July 1983

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

JULY

The following case was Directed for Review during the month of July:

Secretary of Labor, MSHA v. TAMMSCO, Inc., and Harold Schmarje, Docket Nos. LAKE 81-190-M, LAKE 82-65-M (Judge Koutras, June 9, 1983)

No reviews were filed in which a Denial was issued.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 81-96-R
and	:	
UNITED MINE WORKERS OF AMERICA	:	
v.	:	
JONES & LAUGHLIN STEEL CORPORATION	:	

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and involves the interpretation of the mandatory safety standard contained in section 303(d)(1) of the Act, 30 U.S.C. § 863(d)(1)(1976), and the identical implementing standard, 30 C.F.R. § 75.303. 1/ For the reasons that

1/ Section 303(d)(1) of the Mine Act, and 30 C.F.R. § 75.303, provide in part:

> [1] Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. [2] Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. [3] Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. [Sentence numbers added.]

(footnote 1 continued)

follow, we affirm the administrative law judge's holding that coal-carrying conveyor belts are specifically excepted from this mandatory standard's requirements for pre-shift examination. 2/ We emphasize at the outset, however, that we are not deciding whether all entries around belt conveyors are "active workings," and subject to some form of inspection under the first sentence of the standard, because that issue was not litigated below.

On February 17, 1981, Jones & Laughlin Steel Corporation was issued a citation under section 104(d)(1) of the Mine Act alleging that it had violated 30 C.F.R. § 75.303 by not pre-shift examining certain coal-carrying conveyor belt "flights"--that is, sections of the conveyor beltline system. See Bureau of Mines, U.S. Dept. of the Interior, A Dictionary of Mining Mineral, and Related Terms 440 (1968). On February 19, 1981, an order of withdrawal was issued under section 104(d)(1) for another alleged failure to pre-shift coal-carrying conveyor belt flights. On both occasions miners had entered the area where the beltlines were located and begun working before an examination of the beltline had been conducted. Jones & Laughlin's Vesta No. 5 Mine, where the citation and order were issued, is an underground coal mine in which coal haulage is accomplished largely by a conveyor belt system.

Jones & Laughlin contested the citation and order and a hearing was held before a Commission administrative law judge. At the hearing, Jones & Laughlin and the Secretary of Labor stipulated that the belts in question carried coal, not persons, and that coal was produced on the shifts during which the citation and order were written. The parties also agreed that an examination "of the nature specified in 30 C.F.R. § 75.303" was made, but was not conducted within three hours preceding the beginning of the shift, or before miners entered and began to work in the areas cited. The belt conveyors were stipulated to be in "good condition" at the time of the citation and withdrawal order. 3/

---

footnote 1 cont'd.

Further, section 318(g) of the Mine Act and the Secretary's standards identically define key terms used in section 303(d)(1):

> "[W]orking section" means all areas of the coal mine from the loading point of the section to and including the working faces,
>
> "active workings" means any place in a coal mine where miners are normally required to work or travel.

30 U.S.C. § 878(g)(3) and (4); 30 C.F.R. § 75.2(g)(3) and (4).

2/ The judge's decision is reported at 3 FMSHRC 1721 (July 1981)(ALJ).

3/ The United Mine Workers of America ("UMWA") intervened after the hearing.

We granted petitions of the Secretary and the UMWA for discretionary review of the judge's decision. 4/ On review the UMWA asserts that the coal-carrying conveyor belts are "active workings" and must be pre-shift examined under the first sentence of the standard, and that the third sentence requires a separate on-shift examination. The UMWA further asserts that these two examinations cannot be combined. As discussed below, we reject the UMWA's position that the conveyor belt equipment at issue is, in and of itself, an active working. Given our disposition of this case, we need not address the UMWA's other assertions.

The Secretary's position is more involved. He does not argue that coal-carrying beltlines are "active workings." Further, he concludes, as we do, that there is no requirement that coal-carrying belt equipment be pre-shift inspected. Br. 10-13. He argues, however, that section 303(d)(1) does require a pre-shift examination of all areas in coal-carrying conveyor belt entries where miners will be assigned to work on the upcoming shift. The Secretary asserts that, when examining belts on-shift, both the entry and the belt must be examined if the entry has not been pre-shift inspected. The Secretary would allow these two inspections to be merged in certain circumstances.

The Secretary thus asks us to decide whether the areas surrounding the coal-carrying belt equipment must be pre-shift inspected under the first sentence of the standard, which refers to "active workings." After careful examination of the record, we are satisfied that the Secretary did not present to the judge this complex argument distinguishing between the belt equipment and the entries in which the equipment is located. Further, the citation and order in this case both refer to "conveyor belt flights"--as noted above, specific sections of conveyor belt equipment. In short, the Secretary failed to litigate below the argument he now asks us to review. As a result, we have an incomplete and unsatisfactory record on this important question. Similarly, the judge did not decide this issue, and his opinion does not contain any discussion of a distinction between belt

4/ The American Mining Congress, Bituminous Coal Operators Association, and Keystone Bituminous Coal Association filed briefs as amici curiae. Keystone Bituminous Coal Association in its amicus brief requested that the Commission issue a declaratory order to the Secretary requiring him to publish his interpretive and policy memoranda regarding 30 C.F.R. § 75.303 in the Federal Register. An amicus curiae cannot control the course of litigation and, generally, may not request relief. See, for example, Bing v. Roadway Express, Inc., 485 F.2d 441, 452 (5th Cir. 1973); 1B J. Moore, T. Currier, Moore's Federal Practice ¶0.411[6] (2d ed. 1982). Keystone lacks standing to make this request, and therefore it is denied. Further, no request for a declaratory judgment was presented to the administrative law judge, or in the petitions for discretionary review and, thus, such a request is not properly before us. 30 U.S.C. § 823(d)(2)(A)(iii) and B.

equipment and the entries in which the equipment is located. Absent a showing of good cause, section 113(d)(2)(A)(iii) of the Mine Act precludes our review of questions of law and fact not presented to the judge. 30 U.S.C. § 823(d)(2)(A)(iii). Such good cause has not been demonstrated. 5/

Under these circumstances, our decision concerns only coal-carrying belt equipment, which is specifically treated in the third sentence of section 303(d)(1), and which the Secretary agrees need not be pre-shifted. We interpret the judge's decision as referring to belt equipment only, and reject any reading to the contrary. If the Secretary wishes to litigate the question of whether coal-carrying beltline entries must be pre-shifted, he should in a future case issue a citation and file pleadings and briefs clearly raising that issue. We now turn to the narrow question before us.

The inspection requirements imposed by section 303(d)(1) are to be determined by reading that section as a whole. Elementary principles of statutory construction require that the individual inspection requirements be read in an harmonious and consistent manner. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). See 2A Sands, Sutherland Statutory Construction § 46.05 (4th ed. 1973). The first sentence of section 303(d)(1), which requires pre-shift inspection of "active workings," is the most general of the three sentences. Thereafter, Congress proceeded to impose more particular inspection requirements. In the second sentence of that section, Congress required pre-shift examination of "working sections," a less inclusive area than "active workings." In the second sentence, Congress also specifically mandated inspections of particular areas and objects in underground mines, e.g., seals and doors, roofs, faces, and ribs, and active roadways, travelways, "and belt conveyors on which men are carried ..." (Emphasis added.) Finally, in the third sentence Congress specifically directed, "Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun." (Emphasis added.)

Based on the structure of section 303(d)(1), as well as on the definition of "active workings" in section 318(g)(3)(quoted in n. 1 above), we first conclude, in agreement with the Secretary, that coal-carrying equipment per se is not an active working. Active

5/ Indeed, we note that the Secretary's position has evolved through several stages. The judge held below that the Secretary had no "consistent or coherent construction of the section in controversy" and was "unable to cite any written policy or procedure" describing his interpretation of the standard at issue. 3 FMSHRC at 1733. The Secretary's current position was not refined and clarified until his reply brief to us in this case and was not announced to the public until 3 months after we granted review in this case. Further, there are discrepancies between his present position and relevant material in the inspector's manual in effect at the time of the judge's decision.

workings generally are areas or places in a mine, not equipment. 6/ As we have emphasized above, we do not decide here whether the entries or areas surrounding the belt equipment are active workings.

Further, in section 303(d)(1), Congress distinguished between coal-carrying beltlines and those that carry miners. Congress in the second sentence of the standard required pre-shift inspection of man-carrying belts, and, in the third sentence, required on-shift inspection of coal-carrying belts. These discrete references to different belt functions, and clear differences in inspection requirements, demonstrate congressional knowledge of the operation and use of conveyor belt systems in coal mines. Given this evident congressional understanding and the specific inspection requirements imposed as to each type of conveyor belt system, we conclude that coal-carrying conveyor belts do not have to be pre-shifted.

Our construction of section 303(d)(1) is supported by the legislative history. Section 303(d)(1) of the Mine Act was adopted without change from the 1969 Coal Act, and the legislative history of the Mine Act does not discuss this section. Accordingly, we look to the legislative history of the 1969 Coal Act and the intent of the original promulgators of this section. Section 303(d)(1) of the 1969 Coal Act was a revision of a 1952 Coal Act inspection provision that did not expressly mention beltlines. See section 209(d)(7) of the 1952 Coal Act, 30 U.S.C. § 471 et seq. (1964)(repealed 1969).

In the process of amending the provisions of the 1952 Act, the Senate passed a bill that provided in part that "all belt conveyors" shall be pre-shift examined. S. 2197, 91st Cong., 1st Sess. § 204(d)(1)(1969) reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part 1 at 815-16 (1975) ("Legis. Hist."). The bill to amend the 1952 Act that passed the House required pre-shift examination of "all belt conveyors on which men are carried"; it also contained a sentence not found in the Senate version: "Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun." H.R. 13950 § 303(d)(1), Legis. Hist., Part 1 at 1417.

The Conference Committee adopted neither all of the Senate version nor all of the House version. Instead, a hybrid provision appearing in the Conference Report was enacted as section 303(d)(1) of the Coal Act, and was re-enacted as section 303(d)(1) of in the Mine Act. Legis. Hist., Part I at 1470-71; section 303(d)(1) of the Mine Act (quoted above, n. 1). The statutory standard enacted by Congress adopted the House language requiring pre-shift examination of conveyor belts that carry

6/ To the extent that the judge's decision might be read as holding that the belt equipment involved in this case is an "active working," we disagree. We agree with the judge, however, that these belt conveyors are not within the definition of "working section" in the Mine Act. Section 318(g)(3)(quoted in n. 1 above).

persons, and examination of coal-carrying belts "after each coal-producing shift has begun." Thus, Congress rejected the proposed requirement for pre-shift examination of all belt conveyors. We agree with the judge that this factor is important in determining congressional intent. 3 FMSHRC at 1732-33. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-200 (1974). 7/

For the foregoing reasons, we hold that section 303(d)(1) does not require pre-shift inspection of coal-carrying beltlines. Rather, that belt equipment must be examined, pursuant to the third sentence of section 303(d)(1), "after each coal producing shift has begun." We leave for another day the question of whether entries in which coal-carrying beltlines are located must be pre-shift inspected. 8/

Accordingly, on the bases explained above the judge's decision is affirmed and the citation and withdrawal order are vacated.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

7/ Further evidence of congressional intent is found in the section-by-section analysis and explanation presented by Senator Williams, a conferee and manager of the bill, to the Senate on its debate on the bill that became the 1969 Coal Act. Concerning section 303(d), this analysis states:

> Subsection (d) sets forth requirements that the operator must follow for preshift examinations. This [sic] provisions are similar to the 1952 act provisions, ... except for several additional requirements including ... an examination of belt conveyors on which men are carried before each shift, [and] an examination of coal carrying belt conveyors after each shift begins....

Legis. Hist., Part I at 1610 (emphasis added). This explanation by a key conferee also clearly indicates that Congress distinguished between conveyor belts that carry persons and those that carry coal, and that Congress intended that inspections of coal-carrying belts occur after coal-producing shifts begin.

8/ Our resolution of this case makes it unnecessary to decide whether pre-shift and on-shift inspections may be combined in some circumstances, a question on which the Secretary and the UMWA differ.

Commissioner Lawson dissenting:

Plato observed that "The life which is unexamined is not worth living." Bartlett's Familiar Quotations 93 (14th ed. 1968). The mine which is unexamined, however, may snuff the life and moot its examination. Progress in the two millenia since Plato has been hard won, but one would hope we have advanced beyond requiring helots to face the perils of an uninspected mine.

The majority nevertheless is determined to avoid deciding whether the uninspected entries in which these miners were working, and in which these coal carrying conveyor belts were located, are active workings, and therefore subject to preshift inspection. I find this misdirected diligence to be extraordinary given the operator's concession that these are active workings 1/ and since this is the central issue before us, on which the Secretary's and UMW's appeals are premised.

The situation here presented is one of frequent, indeed, daily repetition, at virtually every coal mine in the nation, and my colleagues' decision fails to provide future guidance for the industry, the miners, and the Secretary.

The assertion that the question of "...whether the areas surrounding the coal carrying belt equipment must be preshift inspected..." was not presented by the Secretary to the judge below is simply wrong. Slip op. at 3. Contrary to the majority's determination, the language of the citation, withdrawal order, and action to terminate was directed towards this operator's failure to preshift examine the mine entry or area in which the equipment was located. 2/ Indeed, in my view, a violation is established whether or not the citation was of the area, or the area with the equipment therein, so long as the mine entry or area was part of the cited locale. Here, of course, there is no dispute that this area was not preshift examined. Tr. 7.

The citation stated:

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

1/ J&L admitted the cited areas were active workings before this Commission. Tr. oral arg. 33-35. See also Tr. 18-19.

2/ "Entry" is defined as: a. In coal mining a haulage road, gangway or airway to the surface. b. An underground passage used for haulage or ventilation, or as a manway... c. A coal heading. Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms, at 389 (1968).

Similarly, in the withdrawal order, alleging a violation of the same standard and issued two days after the citation, the inspector wrote, in describing the "Area or Equipment":

> The area not preshifted was the 1 Face conveyor belt haulage A and B flights. [Emphasis added.]

Further, the Secretary's Opposition to J&L's application for temporary relief--filed by the Secretary on March 19, 1981, following the citation (February 17, 1981) and order (February 19, 1981) contained the following statements:

> b. MSHA not only can cite an explicit requirement of 30 CFR 75.303 which mandates preshift examinations of conveyor belt (and other) entries regardless of the transportation of men, it can show that this requirement was the basis for the issuance of the subject citation and order.
>
> c. The holding of the Consol case specifically dealt with on-shift examination, and therefore is not advisory precedent for this case where the material issue centers upon preshift examinations of areas where miners are required to work or travel. [Emphasis added.]

See also Tr. 40, 47 (testimony of Inspector Beck).

The issue of failing to preshift the areas cited where miners were observed working along coal carrying belts was also presented to the administrative law judge by the Secretary. In his post hearing brief to the judge, the Secretary argued:

> At the outset, the Secretary reiterates that "the material issue centers on preshift examinations of an area where miners are required to work or travel" (Tr. 30).

Secretary's post hearing brief at 8.

> J & L urges this proposition while admitting that the areas involved in the citation and order were not only in belt entries, but were also active workings (Tr. 18-19).

Id. at 9.

> The construction urged by J&L would ascribe to Congress the untenable, illogical intent that all miners except those working in the coal-carrying belt conveyor entries should receive the benefit of having a preshift examination of their work place.

Id. at 17.

> On the basis of common sense, experience, legislative history, sound statutory construction and case authority, the Secretary urges that all places where miners are normally required to work or travel be examined within three hours preceding the beginning of any shift and before any miners in such shift enter these areas.

Id. at 22.

Beyond these obvious, forceful and repeated assertions, the Secretary petitioned this Commission to review the ALJ's failure to find a violation for the operator's failure to preshift the area here involved. That petition was granted in its entirety. In his petition, the Secretary left no doubt that he was citing the area, not the coal-carrying belts when he concluded:

> The preshift examiner is not required to test the Conveyor belts itself.
>
> * * * *
>
> In sum, under the standard, an operator must provide a pre-shift examination of those parts of the coal-carrying conveyor belt entries where miners normally work or travel. The examination must cover the items enumerated in the second sentence of the standard.

Petition for discretionary review at 9.

The Secretary supported this argument in his brief (br. at 9-14, 17, 22) and reply brief (r. br. at 3 & n. 1, 14, 16, 17) to the Commission.

Since it is undisputed that there was no preshift examination of these areas involved (Stip. #9, Tr. 7) where the inspector observed miners working along the belts (Tr. 109, 110), only one conclusion can be drawn--that a violation of 75.303 occurred.

The majority has, however, parsed the statutory language beyond the fondest desires of the most scrupulous grammarian. The issue presented is whether the mine operator is required by section 303(d)(1) to preshift active workings of mines along coal conveyor belts. By refusing to consider these cited areas as active workings even though this is not in serious dispute between any of the parties, and although miners were regularly assigned to work, and were observed working along this operator's coal carrying belt lines (Tr. 109, 110), the majority has denied these miners a preshift examination of their work area.

The statute in relevant part provides:

> Within three hours immediately preceding the beginning of <u>any</u> shift, and <u>before</u> any miner in such shift enters the <u>active workings</u> of a coal mine, certified persons designated by the operator of the mine shall examine such <u>workings</u> and any other underground area of the mine designated by the Secretary .... <u>Belt conveyors on which coal is carried</u> shall be examined <u>after each coal-producing</u> shift has begun. [Emphasis added.]

The first sentence of section 303(d) thus requires a preshift examination of active workings "...before any miner in such shift enters the active workings." Section 303(d), supra. The judge found the cited areas to be active workings and the parties do not disagree with this finding. See n. 1, supra. As active workings, the cited areas are therefore required to be preshift examined, unless otherwise excluded or exempted by the statute. The last quoted sentence (supra), argues against any exclusion, and for the requirement of a preshift examination of the area cited by the inspector in this case. The first sentence of section 303(d)(1) describes locales, i.e., "active workings." Section 318(g)(4) of the Act in turn defines "active workings" as "any place in a coal mine where miners are normally required to work or travel."

In 1969 Congress amended the preshift examination provisions of the 1952 Act. This became section 303(d)(1) of the 1969 Coal Act, now section 303(d)(1) of the 1977 Mine Act. The Senate Report accompanying the bill in 1969 stated the reason for requiring examinations of all belt conveyors:

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

S. Rep. No. 411, 91st Cong., 1st Sess. 57 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I at 183 (1975).

Only a strained reading of the plain language of the Act could lead to the conclusion that by the 1969 amendments, or their 1977 reenactment, Congress intended to deny miners working along coal carrying belt conveyors the protection of preshift examination of their working places. Congress, as reflected in both the legislative history and the statutory language, was increasing, not decreasing examinations, and certainly never contemplated miners working in uninspected areas.

The majority's view of 75.303 and its sponsoring statutory provision, section 303(d)(1), would not improve or promote safety, but would reduce the protection afforded to miners. This apparently would deny preshift examinations of active workings along coal conveyor belts, and would certainly deny onshift examinations of coal conveyor belts, as in this case for 3-1/2 hours or until the operator performed such during the shift. It would also deny a miner working along a coal conveyor belt on a non coal-producing shift both a preshift and an onshift examination of his working place, and would eliminate all preshift examinations of an active working if the operator placed a coal conveyor belt in such workings. Such a construction is contrary to the intent of Congress as expressed literally in the standard and statute involved here. Instead, the Act should be construed liberally when improved health and safety for the miners will result, or when it will carry out the purpose of the Act. United States v. American Trucking Association, Inc., 310 U.S. 534, 543-544 (1940).

The possibility of ignition, a fortiori in a "gassy" mine such as the one here operated by J&L, presents the spectre of a major calamity. 3/ To understate the case considerably, sending miners to work in uninspected areas of a gassy mine is not in accord with my understanding of the mandate of the Act.

As the Secretary has well stated:

> The construction urged by J&L would ascribe to Congress the untenable, illogical intent that all miners except those working in coal-carrying belt conveyor entries should receive the benefit of having a preshift examination of their work place.

Secretary's post hearing brief at 17.

The statute, the legislative history and the majority's analysis fail to demonstrate how a requirement of an examination of "active workings" prior to the start of a shift, and an examination of coal carrying conveyor belts while the mining is underway on the shift, imposes a burden on the operator which outweighs the miner's need to be protected in an area in which he or she is to work. The language of the Act requires no less, and the preventive purpose and thrust of the statute, even if subjected to a balancing analysis, mandates in favor of such a requirement.

The problem with the majority's ignoring the failure to preshift the areas along the belts where miners were working is that, if there were no belts in an active working, the area would be subject to preshift examination. If, however, the operator installed a coal-carrying conveyor belt in such an area, then the requirement of preshift inspection for such active working vanishes. This makes no sense as a matter of either law or logic, and indeed turns enforcement on its head, since the additional potential hazard of adding belts to a mine entry, perversely under the majority's view, eliminates the preshift inspection of the area.

The judge below has drawn no distinction between entries with, or without, coal carrying belts, nor I suggest should we, since such is unnecessary to our decision. A more exact delineation of the inspection of conveyor belts in mine entries may well be more appropriately left to further clarification by the Secretary. Whether or not combined inspections are appropriate is also better left to the process of regulatory promulgation, particularly given the varying circumstances and ramifications of

---

3/ The mine here involved is classified as "gassy", and therefore presents even more potential hazards than most. Tr. oral arg. 41-43; and see section 103(i) of the 1977 Act. Interestingly, too, J&L--all of whose mines are located in West Virginia and Pennsylvania--has concededly examined all of its mines, preshift, including coal carrying belts, since 1961, although allegedly only before the first coal producing shift of each work week. Tr. oral arg. 42, 43.

one, two or three shift operations, in which the hazard presented may be of markedly varying potential severity, and the time between inspections accordingly widely disparate. 4/ Finally, the issue of whether a preshift examination of coal-carrying belts is mandated for entries, when no miners are working along such belts, is not presented by this case.

In summary, as the ALJ found and the parties here conceded, these are active workings. They are thus required to be preshift examined pursuant to the first sentence of section 303(d)(1). The prophylactic purpose of the statute requires that such active workings be inspected, and that such inspection not be denied because of either the presence, or the absence, of coal-carrying conveyor belts in those entries.

Based on the clear language of section 303(d)(1) of the Act and its sponsored regulation (30 CFR § 75.303), the legislative history, and in the interest of promoting safety for the miner, 5/ I would find that the statute and the standard involved require a preshift examination of those active workings along a coal conveyor belt, on any shift, before a miner enters his or her work place.

I therefore dissent from the majority's decision, would hold that this operator violated the Act as alleged in the citation and order, and would remand for further proceedings.

A. E. Lawson, Commissioner

4/ Whether or not all or only part of these coal-carrying conveyor belts must be examined preshift may bear further scrutiny, inasmuch as the Secretary has the authority to designate more precisely the underground areas of the mine to be examined. Section 303(d)(1). In any event, the promulgation of specific regulations, with all parties having the opportunity to comment thereon, appears obviously preferable to the enunciation of dicta in the instant case.

5/ If section 303(d)(1) is ambiguous, and I do not believe this to be the case, any ambiguity must be interpreted to promote safety and prevent death and injury to miners. Section 2(e) of the Act. District 6, United Mine Workers of America v. United States Dept. of the Interior, Board of Mine Operations Appeals, 562 F.2d 1260, 1265 (1977); UMWA v. Kleppe, 532 F.2d 1403, 1406 (1976), cert. denied 429 U.S. 858 (1976); Munsey v. Morton, 507 F.2d 1202, 1210 (1974); Reliable Coal Corp. v. Morton, 478 F.2d 257, 262 (1973); and Old Ben Coal Co., 1 FMSHRC 1954, 1957, 1958 (December 1979).

Distribution

Henry McC. Ingram, Esq.
R. Henry Moore, Esq.
Thomas C. Reed, Esq.
Rose, Schmidt, Dixon & Hasley
900 Oliver Building
Pittsburgh, PA 15222

Debra L. Feuer
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Kurt Kobelt, Esq.
United MineWorkers of America
900 15th St., N.W.
Washington, D.C. 20005

Charles P. O'Connor, Esq.
E. Carl Uehlein, Jr., Esq.
Robert A. Dufek, Esq.
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Henry Chajet, Esq.
American Mining Congress
1920 N Street, N.W.
Washington, D.C. 20036

Robert C. Gombar, Esq.
Rose, Schmidt, Dixon & Hasley
1575 Eye Street, N.W.
Washington, D.C. 20005

Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

JUL 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner-Respondent	:	Civil Penalty Proceeding Docket No. LAKE 82-97 A.O. No. 11-00726-03502
v.	:	Contest of Citation
MONTEREY COAL COMPANY, Contestant-Respondent	:	Docket No. LAKE 82-82-R Citation No. 1004993;4/28/82
v.	:	No. 1 Mine
UNITED MINE WORKERS OF AMERICA, Intervenor	:	

DECISIONS

Appearances: Edward H. Fitch, IV, Attorney, U.S. Department of Labor, Arlington, Virginia, for the Petitioner-Respondent MSHA; Carla K. Ryhal, Esquire, Houston, Texas, for the Contestant-Respondent Monterey Coal Company; Mary Lu Jordan and Joyce A. Hanula, Esquires, Washington, D.C., for the Intervenor UMWA.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a citation issued by an MSHA inspector pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent-contestant Monterey Coal Company with a violation of Section 103(f) of the Act. The citation no. 1004993, was issued on April 28, 1982, by MSHA Inspector Lonnie D. Conner, and the "condition or practice" is described as follows:

> The operator has refused to pay Miner's Representative Frank H. Barrett, Jr., for the period of time that he accompanied Federal Coal Mine Inspector Joe S. Gibson on a roof control technical investigation of the mine. The investigation was conducted on March 23, 1982.

These cases were docketed for hearing in St. Louis, Missouri, commencing on March 17, 1983. However, the hearing was cancelled after the parties agreed to submit the matter to me for summary disposition based on joint stipulations by the parties, with supporting briefs.

Applicable Statutory and Regulatory Provisions

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

2. Sections 105 and 110(i) of the Act.

3. Commission Rules, 29 CFR 2700.1 et seq.

4. Section 103(a) of the Act provides:

> Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, ultilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorizied representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine. [Emphasis supplied].

5. Section 103(f) of the Act provides:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act. [Emphasis Supplied].

Issues

The parties stipulated that the following issues are presented for decision by me in these proceedings:

1. Is an operator required by Section 103(f) of the Act to compensate a miner's representative for the time spent accompanying a federal inspector on a spot inspection?

> The parties agree that relevant decisions regarding this issue have been rendered by the United States Court of Appeals for the District of Columbia in United Mine Workers of America v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982) cert. denied, 74 L.Ed 2d 189

(Oct. 12, 1982) and by the Federal Mine Safety and Health Review Commission Nos. 79-2537 and 79-2518, Secretary of Labor v. Helan Mining Company, Docket No. PITT 79-11-P (Nov. 21, 1979); Nos. 79-2536 and 79-2503; Kentland-Elkhorn Coal Corp. v. Secretary of Labor, Docket No. PIKE 78-399 (Nov. 30, 1979); and No. 80-1021; Secretary of Labor v. Allied Chemical Corp., Docket No. WEVA 79-148-D (Dec. 6, 1979).

2. Is a roof control technical investigation different from a spot inspection for purposes of determining an operator's obligation to compensate a miner's representative for the time spent accompanying a federal inspector pursuant to Section 103(f) of the Federal Mine Safety and Health Act of 1977?

Any additional issues raised by the pleadings and briefs are identified and disposed of in the course of these decisions.

The parties stipulated and agreed to the following:

1. Monterey Coal Company owns and operates the No. 1 Mine (Identification No. 11-00726), which is located in Carlinville, Macoupin County, Illinois, and the mine is subject to the Act.

2. Respondent is subject to the jurisdiction of the Act, the presiding Judge has jurisdiction to hear and decide these cases, and the citation in issue was properly served on the respondent.

3. On March 23, 1982, Federal Coal Mine Inspector Joe S. Gibson, a duly authorized representative of the Secretary and a roof control specialist, conducted what is referred to by MSHA as a "CEA-Roof Control Technical Investigation" (Investigation) of the Monterey No. 1 Mine.

4. A "CEA-Roof Control Technical Investigation" is different from a "regular" inspection. Each activity code, including a "CEA-Roof Control Technical Investigation," is defined as indicated in an attached Exhibit "A", dated June 3, 1979. These activity codes and definitions are included in the MSHA Citation and Order Manual. The activity codes are used by the Department of Labor's Mine Safety and Health Administration both to substantively describe the various enforcement procedures conducted by MSHA and to record the utilization of inspector work hours by means of an automated computerized coding system. The activity codes cover a broad range of activities which are variously applicable to individual inspectors, but collectively are applicable to the entire agency's function.

5. The Secretary and the UMWA consider a CEA-Roof Control Technical Investigation enforcement procedure to be a type of spot inspection covered by Section 103(f) walk-around pay provisions. Monterey does not agree with this determination and maintains that this type of investigation is not a type of spot inspection, nor any type of inspection, and that it is a type of investigation which does not constitute an inspection for purposes of Section 103(f)'s walk-around pay provisions.

6. The parties agree that the activities involved in the March 23, 1982, enforcement procedure consisted of a one day investigation to determine if the operator was complying with the provisions of 30 C.F.R. 75.200 through 75.205 in particular and all other standards in general. The parties further agree that during said enforcement procedure, Inspector Gibson may and does cite violations of any standard observed. However, his primary responsibility is to observe the roof bolting activities, to measure room, entry, crosscut widths, and roof bolt spacing, to sound the roof and ribs, and to determine if the operator is in compliance with all the provisions of the mine's roof control plan. In fact, during the investigation in question, a citation of alleging a violation of the Monterey No. 1 Mine's roof control plan was issued, as well as a termination thereof. This enforcement procedure is a regular function of MSHA roof control specialists.

7. During said investigation, Frank H. Barrett, Jr., a representative of the United Mine Workers of America, accompanied Mr. Gibson, but Mr. Barrett was not paid by Monterey for the period of his participation in said investigation.

8. On April 28, 1982, Federal Coal Mine Inspector Lonnie D. Conner, a duly authorized representative of the Secretary, issued Citation No. 1004993 (Citation) and served the same upon Dick Mottershaw, Safety Coordinator for Monterey. The Citation stated that it was issued pursuant to Section 104(a) of the Act and alleged a violation of Section 103(f) of the Act. Under the heading "Condition or Practice" the Citation alleges that:

> The operator has refused to pay miner's representative Frank H. Barrett, Jr. for the period of time that he accompanied Federal Coal Mine Inspector Joe S. Gibson on a Roof Control Technical Investigation of the mine. The investigation was conducted on March 23, 1982.

9. On April 30, 1982, Monterey paid Mr. Barrett for the period of his participation in said investigation. Thereafter, on May 3, 1982, Mr. Conner issued Termination No. 1004993-1, which under the heading "Justification for Action Checked Below" stated that:

> The operator has paid Miner's Representative Frank H. Barrett, Jr. for the period of time that he accompanied Federal Coal Mine Inspector Joe S. Gibson on a (sic) investigation of the mine.

10. Monterey is a large operator and the assessment of a civil penalty in this matter, if appropriate, would not adversely affect Monterey's ability to remain in business.

11. The Monterey No. 1 Mine's history of previous violations is indicated in a computer printout of violations issued in the two years preceding April 28, 1982 (see exhibit "G").

Discussion

These proceedings deal with the scope of the right, pursuant to Section 103(f) of the Act, of a representative of miners to be compensated for the time spent accompanying the Secretary's authorized representative during the inspection of a mine ("walkaround pay"). The material facts are not in dispute and have been stipulated to by the parties. Thus, the matter for determination is one involving a question of law, and the parties seek summary decisions pursuant to Commission Rule 29 CFR 2700.64(b).

MSHA and the UMWA contend that Monterey's declination to compensate the miners' representative for the period of his participation of the roof control technical investigation on the occasion in question constitutes a violation of Section 103(f) pursuant to the holding in United Mine Workers of America v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982), cert. denied, 74 L.Ed. 2d 189 (Oct. 12, 1982) ("UMWA v. FMSHRC"). Monterey submits, however, that the right to walkaround pay is limited to mandatory inspections of a mine as required by Section 103(a) of the Act, and does not extend to other inspections or investigations required, authorized or permitted by the Act. Monterey asserts that a roof control technical investigation is not such a mandatory inspection required by Section 103(a). Thus, it is Monterey's position that its declination to pay the miners' representative for the period of his participation in the Roof Control Technical Investigation on the occasion in question was not a violation of the Act and, consequently, the citation and proposal for a penalty are invalid and should be vacated and dismissed.

Monterey's Arguments

Monterey concedes that there is a right to walkaround pay under Section 103(f) of the Act in connection with "regular inspections" conducted under Section 103(a). Monterey suggests that the term "regular inspections" has been interpreted by MSHA and the mining industry to connote the mandatory inspections mandated by Section 103(a), and that the term "spot inspection" has come to have the accepted meaning of any inspection other than the mandatory inspections of the entire mine.

Monterey argues that when read together, Sections 103(f) and 103(a) limit the right of the miners' representative to compensation for walkaround activities to only the miners' representative's participation in the "regular inspections" mandated by Section 103(a) of the Act. Further, Monterey argues that if Congress had intended the walkaround pay right to apply to all inspections, then it could easily have used the phrase "any inspection" in Section 103(f) instead of referring to an inspection "made pursuant to the provisions of subsection (a)," the language actually chosen. Monterey points out that Section 103(h) of the 1969 Act did refer to "any inspection," and in other sections of the Act where Congress intended a provision to apply to all inspections, Congress specifically used the term "any inspection."

Monterey maintains that Section 103(a) provides the substantive authority for virtually all of the inspections and investigations conducted by MSHA under the Act, probably including those specifically authorized by other sections of the Act. However, if walkaround pay is not limited to the statutory minimum number of inspections at each mine, then the phrase "pursuant to subsection (a)" in Section 103(f) is rendered meaningless. Recognizing the fact that the Court of Appeals for the District of Columbia Circuit held to the contrary in UMWA v. FMSHRC, supra, and held that miners' representatives have the right to be compensated for the time spent accompanying MSHA inspectors during spot and regular inspections, Monterey takes the position that the Court's decision was erroneous, and that it is not binding on the Commission or its Judges. Citing a number of Commission decisions which uniformly held that Section 103(f) grants walkaround pay rights to miners' representatives only with respect to regular inspections required by Section 103(a), and not with respect to spot inspections, and citing the legislative history remarks of Representative Carl D. Perkins in support of its argument, Monterey strongly suggests that the Court's decision in UMWA v. FMSHRC should be ignored.

With regard to MSHA's Interpretive Bulletin, 43 Fed. Reg. 17546, April 25, 1980, which lists spot inspections, as well as regular inspections, among the types of activities giving rise to walkaround rights, Monterey argues that I am not bound by the information contained therein.

In further support of its position, Monterey states that even if its obligation to compensate the miners' representative for the time spent accompanying an inspector extends to spot inspections, it does not extend to a roof control technical investigation. In support of this argument, Monterey maintains that investigations and inspections are distinguishable, and the fact that Congress included both inspections and investigations within the coverage of Section 103(a), but used only the term inspection in Section 103(f), clearly indicates that it did not intend investigations to be included within the walkaround provisions of Section 103(f).

Monterey points to the fact that throughout the Act some provisions use only the terms "inspection", and some use only the term "investigation", and some use both terms. However, Monterey suggests that the two terms are never used interchangeably in the Act, and that they are used to mean different things. Since, in all cases, the usage of the terms is logical and consistent with the different meanings of the terms, Monterey concludes that it is inescapable that throughout the Act, and specifically in Section 103(f), Congress made a purposeful and intelligent distinction between the two terms. As an example, Monterey cites the Act's provision in Section 110(e) restricting a person from giving advance notice of an inspection, while there is no restriction in connection with investigations.

Monterey cites the Activity Codes included in MSHA's Citation and Order Manual, as a further indication that the Secretary also recognizes the distinction between an inspection and an investigation (Exhibit "A", Stipulations). Under Categories A ("Mandatory Inspections and Investigations"),

B ("Policy Inspections and Investigations"), and C ("Auxiliary Inspections, and Investigations"), types of inspections and investigations are distinctly delineated. Further, although other inspections coded and defined in the Manual do not have counterpart investigations, Monterey points to the fact that in Category C several of the inspections and investigations parallel one another, namely: CCA-Roof Control Technical Inspection; CEA-Roof Control Technical Investigation; CCB-Haulage Technical Inspection; CEB-Haulage Technical Investigation; CCC-Ventilation Technical Inspection; and CEC-Ventilation Technical Investigation. This shows that inspections and investigations are different activities, otherwise MSHA would not have coded and defined an inspection and an investigation to address the same concern.

In response to MSHA's assertion that a roof control technical investigation is an enforcement procedure and, as such, is similar to an inspection since the inspector may cite violations of any standards observed during such an investigation, thereby making it subject to the walkaround provisions of the Act, Monterey maintains that while the purposes for conducting inspections and investigations may be the same under Section 103(a) of the Act, there is no indication that the two terms were intended to mean the same thing. The fact that while conducting a roof control technical investigation an inspector may issue citations for violations of standards other than the roof support standards does not render inspections and investigations synonymous, and Section 104(a) requires an inspector conducting either an inspection or investigation to issue a citation whenever he observes a violation of the "Act, or any mandatory health or safety standard . . . "

In further support of its position in these proceedings, Monterey maintains that sound policy reasons exist for distinguishing between technical investigations, if not spot inspections, and regular inspections, consistent with the remedial functions of the Act. The first sentence of Section 103(f) expressly states that the purpose of the right to accompany inspectors, and the right to be paid therefor, is to aid in the inspection. Regular inspections and technical investigations are entirely different in scope and purpose. Because regular inspections are detailed and extensive, covering every aspect of health and safety in the mine, it is conceivable that the miners' representative accompanying an inspector on a regular inspection could improve the inspector's effectiveness by contributing personal familiarity with the particular mine and by providing another "pair of eyes," and could enhance miner consciousness as to the complex regulatory scheme created by the Act.

In contrast, argues Monterey, a technical inspection, by its very nature, focuses on one hazard and usually involves narrow, technical procedures. Inspectors who conduct technical investigations are normally specialists who specialize in one type of safety or health standard, such as respirable dust, ventilation control, or electrical standards. They are especially qualified by training, experience and familiarity with a particular problem. The presence of the miners' representative is not likely

to be terribly helpful to a specialized inspector conducting narrow technical procedures. Nor would the observation by the miners' representative of the inspector conducting these narrow technical procedures enhance the consciousness of miners who perform or observe similar procedures on a regular basis. Monterey points out that a Roof Control Technical Investigation, such as that conducted on the occasion in question, is conducted to determine an operator's compliance with the standards relating to roof support and includes observation of roof bolting activities, measurement of room, entry, crosscut widths, and roof bolt spacing; and sounding of the roof and ribs, and the inspector who conducted the Roof Control Technical Investigation in question was, indeed, a roof control specialist.

Monterey concludes that because the primary purposes for the miners' representatives to accompany an inspector are not applicable in the situation of a technical investigation, its obligation to compensate the representative for doing so should not extend to technical inspections in general, nor to roof control technical investigations in particular.

MSHA's Arguments

In support of its case, MSHA relies on the February 23, 1982, decision by the U.S. Court of Appeals for the District of Columbia Circuit in UMWA v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982), cert denied, 74 L. Ed. 2d 189 (Oct. 12, 1982), holding that the right to walkaround pay is coextensive with the right to accompany an inspector under Section 103(f) of the Act, and that spot inspections, as well as regular inspections, were included in the coverage of Section 103(f) for walkaround pay purposes.

MSHA asserts that the Court of Appeals interpretation of Section 103(f) should be followed and applied until such time as that interpretation is reversed or modified by the D.C. Circuit, another Federal Court of appeals, or the Supreme Court. MSHA argues that the D.C. Circuit properly interpreted the scope and application of Section 103(f) to require an operator to compensate a miner's representative for the time spent accompanying an inspector on a spot inspection, and that Monterey's suggestion that I should ignore the Court's interpretation should be rejected.

MSHA maintains that the inspection at issue in this proceeding is a type of spot inspection activity which has been described as a roof control technical investigation. It is MSHA's view that the use of the word "investigation" does not negate the reality that the activity involved an inspection of the mine related to its roof control plan, that the enforcement procedure was an inspection activity related to the specifics of the mine's roof control plan and was conducted by an authorized representative of the Secretary with special expertise in roof control, and that the procedure concerns one of the most important aspects of maintaining a safe roof control program.

MSHA points to the fact that the various enforcement procedures it conducts are described and coded as indicated in Exhibit D, which is a part of the stipulations. MSHA states that these codes are used by the agency to keep track of the utilization of inspector work hours, and that the substance of an inspector's activity must serve as the foundation to determine the applicability of Section 103(f), not the code chosen to track the inspector's use of his time.

MSHA concludes that if the Commission and its Judges were to ignore the Court of Appeals precedent, the Secretary would be placed in the burdensome and costly position of repeatedly issuing citations, defending them before the Commission, and then seeking review before the D.C. Circuit. Such a result, suggests MSHA, would be contrary to public policy and practical reality and would make a travesty of the Court's ruling. MSHA concludes further that I should give full force and effect to the Court of Appeals decision and implement the Court's statutory construction of Section 103(f) by affirming the citation, determining an appropriate penalty, and dismissing the notice of contest filed in this matter.

The UMWA's arguments

The UMWA's position in this case is similar to that taken by MSHA. Citing UMWA v. FMSHRC, supra, the UMWA emphasizes the fact that the D.C. Circuit rejected the position taken by Monterey in the instant proceeding and upheld the Secretary's Interpretive Bulletin, requiring walkaround pay for spot inspections. In so doing, the Court reversed the Commission's decision in Secretary of Labor v. Helen Mining Company, 1 FMSHRC 1796 (1979), and the UMWA urges that I reject the notion advanced by Monterey that I should ignore the D.C. Circuit and apply the Helen Mining decision.

In support of its position, the UMWA points out that the Commission remanded the UMWA v. FMSHRC line of cases to the appropriate Judges, with directions for adjudicating the cases consistent with the D.C. Circuit's decision. Further, the UMWA emphasizes that the conditions generally advanced to support the cited NLRB's policy of nonacquiescense with Court precedents are not present in the instant proceedings. The UMWA maintains that the Commission's decision in Secretary of Labor v. Magma Copper Co., 1 FMSHRC 1948, aff'd, 645 F.2d 694 (oth Cir. 1981), cert. denied, 454 U.S. 940 (1981), illustrates the Commission's view that the active participation of miners in the enforcement of the Act will lead to improved health and safety in the mines.

The UMWA maintains that the Commission's decision in Helen Mining restricted walkaround pay, not because the majority felt, on the basis of its expertise, that the purposes of the Act would best be served by compensating miners only during the quarterly inspections of the entire mine. The majority reached that result only because of their determination concerning how much weight should be given to Congressman Perkins' remarks in determining Congressional intent. The D.C. Circuit has determined that the Commission majority erred by concluding that the Congressman's remarks were "dispositive" of the question of legislative intent. particularly since those remarks conflicted with the statutory language. It is obvious,

argues the UMWA, that the Circuit opinion does not articulate a rule of law which, in the Commission's view, undermines the purposes and policies of the Act. As such, it would not appear to present a situation where the Commission, relying on its expertise, would determine it must adhere to a particular interpretation, in the face of contrary court rulings, until it is overruled by the Supreme Court.

The UMWA argues that regardless of which "activity code" the inspector chose, his activities on March 23, 1982, were clearly enforcement related and were the type of actions contemplated in the Secretary's Interpretive Bulletin as giving rise to Section 103(f) rights. Further, the UMWA maintains that it was entirely appropriate for MSHA to determine that, for purposes of Section 103(f) the enforcement activity conducted at the mine on March 23 was a type of spot inspection, even though, for purposes of MSHA's computer activity code, the action was listed under "CEA", which is designated a "Safety and Health Roof Control Technical Investigation". Regardless of what "activity code" the inspector's actions came under, the UMWA maintains that they clearly fell within the type of activity described in the Interpretive Bulletin as givin rise to Section 103(f) participation rights.

The UMWA concludes that given the fact that Congress considered an important purpose of the walkaround right to be the improvement of the miners' knowledge of health and safety standards, and given the fact that Congress saw a particular need for the improvement of such knowledge in the area of roof control, it would be completely contrary to Congressional intent to interpret Section 103(f) in a manner that precluded miner participation in MSHA's roof control investigations. The UMWA points out that unlike most other mandatory safety standards, the roof control requirements are contained in individual plans, tailored to the specific conditions of each mine, and they are subject to review by MSHA District Managers every 6 months. The District Managers are required to consider any instances of inadequate support and may require improvements in the plan if they deem it necessary (30 C.F.R. § 75.200). Allowing miners to actively participate in "roof control technical investigations," such as the one that occurred at the No. 1 Mine, will assist MSHA in carrying out its obligations to review the plans. If miners are traveling with MSHA inspectors when they monitor compliance with the plan, the inspectors will be more likely to be made aware of any occasion when the plan has proved inadequate and will be able to obtain suggestions from the miners as to necessary improvements. The fact that roof control plans are subject to continual revision makes it all the more necessary that miners participate in "roof control technical investigations," so they can be kept abreast of the changes and improvements.

Findings and Conclusions

Section 103(a) of the Act directs the Secretary to make "frequent inspections and investigations" for the purpose of--

(1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines,

(2) gathering information with respect to mandatory health or safety standards,

(3) determining whether an imminent danger exists, and

(4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act.

Section 103(f) mandates that a miners' representative be given an opportunity to accompany an inspector during his physical inspection of the mine for the purpose of aiding him in his inspection, and it seems clear to me that the representative is entitled to be compensated during the time spent on the inspection. In the instant case, the question presented is whether or not such compensation is limited to the four annual regular inspections authorized by Section 103(a), and whether or not the roof control technical investigation conducted by Inspector Gibson on March 23, 1982, was in fact a "spot inspection". If one can conclude that the investigation in question was a spot inspection, the question next presented is whether the miners' representative was entitled to be compensated.

The Commission has previously considered the walkaround provisions found in Section 103(f) of the Act in five consolidated cases which resulted from certain MSHA spot inspections for excessive levels of methane gas and electrical hazards; Helen Mining Company, FMSHRC 2193 (1979); Kentland-Elkhorn Coal Corporation, 1 FMSHRC 2230 (1979), and Allied Chemical Corporation, 1 FMSHRC 2232 (1979). In each of those cases, the Commission held that while miners had a right to participate in all mine inspections, mine operators were required to pay them only for their participation in the regular mandatory inspections mandated by Section 103(a) of the Act, and not for "spot" inspections authorized by other sections of the law. On appeal to the United States Court of Appeals for the District of Columbia Circuit, the Court, in a split decision issued on February 23, 1982, reversed the Commission and held that miners were entitled to walkaround pay for "spot" inspections, as well as for regularly scheduled inspections, UMWA v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982), cert. denied, 74 L. Ed. 2d 189, October 12, 1982.

In its supporting brief, Monterey argues that the Court of Appeals decision in UMWA f. FMSHRC, supra, was erroneous and that it is not binding on the Commission or its Judges. In a recent decision issued by Judge Kennedy in MSHA v. Southern Ohio Coal Company, LAKE 80-142, 5 FMSHRC

479, March 14, 1983, he rejected an identical argument, and held that the Commission's direction to him was to dispose of the case in a manner "consistent with the court's order", 4 FMSHRC 856 (1982). */ The Commission's remand order to Judge Kennedy specifically makes reference to UMWA v. FMSHRC, and similar orders were issued in a number of cases decided before UMWA v. FMSHRC (See Orders reported at 4 FMSHRC pgs. 854 through 881). In each instance, the Commission's remand orders directed the Judges to adjudicate them in a manner consistent with the decision in UMWA v. FMSHRC. Thus, I am in agreement with the UMWA's arguments in this case that the Commission has not been inclined to deviate from the D.C. Circuit Court of Appeal's ruling in UMWA v. FMSHRC, supra.

Upon review of Judge Kennedy's decision on remand in Southern Ohio Coal Company, I agree with his holding that he is bound by the Court's decision in UMWA v. FMSHRC, that he should not consider de novo the question of law decided in that case, and I incorporate herein by reference his rationale in support of that holding as grounds for my rejection of the respondent's identical argument in this case. I conclude that I am bound by the Court's decision, and that spot inspections are compensable under Section 103(f).

Exhibit "A" to the stipulations is a June 30, 1979, itemized computer "Activity Codes" listing defining each of the various types of inspections and investigations conducted by MSHA. Category "A" is styled Mandatory Inspection and Investigations, and included among the twenty (20) kinds of inspections in this category are the AAA and AAB regular and saturation inspections of the entire mine, eight different types of "spot inspections", a "reopening inspection" covering mines formerly abandoned or inactive, a "toxic substance or harmful physical agent inspection", two "technical inspections" dealing with section 101 petitions, four different kinds of "accident investigations", one "special investigation" dealing with willful violations, and one investigation dealing with discrimination complaints.

Category "B" is styled Policy Inspections and Investigations, and included in this category are eleven (11) different kinds of "technical and special investigations and inspections."

Category "C" is styled Auxiliary Inspections and Investigations, and included in this category are nineteen (19) different kinds of "technical and special investigations and inspections."

Since the avowed purpose of the codes is to track the inspector's time for fiscal and budget purposes, logic dictates that each code is for a particular and specific type of activity, whether it be styled "investigation" or "inspection". Although it is true that the computerized coding system facilitates the tracking of inspector work hours, those inspector activities connected with MSHA's actual on-site enforcement

*/ The Commission denied review of Judge Kennedy's remand decision in April 1983.

functions are clearly distinguishable from administrative and personnel activities such as inspector leave, training, attendance at meetings, and seminars, which are listed in code categories E, F, and G.

Both MSHA and the UMWA argue that a liberal construction of the provisions of the Act require that miners' representatives be compensated by the mine operator for the time spent on the roof control investigation in question. If one were to accept the arguments advanced by MSHA and the UMWA, then it would logically follow that a miners' representative would be entitled to compensation each time he leaves his regular job in the mine to accompany an MSHA inspector on any of the fifty (50) inspections-investigations covered by MSHA's regulations. While it is not clear that Congress ever intended such a result, MSHA's Interpretive Bulletin distinguishes between pure enforcement inspection activities and those of a purely technical nature unrelated to enforcement. See Interpretive Bulletin, 43 Fed. Reg. 17547, which states as follows:

> Section 103(f) does not necessarily apply to every situation in which a representative of the Secretary is at a mine. Rather, section 103(f) contemplates activities where the inspector is present for purposes of physically observing or monitoring safety and health conditions as part of a direct enforcement activity. This is indicated by the text of section 103(f) itself, which refers to "physical inspection" where the presence of miners' representatives will "aid" the inspection.

The Bulletin goes on to explain the types of activities which do not give rise to miners' representative participation and compensation, and included in the explanation of the matters excluded from such participation and compensation is the following, at pg. 17548:

> In these types of activities, while there may sometimes be a need to physically observe or monitor certain conditions or practices, this aspect of the overall primary activity is incidental to other purposes. Although enforcement action could result from certain of these activities, the relationship of the activities to enforcement of safety and health requirements is indirect, or the activity is being carried out in accordance other duties under the Act. The continuing presence of a representative of miners in all phases of these activities would not necessarily aid the activity.

The parties have stipulated that the type of inspection conducted by Inspector Gibson on March 23, 1982 is known as a "CEA-Roof Control Technical Investigation", which is defined by MSHA as follows in Exhibit "A", pg. A3-6:

Safety and Health Roof Control Technical Investigation of a mine including engineering and indepth studies of roof problems or potential roof problems, roof control surveys, and pull tests.

The parties also stipulated that Inspector Gibson's activities on March 23, 1982, constituted an enforcement procedure consisting of a one-day investigation to determine whether the respondent was complying with the particular mandatory roof support safety standards found at 30 CFR 75.200 through 75.205, as well as all standards in general. Although the parties agreed that Inspector Gibson's primary responsibility was to observe the roof bolting activities, to measure room, entry, crosscut widths, roof bolt spacing, and to sould the roof and ribs, all for the purpose of determining respondent's compliance with the applicable mine roof control plan, they further agreed that during this enforcement procedure Inspector Gibson may and does cite any observable violations of any mandatory standards. As a matter of fact, during the investigation in question, Inspector Gibson issued a citation for a violation of the roof control plan, and a copy is attached as Exhibit "B" to the stipulations. The citation was issued pursuant to section 104(a) of the Act, and it charges a violation of mandatory standard section 75.200, because one of the mined intersections of a track entry had a diagonal measurement of 43 feet, which was in excess of the 38-foot requirement stated in the roof control plan. Inspector Gibson terminated the citation within an hour of its issuance after abatement was achieved by the installation of additional roof posts to narrow the cited diagonal to the required width.

The crux of Monterey's arguments that the roof control technical investigation conducted by Inspector Gibson in this case was not compensable under Section 103(f), is the assertion that the terms "inspections" and "investigations" have different meanings and are never used interchangeably in the Act. Monterey maintains that the fact that Congress included both terms within the coverage of Section 103(a), but used only the term "inspection" in Section 103(f), indicates that Congress clearly intended that compensation only be paid for inspections and not for investigations.

In my view, the fact that a technical investigation may focus on one hazard, and may only involve an inspector's review of narrow and technical procedures, is really not that important in distinguishing this activity from an inspection. A spot inspection often focuses on one hazard, and often involves narrow technical matters dealing with ventilation, electrical matters, etc., and I fail to see the distinction in the two procedures. I have difficulty understanding any real distinction between a spot inspection and an investigation or inspection to determine whether a mine operator is in compliance with his required roof control plan. Simply because MSHA chooses to place different computer code lables on the two activities does not ipso facto change or alter the inspector's authority or the manner in which he goes about his inspection in any given case. I believe that an examination of the prevailing facts, on a case-by-case basis, should permit one to distinguish precisely what the inspector is

actually doing at any given time. As a practical matter, once this is done, labeling the activity an "inspection", as opposed to an Investigation", for the purpose of deciding whether it fits the category of "spot" inspection for walkaround compensation purposes in line with the D.C. Circuit's holding should be a relatively simple matter.

On the facts of this case, and after careful consideration of all of the arguments presented by the parties in support of their respective positions, I conclude that the position taken by MSHA and the UMWA is correct, and I reject the arguments advanced by Monterey. I conclude and find that Inspector Gibson's enforcement activities at the mine on March 23, 1982, constituted a spot inspection, and that the walkaround representative was entitled to be compensated for the time spent accompanying the inspector. Under the circumstances, Monterey's initial refusal to pay the representative constitutes a violation of section 103(f) of the Act, and Citation No. 1004993, issued on April 28, 1982, IS AFFIRMED.

Negligence

The parties have advanced no arguments concerning negligence. However, it seems obvious to me that Monterey's refusal to pay the walkaround representative was based on a legal interpretation of the scope and application of section 103(f), and its obvious intent was to test the law. Taken in this context, I do not believe that the facts here presented lend themselves to an appropriate negligence finding.

Size of Business and Effect of Civil Penalty on Monterey's Ability to Remain in Business.

The parties have stipulated that Monterey is a large mine operator and that the proposed civil penalty will not adversely affect its ability to remain in business. I adopt these stipulations as my findings and conclusions.

History of Prior Violations

The parties have stipulated to the history of prior violations for the two years preceding the issuance of the citation in question in this case (computer print-out, Exhibit G). I take note of the fact that Monterey has paid civil penalty assessments for all but two of 362 citations issued during this time period, and for an operation of its size, and on the facts of this case, I cannot conclude that the record warrants an increase in the penalty assessed in this case.

Gravity

The parties have advanced no arguments concerning the gravity of the violation, and I conclude that it was nonserious.

Good Faith Abatement

The parties have stipulated that Monterey paid walkaround representative Frank H. Barrett, Jr., on April 30, 1982, and payment was made within the time fixed for abatement. Accordingly, I conclude that Monterey demonstrated good faith compliance once the citation issued.

Penalty Assessment and Order

MSHA's initial proposed civil penalty assessment of $20 for the violation in question seems reasonable in the circumstances and I accept it. Monterey IS ORDERED to pay the $20 civil penalty assessment within thirty (30) days of the date of this decision.

In view of the disposition of the civil penalty proceeding, Monterey's contest (LAKE 82-82-R) IS DENIED and DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Edward H. Fitch, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Carla K. Ryhal, Esq., P.O. Box 2180, 1305 Dresser Tower, Houston, TX 77001 (Certified Mail)

Mary Lu Jordan, Joyce A. Hanula, Esqs., UMWA, 900 15th St., NW, Washington, DC 20005 (Certified Mail)

/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUL 8 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 79-203
	:	A. C. No. 41-00356-03008
v.	:	Mine: Sandow Strip
INDUSTRIAL GENERATING COMPANY, Respondent	:	

DECISION

Appearances: Donald W. Hill, Esq., Office of the Solicitor
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Mike Holloway, Esq., Dallas, Texas,
for Respondent.

Before: Judge Morris

The petitioner, the Secretary of Labor, charges respondent with violating Title 30, Code of Federal Regulations § 77.701, a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. The cited regulation provides as follows:

> Metallic frames, casings, and other enclosures of electric equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary.

After notice to the parties a hearing was held in Dallas, Texas on October 26, 1982.

Procedural History

This matter was originally scheduled for hearing on August 21, 1980 before Judge Jon D. Boltz. A continuance was granted and the case was reset for December 4, 1981. That hearing date was vacated and this case was transferred to the writer on February 5, 1982.

At a hearing that commenced on October 26, 1982, in Dallas, Texas the Secretary's inspector was unavailable because of a recent injury. The judge denied the Secretary's motion for a continuance. Respondent requested a hearing on the merits.

After considerable discussion on the record the parties stipulated to certain facts. The judge prepared the formal stipulation and submitted it to the parties for comments. No person objected to the facts as prepared by the judge.

The parties waived post hearing briefs.

Issues

The issues are whether respondent violated the above regulation and, if so, what penalties are appropriate?

Stipulated Facts

Inside its maintenance building, or shop, respondent maintains three overhead cranes. The cranes have a capacity of 5, 10, and 20 tons (Tr. 10, 14, 16; Exhibit R1-R4). They rest and move on railroad rails 30 feet above the concrete floor. The cranes, with attached cables, move heavy equipment such as bulldozers and scrapers (Tr. 10, 15).

The area in front of the maintenance building is paved and the area to the side of the building is paved with rock (Tr. 18). Lignite, moved by a closed conveyor system, passes in front of the shop (Tr. 17).

There is no significant accumulation of dust particles in the building. Any accumulation would be routine dust such as the dust particles in the air in any room (Tr. 10, 17).

The cranes sit on rails which are attached to the sides of the building which are grounded (Tr. 6).

The strip mining itself does not cause any significant amount of dust or other substance to accumulate in the air at the maintenance shop (Tr. 10). The crusher is two miles away and the strip mining is three miles away (Tr. 10, 17). No spray painting or anything of that nature is carried on in the shop (Tr. 16).

The MSHA inspector did not go up and look at the wheels and the rails (Tr. 19).

The citation was issued because of some past experience with crane systems supposedly similar to this system (Tr. 20).

The Secretary acknowledges that respondent's expert witnesses, present for the hearing, are very knowledgeable (Tr. 19).

Expert Pittman [who was to have been a witness for respondent] has been with the Alco Company for 34 years. The company has over 1,000 cranes worldwide. Respondent's cranes, manufactured by HARNISCHFEGER CORPORATION, have steel wheels and steel rails that are as shiny as a mirror (Tr. 21, 22). The shiny portion is polished raw steel. In 34 years expert Pittman had never experienced a failure of a ground because of a dust condition between the wheels and the rails. Respondent's expert in his research contacted many operators. They all indicated there was no need for an additional ground (Tr. 23).

The National Electrical Code, 1978 Edition, Section 610-61 entitled "Grounding" provides as follows:

> All exposed metal parts of cranes, monorail hoists, hoists and accessories, including pendant controls, shall be metallically joined together into a continuous electrical conductor so that the entire crane or hoist will be grounded in accordance with Article 250. Moving parts, other than removable accessories or attachments having metal-to-metal bearing surfaces, shall be considered to be electrically connected to each other through the bearing surfaces for grounding purposes. The trolley frame and bridge frame shall be considered as electrically grounded through the bridge and trolley wheels and its respective tracks unless local conditions, such as paint or other insulating material prevent reliable metal-to-metal contact. In this case a separate bonding conductor shall be provided. (Transcript at 28).

Discussion

Respondent asserts it did not violate 30 C.F.R. § 77.701 since there is no possibility that the equipment could become "alive" because of a failure of insulation or through contact with energized parts.

I agree with this view since the metal wheels of the cranes roll on metal rails; accordingly, the equipment is grounded by virtue of the continuous metal to metal contact between the two surfaces.

This method of metal to metal grounding is recognized under the National Electrical Code (NEC) § 610-61. In its pertinent part it provides as follows:

> All exposed metal parts of cranes ... shall be metallically joined together into a continuous electrical conductor so that the entire crane ... will be grounded in accordance with Article 250 ... . The trolley frame and bridge frame shall be considered as electrically grounded through the bridge and trolley wheels .... (emphasis added).

The gist of the Secretary's case appears to be that metal to metal grounding is inadequate and that an additional grounding mechanism is necessary to insure proper safety. He suggests that dust particles or other insulating materials could collect on the wheels or rails and thereby eliminate the metal to metal ground. This occurence would allow the crane to become "alive."

I find the Secretary's argument unpersuasive for several reasons. The cranes are all housed inside a building. They are 30 feet above a concrete floor and they are located approximately three miles from the mining area. The amount of dust particles accumulating in the building is minimal and insignificant. The citation issued at the inspection is void of any notation concerning any dust accumulation. Further, the inspector did not examine the wheels and rails for any such accumulation.

In addition, respondent's expert, (whom the Secretary recognizes as very knowledgeable), indicated that the ground of the metal to metal contact would not be lost due to the amount of dust that could accumulate here (Tr. 14, 17, 21). Further, in his 34 years in the field, respondent's expert had never seen a ground loss occur under the conditions urged by the inspector. Respondent's expert, in researching other operators, universally found no need for an additional ground.

Due to the considerable expertise of respondent's experts I find such evidence to be very credible.

The Secretary appears to advance an argument that the grounding method used by respondent is inadequate because accidents, or loss of grounding, had occurred where such cranes were not equipped with a supplemental grounding mechanism. No documentation or evidence was produced showing loss of ground in these or similar circumstances. On the other hand respondent's expert testimony, reviewed above, was directly to the contrary indicating no history of such accidents. I therefore conclude that there is no history of accidents in similar circumstances to suggest that the electrical equipment cited here could become alive.

Section 610-61 of the NEC does indicate that a separate ground would be necessary if, "[l]ocal conditions, such as paint or other insulating material prevent reliable metal-to-metal contact." However, the parties have stipulated that no significant accumulation of dust occurs in the area of the cranes. The record shows that there is no painting in the building which houses the cranes and that the building is used exclusively for maintenance purposes. No mining activity takes place (Tr. 16). There was also testimony by respondent's expert that there were no insulating materials on the wheels or rails (Tr. 23).

I conclude that there is no realistic possibility that the cranes operated by respondent could become alive by reason of failure of insulation or contact with energized parts. No violation of 30 C.F.R. § 77.701 occurred.

It further follows that respondent is not required to maintain additional grounding that it installed to abate the citation issued in this case.

Based upon the foregoing findings of fact and conclusions of law I enter the following

ORDER

Citations No. 792310 and 792311 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

Distribution:

Donald W. Hill, Esq. (Certified Mail)
Office of the Solicitor
United States Department of Labor
555 Griffin Square, Suite 501
Dallas, Texas 75202

Mike Holloway, Esq. (Certified Mail)
1511 Fidelity Union Life Building
Dallas, Texas 75201

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

July 11, 1983

JAMES ELDRIDGE, Complainant	:	Complaint of Discrimination
	:	Docket No. KENT 82-41-D
v.	:	
SUNFIRE COAL COMPANY, Respondent	:	

ORDER AWARDING BACKPAY AND LEGAL FEES

In response to my Order of April 5, 1983, the parties filed their claims and supporting arguments with respect to the compensation due the complainant in this case. Respondent's "calculations of lost wages", filed with me on April 27, 1983, covers the period from August 6, 1981, the date of the complainant's discharge, through and including September 9, 1982, the date on which the respondent claims it ceased operations and terminated its work force, and the date that the complainant would have been finally terminated had he continued in respondent's employment. Respondent's calculations for the total gross wages, without deductions for withholdings, state and local taxes, which the complainant would have earned had he continued in respondent's employment is $18,634.60, and those calculations were arrived at by an affidavit executed by respondent's personnel director. Included in those calculations is the sum of $17,879.40 in gross wages, plus accrued vacation time in the amount of $755.20, for a total of $18,634.60. The wage calculations include a weekly summary for each company payroll period in 1981 and 1982, the hours worked, the hourly wage, and periods of lay-offs. The calculations for 1981 are based on the payroll periods ending August 15, 1981 through December 25, 1981, and for the year 1982, they are computed for the payroll period ending January 4, 1982, through September 10, 1982, when the respondent asserts the mine was closed and all employees were terminated.

In addition to its calculation of the complainant's gross wages, respondent asserts that the complainant earned gross wages in the amount of $255.20 as an employee of Linefork Coal Corporation, and the sum of $3,005 as an employee of P.M. Coal Company, and in support of this assertion included copies of the complainant's withholding statements for these employments subsequent to his discharge.

Respondent asserted that subsequent to his discharge, the complainant had received unemployment insurance benefits in the amount of $3,444; $560 from an extended benefits claim; and $2,240 for federal supplemental compensation, the sum of which totals $6,244. Respondent maintained that it is entitled to deduct this amount from complainant's gross wages, and based on its submitted calculations, stated that the total gross wages which complainant should receive subsequent to his discharge of August 6, 1981, is $9,130.40, based on the following:

$18,634.60	Wages complainant would have earned had he not been discharged.
- 3,260.20	Less wages earned subsequent to discharge.
$15,374.40	
- 6,244.00	Less unemployment benefits and compensation.
$ 9,130.40	Total respondent claims is due.

With regard to any award of costs and attorneys fees, respondent argued that the complainant in this case was represented by the Appalachian Research & Defense Fund of Kentucky, Inc., an organization which respondent believes is federally funded. Although recognizing the fact that an attorney would ordinarily be entitled to be compensated for services performed in representing the complainant in this matter, respondent apparently takes the position that since the legal services organization which pursued his claim is federally funded, by its mandate, it should not have accepted this case. By doing so, respondent infers that the organization which represented the complainant provided free legal service, and the complainant incurred no legal expenses in pursuing his claim. Accordingly, respondent concluded that no amount should be awarded as attorney's fees for complainant's legal representation in this case.

In its response to my Order of April 5, 1983, complainant's counsel took issue with the following items submitted by the respondent in its calculation of lost wages, and requested an opportunity for additional discovery:

--lack of documentation for the assertion that complainant would have worked less than 40 hours during several weeks of the back-pay period.

--lack of documentation to support the assertion that the complainant would have been laid off during a three month period from October-December 1982.

--failure by the respondent to address the question of reinstatement, particularly in view of information received by the complainant that any sale of Sunfire Coal Company includes a clause providing for reinstatement by the purchaser of laid-off miners.

Complainant's calculations of the backpay and costs due are stated in a copy of a letter dated March 24, 1983, to respondent's counsel, and they are as follows:

Wages through September 10, 1982	$25,804
Minus wages earned	- 3,260
Back owed	$22,544
Interest	x .12
	$ 2,705
Backpay + interest	$25,249
Mileage	+ 92
TOTAL	$25,341

Complainant's calculations of attorneys' fees and costs are reflected in itemized exhibits which show the dates the work and expenses were performed and incurred, the type of work or expense, and the number of hours devoted to each task. In summary, these fees and costs, for legal services through October 21, 1982, are as follows:

Tony Oppegard: 284.3 hours at $70/hr.	$19,901
Stephen A. Sanders: 34.5 hours at $50/hr.	1,625
attorneys' fees	$21,526
mileage	+ 289
phone	+ 53
other expenses (depositions, transcript, witness fees, etc.)	+ 304
TOTAL	$22,172

In response to the respondent's assertion that unemployment compensation benefits should be deducted from any back-pay due the complainant, complainant's counsel asserted that such benefits should not be considered interim earnings, and thus should not be deducted from any backpay award, and in support of this argument he cites 3 NLRB Casehandling Manual § 10604.1, Bradley v. Belva Coal Co., 3 FMSHRC 921 (1981); Neal v. Boich, 3 FMSHRC 443 (1981); Wilson & Rummel v. Laurel Shaft Const. Co., 2 FMSHRC 2623 (1980); NLRB v. Pan Scape Corp., 607 F.2d 198 (7th Cir. 1979); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977).

In response to the respondent's argument that the complainant has incurred no legal expenses in pursuing his claim because of legal representation furnished him by the Appalachian Research & Defense Fund of Kentucky, Inc., a legal services organization, complainant's counsel states that this argument is wholly without merit and that similar challenges have been rejected not only by a Commission Judge, Bradley v. Belva Coal, 3 FMSHRC 921, 924 (1981), but by the eight U.S. Circuit Courts of Appeals that have considered the issue. Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979); Weisenberger v. Huecker, 593 F.2d 49 (6th Cir. 1979); Mid-Hudson Legal Services v. G & U, Inc., 578 F.2d 34 (2nd Cir. 1978); Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978); Rodriguez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977), cert. denied, 438 U.S. 916 (1978); Sellers v. Wallman, 510 F.2d 119 (5th Cir. 1975); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).

Complainant's counsel points out that respondent has cited no authority to support its argument that the Appalachian Research & Defense Fund of Kentucky, Inc., should not have accepted this case because of its Congressional "mandate". Counsel states further that Federal Courts have uniformly held that challenges to the propriety of Legal Services programs representing clients in particular access are improper in a lawsuit because eligibility for federally-funded legal services is a question of internal program administration, to be resolved according to administrative procedures. Harris v. Tower Loan of Mississippi, 609 F.2d 120 (5th Cir. 1980); Martens v. Hall, 444 F.Supp 34 (S.D. Fla. 1977); Jacobs v. Board of School Comm'rs, 349 F.Supp. 605 (S.D. Ind. 1972), aff'd, 490 F.2d 601 (7th Cir. 1973), dismissed as moot on other grounds, 420 U.S. 128 (1975).

After receipt of the responses to my April 5, 1983 order, I issued another order on May 3, 1983, granting the complainant's motion for further discovery, and I also ordered production of certain personnel and payroll records in the custody of the respondent for the complainant's review. Subsequently, complainant's counsel filed a motion for a subpoena duces tecum requesting certain payroll records for the years 1980-1983, a second set of interrogatories, and a motion for a hearing date. Respondent has filed oppositions to these motions and states that the company has ceased mining operations and no longer has any regular employees with knowledge of the further information requested by the complainant.

The respondent has answered complainant's first set of post-hearing interrogatories and has also made available certain company payroll and personnel documents requested by complainant's attorney for their joint review. Complainant's counsel states that he has reviewed the information provided, but has advanced no valid argument justifying any subpoena duces tecum for these records. Accordingly, the motion for a subpoena IS DENIED.

Although I did indicate in one of my previous orders that I would consider scheduling a hearing if the parties could not agree on the compensation due to the complainant, I have reconsidered the matter and have now decided that any further hearing in this case is not warranted. Accordingly, complainant's motion for a hearing date IS DENIED.

With regard to the complainant's motion for additional discovery, I believe that there is enough information of record to enable me to rule on the compensation question without the need of further discovery. It seems obvious to me that counsel for both sides are at odds with each other over the claimed compensation, and any further discovery will be nonproductive. Accordingly, complainant's motion for further discovery IS DENIED.

Attorneys Fees and Costs

Respondent's objections to the awarding of any attorney fees and other costs of litigation is limited to a legal argument that Counsel Oppegard's employer is a quasi-public corporation funded in part by Federal funds. Counsel Roark has filed no objection to the reasonableness of the claimed attorney fees and costs, and Counsel Oppegard has filed a detailed itemized statement of expenses and costs.

After careful review and consideration of the arguments and documentation filed by the parties, I conclude and find that respondent's arguments concerning the eligibility of the Appalachian Research & Defense Fund of Kentucky, Inc., to be compensated for its services in this case are without merit and they are rejected. I conclude and find that Mr. Oppegard's employing agency is entitled to be compensated for the services performed on behalf of Mr. Eldridge in pursuing his claim in this case. I also conclude and find that the claimed legal fees and costs itemized by Mr. Oppegard, including the $92 in mileage costs incurred by Mr. Eldridge, appear to be reasonable and they are APPROVED.

Complainant's unemployment compensation benefits

Respondent's arguments that any unemployment payments made to Mr. Eldridge should be deducted from any award of backpay are REJECTED. I accept the arguments advanced by complainant in support of the proposition that such payments should not be deducted. If such payments to Mr. Eldridge are illegal under state or local laws, I leave it to those jurisdictions to pursue their claims against Mr. Eldridge.

Complainant's backpay

The only thing that the parties agree on is that the sum of $3260, representing wages earned by Mr. Eldridge during the time he was discharged, should be deducted from any base backpay figure. Although the record contains a letter of June 17, 1983, indicating that Mr. Eldridge is willing to compromise with the respondent by accepting a base backpay figure of $25,804, less interest, in exchange for Mr. Eldridge's foregoing his additional claims for overtime, vacation time, and a bonus, the parties obviously cannot compromise or otherwise settle the matter of compensation.

The initial submission on behalf of Mr. Eldridge concerning his claimed backpay is in the form of a letter from Counsel Oppegard to Counsel Roark, stating that his earnings through September 10, 1982, were $25,804. Although Counsel Oppegard submitted a detailed itemized breakdown of hours worked in support of his claimed attorney fees, the claimed backpay is simply stated as a lump sum figure with no supporting documentation or itemization. On the other hand, respondent's submissions concerning Mr. Eldridge's back wages are supported by an itemized breakdown, by payroll period, with supporting affidavits.

With regard to the respondent's calculations of lost wages, Mr. Eldridge's counsel takes issue with the assertion by the respondent that Mr. Eldridge would only have worked 36 hours during the pay period ending 3/20/82 and 32 hours during the pay period ending 6/11/82. Counsel Oppegard states that the respondent's payroll records reflect that 74 mine employees worked a full 40 hour week during the first disputed payroll period, and that 86 mine employees worked a full 40 hour week during the second disputed period. He therefore concludes that Mr. Eldridge would more than likely have worked full 40 hour weeks during these periods which are in dispute. After review and consideration of the information furnished by the parties concerning these disputed pay periods, I conclude that Mr. Eldridge should be compensated for the full 40 hour weeks in question, rather than the 32 hour and 36 hour weeks as stated by the respondent.

It seems clear to me that the backpay period in this case begins on August 6, 1981, the date of Mr. Eldridge's discharge, and ends on September 9, 1982, the date that the mine closed and mine operations ceased. Counsel Oppegard's lump sum backpay claim of $25,804, up to and including September 10, 1982, obviously does not take into account the 1981 layoff periods shown in respondent's detailed statement of wages earned, two days on July 2 and 9, 1982, where respondent claims Mr. Eldridge was not due any vacation pay, and some possible overtime which may have been earned by Mr. Eldridge but omitted in the respondent's calculations.

The affidavits and other information filed by the respondent indicates that the Sunfire Coal Company has ceased all mining operations and no longer has any regular employees. Given these circumstances, I believe that any further efforts attempting to document such matters as speculative and estimated overtime hours, layoffs which took place over a year or so ago, etc., etc., would be a fruitless exercise, and would only result in additional delays in bringing this matter to finality, plus additional legal costs, none of which are to Mr. Eldridge's benefit. Accordingly, in order to bring this matter to finality, I will decide the backpay compensation due Mr. Eldridge on the basis of the information of record, and in particular, the detailed compensation calculations submitted by the respondent, as supported by a sworn affidavit of its personnel director. On the basis of that information, which I find credible, I award backpay and other compensation as follows:

Total 1981 Gross Wages.	$ 3,616.00	
Total 1982 Gross Wages.	$ 14,263.40	
12 additional work hours for payroll periods ending 3/20 and 6/11/82 at $11.80 hrly. rate. . .	$ 141.60	
	$ 18,021.00	
Accrued Vacation Days (8)	$ 755.20	
	$ 18,776.20	
Minus wages earned.	-$ 3,260.00	
	$ 15,516.20	
Interest at 12%	$ 1,861.95	
	$ 17,378.15	
Mileage expenses incurred by Mr. Eldridge	$ 92.00	
	$ 17,470.15	TOTAL

ORDER

Respondent shall pay to Mr. Eldridge the sum of $17,470.15, less any amounts withheld pursuant to state and Federal law, and payment is to be made within thirty (30) days of the date of this Order.

Respondent shall pay to the Appalachian Research & Defense Fund of Kentucky, Inc., Hazard, Kentucky, the sum of $22,172, as attorneys fees and legal costs, and payment is likewise to be made within thirty (30) days of the date of this Order.

George A. Koutras
Administrative Law Judge

Distribution:

J. L. Roark, Esq., Craft, Barret & Haynes, P.O. Drawer 1017, Hazard, KY 41701 (Certified Mail)

Tony Oppegard, Esq., Appalachian Research & Defense Fund of Ky., Inc., Box 360, Hazard, KY 41701 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JIMMY SIZEMORE and DAVID RIFE,	:	DISCRIMINATION PROCEEDINGS
Complainants	:	Docket No. KENT 83-130-D
v.	:	
	:	MSHA Case Nos. CD 83-07
DOLLAR BRANCH COAL COMPANY,	:	CD 83-10
Respondent	:	
	:	No. 3 White Oak Mine

DECISION

Appearances: Tony Oppegard, Esq., and Martha P. Owen, Esq., Hazard, Kentucky, for Complainants; Thomas W. Miller, Miller, Griffin & Marks, Lexington, Kentucky, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainants Jimmy Sizemore and David Rife contend they were discharged from their employment by Respondent, on November 10, 1982, because of activity protected under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act"). Pursuant to notice, the case was called for hearing on April 18, 1983, in Hazard, Kentucky. At the commencement of the hearing, the parties stated that a settlement had been reached with respect to the claim of David Rife, whereby Rife agreed to withdraw his complaint before the Commission, and to withdraw a complaint filed with the National Labor Relations Board, and Respondent agreed to reinstate Rife effective April 25, 1983, at the same rate of pay he was earning when discharged. Based on the settlement agreement, this proceeding will be dismissed insofar as it involves the complaint of David Rife.

Jimmy Sizemore, Roscoe Collett, Donnie Mosley, David Rife, Ricky Napier, Cecil Harris, and Glenn Caldwell testified on behalf of Complainant Sizemore; John Chaney, Ronnie Napier and Daryl Napier testified on behalf of Respondent. Both parties have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Complainant Sizemore was employed on the third shift at Respondent's mine as a roof bolter. The third shift was a maintenance shift. The hours of work for this shift were changed in approximately October, 1982, from 11:00 p.m. - 7:00 a.m., to 2:00 a.m. - 10:00 a.m. The third shift foreman was Ronnie Napier. Employees on the shift were Jimmy Sizemore, David Rife, Delbert Couch (also known as "Lightning"), and Ricky Napier. Donnie Mosley also worked on the third shift as outside man, but his hours continued to be 11:00 p.m. to 7:00 a.m. All of the third shift miners were unhappy about the change in hours of work. The first shift worked from 6:00 a.m. to 2:00 p.m. and the second shift from 4:00 p.m. to 2:00 a.m. Thus, there was an overlap of 4 hours in the working time of the third and first shifts. Sizemore complained that he was required to install bolts in 4 hours in the cuts made by the second shift and it was not possible to accomplish this in the allotted time. When the third shift arrived, Sizemore discontinued bolting and did general cleanup work.

During the afternoon of November 8, 1982, Ronnie Napier, Delbert Couch and David Rife were out drinking beer and playing pool. They were travelling in Ronnie Napier's jeep. Sometime in the evening, Rife fell asleep in the back of the jeep. Napier and Couch decided to stage a protest at the mine because of the change in the hours of the shift. They drove to the mine site, arriving some time between 10:00 p.m. and midnight. Napier and Couch had consumed approximately 10 bottles of beer each and Rife had drunk six. Couch continued to drink after arriving at the mine. Napier had a rifle in his possession and Couch had a pistol.

The second shift was underground mining coal when they arrived. Napier called the second shift foreman, Terry Ward, from the mine office and directed him to bring his crew out of the mine. When they didn't respond quickly enough, he directed the second shift outside man to cut off the power to the mine, which resulted in shutting off the mine fan. The second shift then came out of the mine. Couch called Glenn Caldwell, the mine superintendent, and Ronnie Napier told him to come out to the mine. Caldwell called the police but they refused to come out to the mine, after being told on calling the mine office that there was no trouble there. After further telephone conversations between Caldwell and Ronnie Napier, Caldwell agreed to come out to the mine at 5:00 a.m., believing that this would allow time for Napier to sober up.

Napier, who was armed told the second shift crew that they were going on strike because of the change in working hours, The second shift crew remained outside the mine and were instructed to remain on the mine property. Napier then gave his rifle to Terry Ward who placed it in Napier's jeep. Couch kept his pistol. Both Couch and Napier were intoxicated.

Complainant Sizemore arrived at the mine at approximately 1:45 a.m. prepared to begin work at 2:00 a.m. When he saw the second shift outside, he went to the mine office. Ronnie Napier was there and was complaining about the change in hours and a problem he was having with insurance. Since the power had been shut off, none of the third shift went into the mine. Napier told them no one could go to work until Caldwell came, and said or implied that no one should go home either. The third shift workers therefore remained in or around the mine office. Between 2:00 a.m. and 5:00 a.m., Napier and Couch refused to permit the loading of coal trucks which were at the mine waiting to be loaded. Napier shot a hole in the door of the mine office and both Napier and Couch shot at insulators on light poles or power lines. A hole or holes had been kicked through the wall of the mine office. Beer cans were scattered over the parking lot. Tires had apparently been cut.

Caldwell arrived at the mine about 5:00 a.m. and met with the third shift miners all of whom had remained at the mine site. Ronnie Napier and Delbert Couch did most of the talking, and voiced complaints of the change in hours of the shift, an insurance problem Napier had, and Couch's demand for a raise in pay. When he was asked what his complaint was, Sizemore told Caldwell he would like to see the hours changed back to the old schedule.

Sizemore had not been drinking or taking drugs. He did not carry a gun. He was not involved in calling the second shift from the mine or in shutting down the mine. He was ready and willing to work his shift. He was not involved in cutting off the power to the mine or in damaging mine property.

Following his meeting with the third shift miners, Caldwell discussed the matter with John Chaney, the owner of the mine, and Daryl Napier, the mine superintendent. Chaney was told, or at least understood, that the entire third shift was involved in drinking and property destruction. Based on that understanding, he told Caldwell to fire all the miners on the third shift. "I told Glenn to fire everybody, that way we would for sure have the right people." (Tr. 136). Later Ricky Napier was rehired when Chaney found out he did not participate in the drinking and destruction of mine property.

ISSUE

Whether Complainant Sizemore was discharged for activity protected under the Mine Safety Act.

CONCLUSIONS OF LAW

To establish a prima facie case of discrimination under the Act, Complainant must show that he was engaged in activity protected by the Act and that his discharge was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary/Bush v. Union Carbide Corporation, 5 FMSHRC ____ (1983).

Complainant contends that he was fired in part for failing to work on November 9, 1982, and that his failure to enter the mine and work his shift was protected activity. He asserts that it was protected activity because to enter the mine when the power (including the fan) was shut off and the preshift examination had not been performed would be (1) dangerous and (2) in violation of sections 303(d)(1) and 303(t) of the Act.

It certainly is true that it would have been dangerous for Complainant to enter the mine when his shift was scheduled to begin on November 9. The danger, however, arose not so much from the fact that the fan was shut off and the mine had not been preshifted as from the fact that an intoxicated man with a gun made it clear that no one should enter the mine. Complainant recognizes that this is not a case of a refusal of a miner to enter a dangerous area or perform dangerous work. The mine was shut down in part because of a labor dispute concerning hours of employment, and in part because two employees, including a supervisor, were drunk. It is stretching the notion of protected activity under the Mine Act to hold that it includes not going to work under these circumstances.

Assuming, however, that the "activity" was protected, was Complainant's discharge motivated in any part by such activity?

It is true that Caldwell testified before the Kentucky Unemployment Commission that Sizemore was fired because he didn't go to work or go home. I think it distorts the real situation, however, to conclude that Sizemore (or any of the third shift miners) was fired for failing to enter an unsafe mine. The reality is that they were all fired because management believed that the entire third shift was involved in shutting down the mine, drinking on the mine site, and wantonly destroying mine property. So far as the record before me shows, management was in error about Sizemore's participation in any of these activities (as it was, and admitted it was, in error concerning the participation of Ricky Napier).

Because his discharge was based on false information, it seems grossly unfair. However, the Commission has no responsibility to assure fairness in employment relations or to determine whether an employee was discharged for cause, but only to protect miners exercising their rights under the Act. Complainant was unfortunately caught by a collective - guilt dragnet and discharged though, according to this record, he was entirely innocent of the charges properly levelled at some of his fellow miners (including his foreman).

I conclude that the discharge of Complainant Sizemore was not motivated in any part by activity protected under the Act. Therefore, no violation of section 105(c) has been established.

ORDER

Based upon the above findings of fact and conclusions of law, (1) the complaint of David Rife is WITHDRAWN and the proceeding is DISMISSED pursuant to a settlement agreement between Rife and Respondent; (2) the Complaint of Jimmy Sizemore and this proceeding is DISMISSED for failure to establish a violation of section 105(c) of the Act.

James A Broderick

James A. Broderick
Administrative Law Judge

Distribution:

Tony Oppegard, Esq., and Martha P. Owen, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., P.O. Box 360, Hazard, KY 41701 (Certified Mail)

Thomas W. Miller, Esq., Miller, Griffin & Marks, 700 Security Trust Building, Lexington, KY 40507 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUL 1[illegible] 1983

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	DOCKET NO. WEST 81-301-M
Petitioner	:	A.C. No. 04-04218-05014 F
v.	:	
	:	MINE: Billie
AMERICAN BORATE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Theresa Kalaski, Esq., Office of the Solicitor
U. S. Department of Labor, Los Angeles, California,
for Petitioner;
Stephen G. Saleson, Esq., San Bernardino, California,
for Respondent.

Before: Judge Vail

STATEMENT OF CASE

On December 2, 1980, a miner at American Borate's Billie mine was killed when struck by a slab of rock that fell from the roof. The Secretary of Labor, after investigating the accident, issued to American Borate a 107(a) imminent danger withdrawal order. The Secretary also alleged American Borate violated 30 C.F.R. § 57.3-20 which reads:

> Mandatory. Ground support shall be used if the operating experience of the mine, or any, particular area of the mine, indicates that it is required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used.

In this proceeding, American Borate contests both the Secretary's finding of a violation and the proposed penalty based upon it.

A hearing was held, pursuant to notice, in Las Vegas, Nevada, on March 2, 1982. Witness for the Secretary was Vaughn Duaine Cowley, official of the Mine Safety and Health Administration (MSHA), who investigated the accident. Witnesses for American Borate were Dale Parson Bess, shift superintendent in charge on the day the fatality occurred, Charles Garrett, mine manager at the Billie mine, Lupe Regalado, employed in the safety department to provide employees the forty hours and annual refresher training, Henry McIntire,

associate safety engineer for mining for the Division of Industrial Safety, State of California, and Richard Russel Renner, Chief Criminologist for the Las Vegas Metropolitan Police Department, Las Vegas, Nevada.

Both parties were afforded the opportunity to file post-hearing briefs but only American Borate chose to do so. Having considered American Borate's brief and contentions of the parties, and the whole record, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

FINDINGS OF FACT

1. American Borate's Billie mine is an underground borate minerals, primarily colemanite, mine near Death Valley, California. Mining proceeds by cut and fill using room and pillar method. Drifts are cut with a continuous mining machine followed by roof bolting using mats with five foot roof bolts on four foot centers.

2. On December 2, 1980, miners Donald Pribbenow and Orval Duncan were assigned the task of rock bolting in the No. 1 south cross cut off the No. 1 drift west of the 1160 level. Immediately prior to the fatal accident that occurred this day, they had installed approximately twenty bolts, four or five mats, and one roll of wire across the back near the face. When Pete Quick, the shift foreman left this area of the mine, Pribbenow and Duncan had approximately two more bolts to put in with the existing mat in place. Shortly thereafter, a slab of rock fell from the roof striking Duncan and causing his death.

3. The process used in the Billie mine for roof bolting consisted of securing steel mats onto the back of the drift with a split set roof bolt with a ring and six by six inch or eight by eight inch plate on the bottom to hold the mat against the roof. Mats are steel straps five to eight feet long with holes drilled for the roof bolts. These mats are placed over the wire mesh used to control the roof (Tr. 20-21).

4. Duncan and Pribbenow had both received the required forty hour training course in mine safety followed by an eight hour refresher course. Both miners had worked for American Borate approximately 12 months (Tr. 119-120).

5. At approximately 5:45 a.m., Duncan and Pribbenow drove a Young buggy to a point where the back railing on the work platform was approximately 2 to 2 1/2 feet from the face of the drift. The roof bolts and steel mats had been installed on the roof up to a point 4 to 6 feet from the face. Duncan and Pribbenow were standing on the work platform of the Young buggy operating a jackleg used to drill holes in the roof for the bolts. The two miners were approximately two to three feet back of the back railing of the Young buggy drilling a hole in the roof two feet back from the face. This hole was drilled at a seventy degree angle. While standing in this position, Duncan and Pribbenow were under supported roof (Tr. 51-59, and Resp. Ex. R4). A

slab of rock fell striking the Young buggy on the left side rail and tipping onto the platform hitting Duncan.

6. Vaughan Duaine Cowley, investigating the accident for MSHA, issued a 107(a) imminent danger withdrawal order to American Borate on December 4, 1980, which is the subject of this case. In the order, American Borate is cited for an alleged violation of "57.3-20" and, under "condition or practice" reads,

> A ground fall fatality occurred in the underground workings. The ground support used was not consistent with the nature of the ground and mining method because temporary support was not used to protect miners working ahead of permanent supported ground. The mine operator shall immediately institute a program of temporary ground support to protect mine workers working under ground not permanently supported and shall develop and institute standardized ground support plans for each type of mine opening. The ground support plan shall be submitted to an authorized representative of the Secretary for review and shall be updated as mining conditions change.

ISSUES

1. Was American Borate properly charged with a violation of the ground support requirements under the standard cited?

2. Did the violation occur as alleged and, if so, what is the appropriate penalty?

DISCUSSION

The Secretary has the burden in this case to prove that a violation of the cited standard occurred. Based upon a careful review of all of the evidence of record, I find that the alleged violation was not proven and that the citation should be vacated. This conclusion is based principally on the testimony of the Secretary's only witness. Inspector Cowley testified that upon arriving at the Billie mine after notification of the fatal accident, he went underground to investigate. Upon arriving at the location in the mine where the fall had occurred, he discovered that the Young buggy on which the miners had been standing and working had been moved to allow the deceased miner to be removed. Cowley was able to determine where the Young buggy had previously been standing from the tire tracks in the wet ground. Cowley was given information surrounding the facts of the accident by Pribbenow who had been working with Duncan when the roof fall occurred. Pribbenow told Cowley that after Quick, the shift foreman left, he and Duncan decided to put up two more mats between the last existing mat and the face. They backed the Young buggy up to the face and started to drill a hole for a roof bolt. Duncan had just changed the starter drill on the jackleg drill to a four foot steel and Pribbenow started drilling in the hole again when the slab fell hitting on the left side rail of the Young buggy and bouncing into the flatbed area striking Duncan.

Cowley testified that during the first day's investigation he determined that the back of the buggy was approximately two feet from the face but that he did not locate the hole in the roof where the drill had been placed. The next day, after a conversation with Pribbenow, Cowley went back to the scene and located the drill hole. On direct examination, Cowley stated that after finding the drill hole, he put a tamping stick or scaling bar in the hole and ran an imaginary line down to where he though the jackleg drill would be and concluded that the two miners were under unprotected roof (Tr. 33). Based upon this, Cowley concluded the miners should have used temporary support, either steel hydraulic jacks or wooden timber stalls, to continue the roof bolting in this area. Several days later, on December 4, 1980, Cowley issued the 107(a) order and indicated that when American Borate came up with a positive plan for ground control, he would modify the order (Tr. 37).

The record shows that American Borate had an approved roof control plan which had been in existence for sometime. The method of roof control being used at the time of the accident was consistent with the roof control plan and in compliance with its requirements. Cowley stated that he did not cite American Borate for a violation of their roof control plan but rather to improve on the plan by incorporating temporary ground control methods along with what already was required (Tr. 74).

At the hearing, Cowley testified on cross-examination that the back of the Young buggy was approximately 2 to 2 1/2 feet from the face of the drift and that the hole which was being drilled was also approximately 2 1/2 feet from the face. He also stated that the last row of mats supporting the roof was 4 to 6 feet from the face, and that he determined the hole being drilled was at a 70 degree angle to the vertical. He determined that the jackleg drill was most likely located in the middle of the flat bed of the Young buggy and probably four feet from the back railing. In response to questions by counsel for American Borate, Cowley testified as follows (Tr. 58-60):

> Q. Apparently, Mr. Cowley, perhaps I am wrong but apparently based on what we have drawn here from your facts and figures it appears that the person at the time the drilling was done would have been standing under supported ground, is that correct, sir?
>
> A. It shows that, yes.
>
> Q. Do you wish to change your opinion now as to whether at the time of the accident Mr. Duncan was standing under supported or unsupported ground?
>
> A. No, my figures is wrong.
>
> Q. Your figures?
>
> A. On that distances.
>
> Q. Well, what I am saying is do you think that what we have

drawn here today as respondent's four is more accurate based on all the statements, and measurements, and photographs that were taken than perhaps the measurements that you made that morning, the 4th.

A. Yes.

Q. Thank you, sir. You may resume the witness stand.

(Witness resumed the witness stand)

Q. So as of today then it is your belief that in fact based on representations as we have gone through them today that Mr. Duncan was standing under supported ground at the time of the accident rather than unsupported ground?

A. I guess.

Q. And if he was standing under unsupported ground then the fact as to whether there had been temporary ground support placed or not would have no bearing on the accident, isn't that true?

A. On those measurements, yes.

Q. Would it not be correct, sir, based on our drawing today and the accuracy of it that in fact a violation did not occur on the morning of December 2nd, 1980?

A. According to that diagram there was no violation.

Cowley was asked the following questions by this writer (Tr. 76-79).

Q. Now, is it your contention that Duncan was standing under unsupported roof when he was standing there by A?

A. Not according to that, sir.

Q. Well, what is your contention then as far as what you stated here as far as the violation is concerned there?

A. My measurements was lousy.

Q. If Duncan were standing under supported roof do you still feel that there was a violation by the Company of the Section fifty-seven point three dash twenty?

A. If he was standing under supported ground there was none.

I conclude from the testimony above and other evidence presented in this case, that the Secretary failed to prove by a preponderance thereof a violation of the cited regulation. In the course of the inspector's testimony, he has stated that if the miners were not working under unsupported roof, there was no violation. The most credible evidence indicates that the miners were under supported roof when the fall occurred.

The procedure used in the mining process by American Borate in this instance was in compliance with the approved roof control plan and what had been successful in the past and was considered by management as proper procedure for the area Duncan and Pribbenow were working in. In the normal sequence of its mining operations American Borate has taken steps to provide adequate support consistent with the nature of the ground in compliance with the cited regulation and thus, the Secretary has failed to sustain the burden of proof by a preponderance of the evidence that the regulation was violated.

ORDER

Citation No. 380358 and the proposed penalty therefore are VACATED.

Virgil E. Vail
Administrative Law Judge

Distribution:

Theresa Kalaski, Esq. (Certified Mail)
Office of the Solicitor
United States Department of Labor
3247 Federal Building
300 N. Los Angeles Street
Los Angeles, California 90012

Stephan G. Saleson, Esq. (Certified Mail)
Gresham, Varner, Savage, Nolan & Tilden
398 West Fourth Street
San Bernardino, California 92401

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 83-4 A.C. No. 13-01855-03501
v.	:	
	:	No. 6 Mine
MICH COAL COMPANY, Respondent	:	

DENIAL OF MOTION TO DISMISS

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming standard practice the Solicitor has filed a motion to dismiss the petition for assessment of a civil penalty for the one violation involved in this matter predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4. According to the Solicitor this regulation provides for the assessment of a $20 single penalty for a violation which is not reasonably likely to result in reasonably serious injury or illness. The Solicitor has orally advised that his records disclose no evidence on gravity or negligence. The citation was issued for a failure to submit a valid respirable dust sample or giving a valid reason for not sampling the designated work position for the bimonthly period June-July 1982.

I am unable to grant the Solicitor's motion on the basis of the present record. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary. This case

demonstrates the point. Not only would granting the motion to dismiss make the Commission a rubber stamp for MSHA but it would allow the Solicitor to be one too because the Solicitor has freely admitted that he does not have any information regarding negligence and gravity. I cannot determine that a nominal penalty of $20 is appropriate when I am given no information regarding negligence and gravity or any of the other statutory criteria.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for dismissal be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalty is justified and dismissal warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Robert S. Bass, Esq., Office of the Solicitor, U. S. Department of Labor, Room 2106, 911 Walnut Street, Kansas City, MO 64106 (Certified Mail)

Mr. Dale Mich, Mich Coal Company, P. O. Box 16, Oskaloosa, IA 52577 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 83-20 A.C. No. 29-01820-03505
v.	:	
	:	Arroyo Mine No. 1
ARROYO MINING COMPANY, INC., Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming standard practice, the Solicitor has filed a motion for settlement in the amount of $20 for the one violation involved in this matter. The motion is predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 penalty for a violation which is not reasonably likely to result in a reasonably serious injury or illness. The citation was issued for a failure to submit the required respirable dust samples.

I am unable to grant the Solicitor's motion on the basis of the present record. The Solicitor has furnished no information. The citation itself contains boxes which were checked by the inspector indicating the feared event was reasonably likely and that negligence was moderate. I cannot approve a settlement based upon checks in boxes but even if I could the checks in this case would contra-indicate a $20 penalty.

Even more importantly, the Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalty is justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., Office of the Solicitor, U. S. Department of Labor, 555 Griffin Square Building, Dallas, TX 75202 (Certified Mail)

Mr. Jack A. Lawrence, Arroyo Mining Company, Inc., Star Route, Box 16B, Bernalillo, NM 87004 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 83-80
	:	A.C. No. 36-04702-03501
v.	:	
	:	Skidmore Slope
MISHBUCHA ENTERPRISES, LTD. Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming standard practice, the Solicitor has filed a motion for settlement in the amount of $40, $20 apiece for the two violations involved in this matter. This motion is predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. The violations involve a failure to take a required valid dust sample.

I am unable to approve the motion for settlement on the basis of the present record. In my opinion $20 is a nominal penalty which indicates a lack of gravity. I note that on the citation form the inspector checked the box indicating that the occurrence of the event against which the mandatory standard is directed was unlikely. However, I am unwilling to accept a check in a box on a form without knowing any of the reasons for the inspector's conclusion. Moreover, I have been told nothing about negligence or any of the other statutory factors which would enable me to make an informed judgement as to proper penalty amounts.

The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the

Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Thomas A. Brown, Esq., Office of the Solicitor, U. S. Department of Labor, Rm. 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Mishbucha Enterprises, LTD, Mr. Roy Harner, President, Spring Glen, PA 17978

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 83-26-M
	:	A.C. No. 08-00826-05501
v.	:	
	:	Newburn Pit
MACASPHALT, INC., Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming standard practice, the Solicitor has filed a motion for settlement in the amount of $60, $20 each, for the three violations involved in this matter.

The Solicitor does not discuss any of the violations. He only attaches the proposed assessment sheet and the citations. He states that the inspector's evaluation is attached but it is not.

In my opinion $20 is a nominal penalty which indicates a lack of gravity. The first violation was issued for an inoperative automatic reverse signal alarm on a front end loader. The second violation was issued because brakes on the front end loader needed adjustment or repair. The third violation was issued for a missing section of hand railing on the walkway on the first floor of the plant in front of the roll screen. On the face of these violations I would have no basis to conclude they are nonserious. Moreover, I have been told nothing by the Solicitor about the rest of the six statutory criteria.

The assessment sheet indicates that the $20 penalties were issued in accordance with the so-called "single penalty assessment" under section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is, however, not binding upon the Commission or

even relevant in these proceedings. The fact the operator has paid the original assessed amounts cannot preclude the Commission from acting in accordance with the governing statute.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

James L. Stine, Esq., Office of the Solicitor, U. S. Department of Labor, 1371 Peachtree Street, N.E., Atlanta, GA 30367 (Certified Mail)

Mr. Raymond H. Garriott, Safety Director, Macasphalt, Inc., P. O. Box 2579, Myrtle Street & SCL Railroad, Sarasota, FL 33578 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 83-7
	:	A.C. No. 44-0404856-03501-I37
v.	:	
	:	Buchanan No. 1 Mine
C. J. LANGENFELDER & SON, INC., Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming standard practice, the Solicitor has filed a motion for settlement in the amount of $240 for the 12 violations involved in this matter. This motion is predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. I have reviewed the 12 violations. They were issued for a variety of conditions including inoperative automatic warning device, lack of a suitable fire extinquisher and inoperative lights.

I am unable to approve the motion for settlement on the basis of the present record. In my opinion $20 is a nominal penalty which indicates a lack of gravity. I have been told nothing about gravity, negligence or any of the other statutory factors which would enable me to make an informed judgment as to proper penalty amounts. The fact the operator has paid the $240 cannot preclude the Commission from acting in accordance with the governing statute.

Section 100.4 is not binding upon this Commission. Indeed, it is not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo

determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Agnes M. Johnson-Wilson, Esq., Office of the Solicitor, U. S. Department of Labor, Rm. 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

C. J. Langenfelder & Son, Inc., Mr. Harry M. Elliott, Treasurer, 8427 Pulaski Highway, Baltimore, MD 21237 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 83-16
	:	A.C. No. 44-05217-03501
v.	:	
	:	No. 1 Strip
HUMPHREYS ENTERPRISES, INC., Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion for settlement for the eight violations involved in this matter. With respect to seven violations the Solicitor seeks settlements in the amount of $20 apiece. For the eighth violation the Solicitor seeks a settlement in the amount of $147.

First, I will discuss the seven violations. The Solicitor does not discuss the circumstances of any of these violations. He merely states that they did not constitute an imminent danger and are not significant and substantial, paraphrasing the Commission's present interpretation of the term "significant and substantial." In accordance with what apparently now is becoming standard practice, the Solicitor relies upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness.

I am unable to approve the proposed settlements for these seven violations on the basis of the present record. In my opinion $20 is a nominal penalty which indicates a lack of gravity. I have been told nothing about gravity, negligence or any of the other six statutory factors which would enable me to make an informed judgement as to proper penalty amounts.

The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983. Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

Finally, I am unable to approve the proposed $147 settlement for the eighth violation which was issued for ineffective brakes on a 35-ton truck. The Solicitor states that gravity and negligence were high but that the operator demonstrated good faith abatement and has a relatively good history of complying with the Act. I have been told nothing about the operator's size and its ability to continue in business. When the Solicitor advises that gravity and negligence were high a penalty of $147 seems relatively low unless other factors mitigate against imposition of a more severe penalty. The Solicitor should inform me as to all statutory criteria.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Craig W. Hukill, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Rm. 1237A, Arlington, VA 22203 (Certified Mail)

Mr. Mike Thomas, Humphreys Enterprises, Inc., P. O. Box 668, Norton, VA 24273 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 83-17
	:	A.C. No. 44-03604-03504
v.	:	
	:	Mine No. 1
VIKING MINING CORPORATION, Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming standard practice, the Solicitor has filed a motion for settlement in the amount of $20 for the one violation involved in this matter. The motion is predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This violation was issued because the operator did not take one valid respirable dust sample from the designated area for the bimonthly sampling period of October-November 1982.

I am unable to approve the motion for settlement on the basis of the present record. In my opinion $20 is a nominal penalty which indicates a lack of gravity. I have been told nothing about gravity, negligence or any other factors which would enable me to make an informed judgement as to proper penalty amounts.

The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. Moreover, the fact that the operator has tendered payment cannot preclude the Commission from acting in accordance with the governing statute.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a

proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfull and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalty is justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Leo McGinn, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Rm. 1237A, Arlington, VA 22203 (Certified Mail)

Viking Mining Corporation, Leon or David Stevenson, Drawer II, Grundy, VA 24614 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 83-37-M A.C. No. 45-00727-05501
v.	:	
	:	East Salah Pit & Plant
YAKIMA CEMENT PRODUCTS COMPANY, INC., Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve a settlement for the five violations involved in this matter. The proposed settlement in the amount of $110 is the originally assessed amount. 1/

The Solicitor has given me no basis whatsoever to approve the proposed settlement. None of the violations are explained or analyzed. The Solicitor merely states that the operator has paid the originally assessed amount. Four of the violations were assessed at $20 apiece and one violation was assessed at $30. In my opinion these amounts denote a lack of gravity. The citations are for lack of guarding on a belt drive, missing or misplaced covers on various equipment which might create a shock hazard and an unintentional ground fault. I do not know whether these conditions are serious or not but I certainly could not find lack of gravity on the face of the subject violations. On two of the citations the inspector has checked boxes relating to gravity and negligence. I do not believe I can approve settlements based upon checking boxes when no reasons are given. Also here in one case negligence was checked as moderate and in the other occurrence of the feared event was thought likely.

It appears from the assessment sheet that the four violations which are assessed at $20 each were done so as the result of the so-called "single penalty assessment" which is set forth in section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single

1/ The Solicitor's motion mistakenly sets forth the amount as $100. This is obviously wrong since both the assessment sheet and the memorandum to the Solicitor from MSHA set forth the amount as $110.

penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is not binding upon the Commission and is not a basis upon which I could approve a settlement.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Ernest Scott, Jr., Esq., Office of the Solicitor, U. S. Department of Labor, 8003 Federal Office Building, Seattle, WA 98174 (Certified Mail)

Yakima Cement Products Company, Inc., 1202 South 1st Street, Box 436, Yakima, WA 98901 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 83-64-M
	:	A.C. No. 04-01959-05501
v.	:	
	:	Sisquic Pit and Mill
KAISER SAND & GRAVEL CO., Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion for settlement for the one violation involved in this matter. She advises that the operator has paid the originally assessed amount of $20 and has withdrawn its notice of contest.

Since the Commission's jurisdiction has attached, the operator's proposed withdrawal of its notice of contest is not determinative. Under section 110 of the Act the Commission has the responsibility to insure that all settlements comply with the requirements of the law including the six statutory criteria. In her motion the Solicitor sets forth information regarding history, size and ability to continue in business. With respect to abatement, negligence and gravity the Solicitor directs my attention to the "inspector's statement, Exhibit 1 attached hereto, which reflects the testimony of the inspector if he were to testify." There is, however, no inspector's statement attached to the motion. Such carelessness is unfortunately all too typical of these settlement motions. The Commission and its Judges should not have to waste time repeatedly attempting to obtain information necessary to dispose of settlement motions.

Moreover, on the face of the matter, I cannot approve the proposed settlement. In my opinion, $20 is a nominal penalty which denotes a lack of gravity. The dry vegetation cited by the inspector appears to fall squarely within the mandatory standard. The proximity of this vegetation to the electrical substation does not necessarily mandate a finding that the condition was serious but if there was no gravity there must be an explanation why.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalty is justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Theresa Kalinski, Esq., Office of the Solicitor, U. S. Department of Labor, Room 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Mr. Clair E. Hay, Kaiser Sand & Gravel Company, P. O. Box 580, Pleasanton, CA 94566 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 83-171
	:	A.C. No. 46-05963-03503
v.	:	
	:	Ridge Land No. 22
RIDGE LAND COMPANY, Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming standard practice, the Solicitor has filed a motion for settlement in the amount of $60 for the three violations involved in this matter. This motion is predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. The first violation was issued for failure to properly install a fire sensor system. The second violation was issued for failure to have proper lighting on a continuous mining machine and failure to properly illuminate the working place. The third violation was issued for failure to have proper lighting on the roof bolting machine and failure to properly illuminate the working place.

I am unable to approve the motion for settlement on the basis of the present record. In my opinion $20 is a nominal penalty which indicates a lack of gravity. I have been told nothing about gravity, negligence or any other factors which would enable me to make an informed judgment as to proper penalty amounts.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i)

of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

David A. Pennington, Esq., Office of the Solicitor, U. S. Department of Labor, Rm. 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Mr. Edward A. Asbury, President, Ridge Land Company, Inc., Drawer 240, Anawalt, WV 24808 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 82-105 A. C. No. 03-01384-03019
v.	:	J & B No. 1 Mine
R & S COAL COMPANY, INC., Respondent	:	

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements for the five violations involved in this matter. The proposed settlements are for $20 apiece.

Based upon the present record, I am unable to approve the proposed settlements. In my opinion, $20 is a nominal penalty which indicates a lack of gravity. Two citations were issued for failure to secure compressed gas cylinders. The third violation was for the lack of a portable fire extinguisher on a diesel storage tank. The fourth citation was issued for the absence of an automatic warning device on a front end loader. The fifth citation was issued because a gasoline container was not a safety can. On the face of these citations, therefore, it appears that there may well have been some degree of gravity present in all of them. The proposed penalties, therefore, do not appear appropriate or in the public interest.

The Solicitor further states that the violations were not considered significant and substantial since they were not reasonably likely to result in a reasonably serious injury or illness. This motion does not mention section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. 100.4, which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. The rationale employed in this motion is, however, just like that underlying the regulation since it relies upon the fact that the violation was not significant and substantial.

The MSHA regulation and the rationale expressing it are not binding upon this Commission. Indeed, they are not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself

recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983. Once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

The Solicitor states with respect to all the violations that exposure was minimal to none. I do not know what this means and even if I did, one such bare conclusion most certainly would not satisfy the requirement that I assess a penalty amount in accordance with the six statutory criteria.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlements be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlements warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., Office of the Solicitor, U. S. Department of Labor, 555 Griffin Square Bldg., Dallas, TX 75202 (Certified Mail)

Rick Brown, R & S Coal Company, Inc., P. O. Box 468, Lamar, AR 72846 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 82-106 A. C. No. 03-01384-03018
v.	:	J & B No. 1 Mine
R & S COAL COMPANY, INC., Respondent	:	

PARTIAL APPROVAL/DISAPPROVAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements with respect to the four citations involved in this matter. The proposed settlements are for $20 apiece.

In my opinion, $20 is a nominal penalty which indicates a lack of gravity. Citations Nos. 1025765 and 1024911 are record-keeping violations. They are, therefore, on their face not serious, and I approve the proposed settlements of $20 each for these violations. However, I will not issue an order for the operator to pay these violations until additional information is submitted with respect to the remaining two violations.

Citation No. 1025764 involves an inadequate braking system on the front end loader. Citation No. 1025767 was issued because the grader did not have an audible warning device. The Solicitor represents that the negligence of the respondent was low and that there were no employees on foot in the area, thereby reducing the probability of occurrence. I accept these representations. Nevertheless, it appears that some degree of gravity may have been present and that therefore a $20 penalty for each of these violations would be inappropriate.

In addition, the Solicitor states that the violations were not considered significant and substantial.

This motion does not specifically mention section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4, which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. The rationale advanced by the Solicitor is, however, the same as appears in the regulation since the Solicitor relies upon the fact that the violations were not significant and substantial. The regulation and the rationale expressing it are not binding upon this Commission. Indeed,

they are not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the proposed settlements for Citations No. 1025765 and No. 1024911 are hereby Approved.

It is further Ordered that the proposed settlements for Citations No. 1025764 and No. 1025767 are hereby Denied. It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlements warranted for these two violations. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., Office of the Solicitor, U. S. Department of Labor, 555 Griffin Square Bldg., Dallas, TX 75202 (Certified Mail)

Rick Brown, R & S Coal Company, Inc., P. O. Box 468, Lamar, AR 72846 (Certified Mail)

/yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 83-10 A. C. No. 29-01153-03502
v.	:	San Juan Mine - Prep Plant
SAN JUAN COAL COMPANY, Respondent	:	

DENIAL OF SETTLEMENT
DENIAL OF DISMISSAL
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to dismiss this matter on the grounds that the operator has paid the proposed penalty in this case thereby making further action unwarranted. The fact that the operator has made payment is not dispositive of this matter and cannot preclude the Commission from acting in accordance with the governing statute.

Moreover, an examination of the file in this case indicates that more is involved than payment of the proposed penalty by the operator. There is one violation involved in this case and the proposed penalty is $20. The assessment sheet indicates that this was a "single penalty assessment" which was made pursuant to section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4, which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. The subject citation was issued because the operator did not take a valid respirable dust sample during the August-September 1982 bi-monthly period from a designated work position as shown on an attached computer printout.

In my opinion, $20 is a nominal penalty which indicates, among other things, a lack of gravity. I cannot say on the face of this violation alone that it is nonserious. Moreover, I have been told nothing about any of the other statutory criteria which would enable me to make an informed judgment as to a proper penalty assessment for this violation.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be

assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record. The Solicitor cannot finesse the matter by purporting to ignore the MSHA regulation in merely asking for dismissal because the operator has paid the minimal penalty of $20.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for dismissal be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine the proper amount of a penalty. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., Office of the Solicitor, U. S. Department of Labor, 555 Griffin Sq., Suite 501, Dallas, TX 75202 (Certified Mail)

Bert T. Wisner, Safety Supervisor, San Juan Coal Company, P. O. Box 561, Waterflow, NM 87421 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 83-44 A. C. No. 15-12403-03504
v.	:	No. 2 Mine
ABRAXIS COAL COMPANY, INC., Respondent	:	

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has submitted a motion for settlement with respect to the five violations involved in this matter. The Solicitor's motion cannot be granted on the basis of the present record.

Citations No. 2053271 and 2053272 each allege a violation of 30 C.F.R. § 75.1719-1(d). These concern the failure of the operator to provide illumination in addition to the illumination provided by the cap lamp of the operator, on a shuttle car. The Solicitor states in his motion that the Office of Assessments correctly evaluated the six criteria when it assessed a penalty of $130 for each of these two violations. However, the assessment sheet indicates that the proposed penalty assessment for each of these violations was $91 reduced from $130 and the operator's check indicates that it paid $91 apiece. Accordingly, I cannot approve the proposed settlements for these violations because the Solicitor's motion is based upon one amount whereas MSHA has accepted payment of a lesser figure.

The proposed settlements for the remaining three violations are for $20 each. The Solicitor states only that he believes that the Assessment Office correctly determined that a "single penalty assessment" was appropriate and that the inspector did not indicate that the respondent was negligent, the gravity contemplated, or the number of persons affected. The proposed settlements for these three violations is therefore predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. 100.4. This regulation provides for the assessment of a $20 single penalty for a violation which is not reasonably likely to result in a serious injury or illness. However, the regulation in question is not binding upon the Commission. Indeed,

it is not even relevant. Moreover, the fact that the operator has tendered payment cannot preclude the Commission from acting in accordance with the governing statute. In my opinion, $20 is a nominal penalty which indicates a lack of gravity. As already indicated, the Solicitor has told me nothing about gravity, negligence, or any other factors which would enable me to make an informed judgment as to proper penalty amounts for these three citations.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlements be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlements warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Darryl A. Stewart, Esq., Office of the Solicitor, U. S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Sheridan Booth, Superintendent, Abraxis Coal Co., Inc., General Delivery, Inez, KY 41224 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 83-72-M A. C. No. 36-03448-05502
v.	:	Mercer Lime & Stone Co. Mine
MERCER LIME & STONE COMPANY, Respondent	:	

PARTIAL APPROVAL AND PARTIAL DISAPPROVAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlement for the two violations involved in this matter.

The Solicitor submits a proposed settlement in the amount of $48 for Citation No. 2007509 which was issued for a violation of 30 C.F.R. 56.9-22. The inspector observed that a berm was not provided for the outer bank of the elevated roadway around the No. 1 and No. 2 ponds. The Solicitor advises that the operator demonstrated good faith efforts to abate the cited condition by constructing a berm for the outer bank of the elevated roadway around both ponds well within the time specified for abatement. The proposed settlement is not large but in view of the Solicitor's advice that the operator is small and that it has a very small history of prior violations, I will approve the recommended settlement for this item.

With respect to the second item which was issued for a violation of 30 C.F.R. 56.11-1 when the inspector observed that a safe means of access was not provided at the dust screws under the cyclones, the Solicitor recommends a $20 penalty. This proposed settlement is predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. 100.4 which provides for the assessment of a $20 single penalty for a violation which is not reasonably likely to result in a reasonably serious injury or illness.

I am unable to approve the proposed $20 settlement. In my opinion, $20 is a nominal penalty which indicates a lack of gravity. A reading of the citation indicates that gravity may well have been present. In any event, I have been told nothing about gravity or negligence so as to enable me to make an informed judgment with respect to the proper penalty amount for this citation.

The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement with respect to Citation 2007509 be approved. I will not issue an order directing the operator to pay $48 for this citation until information is submitted with respect to the other citation as set forth immediately hereafter.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalty in settlement is warranted for Citation No. 2007508. If the Solicitor does not do so, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

yh

Distribution:

Thomas A. Brown, Esq., Office of the Solicitor, U. S. Department of Labor, Rm. 14480-Gateway Bldg., 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

James Christy, Foreman, Mercer Lime & Stone Co., P. O. Box 4, Branchton, PA 16021 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 83-90 A. C. No. 36-04999-03501
v.	:	Leslie Tipple Mine
POWER OPERATING COMPANY, INC., Respondent	:	

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion for a decision and order approving settlement in the amount of $20 for the one violation involved in this matter. The motion is predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4, which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. The violation was issued because a suitable backguard was not provided for the vertical ladder that extended to the feeder platform approximately 9 feet from ground level.

I am unable to approve the motion for settlement on the basis of the present record. In my opinion, $20 is a nominal penalty which indicates a lack of gravity. I note that the inspector has checked Item 21 on the citation form to indicate that the occurrence of the event against which the cited standard directed was unlikely. I also note that he has checked Item 20 to indicate that negligence was low. However, I have been told nothing about the circumstances which led the inspector to reach these conclusions, nor have I been given any information about the other statutory factors which would enable me to make an informed judgment as to the proper penalty amount.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. Moreover, the fact that the operator has tendered payment cannot preclude the Commission from acting in accordance with the governing statute.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalty is justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

William M. Connor, Esq., Office of the Solicitor, U. S. Department of Labor, Rm. 14480-Gateway Bldg., 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Larry Kanour, Supt., Power Operating Co., Inc., P. O. Box 684, Philipsburg, PA 16866 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 83-29 A. C. No. 44-05340-03508
v.	:	No. 1 Mine
D. L. & P. COAL CO., INC., Respondent	:	

DENIAL OF MOTION TO WITHDRAW PETITION
DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Secretary has moved to withdraw his petition for the assessment of civil penalties for the 11 citations involved in this matter. The Solicitor states that the operator has paid $20 each for the 11 proposed penalties or a total of $220. The Solicitor further states that the citations did not cause an imminent danger nor did they significantly and substantially contribute to a coal mine safety or health hazard. He stated that these violations were not reasonably likely to result in a reasonably serious injury or illness and were abated within the time set by the inspector and that in addition the employer demonstrated good faith in abating these violations and has a relatively good history of complying with the requirements of the Act.

The 11 violations were issued for a variety of conditions including ventilation and dust violations, inadequate temporary splices, lack of guarding, improperly installed fire outlets on a water line, permissibility violations, and improperly located battery-charging stations. In my opinion, $20 is a nominal penalty which indicates a lack of gravity. With respect to these 11 violations, I have been told nothing about gravity, negligence, or any of the other statutory factors sufficient to enable me to make an informed judgment as to proper penalty amounts.

The assessment sheet indicates that the $20 penalties in this matter are the so-called "single penalty assessments" made pursuant to section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4, which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness.

The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. Moreover, the fact that the operator has tendered payment cannot preclude the Commission from acting in accordance with the governing statute.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

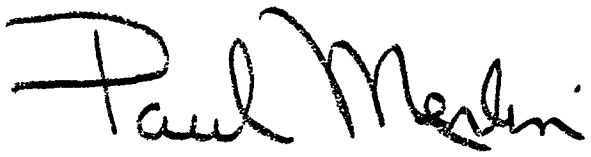
The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion to withdraw be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine appropriate penalty amounts for the 11 citations. Otherwise, this case will be assigned and set down for hearing on the merits.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Jonathan M. Kronheim, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Rm. 1237A, Arlington, VA 22203 (Certified Mail)

Ronnie Lester, D. L. & P. Coal Company, P. O. Box 148, Birchleaf, VA 24220 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 83-63 A. C. No. 46-05793-03505
v.	:	No. 14 Mine
ENERGY COAL CORPORATION, Respondent	:	

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion for a settlement approval for the two citations involved in this matter. The original assessments totaled $148 and the proposed settlements are for $20 apiece.

This motion is predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. 100.4, which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. The Solicitor attaches to his motion copies of modifications to the subject citations deleting the "significant and substantial" description. On this basis he seeks approval of the so-called "single penalty assessment".

The first violation was issued for accumulation of combustible materials, creating fire hazards. The second citation was issued for an unguarded drive chain and sprockets on a wall drill. The inspector indicated that negligence in both cases was moderate and that occurrence was reasonably likely. I am unable to approve the motion for settlements on the basis of the present record. In my opinion, $20 is a nominal penalty which indicates a lack of gravity. From the face of the two citations, and based upon the inspector's statements, it appears that the violations were serious and that the operator was negligent. Under such circumstances, a nominal penalty would not be warranted. See Orders Rejecting Proposed Settlement issued by Administrative Law Judge George A. Koutras in Glen Irvan Corporation, PENN 82-23 (April 4, 1983) and PENN 82-25 (April 6, 1983).

The MSHA "single penalty assessment" regulation is not binding upon the Commission. Indeed, it is not even relevant. Certainly the fact that the operator has agreed to tender

payment cannot preclude the Commission from acting in accordance with the governing statute.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

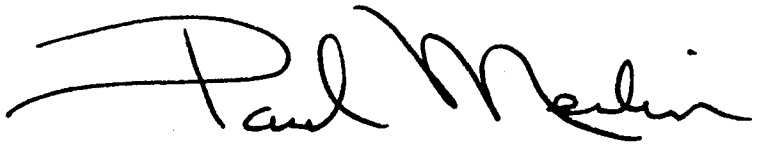
The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlements be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlements warranted. Otherwise, this case will be assigned and set down for hearing on the merits.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Thomas A. Brown, Esq., Office of the Solicitor, U. S. Department of Labor, Rm. 14480-Gateway Bldg., 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Donald McConnell, Director of Safety and Training, Energy Coal Corporation, P. O. Box 72, Paintsville, KY 41240 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 19, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 82-107
	:	A.C. No. 03-01384-03020
v.	:	
	:	J & B No. 1 Mine
R & S COAL COMPANY, INC., Respondent	:	

PARTIAL APPROVAL AND PARTIAL DISAPPROVAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements for the two violations involved in this matter. The original assessments for the violations totaled $56. The proposed settlement totals $40.

Citation No. 1025373 was issued for failure to provide potable drinking water. I find this a nonserious violation on its face. The Solicitor advises that the operator exhibited a low degree of negligence. The Solicitor proposes a penalty of $20. Accordingly, I accept the proposed settlement.

Citation No. 1025375 was issued for failure to keep walkways free of extraneous materials. The Solicitor advises that negligence was low and proposes a reduction in penalty from $28 to $20. In my opinion, $20 denotes a lack of gravity. In this instance, the citation states that a stumbling and slipping hazard existed. This violation appears serious on the face of the citation. Therefore, although I have not overlooked the operator's small size and small history, I cannot approve the proposed settlement on the basis of the information submitted to date.

The Solicitor also advises that this citation was not "significant and substantial." It appears that the proposal to settle the citation for $20 was done as the result of the so-called "single penalty assessment" which is set forth in section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for

the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is not binding upon the Commission and is not a basis upon which I could approve a settlement.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in this proceeding. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

I will not order payment of the settlement amount for Citation No. 1025373 pending final disposition of Citation No. 1025375.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me

to determine whether the proposed penalty for Citation No. 1025375 is justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., Office of the Solicitor, U. S. Department of Labor, 555 Griffin Square Building, Dallas, TX 75202 (Certified Mail)

Mr. Rick Brown, R & S Coal Company, Inc., P. O. Box 468, Lamar, AR 72846 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 19, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 83-53 A. C. No. 12-01897-03501
v.	:	Arlen No. 1 Mine
BLACK BEAUTY COAL COMPANY, INC., Respondent	:	

DENIAL OF MOTION TO WITHDRAW PROPOSAL FOR PENALTY
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to withdraw his petition for civil penalties for the 8 violations involved in this matter. As grounds for this motion, the Solicitor recites that he has received a check from the operator in the amount of $160 in full payment for the 8 penalties. The Solicitor further states that the operator has represented that it desires to withdraw its contest of the proposed penalties and that the full payment of these penalties is a satisfactory and appropriate resolution of this controversy. The citations were issued for a variety of conditions, including lack of audible warning devices, lack of seat belts, and inoperative parking brakes on various types of equipment.

The Solicitor does not refer to any MSHA regulations in support of his motion but rather relies upon the operator's payment, its wish to withdraw its contest, and the allegation that the payment already made is a satisfactory and appropriate resolution of this matter. It appears from the assessment sheet that all of these violations were so-called "single penalty assessments". Such assessments are made pursuant to section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4, which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness.

I am unable to approve the motion to withdraw on the basis of the present record. In my opinion, $20 is a nominal penalty which indicates, among other things, a lack of gravity. I have been told nothing about gravity, negligence, or any of the other statutory factors which would enable me to make an informed judgment as to proper penalty amounts for these citations. Certainly, each citation on its face does not indicate a lack of gravity.

The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. Moreover, the fact that the operator has tendered payment cannot preclude the Commission from acting in accordance with the governing statute.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

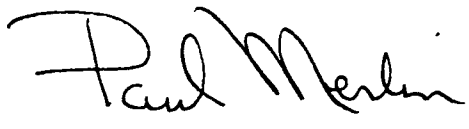
The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion to withdraw be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlements warranted. Otherwise, this case will be assigned and set down for hearing on the merits.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Mark A. Holbert, Esq., Office of the Solicitor, U. S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

T. C. Chambers, Safety Director, Black Beauty Coal Co., Inc., R.R. #1, Box 133, Plainville, IN 47568 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 19, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 82-326 A. C. No. 36-03554-03501
v.	:	Crescent Mine
CRESCENT HILLS COAL COMPANY, INC., Respondent	:	

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements for the 12 violations involved in this case. Based upon the present record, I am unable to approve the motion.

Nine of the violations carry proposed penalty settlements ranging from $74 to $158. The Solicitor does not discuss these violations individually. Rather in a summary paragraph he states that all of them were serious, that the operator's negligence ranged from ordinary to moderately high, and that all were abated within the time set by the inspectors. I have been given no information about the operator's size, prior history and ability to continue in business. The proposed settlements may be appropriate but since I do not have complete information, I cannot act in accordance with all statutory criteria set forth in section 110(i) of the Act. I recognize that the proposed settlements are for the originally assessed amounts but this is not determinative. The Solicitor must furnish the required information.

The Solicitor proposes settlements for the remaining three violations in the amounts of $20 apiece. These proposed settlements are predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. 100.4 which provides for the assessment of a $20 single penalty for a violation which is not reasonably likely to result in a reasonably serious injury or illness.

I am unable to approve the motion for the $20 settlements. In my opinion, $20 is a nominal penalty which indicates a lack of gravity. With respect to these three violations, I have been told nothing about gravity, negligence, or any other factors which would enable me to make an informed judgment as to proper penalty amounts for these items. The MSHA regulation in question is not binding upon the Commission. Indeed, it

is not even relevant. Moreover, the fact that the operator has tendered payment cannot preclude the Commission from acting in accordance with the governing statute.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983. Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlements be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlements warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

David E. Street, Esq., Office of the Solicitor, U. S. Department of Labor, Rm. 14480-Gateway Bldg., 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Melvin E. Peluchette, Vice President, Crescent Hills Coal Company, Inc., 408 Millcraft Center, Washington, PA 15301 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 19, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 83-67
	:	A.C. No. 36-02713-03501 B43
v.	:	
	:	Frenchtown Strip Mine
ANSCO, INCORPORATED, Respondent	:	

PARTIAL DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements for the three violations involved in this matter. The proposed settlements are for the originally assessed amounts. Two violations were assessed at $20 apiece and one violation was assessed at $98.

While the motion for settlement contains sufficient information to approve settlement of the $98 violation, there is little information regarding the two $20 violations. In my opinion, $20 denotes a lack of gravity. However, the $20 violations are for lack of insulated bushings and proper fittings for power wires in a generator and lack of non-conductive material at a circuit box. The inspector has checked boxes on the citations which indicate that negligence was low and an accident was unlikely to occur in each case. I cannot approve a settlement on the basis of checks in boxes because no reasons are given for the bare conclusions represented by the checks.

The Solicitor advises that the two violations which are assessed at $20 each were done so as the result of the so-called "single penalty assessment" which is set forth in section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is not binding upon the Commission and is not a basis upon which I could approve a settlement.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i)

of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in this proceeding. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

I approve of the settlement of the $98 violation but will not direct payment until information is furnished for the two $20 violations.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed $20 penalties for the two citations discussed above are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

William M. Connor, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Ansco, Incorporated, P.O. Box 4371, 901 Neubling Ave., Evansville, IN 47711 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 19, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 82-60
	:	A.C. No. 40-00650-03501
v.	:	
	:	No. 4 Surface Mine
DEAN COAL COMPANY, Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what now is apparently becoming standard practice, the Solicitor has filed a motion for settlement in the amount of $20 for the one violation involved in this matter. The motion is predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 penalty for a violation which is not reasonably likely to result in a reasonably serious injury or illness. In my opinion, $20 indicates a lack of gravity. The citation was issued for the use of a refuse truck with an inoperative automatic reverse warning device. I cannot say the violation appears to be nonserious on the face of the citation. In any event, I have been told nothing by the Solicitor about gravity or negligence or any other of the statutory factors which would enable me to make an informed judgment as to the proper penalty for this violation.

I am unable to grant the Solicitor's motion on the basis of the present record. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant

in this proceeding. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalty is justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Ralph M. Ross, President, Dean Coal Company, 4912 Westover Terrace S.E., Knoxville, TN 37914 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 19, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 83-18
	:	A.C. No. 44-00294-03516
v.	:	
	:	No. 1 Mine
EASTOVER MINING COMPANY, Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has submitted a motion to withdraw his petition for the assessment of civil penalty on the ground that the operator has agreed to payment of the proposed penalties in full. The motion must be denied.

This case involves three citations.

The first item is a Section 104(d) order, 00930034, which was subsequently modified to a Section 104(a) citation. According to the Solicitor after MSHA review it was determined that the violation involved no reasonable likelihood of a reasonably serious injury occurring. On this basis the Solicitor proposes a "single penalty assessment" of $20. This penalty amount apparently is predicated upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness.

In my opinion, $20 is a nominal penalty which indicates a lack of gravity. It may be that this violation was non-serious, but I have been told nothing by the Solicitor about gravity or negligence or any of the other statutory factors which would enable me to make an informed judgment as to a proper penalty for this violation. The violation which was cited for a failure to lock out and tag a disconnecting device was said by the inspector in a modification to involve no negligence or gravity, but the inspector gave no reasons. I cannot accept this.

The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983. Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

The Solicitor further advises that a penalty of $136 has been proposed by MSHA for the next item which was a 104(d) order, 00932049, involving a roof violation under 30 C.F.R. § 75.200. The Solicitor, however, gives no discussion of the subject condition and, as already pointed out, this is a de novo proceeding in which the original assessment amount is not in any way determinative. The inspector said in a modification that negligence was high and occurrence of the event reasonably likely. The inspector gave no reasons, but even his bare conclusions cast some doubt upon a $136 penalty.

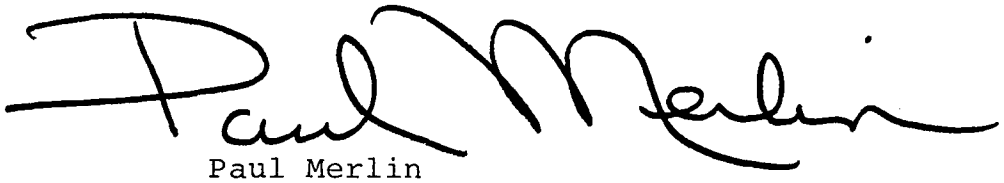
The same is true of the third item which is a section 104(d)(2) order, 00931995, alleging a violation of 30 C.F.R. § 75.1725. For this item the Solicitor advises that MSHA has proposed a penalty of $275. However, beyond stating the bare conclusion that the operator exhibited a high

degree of negligence and that the violation was significant and substantial, the Solicitor gives no basis for approval of this amount. I cannot accept bare conclusions which have no supporting rationale.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion to withdraw be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlements warranted. Otherwise, this case will be assigned and set down for hearing on the merits.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Leo J. McGinn, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Eastover Mining Company, General Delivery, Brookside, KY 40801 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 19, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 82-208-M
	:	A.C. No. 02-00151-05501
v.	:	
	:	San Manuel Mine
MAGMA COPPER COMPANY, Respondent	:	

DENIAL OF MOTION TO WITHDRAW

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to withdraw based on full payment of the original assessment of the one violation involved in this matter. The citation was assessed at $20.

The Solicitor, however, has given me no basis to approve the proposed settlement. There is no analysis of why $20 is an appropriate penalty for the violation. The Solicitor merely states that the operator has paid the originally assessed amount and has filed for a modification of the cited standard. The citation is for failure to properly bush insulated wires extending out of three junction boxes. I cannot find a lack of gravity on the face of the subject citation. I have not overlooked the statements in the motion to withdraw that the only issue presented is whether a strain relief clamp is the equivalent of the bushing requirement in the standard and that the operator has filed a petition for modification on this question. However, I have not been specifically told whether a clamp was used here and if it was, whether such use rendered the violation nonserious.

It appears from the assessment sheet that the one violation which was assessed at $20 was done so as the result of the so-called "single penalty assessment" which is set forth in section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is not binding upon the Commission and is not a basis upon which I could approve a settlement.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in this proceeding. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalty is justified and withdrawal based upon an appropriate payment warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Theresa Fay Bustillos, Esq., Office of the Solicitor, U.S. Department of Labor, 11071 Federal Building, 450 Golden Gate Avenue, Box 36017, San Francisco, CA 94102 (Certified Mail)

N. Douglas Grimwood, Esq., Twitty, Sievwright & Mills, 1700 TowneHouse Tower, 100 West Clarendon, Phoenix, AZ 85013 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 19, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 83-30-M A.C. No. 48-00715-05501
v.	:	
	:	Casper Gravel Pit
CASPER CONCRETE COMPANY, Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The parties have filed a motion to approve settlements for the seven violations involved in this matter. The proposed settlements are for the originally assessed amounts. Six violations were assessed at $20 apiece and one violation was assessed at $98.

The motion for settlement approval contains no discussion whatsoever regarding any of the alleged violations. Rather the motion merely states that the Secretary agrees with and relies upon MSHA's evaluation of the statutory criteria and concludes:

> WHEREFORE, the parties pray that the proposed penalties be approved, respondent be granted leave to withdraw its contest to the penalties as proposed by the agency, and an order be entered requiring respondent to pay the proposed penalties within forty days of the filing of an order approving the penalties.

Although the Secretary may be willing to rely upon MSHA's evaluation of the statutory criteria, this Commission most certainly cannot do so without violating its statutory mandate. In my opinion, $20 is a nominal penalty which denotes a lack of gravity. A reading of these citations indicates that at least on their face the possibility that some degree of gravity may have been present. I have been told nothing about any of the other six statutory criteria.

The $20 "single penalty assessments" are obviously predicated upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. These regulations are not binding upon the Commission and indeed are not even relevant in these proceedings.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

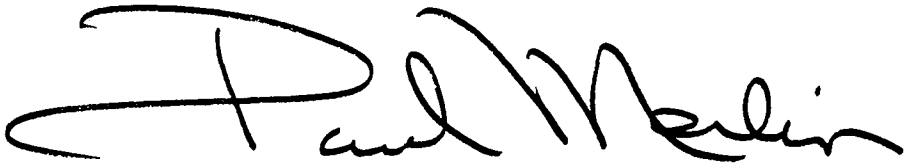
Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

Moreover, I cannot approve the $98 settlement for the remaining violation. This citation was issued for a failure to ground a wire in violation of section 56.12-25. On the citation form the inspector indicated occurrence of the feared event was reasonably likely, injury could be fatal and negligence was moderate. I do not believe I can predicate approval or disapproval of a proposed settlement on nothing more than boxes checked by an inspector. But I note that these checks, without more, indicate that the proposed $98 penalty would be too low.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.



Paul Merlin
Chief Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U. S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Eugene A. Lalonde, Esq., Casper Concrete Company, P. O. Box 30238, Billings, MT 59107 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 26, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 83-24
	:	A.C. No. 41-02867-03502
v.	:	
	:	Thurber Coal Mine
THURBER COAL COMPANY, Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The parties have filed a motion to approve settlement for the seven violations involved in this matter. The proposed settlement is for the originally assessed amount. Six violations were assessed at $68 apiece and one violation was assessed at $20.

The motion for settlement contains no discussion or analysis regarding the factual circumstances of the alleged violations. No information is given regarding gravity or negligence. The inspector checked various boxes on the citation forms indicating his opinion regarding levels of negligence and gravity but as I have indicated in other cases I cannot rely upon these "checks" as a basis for settlement approval when the Solicitor does not explain what the checks mean. I recognize that the Solicitor's motion sets forth that in the 24 months prior to the inspection the operator was inspected 29 times and received 14 assessed violations. The motion further advises that payment of the proposed penalties will not impair the operator's ability to continue in business. However, in addition to being given insufficient advice about gravity and negligence, no information is given by the Solicitor regarding size and good faith abatement. I am unable to determine whether the proposed settlement amounts are appropriate.

With respect to the one proposed settlement amount of $20, I further make the following observations. This proposed settlement is a "single penalty assessment" apparently

predicated upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is not binding upon the Commission and is not a basis upon which I could approve a settlement.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in this proceeding. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

Finally, the fact of payment by the operator is not determinative of the Commission's duties and obligations in this matter.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., Office of the Solicitor, U. S. Department of Labor, 555 Griffin Square Building, Dallas, TX 75202 (Certified Mail)

Mr. Bobby Williams, Thurber Coal Company, P. O. Box 400, Arlington, TX 76010 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 26, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 83-183
	:	A.C. No. 46-05806-03505
v.	:	
	:	No. 3 Mine
MAIDEN MINING COMPANY, Respondent	:	

PARTIAL APPROVAL AND PARTIAL DISAPPROVAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlement for the four violations involved in this matter. The proposed settlement is for the originally assessed amounts. Three violations were assessed at $20 apiece and one violation was assessed at $126. The operator has already tendered payment of $186.

Citation No. 2122147 was issued because a disconnect plug was not marked for identification. The violation was serious and the operator was moderately negligent. The Solicitor proposes to settle this violation for the original assessment of $126. I accept the Solicitor's representations.

The Solicitor proposes to settle the other three citations for the original assessments of $20 apiece. In my opinion, $20 is a nominal penalty which denotes a lack of gravity. The three citations involve accumulations of coal and coal dust, and permissibility violations. A reading of these citations indicates on their face the possibility that some degree of gravity may have been present. The Solicitor provides no information about the gravity or negligence involved in these citations. I cannot approve these proposed settlements on the basis of the information submitted to date.

The $20 "single penalty assessments" were obviously predicated upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4 which provides for the assessment of a $20 single penalty for a

violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is not binding upon the Commission and is not a basis upon which I could approve a settlement.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in this proceeding. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

I will not order that the case be dismissed with respect to Citation No. 2122147 pending final disposition of the three other citations.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed $20 penalties for the

three citations discussed above are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

Distribution:

David A. Pennington, Esq., Office of the Solicitor, U. S. Department of Labor, Rm. 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Mr. Robert O. Weedfall, Maiden Mining Company, P. O. Box 235, Maidsville, WV 26541 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 27 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 82-335
	:	A.C. No. 36-00970-03503
v.	:	
	:	Maple Creek No. 1 Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, and Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This is a civil penalty proceeding wherein the Secretary seeks penalties for five alleged violations of mandatory health and safety standards. Petitioner filed a motion for summary decision with respect to the violation charged in Citation No. 9901317 which was denied by an order issued April 6, 1983. Pursuant to notice, the case was heard in Uniontown, Pennsylvania, on April 27 and 28, 1983. During the course of the proceeding, Petitioner moved to withdraw the petition with respect to one citation - 9901316 - on the ground that it could not establish a violation, and to have the citation vacated. The motion was granted on the record. Respondent admitted that the violations charged occurred but challenged the designation of the violations as significant and substantial and contested the amount of the penalties proposed. Joe Garcia, Thomas K. Hodous, M.D., William H. Sutherland, William R. Brown, Alvin Shade and Gerald E. Davis testified for Petitioner. Samuel Cortis, Joseph G. Ritz, Paul Shipley and John Pecko testified for Respondent.

Both parties have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW COMMON TO ALL CITATIONS

1. At all times pertinent to this proceeding, Respondent owned and operated an underground mine in Washington County, Pennsylvania, known as Maple Creek No. 1 Mine.

2. Respondent has an annual production of coal of approximately 15 million tons. The subject mine has an annual production of approximately 540 thousand tons. Respondent is a large operator.

3. Between June 3, 1980 and June 2, 1982, Respondent's history shows 656 paid violations at the subject mine. Of these, four were violations of 30 C.F.R. § 70.101, 71 were violations of 30 C.F.R. § 75.200, and 73 were violations of 30 C.F.R. § 75.503, the health and safety standards involved in this case. This is a moderate history of prior violations, and penalties otherwise appropriate will not be increased because of this history.

4. Each of the violations charged herein occurred except as otherwise found herein, and in each case the violation was abated promptly and in good faith.

5. The imposition of penalties for the violations will not affect Respondent's ability to continue in business.

6. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and the undersigned Administrative Law Judge has jurisdiction over the parties and the subject matter of this proceeding.

CITATION NO. 9901317 ISSUED MAY 27, 1982

1. On October 26, 1981, a respirable dust technical inspection was conducted on mechanized mining unit 010-0 in the subject mine. A sample collected at that time for occupation 036 showed 10 percent quartz. Based on this finding the respirable dust limit on the unit was reduced to 1.0 mg/m3. A sample taken on February 10, 1982, showed 8 percent quartz and the dust limit was raised to 1.2 mg/m3. In response to a request from Respondent, a technical investigation was conducted from February 22 to March 1, 1982. This showed an average dust concentration of 2.3 mg/m3. A citation was issued for a violation of the dust standard. The same investigation showed a quartz percentage of 7 and the respirable dust level was raised to 1.4 mg/m3. Between May 11 and 18, five respirable dust samples were taken which showed an average concentration of 1.8 mg/m3 for which the citation with which we are here concerned was issued.

2. Exposure to excessive amounts of respirable dust with a quartz content in excess of five percent can contribute to silicosis and coal workers pneumoconiosis. The quartz content in the dust can be a factor in the progression of simple coal workers pneumoconiosis. It can also cause silicosis, a progressive, serious disease of the lungs resulting from deposition of silica in the lung and the body's reaction to it. Coal workers pneumoconiosis and silicosis are reasonably serious illnesses.

3. An exposure to 1.8 mg/m3 of respirable dust which contains approximately seven percent quartz over a 2-month period, would not in itself cause silicosis but would contribute in a substantial way to the risk of acquiring silicosis. See Secretary v. U.S. Steel Mining Co., Inc., 5 FMSHRC 46, 67-68 (1983) (ALJ).

4. The violation of 30 C.F.R. § 70.101 which occurred in this case was reasonably likely to result in a reasonably serious disease. Therefore, it was of such nature as could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard. See Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981); Secretary v. U.S. Steel Mining Co., Inc., supra; I should note that the precise issue raised by Respondent in this case was raised by it in the case of Secretary v. U.S. Steel Mining Co., Inc., supra, before Judge Kennedy. A decision by a tribunal of competent jurisdiction is res judicata in a subsequent proceeding between the same parties involving the same issue. 46 Am. Jur. Judgments § 397 (1969); 1B Moore's Federal Practice § 0.405 (1982). Factual differences not essential to the prior judgment do not render the doctrine inapplicable. Montana v. United States, 440 U.S. 147 (1979); Hicks v. Quaker Oats Co., 662 F.2d 1158 (5th Cir. 1981). Respondent had a full and fair opportunity to litigate this issue before Judge Kennedy and to petition the Commission for review. Based on the doctrine of res judicata, it should be precluded from relitigating it here. The government, however, did not raise this issue, and the case was heard on the merits. My conclusion here is based on a consideration of the evidence in the case before me. Respondent should not be permitted to endlessly raise this issue, however. I accept and adopt the analysis and conclusions of Judge Kennedy that exposure to respirable dust with a quartz content that exceeds 100 micrograms per cubic meter of air constitutes a significant risk of a serious health hazard. See also Consolidation Coal Co. v. Secretary, 5 FMSHRC 378 (1983) (ALJ).

5. There is no evidence that the violation was the result of Respondent's negligence.

6. I conclude that an appropriate penalty for the violation is $200.

CITATION NO. 1250101 ISSUED MAY 21, 1982

1. The subject citation was issued because the inspector found a broken torque wrench on the roof bolter. Roof bolting was being performed at the time. The torque wrench gauge had been damaged and could not be used to determine the torque of the bolts. The approved roof control plan requires that the first bolt be checked prior to removing any temporary supports. Only one bolt had been installed by the crew and no attempt to torque the bolt had been made prior to the citation being issued. The roof control plan is not violated by the fact that the torque wrench was defective, but only if the operator fails to torque the bolts in accordance with the plan. Despite the fact that Respondent at the commencement of the hearing admitted a violation, I conclude that the evidence does not show a violation of the roof control plan and will dismiss the petition with respect to this citation, and the citation will be vacated.

CITATION NO. 1249541 ISSUED JUNE 1, 1982

1. The subject citation was issued charging a violation of 30 C.F.R. § 75.503 because of a permissibility violation in a shuttle car resulting from a conduit being pulled out of the packing gland. The violation was originally designated as significant and substantial but this designation was subsequently deleted.

2. The violation was not serious but it was the result of Respondent's negligence. Respondent had been cited for the same condition "quite a few times."

3. I conclude that an appropriate penalty for the violation is $75 based on the criteria in section 110(i) of the Act.

CITATION NO. 1250107 ISSUED JUNE 3, 1981

1. The subject citation was issued because of a permissibility violation, 30 C.F.R. § 75.503, resulting from the absence of a bolt on the control compartment on the foot switch of a shuttle car.

2. In the event of methane entering the control compartment, an internal explosion would be less likely to be contained within the compartment and could get into the mine atmosphere. The shuttle car was energized and was being prepared to load coal from the face.

3. The subject mine has been classified as a gassy mine. Ignitions have occurred in the subject mine.

4. I conclude that the violation was reasonably likely to cause an injury of a reasonably serious nature. The citation was properly designated significant and substantial. The violation was serious. The absence of the bolt should have been known to Respondent. The violation was the result of Respondent's negligence.

5. I conclude that an appropriate penalty for the violation is $200 based on the criteria in section 110(i) of the Act.

ORDER

Based on the above findings of fact and conclusions of law IT IS ORDERED

(1) The penalty proceeding is DISMISSED with respect to the violations charged in Citation Nos. 9901316 issued May 27, 1982, and 1250101 issued May 21, 1982, and the citations are VACATED.

(2) Respondent shall pay within 30 days of the date of this decision civil penalties for the following violations:

Citation No.	Date	Penalty Amount
9901317	05/27/82	$200
1249541	06/01/82	$ 75
1250107	06/03/82	$200
		$475

(3) The citation Nos. 9901317 and 1250107 were properly designated "significant and substantial" and are AFFIRMED as issued.

(4) In Citation No. 1249541, the designation "significant and substantial" was deleted.

James A. Broderick
Administrative Law Judge

Distribution:

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelpha, PA 19104 (Certified Mail)

Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Louise Q. Symons, Esq., 600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

RUSSELL COLLINS AND VIRGIL KELLEY, Applicants	:	APPLICATION FOR ATTORNEYS FEES
	:	Docket No. EAJ 83-1
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	

DECISION

Statement of the Case

Following my decision dismissing a civil penalty proceeding brought by the Secretary of Labor under section 110(c) of the Mine Safety Law, 4 FMSHRC 1816 (1982), two of the six individuals charged moved for an award of costs and attorneys fees. 1/ Jurisdiction over the claim arises under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a).

The bench decision dismissing the charges occurred after lengthy pretrial discovery and a four-day evidentiary hearing. It was predicated on a failure of proof with respect to both the underlying violation and applicants' alleged knowing participation therein.

Thereafter, counsel for the Secretary waived his right to challenge the tentative bench decision; agreed there was insufficient evidence to show applicants knowingly authorized, ordered or carried out the violation charged; joined nunc pro tunc applicants' motion to dismiss at the close of the

1/ The gravamen of the charge was that applicants, a superintendent and a foreman at the Annapolis, Missouri quarry of the GAF Corporation, with knowledge that the braking system of a large haulage truck was unsafe, authorized or ordered miners to operate the truck on a steep haulage road thereby endangering their lives. The relevant mandatory safety standard, 30 C.F.R. 56.9-2, prohibits the use of self-propelled equipment with "defects affecting safety."

receipt of evidence; and in the alternative independently moved to dismiss the Secretary's charges on the grounds stated in the decision of the trial judge. 2/

An exhaustive review of the record shows the Secretary's evidence failed to rise above a level of suspicion. Indeed, the countervailing evidence as to the drivers' negligence and reckless disregard for safe operation of the truck, which both the underlying investigation and the solicitor's pretrial discovery largely ignored, convincingly shows that the government's litigation position was factually and legally untenable. The failure to properly evaluate the probative force of this evidence, including the implausibility of the characterizations of the operative facts by the Secretary's witnesses, led to an improvident decision to proceed where no prosecutable offense had, in fact, been committed.

2/ The Secretary contends the trial judge's denial of applicants' motion to dismiss at the close of MSHA's case-in-chief shows the government's litigation position was substantially justified. As my decision made clear, because of the need for clarification of the testimony given by the bench witness Warnecke I resolved all questions of credibility and conflicts in favor of the Secretary. This afforded applicants the opportunity to present the trial judge with a full exposition of the claimed flaws in the government's position. The first benefit of that decision was the Secretary's accedence in the correctness of the trial judge's tentative decision as to the final disposition of the matter. The second benefit was the light which that record affords for making this decision.

For these reasons, I find the Secretary's threshold contention without merit. The Secretary vigorously opposed the motion to dismiss at the close of MSHA's case-in-chief although at that time counsel had to be painfully aware of the unreliability of MSHA's witnesses. There is authority, of course, for holding the government liable for attorney fees and expenses where it adopts, even briefly, a litigation position lacking substantial justification. H.R. Rep. 1418, 96th Cong., 2d Sess., 11 (1980); S. Rep. 253, 96th Cong., 1st Sess. 7 (1979); Stanley Spencer v. NLRB, D.C. Cir. No. 82-1851, decided June 28, 1983, Slip Op. at 34, n. 58. But since counsel for applicants' has not separately argued the point I will treat it as subsumed under the argument that the record considered as a whole shows the government's position in the underlying litigation was not substantially justified.

The record at trial confirmed the fatal flaws in the pretrial investigation and preparation of the case. The same considerations that led to the decision to dismiss four of the six respondents after two days of trial supported my finding that the claimed mechanical defect in the braking system was not a defect affecting safety. Further, applicants' knowledge of the complaining drivers' improper and unsafe operating procedures justified applicants' reliance on brake adjustments to correct the condition and did not violate applicants' duty under the law to provide a vehicle capable of safe operation.

As the court of appeals has recently pointed out, the fact that government counsel may have felt reasonably justified in putting applicants to their proof does not mean the agency was substantially justified in pursuing the litigation. One of the principal purposes of the EAJA was to deter prosecutors from pursuing weak cases or to pay the price in sizeable awards of attorneys fees. 3/ Stanley Spencer, supra, Slip Op. at 22, n. 40; 39-41. Thus, it would be improper for me to accept as a substantial justification the bald assertion that the testimony of the complaining drivers, if uncritically accepted, was sufficient to warrant this prosecution. As the court noted, where the controversy revolves around competing characterizations of the underlying facts, here a defect in the braking system allegedly affecting safety, the "trial judge must assess the plausibility of the government's original depiction of the situation that gave rise to the suit." This "involves evaluation of the probative force of evidence submitted by the government." Stanley Spencer, supra at 51-52.

The government's only disinterested witness, Mr. Zancauske, was reliable but gave no evidence probative of a defect in the braking system affecting safety. It is true that he testified there might have been a defect in the braking system but he could not say it affected safe operation of the truck. On the other hand, he unreservedly expressed the view that the principal problem was the drivers' habit of riding the brakes on the steep inclines instead of gearing down and engaging the retarder. Counsel, who admitted he had never interviewed Mr. Zancauske before he testified, made a serious error in believing Mr. Zancauske would provide probative evidence of the underlying violation. Absent reliable, probative and substantial evidence of the underlying

3/ Indeed the EAJA seems to be a specific grant of authority to review the exercise of prosecutorial discretion.

violation, the Secretary could never hope to prove applicants knew or should have known of its existence. It is impossible for an individual to have knowledge of the unknowable or of the existence of the nonexistent.

A review of the investigative file further shows the inspection and investigation were botched due to a lack of diligence, if not competence, on the part of both the inspector and investigator. Nor did their failure to appear as witnesses because they chose to take a vacation enhance the worth of their efforts.

Applying what I understand is the applicable standard, a standard which Congress and the courts deem to be "slightly more stringent than one of reasonableness," I conclude that neither the underlying nor the ligitation position of the Secretary was substantially justified. 4/ S. Rep. 96-253, supra, at 8; Stanley Spencer, supra, Slip Op. 16, n. 31, 25, 39.

Because this case presents a matter of first impression under the EAJA for the trial judge and the Commission as well as an issue of eligibility which has never before been decided by any tribunal, administrative or judicial, I set forth below my formal findings and conclusions.

Findings and Conclusions

Attorney Fees - Eligibility

The Equal Access to Justice Act (EAJA) requires the award of attorney fees and expenses to a qualified party prevailing against a regulatory agency unless the administrative law judge who heard and determined the matter finds

---

4/ While the EAJA indicates that it was the Secretary's position "as a party," on which I should focus, I agree with the court's observation that "Examination of the variety of kinds of controversies covered by the Act reveals that, in the large majority of contexts, it makes no functional difference how one conceives of the government's 'position.' In actions brought by the United States, the governmental action that precipitates the controversy almost invariably is its litigation position." Stanley Spencer, supra at 25. That was certainly true in this case.

that "the position of the agency as a party to the proceedings was substantially justified or that special circumstances make an award unjust." 5/

Administrative Law Judges of the Federal Mine Safety and Health Review Commission are by law the designated adjudicative officers under the Mine Safety Law for charges brought under section 110(c) of the Act. 30 U.S.C. § 823(d)(1). The Commission has determined therefore that they are authorized to hear and determine claims for fees and expenses arising under the EAJA against the Department of Labor which is charged with responsibility for enforcing the Mine Safety Law. 29 C.F.R. 2704.201(f). Unlike the old line regulatory agencies such as the FTC, SEC, ICC, FCC, CAB and NLRB, the Federal Mine Safety and Health Review Commission (FMSHRC) does not initiate or prosecute the adversary administrative adjudications that it hears and decides. This Commission is an independent administrative agency that functions as an administrative trial and appellate court. 30 U.S.C. § 823. The Commission possesses only adjudicative powers, has no prosecutorial prerogatives, is not a party to proceedings brought before it, and is not responsible for the actions of the Department of Labor in initiating or prosecuting alleged violations of the law. Under the Commission's rules, awards are made by the Commission and its judges against the Department of Labor. 29 C.F.R. 2704.108. Findings by the Commission's trial judges are final and conclusive if supported by substantial evidence. Chacon v. Phelps Dodge Corporation, D.C. Cir. No. 81-2300, decided June 7, 1983, Slip Op. at 9-10. Judicial review is available in the courts of appeals under an abuse of discretion standard only to the extent that a decision denies an award or there is a dispute over the calculation of an award. 5 U.S.C. § 504(c)(2). 6/

5/ 5 U.S.C. § 504(a) provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

6/ Stewart, Beat Big Government and Recover Your Legal Fees, 69 ABAJ 912 (1983); Few Claimants Win Fee Awards in Agency Actions, Legal Times, Monday, April 25, 1983, p. 1; Courts Debate Reach of EAJA, Legal Times, Monday, May 16, 1983, p. 16.

There is no dispute about the fact that applicants were prevailing parties whose individual net worth was less than $1,000,000. The Secretary suggests a special circumstance warranting denial of applicants' eligibility, however, is the fact that they incurred no expense in defending themselves.

Applicants' employer, GAF Corporation, a large, multinational corporation with more than 500 employees and a net worth that exceeds $5,000,000 authorized one of its full-time house counsel, Mr. Patrick Daly, to represent applicants with the understanding that (1) GAF would defray all of the expense involved without right of reimbursement from applicants and (2) if applicants prevailed Mr. Daly would be entitled to keep whatever attorney fees and expenses he succeeded in recovering. If the allowance of fees for Mr. Daly's services is in accord with the purposes and policy of the Act, I can perceive no valid basis for denying applicants' eligibility even if payment to Mr. Daly amounts to a bonus to him over and above the salary and benefits he earned from GAF during the period of his pro bono representation of applicants. Under the Commission's rules and the applicable case law the fact that services are rendered on a pro bono basis is no bar to the recovery of fees for such services by a prevailing party. Rule 2704.106(a); Hornal v. Schweiker, 551 F. Supp. 612, 615-616 (M.D. Tenn. 1982); Kinne v. Schweiker, Civ. No. 80-81, D. Vt., December 29, 1982. Compare Munsey v. FMSHRC, No. 82-1079, D.C. Cir., March 11, 1983. Contra, Cornella v. Schweiker, 553 F. Supp. 240, 245-248 (D.S.D. 1982).

The language of the Act and its legislative history lead me to conclude the underlying policy of the EAJA is served by awarding applicants Mr. Daly's fees regardless of the source of the funds advanced to enable him to defend applicants. The Act, as well as the House and Senate Committee Reports, show that to be allowable fees and expenses need not be actually owed to attorneys. The Act provides that awards are to be based on "prevailing market rates," 5 U.S.C. § 504(b)(1)(A), and that this is to be the measure of the prevailing party's recovery. The "measure" of applicants' entitlement has nothing to do with whether they owe all, some, or none of it to the attorney or anyone else. The House Report states:

> In general, consistent with the above limitations [$75.00 per hour], the computation of attorney fees should be based on prevailing market rates without reference to the fee arrangements between the attorney and client. The fact that attorneys may be providing

> services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services rendered is not relevant to the computation of compensation under the Act.

H.R. Rep. 96-1418, supra, at 15. The Senate Report is to the same effect. For these reasons, I conclude that in considering applicants' claims for Mr. Daly's fees the source of the funds used to defray Mr. Daly's expenses pendente lite and the actual fee arrangement between applicants and Mr. Daly is irrelevant.

On the other hand, I find special circumstances bar the award of fees and expenses for services rendered by outside attorneys employed by GAF to assist Mr. Daly in his representation of applicants. These attorneys did not enter appearances in the matter on behalf of applicants, had no colorable attorney-client relationship with applicants, and no pro bono or other fee arrangement with applicants. They were employed by Mr. Daly in his capacity as labor attorney for GAF on the understanding that their billings would be sent to and paid for by GAF. These fees and expenses, which totalled $13,139.31, were, in fact, paid by GAF Corporation for the services rendered. Under these circumstances, payment of these sums to Mr. Daly or applicants would be a pure windfall. Further, since the outside attorneys have been paid by GAF the statute does not authorize further payment to them.

The remaining question is whether GAF Corporation qualifies directly for reimbursement of the fees and expenses incurred on behalf of applicants. I find payment of these monies is not compensable to GAF because this tax deductible business expense was made not only on behalf of applicants but in pursuit of GAF's own business interests. These were GAF's interests in (1) supporting and defending its supervisory management against what it firmly believed to be trumped-up charges of reckless disregard for safety and (2) creating a precedent against MSHA's easy acceptance of charges of wrongdoing against supervisors by union representatives and rank-and-file miners. In other words, GAF had a large stake in this litigation from the standpoint of preserving management's valued right to manage its quarry without unwarranted intrusion on that right by the union and MSHA.

While it is clear that a deterrent to improvident regulatory action is in accord with the purposes and policy of the Act for eligible applicants, here GAF was not an eligible applicant. 5 U.S.C. § 504(b)(1)(B); H.R. Rep. 96-1418, supra, at 15. Because of its size and wealth the

economic deterrent the Act sought to remove with respect to applicants was never present with respect to GAF which, quite properly, chose to join in applicants' defense as a matter of sound and prudent business policy. Further, as a necessary and proper business expense incurred by GAF, up to 54% of the sums in question have already been fee-shifted to the government under the applicable provisions of the Internal Revenue Code.

Under the circumstances shown, I believe GAF's participation was sufficient to make it a privy to applicants' defense. The claim for fees and expenses for the outside attorneys and law firms is therefore, disallowed on the ground that this expense was primarily incurred on behalf of an entity ineligible to receive compensation under the terms of the statute. 7/ It is also denied on the ground that to allow an award of the outside attorney fees and expenses to applicants or GAF would, under the special circumstances shown, be unjust and inequitable. 8/

The Standard

The EAJA does not require the Government to compensate prevailing parties automatically for fees and expenses. Instead, it adopts a compromise position, embodied in the standard of "substantial justification," which "balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights." 9/ H.R. Rep. No. 96-1418, supra, at 10. In particular, Congress rejected the liberal standard of recovery under the civil rights statutes which generally entitle prevailing plaintiffs

7/ Rule 2704.104(g) provides:

> An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

8/ The House Report notes the "special circumstances" exception was intended to give the trial judge "discretion to deny awards where equitable consideration dictate an award should not be made." H.R. Rep. 96-1418, supra, at 11.

9/ An analogous provision, 28 U.S.C. § 2412 affords a similar entitlement to attorney fees and expenses to prevailing parties in the courts.

to receive an award of attorney fees unless special circumstances would render an award unjust. See Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

At the same time, Congress rejected a standard proposed by the Department of Justice which would have authorized recovery of fees and expenses against the Government only if a prevailing party could prove that the government's position was arbitrary, frivolous, unreasonable, or groundless. H.R. Rep. 96-1418, supra, at 10, 14. See, Christianbery Garment Co. v. EEOC, 434 U.S. 412, 420-421 (1978). Such a restrictive approach, Congress reasoned, would maintain significant barriers to recovery of fees by prevailing litigants and would not appreciably diminish existing deterrents created by the high cost of vindicating legal rights in the face of arbitrary and unreasonable government action. Id.

The standard of recovery that ultimately emerged represents a "middle ground" between an automatic award of fees to a prevailing party engaged in litigation with an agency and the standard proposed by the Department of Justice. Although the Act itself is silent on the meaning of the "substantially justified" standard, the House Report contains an instructive passage:

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made. In this regard the strong deterrents to contesting Government action require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question. The committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the government was unreasonable.
>
> * * * * * *
>
> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision was based on a substantial probability of prevailing.

H.R. Rep. 96-1418, supra, 10-11.

The legislative history also teaches that the government must "make a positive showing that its position and actions during the course of the proceedings were substantially justified." H.R. Rep. 96-1418, supra 13. In Tyler Business Services v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982), the court held this requires an agency to substantially justify not only its actions as a party to the proceeding but also its preliminary decision to initiate the proceeding. Contra, Stanley Spencer, supra.

In cases charging knowing violations by supervisors, MSHA acts as the investigator. The decision as to whether there is a prosecutable offense and the conduct of the prosecution, however, rests with the Office of the Solicitor, Department of Labor. While the record is replete with indications of the ineptness of the investigation, this would not require an award if the solicitor's pretrial preparation and discovery filled the voids in the investigative record to the point where it can fairly be said that by the time of the evidentiary hearing the solicitor had substantial, legally competent evidence of the violations charged. If, on the other hand, the solicitor's case, as presented, shows that at no time did he have such relevant evidence as a reasonable mind might accept as adequate to support a finding that the underlying violation occurred and that applicants knew or should have known of the putative condition I cannot find the Secretary's litigation position was substantially justified.

Since the advent of the EAJA, the quality of departmental in-house lawyering must obviously improve. No longer may the solicitor "wing" it or rest on MSHA's recommendation as the justification for pursuing weak and tenuous cases. The solicitor must make an independent evaluation of the probative force of his evidence in the light of the expected defense and whatever else fairly detracts from the probative value of his evidence.

The need to raise the level of the plane of litigating competence in administrative proceedings was foreshadowed by the legislative history's admonition that the EAJA was intended "to caution agencies to carefully evaluate their case and not to pursue those which are weak or tenuous." 10/

10/ The Act was intended to "induce government counsel to evaluate carefully each of the various claims they might make in a particular controversy, and to assert only those that are substantially justified." Stanley Spencer, supra, at 36.

H.R. Rep. 96-1418, supra, 14. The requirement for pretrial evaluation of the worth of evidence when coupled with the burden of demonstrating that a litigation position was substantially justified were purposely designed to press agencies "to address the problem of abusive and harassing regulatory practices." H.R. Rep. 96-1418, supra, 14.

Further, because this was a case in which the government conceded only after there was a substantial investment of effort and money the Secretary was required to make an "especially strong showing that [his] persistence in litigation was justified." Stanley Spencer, supra, at 43. Compare Id. 16, n. 31, 22, n. 40, 33-34, n. 58.

Insight as to the Secretary's burden is gleaned from the following passage of the legislative history:

> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.

H.R. Rep. No. 96-1418, supra, at 10-11; S. Rep. No. 96-253, supra, at 6-7.

Here, of course, the record shows that after protracted litigation the Secretary acceded by joining the applicants' motion to dismiss the charges.

Nevertheless, the Secretary argues that because the underlying case involved questions of credibility it was per se "reasonable" for government counsel to pursue the litigation. I do not agree.

A central objective of the Act was to require government counsel to carefully evaluate the worth of informers' testimony. No longer may counsel for the Secretary offer such testimony "for whatever its worth." At least not without risk of the imposition of substantial awards for attorney fees and expenses.

As the court of appeals so trenchantly observed, the purposes of the Act will "not be promoted by treating the question of whether the position taken by the United States in a particular case was 'substantially justified' as

equivalent to the question whether it was 'reasonable' for government counsel to pursue the litigation." Stanley Spencer, supra, at 39. My analysis of the government's litigation position shows its counsel gullibly accepted totally implausible stories by witnesses who had every incentive to disinform if not outright lie. The fact that bureaucratic constraints may have encouraged counsel to accept their stories at face value does not justify a conclusion that the decision to proceed, followed by dogged pursuit of a "long shot" was substantially justified.

I conclude, therefore, that the standard to be applied in determining whether the Secretary's case was substantially justified was not whether it was arguably or reasonably justified by the investigatory record but whether an objective evaluation of the probative force of the evidence adduced at the hearing shows that there was substantial credible evidence that the braking system of the Euclid truck had a defect affecting safety; that applicants knew or should have known of this condition; and that with such knowledge or awareness they tacitly ordered or authorized continued use of the truck. 11/

Evidence which was discredited or which did not directly or circumstantially raise an inference of the existence of an operative fact was not substantial and therefore did not constitute a substantial justification for the agency's litigation position. In this context substantial evidence is used, to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and not "a certain quantity [or preponderance] of evidence." Steadman v. SEC 450 U.S. 69, 98-100 (1980).

11/ Substantial evidence may consist of either direct or circumstantial evidence. It need not be dispositive but standing unrebutted must be capable of raising an inference of the existence of the operative fact or facts in issue. If it does not raise such an inference it is not substantial and cannot provide a substantial justification for prosecution of a case. I recognize that statutory formulations for reviewing discretion are among the most unsatisfactory of legislative standards. Words such as "substantial justification" or "abuse of discretion" state conclusions, not premises from which a conclusion may be derived. While these verbal formulas provide the terms in which the conclusion of invalidity may be pronounced, they do nothing to articulate the process of analysis by which the issue of invalidity is to be litigated and decided.

The Evidence

At the outset of the hearing the Secretary offered a document subpoenaed from the files of the Midco Sales & Service Company which showed that after the imminent danger closure order (later modified to an unwarrantable failure citation) was issued GAF immediately employed Midco to perform repairs on the braking system of the Euclid truck (GX-1). This document, a purchase order, invoice, and service report covering the work done, was offered through Mr. Jerry D. Zancauske, service manager for Midco, to establish (1) the fact of violation under the strict liability standard of the Act, and (2) culpable conduct, i.e., consciousness of fault through awareness of the existence of a defect affecting safety on the part of the six individual respondents (Tr. 38-39).

Counsel for respondents objected to the receipt of this document and testimony pursuant to the exclusionary rule set forth in Rule 407 of the Federal Rules of Evidence (Tr. 24, 39). Rule 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. 12/

The trial judge admitted the document and Mr. Zancauske's testimony solely to prove the fact of violation under the strict liability standard of the Mine Safety Law. (Tr. 39-41). 13/

12/ The document was never used for impeachment nor was the fact of ownership, control or feasibility of precautionary measures ever controverted.

13/ The trial judge also admitted the invoice, service report and GAF's purchase order, all of which were part of the same document, as records kept in the regular course of business (Tr. 64, 75-76), and as an implied admission under Rules 801(d)(2)(A), (B), (D), and 803(6) (Tr. 78). Since this evidence was barred under Rule 407, it was not properly received under these rules. 23 Wright & Graham, Federal Practice & Procedure § 5284, at 109-110 (1980).

A review of the applicable case law shows that since at least 1980 the weight of authority has supported the view that Rule 407 bars the receipt of post hoc remedial measures with respect not only to culpable conduct but also strict liability. Neither counsel brought these authorities to the attention of the trial judge during the hearing. Nevertheless, in deciding whether the Secretary's action in prosecuting this matter was substantially justified I find it necessary to consider whether in view of the practical unaniminity of the decisions interpreting Rule 407 as precluding the receipt of evidence of post-event repairs to show strict liability, negligence, or culpable conduct it was reasonable for the Secretary to rely on this inadmissible evidence as the keystone of his case against these applicants. I conclude it was not. 14/

Rule 407 of the Federal Rules of Evidence bars post-event remedial evidence to prove (1) strict liability, (2) negligence, or (3) culpable conduct. The rationale for this exclusionary rule is the public interest in encouraging the adoption of safety measures and the questionable relevancy of evidence of subsequent repairs. 2 Wigmore, Evidence § 283, at 151 (3 Ed. 1940); Columbia and P.S.R.R. v. Hawthorne, 144 U.S. 202, 207-208 (1892); Weinstein's Evidence, ¶ 407(02) (1982); Louisell and Mueller, Federal Evidence, §§ 163, 164 (1978); 23 Wright & Graham, Federal Practice and Procedure, § 5382 (1980).

While there is, and will probably continue to be, considerable debate, at least among the commentators, over whether the quasi-privilege created by Rule 407 encourages people to correct unsafe conditions or practices, there is practical unanimity among the courts of appeals on the question of relevance. Because of its equivocal nature, the courts have held that evidence of subsequent repair has little relevance with respect to whether a defect affecting safety existed in a machine or product prior to its repair.

14/ Even if properly received, which I find it was not, the repair report was of little or no probative value since standing alone it did not establish that the drivers' complaints over the need for frequent adjustments was attributable to any defect affecting safety in the equipment. Further, Mr. Zancauske's testimony served only to corroborate the respondents' claim that the principal defect affecting safety was the improper driving habits of the drivers assigned to operate the equipment (Tr. 104-105).

Grenada Steel Industries v. Alabama Oxygen Co., 695 F.2d 883, 887 (5th Cir. 1983), and cases cited.

The commentators also favor the view that Rule 407 does not apply in strict liability cases. Again the federal circuit courts have disagreed. Research discloses that long before this case went to trial it had been authoritatively held in the First, Second, Third, Fourth, Fifth, Sixth and Seventh Circuits that post hoc remedial measures were not admissible in strict liability cases. Grenada Steel Industries, supra, at 888; Oberst v. International Harvester Company, 640 F.2d 863, 866 & n. 5 (7th Cir. 1980). Compare DeLuryea v. Winthrop Labs., 697 F.2d 222, 229 (8th Cir. 1983).

Counsel for the Secretary was chargeable with knowledge of these developments in the law of evidence, including the fact that the Supreme Court had denied certiorari in two of the leading cases that support application of the exclusionary rule in strict liability proceedings. Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980); cert. denied, 449 U.S. 1080 (1981); Cann v. Ford Motor Co., 658 F.2d 54, 59-60 (2d Cir. 1981), cert. denied ____ U.S. ____, 72 L Ed. 484 (1982). In Cann, the court observed:

> The failure of Rule 407 to refer explicitly to actions in strict liability does not prevent its application to such actions. When Congress enacted the Federal Rules of Evidence, it left many gaps and omissions in the rules in the expectation that common law principles would be applied to fill them . . . . The application of those principles convinces us that although negligence and strict product liability causes of action are distinguishable, no distinction between the two justified the admission of evidence of subsequent remedial measures in strict product liability actions. Id. at 60.

The question of admissibility aside, a review of the totality of the evidence as to the repairs effected by Midco shows the Secretary was not justified in believing the brakes on the Euclid truck were defective at the time the closure order issued. Mr. Zancauske candidly admitted that while he supervised the brake repairs he had no personal knowledge or "hands on" experience with the condition of the brakes either before or after the closure order issued and that from the service report he could not testify as to what the "holding ability or stopping ability of the brakes of this truck" were prior to the time Midco worked on it (Tr. 59). When pressed for an opinion he could only say he "surmised" that safety of the brakes may have been adversely affected by the presence of an unknown quantity of oil or

grease on one of the brake linings (Tr. 59-63, 107-109). Whether this was a "major" or "minor" defect and whether it affected safety he said he could not say (Tr. 108-109). Most telling was the following colloquy between counsel for the Secretary and Mr. Zancauske:

Counsel:

Q. Can you explain what it means to adjust the brakes on this type of machine, on this very machine, let's say, the Euclid truck?

Judge: If you know.

Counsel:

Q. If you know. If you were to adjust the brakes, and they get hot and have to be backed off, what does that indicate to you, sir?

A. That somebody might be riding the brakes overheating them.

Q. And if this continues over a two month period for practically every eight-hour shift at this quarry, and sometimes even eight and nine times during this shift that the brakes have to be adjusted they get hot and have to be backed off, and this occurs for a two month period, what would that indicate to you, sir?

A. Well you could assume several things. One, that the operator is driving too fast, he's not using the retarder.

Q. Let's assume he's using the retarder.

Judge: Let him answer the question, don't interrupt. Go ahead, sir.

A. Not using the retarder, he's driving too fast, or the hauls are in such a short sequence that the brakes are having to be used too much, that maybe not all of the wheels are not holding to their ability that they were designed for.

* * * * * *

Counsel:

Q. What is the effect of the brakes heating up, does that help deteriorate them?

A. If you have an overheating condition of the brakes for a period of time, you'll heat crack the drums and glaze the lining, which will affect your stopping ability. Tr. 104-105.

Three days and many hundreds of transcript pages later the undisputed testimony of Mr. Weigenstein, an experienced quarry foreman and GAF's expert on the repair and maintenance of the Euclid truck gave substantially the same reasons for the need for repeated adjustments to the brakes, namely, the fact that the complaining drivers drove too fast, failed or refused to use the retarder and continually rode the brakes on the steep inclines thus overheating the brakes and impairing their braking power (Tr. 861-868).

Counsel for the Secretary admitted neither he nor MSHA's investigator had interviewed either Mr. Zancauske or Mr. Weigenstein before they testified and apparently had no idea that they would be in agreement as to the causes for the brakes overheating and losing their braking power.

Despite this the Secretary contends that he was substantially justified in pursuing these matters because (1) a mechanic of admittedly limited experience and knowledge but who worked on the truck believed the adjustments were not effective to remedy the condition because of a break in a seal on the right rear wheels which allowed grease to leak on the brake lining causing the lining to crystallize and lose braking power, (2) the mechanic related this defect to applicants at a meeting on February 15, 1980, (3) applicants reportedly took no corrective action but authorized continued use of the truck, and (4) Mr. Zancauske the service manager for Midco who supervised the post-citation repair work believed that if there was oil or grease on the right rear brake lining it could result in a "slipping effect" on that wheel assembly that could diminish the degree of friction necessary for proper braking of the truck.

Facts developed on cross examination showed that the mechanic's testimony was highly unreliable. He was an individual with an obviously selective memory and little experience as a heavy equipment mechanic. The only completely candid testimony he gave was persuasive of the fact that he had never pulled the right rear wheel assembly of the truck to examine the alleged oil or grease leak and that the crystallization of the lining on the other wheels was, he believed, due to the complaining drivers' penchant for riding the brakes down the steep grades (Tr. 324, 327, 364). Had a thorough pretrial interview of the witness been

conducted, these facts would have been known to government counsel before Mr. Stevens testified.

With respect to the Secretary's other contentions, applicants claim the Secretary knew or should have known (1) that after the meeting on Friday, February 15, 1980, applicant Collins assigned applicant Kelley to investigate the complaints about the truck, (2) Mr. Kelley went to the day shift driver, Mr. Warnecke, and asked him to check the brakes, (3) Mr. Warnecke checked the brakes and reported they were "adequate," (4) the truck was not operated thereafter (because of the intervening weekend and Washington's Birthday holiday) until Tuesday, February 19, 1980, (5) that Mr. Collins told Mr. Weigenstein the quarry foreman who had over 30 years experience in maintaining heavy haulage equipment (20 years on this truck alone) to perform a thorough check of the braking system of the truck on the afternoon of Tuesday, February 19, 1980, (6) that Mr. Weigenstein took the truck out of service on the evening shift of Tuesday, February 19, and for four hours performed a complete overhaul of the braking system, (7) that Mr. Weigenstein did not find any measurable amount of oil or grease leaking on the right rear brake drum but did find and correct a leak in the hose that serviced the retarder, (8) that Mr. Howard, one of the complaining drivers, knew this work was performed on the truck, (9) that when the truck was put back into service on the midnight shift on February 20, it had no defect affecting safety, (10) that Mr. Johnson one of the complaining drivers drove the truck during that entire shift without adjusting the brakes, (11) when Mr. Warnecke the day shift driver took the truck over at 7:00 a.m. the morning of Wednesday, February 20 he found the brakes were in need of adjustment, (12) that Mr. Johnson was known to drive at excessive speeds and to ride the brakes instead of using the retarder in order to move his loads faster, (13) that foreman Goodman approached Mr. Warnecke and asked him if the brakes were adequate at about the time he, Mr. Warnecke, had decided to take the truck to the repair shop for a brake adjustment, (14) that the inspector Mr. Ryan arrived on the mine site around 7:00 a.m., announced he was there to investigate a complaint from the union about the truck and asked for the union representative, Mr. Mathes, (15) that when told Mr. Mathes was not there Mr. Ryan left the mine site to find Mr. Mathes, (16) that when the inspector returned about an hour later he found the truck parked at the repair shop, awaiting a brake adjustment, (17) that without making a static check of the condition of the brakes, the inspector, Mr. Ryan, directed the driver Mr. Warnecke to drive him to the loading area, (18) that Mr. Ryan directed Mr. Warnecke

to ride the brakes in taking the loaded truck down the steep grades, (19) that Mr. Warnecke did this but had to put the truck into reverse to stop it at one point because the brakes had not been adjusted, and (20) that Mr. Zancauske could not persuasively identify the defect that allegedly affected the safety of the brakes on the truck.

These undisputed facts lead me to concur in the applicants' claim that there never was any credible evidence that applicants failed to act in a responsible manner to correct the claimed defect affecting safety; that the defect claimed did not, in fact, affect safety either because it did not exist, or if it did, it was not serious enough to affect safety; that the retarder and other failsafe mechanisms described by Mr. Weigenstein were unaffected by the claimed oil leak; that the inspector, the investigator and the Secretary's trial counsel knew or should have known that the witnesses Warnecke and Weigenstein would testify that as a result of the complaint on February 15 corrective action was promptly taken; that no amount of corrective action could offset the drivers' bad driving habits; that the brakes ran hot because the complaining drivers operated the truck with a reckless disregard for their own safety; that the failure to take statements from the witnesses Warnecke and Weigenstein was not justified since both were material witnesses of applicants claimed dereliction and, in fact, Mr. Weigenstein was charged with the same dereliction.

Accordingly, I conclude there was (1) no credible evidence that applicants knew or should have known the truck was being operated with a defect affecting safety, (2) no probative evidence that the truck was at any time operated with a defect affecting safety, and (3) in the exercise of due diligence the Secretary and his duly authorized representatives including his trial counsel knew or should have known this.

In view of the oversights and deficiencies in the agency investigation and prosecution of this matter, I find there was no substantial justification for the agency to believe it could prove the underlying violation or applicants participation therein.

Order

The premises considered, it is ORDERED that the application for award of attorney fees and expenses be, and hereby

is, GRANTED as to the fees claimed by Mr. Daly, otherwise it is DENIED. It is FURTHER ORDERED that, there being no objection of record to the amount of fees claimed by Mr. Daly, the Department of Labor pay attorney fees in the amount of $15,600 to Patrick E. Daly on or before Tuesday, August 30, 1983.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Patrick E. Daly, Esq., GAF Corporation, 140 West 51 St., New York, NY 10020 (Certified Mail)

J. Phillip Smith, Esq., and Anna L. Wolgast, Esq., Office of the Solicitor U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Mike Mathes, United Steelworkers of America, P.O. Box 351, Ellington, MO 63638 (Certified Mail)

ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUL 28 1983

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 82-31-M
Petitioner	:	A.C. No. 41-00059-05013
v.	:	
	:	Ogden Quarry & Plant Mine
SERVTEX MATERIALS COMPANY,	:	
Respondent	:	

DECISION

Appearances: James J. Manzanares, Esq., Office of the Solicitor, U. S. Department, Dallas, Texas, for Petitioner;
Ed S. Chapline, III, Esq., Dallas, Texas, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent, Servtex Materials Company, (Servtex), with violating five safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (the "Act").

After notice to the parties, a hearing on the merits was held in San Antonio, Texas on November 30, 1982.

The parties filed post trial briefs.

Issues

1) Is the Secretary estopped from issuing citations for safety violations when no citations for the same conditions were issued during previous inspections?

2) If not, did respondent violate the regulations?

3) If a violation occurred, what penalties are appropriate?

Synopsis of the Case

During an inspection in June 1981 of respondent's New Braunfels facility (engaged in crushing limestone), MSHA Inspector Pascual Herrera issued five citations under the authority of section 104(a) of the Act. 1/ The citations charge violations of the Act's safety regulations due to an unguarded coupling, insufficiently guarded pulleys, as well as an inadequate transformer fence.

Approximately fifty-three previous inspections of the facility by Herrera and other MSHA inspectors had not resulted in the issuance of citations for the violations charged in this case (Tr. 71). Petitioner seeks an order affirming four citations and proposed civil penalties. Petitioner also moved to vacate one of his citations.

Discussion

Failure of MSHA to issue citations at previous inspections.

As a threshold matter Servtex contends the citations are invalid. This defense arises from the fact that on 53 prior inspections no citations were issued on these conditions. Servtex suggests that Herrera's issuance of citations for newly noticed safety violations demonstrates an incorrect use of subjective standards and a minimal understanding of the operation and function of the machinery involved. Servtex further contends that an operator must rely, in part, on the results of previous inspections to determine the efficiency of its compliance with safety regulations.

Servtex's arguments lack merit. The evidence of record does not support Servtex. Further, the case law is contrary to that view. Generally, an operator's reliance on prior inspections does not estop the Secretary from bringing an action on newly discovered safety violations. Midwest Minerals, Inc., 3 FMSHRC 251 (January 1981)(ALJ); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981)(ALJ). Furthermore, Inspector's Herrera's 27 years of mine safety experience, and an additional seven and a half years as a MSHA inspector hardly suggest lack of knowledge and experience in dealing with mine machinery and related safety issues (Tr. 10, 11).

1/ Section 104(a) provides in pertinent part:

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

The failure of previous inspections to result in the issuance of citations for the safety violations charged in this case does not indicate that the Servtex facility is in automatic compliance with the appropriate safety regulations. It is necessary, then, to examine each of the citations issued to determine if any violations occurred.

Citation 174561

Inspector Herrera issued this citation for an unguarded coupling on a drill at Servtex's plant. It alleges a violation of Title 30, C.F.R., Section 56.14-1 [2]/(Tr. 17, P2, P6).

Herrera testified that a six inch coupling connects and lies between the V-belt drive shaft and the transmission. While the coupling on the drill is only 18 inches from a walkway, it is separated from the walkway by a guard for the V-belt drive; the guard is 14 to 15 inches high. The area is further enclosed by a hand rail (Tr. 52).

Petitioner claims that a serious or fatal accident could occur if a miner were to become entangled in the coupling due to a fall or in the performance of maintenance duties (Tr. 21).

In conflict with such testimony, Servtex claims that the coupling was enclosed in a box-type guard, and was effectively separated from the walkway by the 24 inch V-belt drive guard (Tr. 33). In addition, witness John Faust (assistant plant manager) testified that an injury due to the coupling is unlikely. The coupling moves only when the transmission is engaged by the drill operator in the cab. In addition, the coupling is not serviced or repaired while the drill is in operation (Tr. 87, 88).

I accept MSHA's evidence but a fair reading of the record and a study of the drawing (P6) establishes that this coupling was guarded by location. Section 30 C.F.R. 56.14-1 only requires guarding when the moving parts "may be contacted by persons ..." It follows that when the Secretary charges a violation of Section 56.14-1 he must show that the unguarded part may be "contacted by persons." Kincheloe & Sons, Inc., 2 FMSHRC 1570 (June 1980)(ALJ).

In Applegate Aggregates 2 FMSHRC 2403 (August 1980) I vacated a citation charging a violation of Section 56.14-1. In that case the unguarded machine part was in a location where it was unlikely that a worker would come in contact with it; further, a guard rail prevented ready access to the part; in addition, the equipment was shut down when maintenance was performed.

2/ The cited section, 30 C.F.R. 56.14-1, provides as follows:

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

Similar facts exist in this case. The coupling cited as a safety violation is separated from the walkway by both a V-belt drive guard and a hand rail, and it is not serviced while the drill is in operation. The mandatory regulation was therefore improperly applied. Citation 174561 should be vacated.

Citation 174568

At the commencement of the hearing the Secretary moved to vacate this citation (Tr. 7). The motion was granted and the order is formalized in this decision (Tr. 8).

Citation 174569

This citation alleges a violation of Title 30, C.F.R., Section 56.14-3. 3/

The citation was issued for an insufficient guard at the head and tail pulley on a reversible conveyor at Servtex's plant. Herrera testified that the guard extended eight inches above the pulley's top pinch point. But the bottom pinch point was exposed as the pinch point was 3 1/2 feet beneath the bottom of the guard. The exposed pinch point was adjacent to a walkway (Tr. 72, Exhibit P7).

Herrera stated that both pinch points subjected miners to potential dangers. The guard extending above the pulley was felt to be inadequate because the conveyor belt was smaller than the pulley, thereby creating an exposed pinch point. A person performing service duties or removing debris from the top of the conveyor could therefore be caught (Tr. 30). The unguarded pinch point on the bottom of the pulley (and adjacent to the walkway) exposed miners to potentially serious injuries should they fall or reach into the area (Tr. 29).

Servtex offered evidence that the space between the shaft of the pulley and the walkway was a distance of 20 to 24 inches and that the radius of the pulley was approximately nine inches (Tr. 89, 100). I find additional

---

3/ The cited section 30 C.F.R. § 56.14-3 provides as follows:
Mandatory. Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley.

conflicting testimony offered by Servtex to be unconvincing. 4/ A photograph of the pulley, offered by Servtex, does not shed light on the dispute: the angle of the photograph and a person's foot effectively obstruct the view of both the pulley and the alleged gap in the guard (Exhibit R8).

I find from MSHA's evidence that: the bottom pinch point was approximately 27 inches below the guard, and 15 inches above the walkway. 5/ I therefore accept MSHA's evidence that the bottom pinch point on the pulley was unguarded. The unguarded pinch point, adjacent to a walkway, posed a foreseeable hazard to a miner's safety. It was readily accessible to miners in the normal course of their duties, and was not indirectly guarded by location. A previous case has upheld a citation issued for a similar condition. Central Pre-Mix Concrete Co., 1 FMSHRC 1424 (September (1979) (ALJ). Citation 174569 should be affirmed.

Citation 174575

This citation also alleges a violation of a mandatory safety standard, 30 C.F.R. Section 56.14-3. 6/ Servtex is charged with failing to provide an adequate head pulley guard.

Inspector Herrera testified that the 4 1/2 foot pulley guard extended ten inches above the pinch point created by the pulley and conveyor belt (Tr. 58, 65). The width of the conveyor belt was smaller than that of the pulley, creating an exposed area on each end of the pulley of about four inches (Tr. 34, 35). Such a situation created two pinch points and made the guard less effective than it would have been if the conveyor belt and guard were directly adjacent to one another (Tr. 29, 34). The pulley was surrounded on three sides by a walkway (Tr. 35). Serious injuries could be suffered should a miner fall against the exposed part of the pulley, or reach in and be caught in the pinch point (Tr. 35).

4/ Respondent also claims that the bottom of the pulley and the lower pinch point extend below the walk way, and that both pinch points were covered by a guard (Tr. 89).

5/ Figures are derived from the following measurements:
(a) Distance from guard to walkway = 42"
(b) Distance from shaft of pulley to walkway = 24"
(c) Radius of pulley = 9"
(d) Distance between walkway and bottom of pulley (and pinch point) = (b)-(c) = 15"
(e) Distance from bottom of guard and pinch point = (a)-(d) = 27".
(Transcript at 72, 89, 100, P7).

6/ The standard is cited in footnote 3.

On the other hand, Servtex claims that its pulley guard was adequate. It asserts that MSHA Management Letter No. 80-39 requires guards to extend only "a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley." Servtex also argues in its reply brief (page 2) that accidental contact with the pinch points is "extremely unlikely" and that deliberate acts of reaching over the guard cannot be prevented.

I disagree with Servtex's construction of the evidence. It is true that it is unlikely that a miner would reach behind the guard and be caught in the pinch point. But in the unguarded area contact could readily be made. Exhibit P8 illustrates this point. A photograph of a pulley guard offered by Servtex (Exhibit R11) does not alter my conclusion, since statements made during the hearing suggest that the pulley guard depicted in the photograph was not the one cited by Herrera (Tr. 68).

The Commission case law establishes that where a miner can become entangled in pinch points during the ordinary course of duties then the citation should be affirmed. Belcher Mine, Inc., 5 FMSHRC 584 (March 1983) (ALJ); Central Pre-Mix Cement Co., 1 FMSHRC 1424 (September 1979)(ALJ).

Therefore, I accept Herrera's assessment of the hazard involved with the head pulley guard. The potential of entanglement in the pinch point, even though "extremely unlikely," does exist. Accordingly, Citation 174575 should be affirmed.

This is an appropriate place to discuss the factual differences between Citation 174561 and the remaining guarding citations. In citation 174561: Exhibit P6 shows the coupling in this citation to be guarded by location. It would virtually be impossible for a miner to be exposed to the hazard of the unguarded coupling. On the other hand, exposed pinch points in the other citations are not so guarded. In sum, the later violative conditions expose a miner in the ordinary course of his work to the hazard of entanglement.

Citation 174573.

This citation charges respondent with a violation of Title 30, C.F.R., Section 56.12-67, 7/ due to an allegedly inadequate transformer fence.

The uncontroverted evidence establishes the following facts:

The fence around the transformer was 6 to 6 1/2 feet high (Tr. 39, 91).

7/ The section provides as follows:

> Mandatory. Transformers shall be totally enclosed, or shall be placed at least 8 feet above the ground, or installed in a transformer house, or surrounded by a substantial fence at least 6 feet high and at least 3 feet from any energized parts, casings, or wirings.

A "muck pile" had been allowed to accumulate outside the fence, with one foot to 18 inches of debris settling against the fence over a distance of 6 to 8 feet (Tr. 91, 121, P9).

The foregoing facts establish a violation of Section 56.12-67. The pile of debris that had accumulated against the transformer fence effectively reduced the fence's height to less than 6 feet. Therefore, Citation 174573 was properly issued, and it should be affirmed.

Civil Penalties

Petitioner proposes the following civil penalties for the three citations that are to be affirmed:

Citation 174569		$98
174573		60
174575		44
	Total	$202

Section 110(i) [now 30 U.S.C. 820(i)] of the Act sets forth six criteria to be considered in determining civil penalties:

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

Concerning prior history: The MSHA computer printout indicates that Servtex was assessed 22 violations from June 1979 to the beginning of June 1981 (Exhibit P1). Fifteen citations were issued during June 1981, four of which are at issue in this case (Tr. 15).

Concerning size: Servtex is a medium-sized operator. The evidence indicates that 105 people are employed at Servtex's Ogden Quarry and Plant. The number of man-hours worked was approximately 54,605 hours for the first quarter of 1981 (Tr. 42, 43).

Concerning negligence: The violative conditions should have been obvious to the operator.

Concerning the effect on operator's ability to continue in business: This is essentially an affirmative issue to be established by the operator. Buffalo Mining Co., 2 IBMA 226 (1973). Since no argument was advanced by Servtex that payment of the proposed penalties would impair its ability to continue in business, I assume that no such adverse affect will be suffered through payment of assessed penalties.

Concerning gravity: The gravity of each violation is moderate. Protective devices had been provided in each instance, but such devices were insufficient.

Concerning good faith: The record establishes that Servtex promptly abated the violative conditions.

After considering all the statutory criteria, I conclude that the penalties proposed by petitioner for Citations 174569, 174575, and 174573 are appropriate.

The Solicitor and Servtex's counsel filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Based on the findings of fact and conclusions of law herein, I enter the the following:

ORDER

1. Citations 174561 and all penalties therefor are vacated.

2. Citation 174568 and all penalties therefor are vacated.

3. Citation 174569 and the proposed penalty of $98 are affirmed.

4. Citation 174573 and the proposed penalty of $60 are affirmed.

5. Citation 174575 and the proposed penalty of $44 are affirmed.

6. Respondent is ordered to pay the sum of $202 within forty (40) days of the date of this order.

John J. Morris
Administrative Law Judge

Distribution:

James J. Manzanares, Esq., (Certified Mail), Office of the Solicitor
United States Department of Labor, 555 Griffin Square, Suite 501
Dallas, Texas 75202

Mr. Ed S. Chapline, III (Certified Mail), Gifford Hill Corporation
8435 Stemmons Frwy., P.O. Box 47127
Dallas, Texas 75247

/blc

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 1983

RAY WARD, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 82-55-D
v.	:	
	:	BARB CD 81-38
VOLUNTEER MINING CORPORATION, Respondent	:	

DECISION

This proceeding was brought by the Complainant under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., seeking relief for alleged acts of discrimination. The case was heard at Knoxville, Tennessee.

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 underground coal mine that produced coal for sale or use in or substantially affecting interstate commerce.

2. Complainant was hired at Respondent's mine on October 30, 1978, as an operator of a continuous miner, a machine used to extract coal, and operated such equipment until April 10, 1981. On that date, Complainant was temporarily assigned to relieve a roof-bolter

operator, Paul McKamey, who left on sick leave. Complainant had severe stomach pains at that time, because of an ulcerous condition, and was also upset by being assigned to run the roof bolter without instruction as to the roof control plan. He told his immediate supervisor that he was leaving the mine to talk to the mine superintendent, Everett Davidson, because Complainant needed to see a doctor about his pain.

3. He told Davidson that he needed to see a doctor because of stomach pains and that he was upset about being assigned to the roof bolter without training. Davidson denied him sick leave and told him that, as far as Davidson was concerned, Complainant had quit his job. Complainant saw a doctor for examination and treatment and later that day, April 10, reported the job incident to the local office of the Mine Safety and Health Administration, United States Department of Labor (MSHA).

4. When Complainant reported for work the following Monday, April 13, and was denied employment, Complainant filed a discrimination complaint with MSHA under section 105(c)(1) of the Act. This complaint was settled by an agreement to reinstate Complainant with back wages for 108 hours. Complainant interpreted the agreement as a right to be reinstated in his regular position, continuous miner operator, but the written agreement did not specify a position in which he was to be reinstated.

5. Complainant was reinstated on April 29, 1981. His supervisor told him that, since McKamey was still on sick leave, Complainant would be assigned to roof bolter until McKamey returned, and the supervisor estimated that McKamey would be back in a few days.

McKamey returned to work in two or three days, but management kept Complainant on the roof-bolter job.

6. On July 10, 1981, Respondent laid off a number of miners, including Complainant, for the stated reason that the section where they were working was being closed and some time would be needed before a new section would open.

7. All of the miners on Complainant's shift who were laid off were later rehired except Complainant, and an additional employee was hired after the layoff. The miners on Complainant's shift who were rehired were: Paul McKamey, rehired on August 3, 1981, Herman Carroll, rehired on August 3, 1981, Joe Ward, rehired on August 10, 1981, and Hoyle West, rehired on August 17, 1981. Bayless Phillips, (a prior employee), who was not employed at the time of the layoff, was hired on August 17, 1981. During the layoff, Complainant asked Davidson for reinstatement but was not rehired; instead, Davidson told him that he could not tell when or if he would be rehired and recommended that Complainant seek employment elsewhere.

8. The layoff on July 10, 1981, was the only layoff at the mine in the time Complainant was employed there. The record does not indicate whether or not there had been a layoff at the mine before Complainant's employment.

9. At all pertinent times, Respondent's employees did not have a collective bargaining agreement. Respondent paid all non-supervisory miners the same rate, regardless of position or length of employment with Respondent.

10. During the period of Complainant's employment by Respondent,

until July 10, 1981, Respondent operated two coal-producing sections on the day shift and one section on the night shift.

DISCUSSION WITH FURTHER FINDINGS

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

> (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.

This section protects a miner from discrimination because of safety complaints or his exercise of other rights under the statute.

Complainant's complaint to Respondent's mine management on April 10, 1981, and to MSHA later that day, because of his assignment to run the roofbolter without adequate training, was a protected activity under section 105(c)(1) of the Act. His discrimination complaint on April 13, 1981, filed with MSHA under section 105(c)(1) of the Act, was also a protected activity under that section.

Complainant's regular job with Respondent, for over 2 1/2 years, was a continuous miner operator. He was hired for that position on October 30, 1978, and performed this skilled position without incident or any problem until April 10, 1981.

His first discrimination complaint was settled by

Respondent's agreement to reinstate him with back pay for 108 hours and Complainant's agreement to drop the charges.

Pursuant to this settlement, he was reinstated on April 29, 1981. He was not reinstated in his regular position but was given a temporary assignment to relieve Paul McKamey as roof bolter until McKamey returned from sick leave. Complainant's supervisor, Otis Cross, stated that this assignment would be only a few days, since McKamey was expected to return to work in a few days.

The circumstances of the temporary assignment on April 29 raise a suspicion of a discriminatory intent to penalize Complainant because of his prior safety and discrimination complaints. Respondent did not show a legitimate business reason for this temporary assignment, to explain why Complainant could not have reasonably been reinstated as a continuous miner operator and another employee assigned to the job of roof bolter until McKamey's return.

However, without resolving whether the April 29 temporary assignment was discriminatory, I conclude that the permanent assignment of Complainant as a roof bolter helper, on or about May 4, 1981, was discriminatory.

When McKamey returned in a few days, on or about May 4, 1981, Respondent did not return Complainant to his regular position of continuous miner operator but, instead, made him a permanent roof bolter helper. I find that this assignment was discriminatory, and motivated by an intention to retaliate against Complainant because of his exercise of his rights under the statute on April 10 and April 13, 1981. Respondent offered no credible business explantion for its assignment of Complainant as a roof bolter helper after McKamey

returned, or its transfer of Dolphus Carroll from roof bolter to continuous miner operator helper, in order to make Complainant a roof bolter helper. Carroll was not trained as a continuous miner operator, but was an experienced roof bolter. The assignment of him as a continuous miner operator helper was contrary to Respondent's practice of assigning two qualified continuous miner operators on the same shift, so that they could take turns as miner operator and helper in order to achieve the best production. Complainant was a qualified miner operator, and had worked effectively with Joe Ward, another qualified miner operator, as a team for over two years and nine months — rotating with him as operator and helper. The disturbance of this assignment of the two miner operators, by moving Carroll to miner operator helper, displaced Complainant from his regular position with no showing of a legitimate business reason for this job change. I find that the permanent assignment of Complainant as a roof bolter operator or helper was discriminatory. In addition, I find that Davidson demonstrated a discriminatory intent toward Complainant by his hostility in not talking to Complainant at various times when Complainant greeted him after Complainant's reinstatement. This hostility is consistent with, and is further evidence of, an intention by Davidson to discriminate against Complainant because of his prior discrimination complaint and safety complaint.

The layoff on June 10, 1981, was for the purported reason that the section where complainant's shift was mining was being closed and some time was needed before a new section would be opened. This decision by Respondent was different from past practices, in that

Davidson testified that he usually kept a crew on when a section was being closed and gave them duties in order to keep their jobs while the next section was being prepared for mining. The decision to lay-off Complainant's shift on July 10 raises a suspicion of a discriminatory intent to use the layoff as a means of discharging Complainant. However, without resolving whether the layoff was discriminatory, I conclude that the decision not to rehire Complainant after the layoff was motivated by an intention to discriminiate against him because of his prior discrimination complaint and safety complaint. Everyone on Complainant's shift who was laid off was later rehired except Complainant, an additional employee was hired in preference to Complainant, Complainant requested but was denied reemployment during the layoff, and Respondent provided no credible, legitimate business reason for its failure to rehire Complainant. In addition, as discussed above, there was discriminatory treatment of Complainant before the layoff.

Complainant has not met his burden of proof on the charge that Respondent violated section 105(c)(1) by denying him the opportunity to work overtime after April 29, 1981. His proof raises a suspicion of a discriminatory intent to deny him overtime opportunities after April 29, 1981 1/, but Complainant did not prove sufficient facts to

1/ The employment records show that, prior to April 29, 1981, Complainant worked overtime an average of about one week a month but he worked no overtime from the time of his reinstatement on April 29, 1981, until his layoff on July 10, 1981; a number of employees worked overtime both before April 29, 1981, and in the period from April 29, 1981, until July 10, 1981.

make a prima facie case on this charge. He did not prove either Respondent's practice with respect to how overtime asignments were made or any specific incidents in which Complainant requested but was denied overtime assignments.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. Respondent violated section 105(c)(1) of the Act by failing to assign Complainant to his regular position of continuous miner operator on or about May 4, 1981, when Paul McKamey returned from sick leave.

3. Respondent violated section 105(c)(1) of the Act by failing to reemploy Complainant on and after August 3, 1981, when the other employees on layoff were reemployed, and on August 17, 1981, when Bayless Phillips was employed.

4. Complainant has not met his burden of proof on the charge that Respondent violated section 105(c)(1) of the Act by denying Complainant the opportunity to work overtime after April 29, 1981.

5. Complainant is entitled to reinstatement, back pay with interest, a reasonable attorney's fee and costs, and such other relief as may be deemed equitable and just.

Proposed findings of fact and conclusions of law inconsistent with the above are rejected.

PENDING A FINAL ORDER

Jurisdiction of this proceeding is retained by the judge pending a final order for relief. Counsel for the parties should confer in an effort to stipulate the amounts and other relief due under this Decision. Such stipulation will be without prejudice of Respondent's

right to seek review of this Decision. Complainant shall have 10 days to file a proposed order, and Respondent shall have 10 days to reply to Complainant's proposed order. If necessary, a further hearing will be held on issues relevant to relief.

William Fauver
Administrative Law Judge

Distribution Certified Mail:

Dorothy B. Stulberg, Esq., Mostoller and Stulberg, 100 Tulsa Road at Illinois Avenue, Oak Ridge, TN 37830

Joseph H. Van Hook, Esq., Drawer M, Oliver Springs, TN 37840

kg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUL 29 1983

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	DOCKET NO. WEST 82-184-M
Petitioner	:	A.C. No. 48-00144-05010
v.	:	
	:	Sunrise Mine & Mill
C F & I STEEL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor
U. S. Department of Labor, Denver, Colorado
for Petitioner;
Allan R. Cooter, Esq., Pueblo, Colorado
for Respondent.

Before: Judge Carlson

The Secretary of Labor petitions this Commission for the affirmance of a penalty assessed against C F & I Steel Corporation (CF&I) for the alleged violation of 30 C.F.R. § 57.19-124, (1982) a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (1976 and Supp. 1982). The cited regulation provides as follows:

> Mandatory. Hoist ropes other than those on friction hoists shall be cut off at least six (6) feet above the highest connection to the conveyance at time intervals not to exceed one (1) year unless a shorter time is required by standard 57.19-126, or by conditions of use. The portion of the rope that is cut off shall be examined by a competent person for damage, corrosion, wear and fatigue.

After notice to the parties a hearing was held on February 2, 1983, in Denver, Colorado. The parties stipulated to all the material facts. Certain of the stipulations were oral; others were based upon agreement that all factual representations contained in the pleadings and supporting documents already in the file were true. Both parties submitted post-hearing briefs.

THE FACTS

The material facts as revealed by the stipulations may be summarized as follows:

(1) CF&I's Sunrise mine is subject to the coverage of the Act.

(2) The Sunrise operation is large with an average history of citations.

(3) The mine hoist, a non-friction hoist, is the type of hoist described in 30 C.F.R. § 57.19-124.

(4) On May 21, 1981, CF&I filed a petition for modification of the application of that standard, seeking to avoid the annual requirement for cutting off a six foot length of hoist rope for inspection.

(5) CF&I sought this modification from the Secretary because the mine was shut down on July 13, 1980, after which the hoist was used by eight to ten maintenance people with an approximate frequency of five percent of the normal operating use.

(6) The rope was last replaced on June 20, 1980.

(7) On January 21, 1982, while CF&I's petition for modification was pending, a representative of the Secretary inspected the mine and issued a citation for violation of 30 C.F.R. § 57.19-124.

(8) In the year prior to inspection CF&I did not cut and examine the rope as required by 30 C.F.R. § 57.19-124.

(9) At no time prior to the hearing did CF&I file an application for interim relief under 30 C.F.R. § 44.16 et seq.

(10) On March 18, 1982, CF&I received notice that its petition for modification was denied.

(11) CF&I exercised good faith in abating the violation shortly after receiving the inspection citation.

ISSUE

Does the pendency of a petition for modification, filed in good faith, abrogate or limit the Secretary's authority to issue a valid citation for violation of the standard from which the petitioner seeks relief?

DISCUSSION

CF&I sought its modification of the hoist rope standard because the hoist in question received less-than-normal use and the hoist rope would therefore suffer less-than-ordinary wear. In defense against the Secretary's charge, CF&I basically argues that it was improper for the Secretary to issue the citation for violation of 30 C.F.R. § 57.19-124 because it had a petition for modification pending on that very regulation. Because of its good faith in pursuing a variance in the application of the standard to the hoist in question, and a reasonable expectation that it would ultimately be granted, CF&I contends it should not be subject to a citation while a decision on the modification request was pending.

The difficulty with this argument is manifest. Neither the Act nor the Secretary's regulations relating to modifications provide for any suspension of the Secretary's enforcement powers or duties while a mere petition for modification is pending. The regulations do provide an avenue of relief, however, in the form of an application for interim relief, which may be filed under 30 C.F.R. § 44.16. Such an application is adjunctive to the original petition and opens the way for an administrative suspension of enforcement pending a final determination on the petition itself. Unfortunately, CF&I failed to file an application for interim relief.

In this present proceeding CF&I suggests that its original petition for modification is the equivalent of an interim application, or includes one by implication. The argument cannot prevail. The provisions of 30 C.F.R. 44.16 require extensive special showings of fact beyond those specified for a petition for modification. Specifically, 30 C.F.R. § 44.16(e) provides:

> Before interim relief is granted, the applicant must clearly show that (1) the petition seeking modification has been filed in good faith, and the applicant is not using the proceeding solely to postpone or avoid abatement; (2) the requested relief will not adversely affect the health or safety of miners in the affected mine; and (3) there is a substantial likelihood that the decision on the merits of the petition for modification will be favorable to the applicant.

According to 30 C.F.R. § 44.16(d) these representations must be set out and supported in the application. In addition to the more burdensome special showings required, the interim relief mechanism provides procedural safeguards to insure that the enforcement powers of the Secretary are not suspended by unilateral action on the part of a petitioning party, to the possible detriment of the safety of miners. Section 44.16(f) allows all parties three days in which to respond to the interim application, and 44.16(h) allows for speedy hearings upon any of the issues raised. Thus, the regulations make a clear distinction between a petition for modification and an application for temporary relief. The former proceeds through the various procedural phases outlined in the Secretary's regulations in a way which does not affect the interim enforceability of the standard in question. On the other hand, the operator seeking temporary relief must supplement his modification efforts by special showings and must be prepared for a speedy hearing in which the facts pertaining to all issues may be aired in an adversarial setting. Only in this way can there be a reasonable assurance that the safety or health of miners will not be jeopardized by a precipitous and unwarranted suspension of the Secretary's enforcement duties. In short, the difference between the petition for modification and the application for interim relief is one of substance, not mere nomenclature or form. For that reason, CF&I's petition for modification cannot be construed to embody an implied request for interim relief.

CF&I places much emphasis upon it's good faith approach to the hoist problem, and its reasonable expection of success in its quest for a

modification. The case for modification does indeed seem strong. These factors, however, are simply not material to the issues before me. That CF&I may ultimately have been successful cannot affect the outcome here. Its miners, the Secretary, and other potential parties in interest were entitled to notice of any intent to seek a suspension of the hoist rope standard pending final action on the modification petition. That notice was required to be in the form of a formal application for interim relief. No such application was filed, and that oversight cannot be remedied in this present penalty proceeding.

Similarly, it is not material that the petition for modification was prepared pro se. It is likely true that had the company been aided by counsel an application would have been filed. Pro se status, however, cannot transform a petition for modification into an application for interim relief.

A further matter deserves note. After the hearing, CF&I submitted copies of correspondence showing that the company had asked the Secretary for further consideration of its modification request in view of MSHA's proposal to eliminate the part of the standard which requires cutting of the rope for examination. A letter to CF&I's General Superintendent by MSHA's Administrator for Metal & Nonmetal Mines dated March 14, 1983 appears to waive the cutting requirement for March 29, 1983. This correspondence cannot influence the outcome of this present proceeding. First, it was submitted after the factual record was closed, and was accompanied by no motion to reopen the record. Second, even if given consideration, MSHA's later action as to respondent's 1983 responsibilities does not alter the previously discussed legal precepts which govern the resolution of the issue before me.

PENALTY

The parties stipulate that if CF&I does not prevail upon the legal issue presented here, the $90.00 proposed by the Secretary should be affirmed (Tr. 4). Since I find the citation valid, and conclude that the $90.00 proposed penalty accords with the statutory criteria set out in section 110(i) of the Act, CF&I shall be required to pay a civil penalty of $90.00

ORDER

CF&I is therefore ordered to pay to the Secretary a civil penalty of $90.00 within 30 days of this decision.

John A. Carlson
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., (Certified Mail), Office of the Solicitor
United States Department of Labor, 1585 Federal Building
1961 Stout Street, Denver, Colorado 80294

Allan R. Cotter, Esq.,(Certified Mail), P.O. Box 316, Pueblo, Colorado 81102

/blc