Mine Safety Law. 66/

Because Danny Bryant violated the no-strike provision of his collective bargaining agreement with Clinchfield Coal Company, the operator had

66/ On the other hand, a concerted refusal to work because of a good faith, reasonable belief that a hazard exists is protected activity under section 105(c) of the Mine Safety Law. Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 134 (1982); Isaac A. Burton, et al. v. South East Coal Company, 4 FMSHRC 457, 462 (1982); Mark Segedi, et al. v. Bethleham Mines Corporation, 3 FMSHRC 765 (1981). The right to strike over safety and health issues is also protected by section 7 of the National Labor Relations Act and section 502 of the Labor Management Relations Act. Whirlpool Corp. v. Marshall, 445 U.S. 1, 17, n. 29 (1980); NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962); NLRB v. Knight-Morley Corp., 251 F.2d 753 (6th Cir. 1957).

The effect of these provisions as well as those found in the Occupational Safety and Health Act is to create an exception to a no-strike obligation in a collective bargaining agreement. Id.; Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 385 (1974). While different standards of proof may be required to trigger the immunity, all provide protection to workers who walk off their jobs because of hazardous conditions. In addition, the miners' collective bargaining agreement authorizes individual miners to withdraw their labor in the face of "abnormally and immediately dangerous" conditions (RX-29, p. 18). The Mine Safety and Health Committee can close down a mine or any portion thereof that it has reason to believe presents an imminent danger to the lives or bodies of the miners (RX-29, p. 12).

But a miner may not bypass the arbitral process and resort to self-help by inducing a wildcat sympathy strike in an effort to coerce an operator into resolving an existing health or safety dispute in his favor. Emporium Capwell, supra. In this case, the Secretary never claimed the strike was a protected activity or that it involved a refusal to work because of any hazardous or extrahazardous condition that existed in the mine. On the contrary a preponderance of the evidence established that the underlying dispute that triggered the strike was Bryant's suspension. The strike was not, therefore, in furtherance of any rights guaranteed under the Mine Safety Law to Danny Bryant or the other miners who participated. The absence of any right to engage in economic coercion is negated by the availability of the remedy of reinstatement pending resolution of a protected health or safety dispute.

the right under that agreement and the law to discharge him without right of reinstatement. Complete Auto Transit Inc. v. Reis, 451 U.S. 401, 415, n. 16, 416, n. 18, 420 (1981); Atkinson v. Sinclair Refining Company, 370 U.S. 238, 246 (1962); NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939). 67/

CONCLUSIONS OF LAW

Based on the foregoing findings I conclude that as a matter of law:

1. Bryant's refusal to accept a strenuous work task assignment based on his asserted belief that performance of the task in conditions normally encountered in the environment of a low coal mine would aggravate or worsen his claimed respiratory and gastrointestinal ailments was not an activity protected under section 105(c)(1) of the Mine Safety Law. To enjoy protection under the anti-reprisal provisions of the Mine Safety Law, a refusal to work must (1) be based on some condition or practice in the mine or working environment for which the operator is responsible and (2) create a hazard or danger to the miner's health or safety that is recognizable and in excess of that inherent in the operation and normally encountered. Where, as here, the claim of protected activity concerns not some identifiable presently existing threat to the miner's health or safety, but rather a generalized doubt on his part as to his competence

67/ Compare, Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d 1981), where the court held that while a miner has a right to refuse to work in the face of a hazard to his safety or health he does not have the right to prevent others from working by shutting down the means of production. See also Blankenship v. W-P Coal Company, 3 FMSHRC 969 (1981); Gooslin v. Kentucky Carbon Corporation, 3 FMSHRC 640 (1981).

and physical fitness to perform the task, Congress did not intend that the public policy favoring the arbitration of grievances be circumvented and supervening jurisdiction over the dispute conferred on the Commission merely because a refusal to work was involved.

2. Danny Bryant's instigation of a work stoppage on June 1, 1979 in connection with the Julie car was not a protected activity under section 105(c)(1) of the Mine Safety Law.

3. The Secretary failed to prove by a preponderance of the reliable, probative and substantial evidence that Danny Bryant's refusal to accept Mr. White's order to perform the job of a jack setter on March 7, 1980, was a protected activity under section 105(c)(1) of the Mine Safety Law.

4. The operator proved by a preponderance of the reliable, probative and substantial evidence that Danny Bryant was one of the instigators of the wildcat strike that commenced on Monday, March 10, 1980. This activity was unlawful and in breach of Bryant's no-strike pledge under his collective bargaining agreement with the operator. This activity furnished just cause for Bryant's discharge.

OPINION

This was not a dual motive case. Reams have been written over the pleading and proof requirements in anti-reprisal (discrimination) cases involving dual or mixed motives. See, e.g. Lasky and Leathers, Applying the Wright Line Test: Mixed Results In the Circuits, NLJ, 3/22/82, p. 32. Applying the tests for evaluating a prima facie case of protected activity

as developed by the Commission in Pasula/Robinette I conclude the Secretary failed to prove by a preponderance of all the evidence that Bryant was at any time engaged in a protected activity. This eliminates, therefore, the necessity of making any extended "pretextual" or "but for" analysis. 68/ Compare, NLRB v. Chas. H. Batchelder Co., 646 F.2d 33, 42-44 (2d. Cir. 1981). I realize that because of Congressional concern over protecting the unhibited exercise of the right to refuse to work all the Act requires is proof that the miner honestly and reasonably believed that he confronted a threat to his safety or health. Consolidation Coal Co. v. Marshall, 663 F.2d 1211, 1219 (3d Cir. 1981). I also understand that such a refusal is protected from retaliation by the operator even if the evidence ultimately shows that

68/ The Secretary argues that Bryant was fired for engaging in two instances of protected activity: (1) the Julie car incident, and (2) the refusal to set jacks. The Secretary says both incidents stemmed from a management animus against safety activists and were inspired by a single discriminatory motive. My evaluation of the evidence shows: (1) the Julie car incident did not involve any protected activity because the absence of a fire extinguisher presented no immediate or recognizable hazard that justified a work stoppage and, even if it did, it was under the circumstances so clouded by pretextual reasons for harrassing the section foreman that it lost all independent significance as a cause of management's displeasure with Bryant's conduct; (2) the refusal to set jacks was unprotected because there was no immediate or long-term health or safety hazard that justified Bryant's claimed right to be selective in his work assignments. Since both activities relied upon were unprotected, a presumption of discriminatory motive was never established. Both the prima facie and rebuttal cases show the sole reason for Bryant's suspension was his refusal to work at setting jacks. This was a serious breach of his employment obligation that justified disciplinary action. Whether it was of a magnitude sufficient to justify discharge, I need not, and probably should not, be concerned. See, Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508, 2516, 2 BNA MSHC 1505 (1981); Bradley v. Belva Coal Co., _____ FMSHRC _____, Dkt. WEVA 80-708-D, decided June 4, 1982. In any event, the undisputed evidence shows Bryant was actually fired because he instigated a wildcat strike, a breach of his employment obligation that undoubtedly justified his discharge. The fact that few, if any, tears were shed over his departure may be regrettable but it was not unlawful.

the conditions were not as serious or as hazardous as the miner honestly believed them to be. Id.

Under the circumstances presented in this case, however, I am not persuaded that the miner either had a good faith, reasonable belief that his illness was as serious as he claimed it was or, regardless of the bona fides of his belief, that it was the kind of threat to his safety or health covered by the Act. I do not believe Congress intended to afford miners the right knowingly to present themselves for work in a physical condition that precludes the safe or healthful execution of their tasks and then to decline or refuse to perform such tasks with total immunity from discipline by their employers.

For these reasons, I have determined that even if Mr. Bryant had a good faith, reasonable belief that his claimed weakened physical condition would not permit him to perform the tasks of a jack setter safely and without detriment to his health, this subjective belief was not, under the circumstances, a justification for his refusal to work because it stemmed from his own misconduct and violation of company policy in presenting himself for work in that condition.

Finally, I find the operator made a persuasive affirmative showing that subsequent to his disciplinary suspension Mr. Bryant was one of the instigators of a wildcat strike and that but for that activity Mr. Bryant would not have been discharged. The operator thus successfully carried a heavier burden than some of the courts of appeals would require and at least as heavy a burden as the Commission fashioned in Pasula and

Robinette. 69/ Not only did Bryant fail to validate the purity of his motives and the reasonableness of his beliefs with respect to the claimed antecedent protected activity but the operator successfully established through contemporaneous clinical evidence that Bryant's actually physical condition on the critical date did not render him unfit to perform the work assignment he refused.

The decision in this case has turned on a careful weighing of all the evidence in the record considered as a whole. Because the Secretary failed to prove Bryant engaged in protected activity, it has not focused on any narrow issues concerning burdens of proof as to motive. As a practical matter, those considerations fell away once the trial was concluded. I do not believe it productive, therefore, to attempt to unravel the labyrinthine holdings and literature spawned by the Commission's Pasula and the NLRB's Wright Line decisions. The reconciliation of these writings and their implications for the correctness of the Commission's allocation of the burdens of proof in dual motive cases under section 105(c) of the Mine Safety Law I must leave to another day or to the law reviews 70/ and the Commission. Suffice it to say that my distillation of the holdings and literature leads me to conclude that under Pasula and its progeny once a showing has been made that a disciplinary decision was tainted or motivated "at least in part" by a miner's protected activity, the burden of persuasion shifts to the operator to show that the

69/ Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800, 2 BNA MSHC 1001 (1980); Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818, 2 BNA MSHC 1213 (1981).

70/ See, generally, Broderick and Minahan, Employment Discrimination Under the Federal Mine Safety and Health Act, 84 W.Va. L. Rev. _____ (1982).

decision was motivated "at least in part" by unprotected activity and that "but for" the unprotected activity, and for that activity "alone," the miner would not have been disciplined or discharged. 71/

Whether shifting the ultimate burden of persuasion to the operator to show a plausible motive for a disciplinary action contravenes section 7(c) of the APA or whether the Commission's burden shifting rule is more in accord with the Congressional purpose that underlies the anti-reprisal provisions of the Mine Safety Law, I need not decide. 72/

71/ Robinette, supra; Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508, 2 BNA MSHC 1505 (1981); Bradley v. Belva Coal Co., _____ FMSHRC _____, Dkt. WEVA 80-708-D, decided June 4, 1982. The courts of appeal are split over the authority of the NLRB to shift to an employer the burden of persuasion in rebutting a charge of discrimination under the National Labor Relations Act. Compare Behring International, Inc., v. NLRB, No. 81-1937 (3d Cir. April 7, 1982); NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981); TRW v. NLRB, 654 F.2d 307 (5th Cir. 1981) with NLRB v. Fixtures Manufacturing Corp., 669 F.2d 547 (8th Cir. 1982); NLRB v. Lloyd A. Fry Roofing Co., (7th Cir. 1981); and NLRB v. Nevis Industries Inc., 647 F.2d 905 (9th Cir. 1981).

72/ The Commission relied on Mount Health City Board of Education v. Doyle, 429 U.S. 274 (1977) for guidance in arriving at its position. On the other hand, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) indicates the ultimate burden of persuasion as to the motive for a disciplinary action lies on the Secretary and not the operator. In Chacon, supra, however, the Commission greatly diluted the operator's Pasula burden by holding that it is carried merely by a showing that the operator's motive for a disciplinary suspension was "not plainly incredible or implausible."

If the Commission is ultimately required to follow Burdine, the operator to rebut a prima facie case or presumption of discrimination, need only articulate a legitimate, nondiscriminatory reason for the allegedly unlawful action. Contrary to Pasula, the operator would not need to persuade the trial tribunal it actually was motivated by the proffered reason and that "but for" the permissible reason and that reason "alone" the miner would not have been disciplined. The burden of proceeding would then shift back to the Secretary and then, as the Court stated, "This burden now merges with the ultimate burden of persuading the court that [the complainant] has been the victim of intentional discrimination. [The complainant] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id.

Burdens of production and persuasion in an administrative proceeding are usually significant only where the evidence is in "equipose," that is, where after all the evidence has been submitted, it cannot fairly be said to preponderate in favor of either party. NLRB v. Transportation Management, Corp., (1st Cir., April 1, 1982) (concurring opinion).

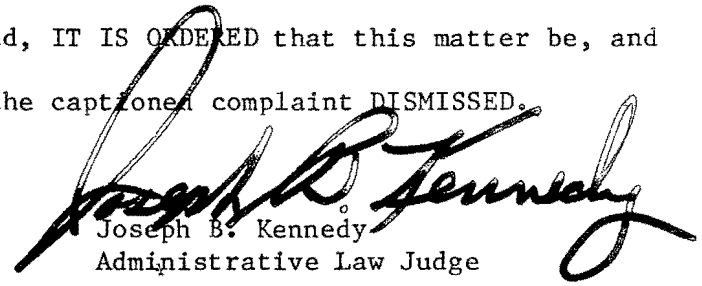
The burden of persuasion is crucial, however, in retaliation cases which turn on the elusive concept of motive. Under Pasula and Wright Line the party bearing the burden of persuasion will lose when the evidence shows the employer's true motive was just as likely a business reason as retaliatory. In other words where the evidence is in equipoise the operator, not the complainant, will lose. By relieving the Secretary of the burden of persuasion on the issue of true motive, the Commission has cast the balance in favor of finding a discriminatory motive in most cases where a protected activity was "in any way" involved. The Senate Committee Report, of course, supports this allocation of the burden of proof. S. Rep. 95-181, 95th Cong. 1st Sess., 36 (1977). See also, Larry D. Long v. Island Creek Coal Company, et al., 2 FMSHRC 1529, 2 BNA MSHC 1437 (1980); affirmed 2 BNA MSHC 1436 (4th Cir. 1981).

In this case, the operator not only rebutted the Secretary's showing of protected activity but positively negated the existence of such activity. By doing so, the operator successfully neutralized the claim of culpable motive for Bryant's discharge. In the absence of a showing of protected activity, there can be no "mixed" or "bad" versus "good" motive for a discharge. Bryant was suspended for an act of unprotected insubordination on March 7,

1980 amd discharged for that activity and for subsequent unlawful misconduct in instigating the wildcat strike of March 10, 1980. No matter how allocated, the operator carried his burdens of rebuttal and persuasion with respect to all of these issues by a clear preponderance of the reliable and probative evidence. It follows that Bryant's discharge was for just cause and for legitimate, nondiscriminatory business reasons. It was, therefore, in all respects proper.

ORDER

The premises considered, IT IS ORDERED that this matter be, and hereby is, terminated and the captioned complaint DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 30 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No: WEST 82-48 A.O. No: 42-00121-03103
v.	:	Docket No: WEST 82-80 A.O. No: 42-00121-03106 H
EMERY MINING CORPORATION, Respondent	:	Deer Creek Mine
and		
EMERY MINING CORPORATION Applicant	:	Contest of Order
v.	:	Docket No: WEST 81-400-R Order No: 1022357; 9/9/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Deer Creek Mine

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner
Evert W. Winder, Manager, Health and Safety, Emery Mining Corporation, Huntington, Utah and
Todd D. Peterson, Esquire, Attorney for Respondent

Before: Judge Moore

The above three docket numbers were consolidated for hearing and were tried together on May 18, 1982 in Price, Utah.

At the outset counsel for the government announced a settlement of the two violations involved in Docket No: WEST 82-80. The government announced that it had insufficient evidence to support one of the two alleged violations and that with respect to the other alleged violation it would amend its imminent danger order to a normal citation and settle the matter for $1,000 rather than the $2,500 that had originally been assessed. I approved the settlement.

With respect to the other violations, most of the facts were stipulated. My decision herein will rest on an interpretation of 30 C.F.R. 48.8(a) which states:

"each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section".

It is the Company's position that "8 hours of annual refresher training means 8 hours of refresher training in each calendar year." It is the government's position that the annual refresher training is required every twelve months without regard to the calender year. The miners in question in this case, all received 8 hours of refresher training in each calendar year, but the refresher training in 1981 was given more than twelve months after the refresher training that was given in 1980. 30 C.F.R. 48.3(a) requires each operator to have an MSHA approved plan "containing programs for training new miners, training newly employed experienced miners, training miners for new tasks, annual refresher training, and hazard training for miners as follows: "The training plan submitted by respondent to MSHA provides that annual refresher training will be given by December 31 in each calender year. The plan was approved by MSHA. (See Respondent's exhibit No. 1).

The citations in the instant cases were issued in reliance on government exhibit 1, which is a policy memorandum issued by MSHA on June 1, 1981. The policy memorandum is couched in terms that would lead one to believe that it was a relaxation of a former more strict interpretation of the refresher training standard. It says "in order to provide practical flexibility and to reduce record keeping for Part 48, this office has determined that miners may complete their annual refresher training any time during the last calendar month of their annual training cycle. For example, a miner beginning work on June 5, 1981, may complete his annual refresher training any time before June 1982." In the next paragraph the memorandum states that this policy permits records and training schedules to be maintained on a monthly basis instead of tracking individual calendar days." The implication is that prior to this memorandum a miner who began work on June 5 of one year, would have to have his refresher training completed by June 5 of the following year. No memoranda to that effect has been produced or referred to by the parties. If the standard is interpreted in accordance with government exhibit 1, almost 13 months could elapse between refresher training periods. Under the mine operator's plan, however, almost two years could elapse between training periods. If, for example, a miner was hired and trained early in one year, and not given his refresher training until December of the following year, the interval could be close to two years. Section 115(a)(3) of the Act says "all miners shall receive no less than 8 hours of refresher training no less frequently than once each twelve months..." This could mean training in one 12 month period and training in the next 12 months period or it could mean that no longer than 12 months shall separate training sessions.

I think that the Congress may well have intended that refresher training be given at least once every twelve months. I think it clear, however, that in preparing the regulation in question here, the Secretary did not intend that refresher training be given every twelve months. The

regulations demonstrate that when the Secretary intends to say twelve months, he does so explicitly. See for example 30 C.F.R. 48.2(b), 30 C.F.R. 48.7(a), 30 C.F.R. 48.11(b) and similar provisions regarding surface mines and surface areas of underground mines. 30 C.F.R. 48.11(b) refers to hazard training and states "miners shall receive the instruction required by this section at least once every twelve months." If 30 C.F.R. 48.8(a) means the same thing, why were not the same words used? I think MSHA meant to require training in every calendar year, and it seems clear that the format it supplied for the preparation of a training plan contemplated training in each calendar year. Item 6 on the training plan is "predicted time when regularly scheduled refresher training be given" and the Respondent mine has in its plan "by December 31 annually." If every miner had to be trained within twelve months of being hired or of his last refresher training there would be no way to respond to the question without giving a date for each miner. Also in Respondent's favor is the normal use of the word "annual". Annual banquets and annual meetings are not necessarily within twelve months of each other.

The fact that Congress may have intended that refresher training be conducted within twelve months of the previous training is not controlling as to the meaning of the regulation promulgated by the Secretary. In Service vs. Dulles 354 U.S. 353 (1957) Congress had given the Secretary of State absolute discretion to discharge anyone who he suspected of being disloyal to the United States. A regulation had been published providing for a hearing for anybody suspected of being disloyal. In this case a hearing was held. It turned out that the results of the hearing were deemed improper, but it was argued by the government that since Congress gave the Secretary absolute discretion the results of the hearing were not important. The Supreme Court held that even though Congress gave the Secretary absolute discretion, if regulations were promulgated providing for a procedure to be followed, then the Secretary no longer had absolute discretion but must follow the procedure. Similar results were reached in Accardi vs. Shaughnessey, 347 U.S. 260 (1954) and Vitarelli vs. Seaton, 359 U.S. 535 (1959). See also Pacific Molasses Company vs. Federal Trade Commission, 356 (Fed 2d. 386, 389, (5th Cir. 1966). Taken together, I consider these cases stand for the proposition that regardless of the intent of Congress, if any agency publishes a regulation that is not so harsh as the one authorized by Congress, the public is bound only by the agency regulation. Therefore, I hold that even though Congress may have intended that refresher training be conducted every twelve months, the regulation published by MSHA is controlling, and only requires refresher training during every calendar year.

The Citations are vacated and the case is DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

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