JULY

Commission Decisions

Administrative Law Judge Decisions

JULY

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

Secretary of Labor, MSHA v. Halfway, Incorporated, Docket No. WEVA 85-15. (Judge Broderick, June 13, 1985).

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

Secretary of Labor, MSHA v. Cowin and Company, Docket No. WEST 85-13. (Judge Morris, Interlocutory Review of May 24, 1985 Order).

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 2, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of JAMES M. CLARKE	:	Docket No. LAKE 83-97-D
v.	:	
T.P. MINING, INC.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises in connection with a discrimination complaint filed under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"), by the Secretary of Labor on behalf of James M. Clarke against T.P. Mining, Inc. ("T.P. Mining"). We granted the Secretary's petition for discretionary review of an order issued by Commission Administrative Law Judge Joseph B. Kennedy. In this order dated April 25, 1984, the judge affirmed his previous severance of the civil penalty aspects of the case from the merits of the discrimination complaint and also commented critically upon the professional competence and ethical conduct of the Secretary's counsel, Frederick W. Moncrief. 1/ The Secretary asserts that the judge's critical comments regarding Mr. Moncrief are without foundation and should be struck. We agree.

The Secretary's complaint initiating this proceeding, which was filed under section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), alleged that T.P. Mining had discriminatorily discharged Mr. Clarke.

1/ In a subsequent order, dated May 10, 1984, the judge affirmed the April 25, 1984 order and dismissed the case "for want of prosecution."

The complaint requested, among other things, that Mr. Clarke be reinstated with back pay and benefits, and that a civil penalty of $5,000 be assessed against T.P. Mining for the alleged violation of section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1). Following negotiations, the parties were able to agree on a settlement satisfactory to Mr. Clarke. On April 12, 1984, the Secretary, through Mr. Moncrief, filed a motion with Judge Kennedy requesting that the discrimination complaint be dismissed. The Secretary's motion stated that, if successful, Mr. Clarke would have been entitled to $7,405.48 in back pay plus interest and that T.P. Mining had paid "$5,000 in compromise settlement of [Mr. Clarke's] claim." Mr. Moncrief attached to the motion a letter signed by Mr. Clarke that stated, "My discrimination case has been settled to my satisfaction." The motion did not refer to the civil penalty aspects of the case.

In an order dated April 3, 1984, the judge dismissed the charge of wrongful discharge contained in the complaint. The judge, however, severed the Secretary's civil penalty proposal from the complaint on the grounds that the dismissal motion provided "no basis ... for approval of a settlement of the Secretary's penalty proposal." The judge retained jurisdiction over the penalty portion of the case "pending receipt of the information on section 110(i) criteria necessary to approve settlement of the civil penalty aspect of the complaint."

In a letter to the judge dated April 18, 1984, Mr. Moncrief stated that the parties intended that the settlement of Mr. Clarke's back pay claim would resolve the case completely. The letter stated that the motion to dismiss might not have made clear that in settlement of the case the Secretary had agreed to forego seeking a civil penalty. Mr. Moncrief asserted, however, that the Secretary's determination to forsake a civil penalty had been an "important ingredient of the money settlement to Mr. Clarke." Mr. Moncrief cautioned that T.P. Mining might cancel the entire settlement unless the civil penalty aspects of the case were likewise dismissed. Mr. Moncrief added:

> The Secretary is concerned that these matters be resolved as quickly as possible. Mr. Clarke, who played an actual role in the settlement terms, is aware of the culmination of our efforts and is anxious to receive his money. [T.P. Mining] has made that payment on the assumption that it will end the matter. I am reluctant to authorize Mr. Clarke to cash his check, under the circumstances, even though technically it has been approved.

In response to Mr. Moncrief's letter, Judge Kennedy issued his order of April 25, 1984. In the order the judge affirmed his prior dismissal of the discrimination charge contained in the complaint and his severance of the civil penalty aspects of the case. The judge

stated that the Secretary's failure to disclose in the dismissal motion that one of the considerations leading to the settlement was the Secretary's agreement to forsake the civil penalty was evidence of Mr. Moncrief's "professional ineptitude." The judge characterized Mr. Moncrief's reluctance to authorize Mr. Clarke's cashing of the settlement check a "threat" which the judge termed both "unprofessional and ethically improper." The judge asserted, "The Solicitor has no right to hold complainant's settlement check hostage to his own intransigence and incompetence." He further stated that he found Mr. Moncrief's "irresponsible attempt to coerce the trial judge to [dismiss the civil penalty aspects of the case] .. reprehensible." Finally, the judge claimed, "In the past counsel have been careful to include a provision for payment of a reduced penalty in settlement of the penalty case even where the operator denied liability. Never in my experience has the Solicitor previously asserted a right to abandon or waive, without consideration or justification, the public's claim to a civil penalty in a discrimination case." Order at 2.

Having reviewed carefully the record in this matter, we conclude that the judge's comments with regard to Mr. Moncrief are unfounded and unwarranted. Mr. Moncrief appears to have provoked the ire of the judge by failing to address specifically the civil penalty aspects of the discrimination complaint in his motion to dismiss. This omission did not justify the judge's highly critical comments.

In general, it is clear that a civil penalty must be assessed for a violation of section 105(c)(1) of the Mine Act. Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2046 (December 1983). However, it is at least debatable whether, consistent with the Mine Act, a penalty may be forsaken in a discrimination case when the complainant requests that in settlement of the case his complaint be withdrawn before it has been determined on the merits that a violation of section 105(c)(1) has occurred. We need not resolve that issue here. Suffice it to say that there have been other cases before the Commission in which the complainant has requested that the complaint be withdrawn before liability is determined and where, despite the fact that neither the settlement agreement nor the motion to dismiss referenced the civil penalty aspects of the complaint, Commission judges nevertheless have dismissed the proceedings entirely. See, e.g., Secretary of Labor on behalf of Arnott v. Mettiki Coal Corp., FMSHRC Docket No. YORK 82-20-D (May 27, 1982)(ALJ).

Judge Kennedy's assertion in his order of April 25, 1984, that in the past counsel for the Secretary have always included in their motions to dismiss or their settlement agreements a provision for payment of a reduced penalty in settlement of the penalty case, even where the operator has denied liability, is simply not true. In fact, the judge himself has dismissed discrimination complaints in cases where neither the settlement agreement nor the motion to withdraw the complaint has

referenced a civil penalty and where it has been agreed in effect that settlement did not constitute an admission by the operator of a violation of the Act. Secretary of Labor on behalf of Taylor v. Buck Garden Coal Co., 6 FMSHRC 919 (April 1984)(ALJ); Secretary of Labor on behalf of Litz v. Shale Hill Coal Co., FMSHRC Docket No. PENN 83-162-D (January 12, 1984)(ALJ). The judge has also dismissed a discrimination complaint in a case where the settlement agreement expressly stated that the Secretary would not seek a civil penalty assessment for the violation of section 105(c) and that nothing contained in the settlement agreement would be deemed an admission by the operator of a violation of the Act. Secretary of Labor on behalf of Swann v. Chestnut Ridge Fuel Co., FMSHRC Docket No. VA 82-52-D (December 8, 1982)(ALJ).

Therefore, to the extent that the judge based his assertion that Mr. Moncrief's performance as a lawyer was "incompetent," "irresponsible," and "reprehensible," on his own inaccurate perception concerning the Secretary's past practice, his condemnations are unfounded and unwarranted. However, to avoid any repetition of the kind of procedural problem that developed in this case, we will require that, henceforth, when seeking dismissal of a discrimination complaint in settlement of the case, the Secretary shall include in both the dismissal motion and underlying settlement an express reference to the parties' agreement concerning the civil penalty. As noted above, we leave for another day resolution of the consequences, if any, of an attempted waiver of a penalty in such circumstances.

We can find no record support for the judge's assertions that Mr. Moncrief was "professionally inept," "irresponsible," or "incompetent." Rather, the record reveals that Mr. Moncrief ably represented Mr. Clarke. Mr. Moncrief filed the appropriate pleadings to initiate the action; he opposed what he believed would be a premature dismissal of the complaint harmful to Mr. Clarke's interests; he advocated and defended the Secretary's position; and he negotiated a settlement that satisfied Mr. Clarke. These were not the actions of one demonstrating the lack of ability to perform the legal functions required of him.

Judge Kennedy asserted that Mr. Moncrief's reluctance to authorize Mr. Clarke's cashing of the settlement check resulted in Mr. Moncrief "hold[ing] complainant's settlement check hostage to his own intransigence and incompetence." The judge described Mr. Moncrief's reluctance as "unprofessional," "ethically improper," and as a "threat." A review of the record does not support these characterizations. Mr. Moncrief's reluctance to advise Mr. Clarke to cash the check represented sound litigation judgment--an attempt to preserve the status quo until the dispute over the civil penalty was settled, based upon a legitimate concern over T.P. Mining's reaction to the severance of the civil penalty aspect of the case. Although one could read into Mr. Moncrief's statement an attempt to exert some "pressure" on the judge to approve the settlement promptly, we do not believe that a jurist acting reasonably and responsibly would find Mr. Moncrief's statements to amount to an ethically improper "threat." Rather, we regard the statements as well within the zone of permissible advocacy on behalf of a client.

In concluding that the judge's criticism of Mr. Moncrief was unwarranted, we do not imply that the Commission's judges must remain mute in the face of actual incompetence, unprofessional conduct, or unethical behavior. A judge is not a cipher who perceives without comment all that passes before him. Rather, a judge is an active participant in the adjudicatory process and has a duty to conduct proceedings in an orderly manner so as to elicit the truth and obtain a just result. See, e.g., Knapp v. Kinsey, 232 F.2d 458, 466 (6th Cir. 1956), cert. denied, 352 U.S. 892 (1956). Among a judge's specific obligations in this regard is a duty to admonish counsel, when necessary, during the course of proceedings--although such admonitions are to be couched in temperate language. Cromling v. Pittsburgh & Lake Erie R.R. Co., 327 F.2d 142, 152 (3rd Cir. 1963). Here, however, the judge's criticism of counsel was unnecessary and the language used was intemperate. Words such as "incompetence," "unprofessional," "ineptitude," "ethically improper," "reprehensible," and "irresponsible," when published without support and broadcast to the public, not only wound the advocate personally--they damage professionally. In unjustly maligning one who appears before him, a judge not only demeans himself, but dishonors this Commission. Such unwarranted rebukes can only lessen public confidence in this independent agency's ability to serve its statutory role as a temperate and even-handed decision maker.

The Commission demands that those who practice before it conform to the standards of ethical conduct required of practitioners in the courts of the United States. 29 C.F.R. § 2700.80(a). Where such standards have been violated, the Commission's procedural rules provide an orderly and fair means of correction. Commission Procedural Rule 80(b) mandates that disciplinary proceedings be instituted when one practicing before the Commission has engaged in unethical or unprofessional conduct. 29 C.F.R. § 2700.80(b). In order to ensure due process to those charged, Commission Procedural Rule 80(c) provides that those accused be afforded notice of the charges and the right to a hearing. 29 C.F.R. § 2700.80(c). Specifically, Rule 80(c) requires that a judge "having knowledge of circumstances that may warrant disciplinary proceedings ... shall forward such information, in writing, to the Commission for action." 29 C.F.R. § 2700.80(c).

Judge Kennedy's comments with regard to Mr. Moncrief contain assertions of unethical and unprofessional conduct which, had they been well-founded, would have been grounds for a disciplinary proceeding. We have previously cautioned Judge Kennedy that such allegations made in the course of a proceeding, without the required disciplinary referral, deprive the accused of elementary procedural safeguards. Canterbury Coal Co., 1 FMSHRC 335, 336 (May 1979). By now, Judge Kennedy should know how to make a disciplinary referral. Canterbury Coal Co., 1 FMSHRC at 336; James Oliver and Wayne Seal, 1 FMSHRC 23, (March 27, 1979); In re Kale, 1 BNA MSHC 1699 (FMSHRC Docket No. D-78-1, November 15, 1978). In this case, Judge Kennedy's demonstrated insensitivity to the legitimate interests and rights of those appearing before the Commission, and his disregard of the Commission's rules and our prior warnings on this subject, warrant our gravest concern.

Accordingly, we conclude that the judge's critical comments were unfounded and unjustified. Based on the record, even if the judge had followed the proper procedural course for making a disciplinary referral, we would have vacated the referral as being unfounded. Therefore, all but the last paragraph of the order of April 25, 1984, is struck, as is the phrase "for want of prosecution" in the judge's final order of dismissal. 2/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

2/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 2, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 83-61
v.	:	
MONTEREY COAL COMPANY, INC.	:	

BEFORE: Acting Chairman Backley; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), the issues presented are whether substantial evidence supports a Commission administrative law judge's findings that an operator's violation of its ventilation system and methane and respirable dust control plan was "significant and substantial" and that the operator exhibited negligence in connection with the violation. For the reasons set forth below, we affirm.

On February 3, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Monterey Coal Company ("Monterey") pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), during an inspection of Monterey's No. 1 underground coal mine located in Carlinville, Illinois. The citation charged Monterey with a violation of 30 C.F.R. § 75.316, the mandatory safety standard requiring an operator to have an approved ventilation system and methane

and dust control plan for each of its mines. 1/ The ventilation plan for Monterey's No. 1 Mine required the operator to maintain a minimum quantity of 5,000 cubic feet of air per minute ("cfm") at working faces whenever the ventilation tubing at the faces extended in excess of 370 feet from a fan. 2/ The citation stated that Monterey was not complying with its ventilation plan in violation of the standard "in that the quantity of air in the 18-inch tubing (390 feet from fan), when coal was being cut with a continuous miner, was only 1,900 cfm when measured...." The inspector checked the "significant and substantial" box on the citation form and indicated that two persons were exposed to the violative condition.

The inspector did not testify at the hearing, but the judge admitted his affidavit into evidence. In the affidavit, the inspector stated that, following issuance of the citation, rock dust bags were found in the ventilation tubing. Once the bags were removed, the quantity of air at the face increased to 6,302 cfm. The inspector also set forth the findings on which he based his characterization of the violation as being "significant and substantial": (1) the No. 1 mine liberated more than one million cubic feet of methane or other explosive gases during a 24-hour period during mining operations and was under the five-day spot inspection cycle mandated by section 103(i) of the Mine Act, 30 U.S.C. § 813(i); (2) although permissible methane readings of .2% and .3% were recorded 15 feet outby the face, the inspector believed that higher levels could have existed at the face itself, where he could not take measurements because of unsupported roof; (3) the methane level

1/ 30 C.F.R. § 75.316, which repeats section 303(o) of the Mine Act, 30 U.S.C. § 863(o), provides:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

2/ The No. 1 Mine used three ventilation fans that collectively pulled a quantity of air of 700,000 cfm through the mine. A system of exhaust fans and fiberglass tubing removed methane and dust from working face areas. The tubing was hung from the roof and a 55-horsepower exhaust fan pulled air through the tubing, into a return airway, and out of the mine. Before any cutting of coal was done by the continuous miner, the tubing was located two to three feet from the face. As the miner advanced, the tubing was kept within 10 feet of the face.

could have built up at the face at any time, creating the hazard of an ignition that could have caused burn injuries to the two operators of the continuous miner; (4) such burn injuries could have resulted in lost work days or restricted duty; and (5) the reduction of air quantity from the requisite 5,000 cfm to 1,900 cfm "contributed to the increase in methane gas and respirable dust and increased the exposure of miners to the hazard caused by high methane levels and respirable dust."

Before the administrative law judge, counsel for the Secretary of Labor and Monterey stipulated that a violation of section 75.316 had occurred, and that the No. 1 Mine was a "gassy" mine. The parties also stipulated that the inspector had recorded methane readings in the acceptable range 15 feet from the working face, and had not taken respirable dust samples. The parties further agreed that a continuous miner was cutting coal at the location where the citation was issued. At the hearing, Monterey's safety coordinator explained how rock dust bags had gotten into the ventilation tubing:

> As the installers install [the ventilation tubing] and turn the fan on, as they walk past certain joints or weak spots in the fiberglass tubing, they'll find where the tubing is sucking out back there ... and rather than get a piece of plastic material that's manufactured for it, they'll take an empty rock dust bag and put it up there. And it will hold and control air real good. Every once in a while they'll use too small a strip and it will suck in through the tubing, or as they walk away later it'll collapse and suck in. It's not the greatest material in the world to use.... The workmen are putting them there to try to stop a leak.
>
> * * * *
>
> If you have problems when you take your reading and move from room to room, a lot of times the first thing you'll do is walk back to the fan, disconnect the tubing, pull out a rock dust bag and start all over.

Tr. 82-83. During this testimony, Monterey's counsel interjected that this method of tubing repair was "probably not a one time only occurrence." Tr. 83.

The judge found that the admitted violation of the standard was significant and substantial, and that Monterey exhibited "gross" negligence in connection with the violation. 6 FMSHRC 424, 470-71, 473 (February 1984)(ALJ). With regard to the significant and substantial issue, the judge stated that he "agree[d] with MSHA's arguments that the interruption to the ventilation flow resulted in a significant decrease in the amount of air required to be maintained where coal was being cut" and that this "marked decrease in air presented a substantial hazard to the miners

working in the cited area...." 6 FMSHRC at 470. The judge emphasized that the interruption to the ventilation flow resulted from what he labelled Monterey's "practice of using ... rock [dust] bags to make ... repairs [to the ventilation tubing.]" 6 FMSHRC at 471 (emphasis in original). In finding that Monterey was grossly negligent, the judge also focused on the consideration that, in his view, Monterey "routinely used" rock dust bags to make repairs in the tubing. 6 FMSHRC at 473. The judge assessed a civil penalty of $850 for the violation.

On review, Monterey argues that the judge misapplied the test first stated in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), for determining whether a violation is significant and substantial. Specifically, Monterey asserts that the judge erred in premising his significant and substantial findings on what he regarded as the cause of the violation, Monterey's "practice" of using rock dust bags to repair ventilation tubing. Monterey contends that substantial evidence does not support the finding that any such "practice" existed, and that the judge's focus on this alleged practice ignored the main issue: whether there was a reasonable likelihood of a reasonably serious injury or illness given the facts surrounding this particular violation. Monterey argues that the Secretary of Labor failed to prove that there was a reasonable likelihood of this violation resulting in the danger of excessive buildup of methane or respirable dust, which in turn could contribute to serious injury or illness. It points out that an excessive level of methane was not actually present and the inspector did not test the respirable dust level. Monterey also maintains that substantial evidence fails to support the judge's finding that the violation was the result of Monterey's gross negligence.

We briefly restate the major principles for determining whether a violation is "significant and substantial." 3/ A violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a

3/ Section 104(d)(1) of the Mine Act provides in relevant part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. § 814(d)(1)(emphasis added).

reasonably serious nature." National Gypsum, supra, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), we articulated in detail the four elements that the Secretary must prove to meet the National Gypsum test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. We have further explained that in proving the third element, "the Secretary [must] establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984). Finally, as the statutory language directs, we have held that it is the contribution of the violation to the cause and effect of a hazard that must be found significant and substantial. U.S. Steel Mining Co., Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The parties stipulated to Monterey's violation of its ventilation plan, and hence of section 75.316. Indeed, as the judge observed (6 FMSHRC at 459), the violative condition -- a measured air quantity of only 1,900 cfm -- represented a major departure from the minimum air quantity of 5,000 cfm required under Monterey's plan at working faces when the ventilation tubing extended more than 370 feet from a fan.

With respect to the hazard contributed to by the violation, the hazards associated with inadequate ventilation, especially at working faces, are among the most serious in mining. Section 303(b) of the Mine Act, 30 U.S.C. § 863(b), requires that "the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes," and that "[t]he minimum quantity of air in any coal mine reaching each working face shall be three thousand cubic feet a minute." See also 30 C.F.R. § 75.301 (restating statutory provisions). A basic reason for these requirements is the grave danger that, if there is not adequate ventilation, ignitions or explosions can result from concentrations of explosive gases like methane, either alone or mixed with coal dust, liberated during mining operations. When coal is freshly cut, methane can be liberated in dangerous amounts in short periods of time. Although methane itself becomes explosive at a 5% concentration, even a smaller percentage concentration of the gas mixed with fine coal dust can generate an explosion. See, e.g., S. Cassidy (ed.), Elements of Practical Coal Mining 199, 243-47 (1973); R. Lewis & G. Clarke, Elements of Mining 695 (3d. ed. 1964). In enacting the statutory ventilation standards of the Mine Act, Congress expressly recognized these, and related, dangers associated with inadequate ventilation:

> [V]entilation of a mine is important not only to provide fresh air to miners, and to control dust accumulation, but also to sweep away liberated

> methane before it can reach the range where the gas could become explosive. In terms then of the safety of miners, the requirement that a mine be adequately ventilated becomes one of the more important safety standards under the ... Act.

S. Rep. No. 181, 95th Cong. 1st Sess. 41 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 629 (1978).

In the present case, Monterey's mine is a gassy mine that liberates excessive amounts of methane and is under the spot inspection cycle mandated by section 103(i) of the Mine Act. 30 U.S.C. § 813(i). The citation was issued at a working face where coal was being cut. For the purposes of this decision, the discrete hazard contributed to by the loss of ventilation, was, as the inspector explained in his affidavit, a buildup at the face of methane and dust that could result in a possible methane ignition or could propagate an explosion.

The key issue is whether there was a reasonable likelihood that the hazard contributed to would result in an event in which there was an injury. We agree with the judge that there was such a reasonable likelihood. As noted, the mine was gassy and coal was being cut with a continuous miner at the working face where the citation was issued. As the inspector stated in his affidavit, methane could have been liberated at any time and, as a result of the serious deficiency in the ventilation, could have become concentrated in a relatively short period of time. The operation of the miner itself provided a potential ignition source. Given the fact tht less than 40 per cent of the required minimum quantity of air was reaching the face, we have no difficulty concluding that, under the facts presented, a reasonable likelihood of an ignition or explosion in which there would be an injury to the miners was established. Monterey does not seriously dispute that any such injury would be of a reasonably serious nature.

The major thrust of Monterey's objection to the judge's significant and substantial findings is that he erred in commenting on the alleged cause of the violation itself, the "practice" of using rock dust bags to repair ventilation tubing. Although substantial evidence supports the conclusion that the presence of rock dust bags in the ventilation tubing was the cause of the decreased airflow, we do not premise our decision on whether such use of these bags was a normal, routine practice at this mine. The essential and undisputed fact is that there was a major decrease from the required minimum ventilation level. Whatever the precise chain of causation leading to the loss of ventilation at the time of the citation, the loss itself, in conjunction with the other factors discussed above, was sufficient to create a reasonable likelihood of an injurious ignition or explosion. Monterey further objects that at the time of the citation there was no evidence that methane was

present at dangerous levels. As we have observed previously, our proper focus is on the hazards posed by continued mining operations. See, e.g., U.S. Steel Mining Co., Inc., supra, 6 FMSHRC at 1574-75. Here, the cutting of coal was ongoing and the potential for methane liberation was presented.

In sum, we conclude that substantial evidence supports the judge's conclusion that the violation was significant and substantial.

With regard to the judge's negligence findings, we need not engage, as did the judge, in a quantification of the degree of the operator's negligence. See Penn Allegh Coal Co., Inc., 4 FMSHRC 1224, 1227 (July 1982). Rather, we find that the record supports a finding of negligence and that the penalty assessed by the judge is appropriate and consistent with the statutory penalty criteria. 30 U.S.C. § 820(i).

Accordingly, on the bases discussed above, the judge's decision is affirmed. 4/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 2, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. HOPE 79-323-P
v.	:	
MONTEREY COAL COMPANY	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case is before us on petitions for interlocutory review filed by Monterey Coal Company ("Monterey") and Frontier-Kemper Constructors, Inc. ("Frontier-Kemper"), a contractor hired by Monterey to sink a shaft at its Wayne Mine in Wayne County, West Virginia. Monterey seeks review of an order issued by a Commission administrative law judge denying its motion to dismiss it as a party-respondent in a civil penalty proceeding instituted by the Secretary of Labor pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). Frontier-Kemper seeks review of the judge's decision to allow the Secretary to amend his proposal for penalty to add Frontier-Kemper as a respondent. For the reasons that follow, we dismiss Monterey's petition, reverse the judge's decision adding Frontier-Kemper as an additional respondent, and remand for further proceedings consistent with this decision.

This case had its genesis in a section 107(a) imminent danger withdrawal order issued by the Secretary to Monterey on May 8, 1978. 30 U.S.C. § 817(a). The order alleged that three violations of mandatory safety standards had contributed to a fatal accident at the Wayne Mine shaft-sinking operation. The Secretary subsequently instituted this action against Monterey, seeking civil penalties for those violations. Monterey contested the penalties and argued that, if any violations had occurred, its contractor Frontier-Kemper was the operator responsible for the violations. In 1979, these proceedings were stayed by the administrative law judge pending the resolution of Secretary v. Monterey Coal Co., FMSHRC Docket No. HOPE 78-469 ("Monterey I"), a case involving Monterey's challenge to a number of 104(d) withdrawal orders arising out of the same accident and presenting the same question of liability.

Following the termination of the Monterey I litigation, 1/ this proceeding became active again in 1983. At that time the Secretary moved to amend his proposal for penalty to join Frontier-Kemper as an additional respondent and Monterey sought to have the proceedings against it dismissed. The judge granted the Secretary's motion and denied Monterey's. These interlocutory appeals followed.

Frontier-Kemper's argument that joinder is not proper is based on its claim that, under the circumstances of this case, the Commission lacks jurisdiction over it. It asserts that Commission jurisdiction over a mine operator from whom the Secretary is seeking civil penalties for violations of the Mine Act or its mandatory standards only attaches after the operator has been issued a citation or order and has contested the penalty the Secretary proposes for the violation. Frontier-Kemper argues that, absent these prerequisites, the Secretary may not rely on Fed. R. Civ. P. 19 to effect joinder at the Commission level.

The Secretary asserts that the Mine Act does not limit Commission jurisdiction in penalty cases only to operators who have received citations or orders and who have contested proposed civil penalties. He points out that, both in section 105(c) discrimination cases and in section 110(c) penalty cases involving "knowing" violations by agents of corporate operators, this Commission assesses civil penalties against parties who have not been issued a citation or order. In the Secretary's view, joinder is merely an economical device to ensure that all potential parties who could be held liable for the violations at issue in this case are involved in the hearing and to permit the Commission to properly apportion liability among them.

We hold that both the Mine Act and our own rules of procedure prohibit the Secretary from accomplishing joinder of Frontier-Kemper in the manner attempted in this case. Before the Secretary may institute a proceeding before this Commission seeking a civil penalty from an operator for a violation of the Mine Act or a mandatory standard, the operator must have been cited for a violation and been given the opportunity either to contest or to pay the Secretary's proposed civil penalty. This requirement provides both a method by which the parties may dispose of civil penalty matters without Commission involvement in uncontested cases and a framework within which litigation may productively occur in those cases where a dispute exists.

1/ A Commission administrative law judge originally held that Monterey could not be held liable for the orders because the violations had been committed by Frontier-Kemper. In 1979, the Commission reversed that holding. 1 FMSHRC 1781. In doing so, it relied on its decision in Old Ben Coal Co., 1 FMSHRC 1480 (October 1979), aff'd, D.C. Cir., No. 79-2367 (Dec. 9, 1980)(unpublished), that, for an interim period following the effective date of the Mine Act, the Secretary's policy of citing only owner-operators for all violations occurring at their mines was valid. The Commission remanded Monterey I for a decision on the merits by the administrative law judge. Monterey's subsequent petition for review in the U.S. Court of Appeals for the Fourth Circuit was dismissed because

(Footnote continued)

Sections 105(a) and (d) of the Mine Act, 30 U.S.C. §§ 815(a) and (d), provide the basic framework within which civil penalty litigation takes place. Section 105(a) provides that an operator may choose not to contest a proposed penalty and thereby avoid litigation before this Commission. 2/ Concomitantly, section 105(d) clearly conditions the institution of proceedings before this Commission on the operator's filing of a notice of contest of the citation or penalty. The operator's notice of contest may be filed only in response to the Secretary's proposed assessment of penalty, which is itself a consequence of the Secretary's issuance of a citation or order under section 104. We believe that Congress did not intend the Secretary to be able to leap-frog over these procedural steps and begin a civil penalty proceeding against an operator by the filing of a proposal for penalty, in the first instance, before the Commission.

The Commission's procedural rules also reflect, even more explicitly, the need for the Secretary to observe the necessary prerequisites before filing a proposal for penalty. Commission Procedural Rule 25, 29 C.F.R. § 2700.25, states:

> The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of: (a) The violation alleged; (b) the amount of the penalty proposed; and (c) that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty. If within 30 days from the receipt of the Secretary's notification of proposed assessment of penalty, the operator or other person fails to notify the Secretary that he intends to contest the proposed penalty, the Secretary's proposed penalty shall be deemed to be a final order of the Commission and shall not be subject to review by the Commission or a court.

(Emphasis added). Also, Commission Procedural Rule 27(a), 29 C.F.R. § 2700.27(a), provides a further clear statement of the requirement that the Secretary file a proposal for penalty in response to an operator's notice of contest:

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

Fn. 1/ continued

the Commission's remand order was not an appealable order under section 106 of the Mine Act, 30 U.S.C. § 816. Monterey Coal Co. v. FMSHRC, 635 F.2d 291 (1980). On remand to the administrative law judge, the case was settled when Frontier-Kemper paid civil penalties totaling $5,000 and the Secretary agreed to dismiss the action against Monterey.

2/ If an operator simply pays the penalty proposed by the Secretary, he may avoid any litigation. If he neither contests nor pays the proposed penalty, it is deemed a final order of the Commission and may be enforced by the Secretary in an appropriate district court.

We have considered the Secretary's argument that the procedure followed by him in the instant case is analogous to the penalty procedure utilized in cases brought under sections 105(c) and 110(c) of the Mine Act. We have previously noted that, unlike most other Commission proceedings, section 105(c) discrimination cases are initiated not with the issuance of citations or orders, but instead, with the filing of special complaints before this Commission. Secretary ex rel Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2046 (December 1983). We have therefore specifically provided, in Commission Procedural Rule 42(b), 29 C.F.R. § 2700.42(b), that the Secretary propose a civil penalty at the same time he files a discrimination complaint under section 105(c)(2). 3/ With respect to section 110(c) cases, the Act specifically allows a civil penalty to be assessed against the agent of a corporate operator after a citation or order has been issued to the operator. We also note that in such cases, the Secretary issues a proposed penalty to the agent and, under our rules, supra, may only begin Commission proceedings if the agent files a notice of contest. Therefore, in section 105(c) and 110(c) civil penalty cases, both the Mine Act and our procedural rules provide specific procedures for the assessment of civil penalties against an operator who has not been issued a citation or order. Contrary to the Secretary's assertions, we conclude that those situations are not analogous to the case before us.

Our insistence on the need for compliance with the procedural requirements described above also serves a practical purpose and furthers the enforcement scheme contemplated by Congress in the Mine Act. Providing a mine operator with the opportunity to pay a civil penalty before the institution of litigation promotes judicial and administrative economy and can assist more expeditious resolution of enforcement disputes.

For these reasons, we reverse the judge's decision allowing the Secretary to amend his penalty proposal to add Frontier-Kemper as a respondent. We remand the case with instructions to the judge to permit the Secretary to seek modification of the underlying citations and order at issue here to name Frontier-Kemper as operator, and to thereafter follow the appropriate penalty assessment procedures. Cf. Cowin and Co. v. FMSHRC, 612 F.2d 838, 841 (4th Cir. 1979) and 694 F.2d 966 (1982).

We remand the Monterey portion of this litigation without opinion. The Secretary has recognized and we have held previously that the allocation of liability between an owner-operator and an independent contractor-operator should be based on the factual circumstances of each case. 44 Fed. Reg. 44496 (July 1, 1980); Cathedral Bluffs Shale Oil Co., 6 FMSHRC 1871 (August 1984), pet. for review filed sub nom. Donovan v. Cathedral Bluffs Shale Oil Co. (D.C. Cir. No. 84-1492). Correct resolution of the liability issue based on the circumstances of this case cannot occur until Frontier-Kemper's status in the litigation is resolved. In this

3/ We have also recognized that the Secretary uses his own "special assessment procedure", 30 C.F.R. § 100.5, to propose civil penalties against operators who have been adjudicated liable for discrimination in section 105(c)(3) proceedings to which the Secretary was not a party. An operator who wishes to contest a penalty proposed under this procedure may also file a notice of contest.

case we granted Monterey's petition for interlocutory review as a matter of proper judicial administration in order to keep the Monterey litigation from proceeding while we considered Frontier-Kemper's appeal. On remand the judge should refrain from further action in Monterey pending the Secretary's attempt to properly propose a penalty against Frontier-Kemper. Thereafter, the judge should proceed to resolve any remaining questions of liability for the subject violations. 4/

Accordingly, we remand this matter for further proceedings consistent with this decision. 5/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4/ We note that the present record does not indicate satisfactorily why a resolution of the instant litigation that is consistent with the resolution of the Monterey I litigation is not appropriate and in the best interest of all concerned.

5/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 10, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
ON BEHALF OF JAMES M. CLARKE	:	Docket No. LAKE 83-97-D
v.	:	
T. P. MINING, INC.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This inquiry has been conducted to determine whether Commission Administrative Law Judge Joseph B. Kennedy and John J. Malik, counsel for respondent T.P. Mining, Inc. ("T.P. Mining"), engaged in a prohibited ex parte communication in violation of Commission Procedural Rule 82, 29 C.F.R. § 2700.82, in the course of pretrial proceedings in the above-captioned matter. 1/ The Commission solicited and received

1/ Rule 82, entitled "Ex parte communications," provides:

> (a) Generally. There shall be no ex parte communication with respect to the merits of any case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the decisional process, and any of the parties or intervenors, representatives, or other interested persons.
>
> (b) Procedure in case of violation. (1) In the event an ex parte communication in violation of this section occurs, the Commission or the Judge may make such orders or take such action as fairness requires. Upon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.
>
> (2) All ex parte communications in violation of this section shall be placed on the public record of the proceeding.
>
> (c) Inquiries. Any inquiries concerning filing requirements, the status of cases before the Commissioners, or docket information shall be directed to the Office of the Executive Director of the Commission....

29 C.F.R. § 2700.82.

affidavits from the relevant parties. For the reasons that follow, we conclude that Judge Kennedy and Mr. Malik did engage in a prohibited ex parte communication. Judge Kennedy's violation of Rule 82, in the face of explicit prior warnings to him on this subject, is particularly egregious.

This inquiry arises in connection with a discrimination complaint filed by the Secretary of Labor on behalf of miner James M. Clarke pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). The complaint alleged that T.P. Mining had discharged Mr. Clarke in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), and requested that Mr. Clarke be reinstated with back pay and benefits, and that a civil penalty of $5,000 be assessed against T.P. Mining for the violation. T.P. Mining denied that Mr. Clarke had been wrongfully discharged, and the case was assigned to Judge Kennedy.

In an order issued on November 3, 1983, Judge Kennedy directed the Secretary to furnish him and Mr. Malik with a copy of the report of the investigation into Mr. Clarke's complaint conducted by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The judge's order stated that the MSHA report was needed "[i]n order to facilitate the trial judge and the operator's understanding of the issues." The report was not produced. Rather, the Secretary requested a stay of the order on the grounds that Mr. Clarke had been reinstated by T.P. Mining and that a settlement of his back pay claim was expected. On February 22, 1984, the judge ordered the Secretary to show cause why the discrimination complaint should not be dismissed "subject to reinstatement when the parties were prepared to file their motion to approve settlement." On March 1, 1984, the Secretary responded to the show cause order, opposing dismissal of the complaint because "[d]espite frequent discussions of the matter of [Mr.] Clarke's lost income ... no basis for settlement has resulted." Judge Kennedy then ordered the Secretary to furnish the MSHA investigative report by March 23, 1984.

On March 20, 1984, the Secretary's counsel, Frederick W. Moncrief, wrote to the judge that Mr. Clarke's discrimination claim had been settled to Mr. Clarke's satisfaction. Eight days later, on March 28, 1984, T.P. Mining's counsel, Mr. Malik, wrote the judge a letter that began, "Pursuant to your telephone request this morning, I will advise you of our proposed settlement." Mr. Malik stated that he and Mr. Moncrief had agreed that T.P. Mining would pay Mr. Clarke $5,500, and that the check be transmitted to Mr. Moncrief to retain until Mr. Clarke had signed the "necessary papers." Mr. Malik stated that the check had been mailed on March 26, 1984, and that the check was "payment in full for a discrimination case filed by [Mr.] Clarke for full back pay and employment benefits ... and for interest." On April 2, 1984, the Secretary moved that the case be dismissed.

In an order dated April 3, 1984, Judge Kennedy dismissed the wrongful discharge aspect of the complaint. However, he severed the Secretary's civil penalty proposal. The judge stated that the Secretary's motion provided "no basis ... for approval of a settlement of the Secretary's penalty proposal." The judge retained jurisdiction over the penalty portion of the complaint "pending receipt of the information ... necessary to approve settlement of the civil penalty aspect of the complaint." On April 18, 1984, Mr. Moncrief wrote to the judge that the parties intended that the resolution of Mr. Clarke's back pay claim totally resolve the case and that the Secretary's agreement to forsake seeking a civil penalty had been an "important ingredient of the money settlement to [Mr.] Clarke."

In response to Mr. Moncrief's letter, Judge Kennedy issued an order on April 25, 1984, affirming the severance of the civil penalty aspect of the case and ordering the Secretary to furnish forthwith the MSHA investigation report in order to support the Secretary's request to forsake the civil penalty. On May 10, 1984, the judge dismissed the severed penalty proposal for "want of prosecution," due to the failure to produce the investigative report. On May 16, 1984, the Secretary filed with the Commission a petition for discretionary review of the April 25 order.

On May 23, 1984, we granted the Secretary's petition for discretionary review. On May 31, 1984, Judge Kennedy sent the Commission a letter concerning the Secretary's petition. In his letter, Judge Kennedy asserted that the record supported his decision. The judge also maintained that he had appropriately severed the penalty aspect of the case from the discrimination complaint and stated that Mr. Malik had recognized that the penalty proposal would require separate consideration. Judge Kennedy stated: "This was because the basis for the settlement was fully disclosed in a discussion between counsel for the operator and the trial judge to which Mr. Moncrief was not a party." Because we concluded that the judge's letter, on its face, indicated that an ex parte conversation had occurred between Judge Kennedy and Mr. Malik, we did not return it to the judge as an unauthorized submission. We directed the judge and Mr. Malik to submit sworn statements that disclosed fully the substance of the telephone conversation. 6 FMSHRC 1401 (June 1984).

The first sworn statement received by the Commission was from Mr. Malik. Mr. Malik stated that on March 28, 1984, he had received a telephone call from Judge Kennedy inquiring about the settlement negotiations. Mr. Malik further stated that he "informed the judge that the matter had been basically settled but there were a few small details to be worked out between [Mr.] Moncrief and myself." Although Mr. Malik asserted that he did not discuss the settlement in detail, he added that "the money settlement ... had been resolved and I may have related that to the judge." Mr. Malik concluded his affidavit by stating that following the telephone call from Judge Kennedy he called Mr. Moncrief and related the conversation.

The second sworn statement received was the affidavit of Judge Kennedy, accompanied by a brief in the form of a letter from counsel retained by the judge. In his affidavit, Judge Kennedy stated that his telephone conversation with Mr. Malik on March 28, 1984, lasted "no more than one or two minutes," and was confined to a single inquiry--namely, whether the check in payment of Mr. Clarke's claim for back pay had been sent to Mr. Moncrief. The judge stated that Mr. Malik had told him that he was certain the check had been sent but that "he would double check the matter with [T.P. Mining] and inform [the judge] by letter of the exact status both of the payment and of the parties' settlement negotiations." Judge Kennedy added, "My recollection of the conversation closely coincides with that of Mr. Malik as set forth in his [affidavit]."

Judge Kennedy also noted Mr. Malik's statement in his letter of March 28, 1984, to the judge that "[p]ursuant to your telephone request this morning, I will advise you of our proposed settlement which I am aware is subject to your approval." Judge Kennedy asserted that this statement confirmed his recollection that he did not inquire, Mr. Malik did not volunteer, and neither of them discussed any details of the settlement, because at the time of the telephone call the details of the settlement had not been finally resolved. The judge stated that Mr. Malik's March 28 letter was composed after Mr. Malik had spoken with Mr. Moncrief later that day and had worked out the settlement details. The judge asserted that it was Mr. Malik's March 28 letter, not the earlier telephone conversation with Mr. Malik on that date, which "informed me of the basis of the settlement." Judge Kennedy stated that when he wrote in his May 31, 1984 letter to the Commission that "the basis for the settlement was fully disclosed in a discussion between counsel for the operator and the trial judge to which [Mr.] Moncrief was not a party," his reference to a "discussion" included Mr. Malik's letter of March 28, 1984.

The third sworn statement received by the Commission was the affidavit of Michael A. McCord, the Secretary's Counsel for Appellate Litigation. Mr. McCord moved the Commission for leave to file the affidavit, asserting that it contained information directly bearing on the inquiry, and the motion was granted. In his affidavit, Mr. McCord stated that he had several telephone conversations with Mr. Malik in April and May 1984, while trying to obtain background information for a possible appeal of the judge's orders. According to Mr. McCord, Mr. Malik stated that the judge had called him on March 28, 1984, and that Mr. Moncrief had not been involved in the conversation. Mr. McCord stated that Mr. Malik informed him that the following subjects had been discussed during the conversation: (1) The judge repeatedly complained to Mr. Malik about alleged misconduct by Mr. Moncrief; (2) the judge asked whether Mr. Malik intended to demand that the Secretary turn over a copy of his official investigative files and suggested that this might be helpful; (3) Mr. Malik told the judge that he did not intend to seek the file because the case might be settled; and (4) Mr. Malik gave the judge a brief status report of the case but did not fully disclose the basis for the settlement.

After a review of these affidavits, together with the judge's letter of May 31, 1984, the Commission issued an order on August 21, 1984, in which we stated that the record contained "apparent discrepancies and omissions." We therefore ordered Mr. Malik to file a "complete and detailed" affidavit to resolve the discrepancies.

On September 20, 1984, Mr. Malik filed his second affidavit. In the affidavit, Mr. Malik stated that on at least two separate occasions during his March 28 telephone conversation with Judge Kennedy, the judge complained about the manner in which Mr. Moncrief was handling the case. Mr. Malik stated that he did not recall the specifics of Judge Kennedy's comments "but there was no question that they were of a derogatory nature." Mr. Malik also stated, "The judge and I did discuss the investigative file in this matter. I told him that I had not reviewed it and he suggested that it might be helpful. I then informed him that I did not intend to seek the file at that time because of the way our negotiations were going."

Both Commission Rule 82 (n. 1 supra) and section 557(d) of the Administrative Procedure Act, 5 U.S.C. § 557(d)(1982)("APA"), prohibit ex parte communications between a Commission judge and a party regarding the merits of pending cases. Knox County Stone Co., Inc., 3 FMSHRC 2478, 2483-86 (November 1981). 2/ We have held that the concept of the "merits" of a case is to be broadly construed, and that the purpose of prohibiting ex parte communications with respect to the merits of a Commission case is to foster the integrity and the fairness of Commission adjudicative proceedings. Knox County, supra, 3 FMSHRC at 2485-86; United States Steel Corp., 6 FMSHRC 1404, 1407 n. 2 (June 1984). 3/ Ex parte communications also are prohibited in the Code of Judicial Conduct. Knox County, 3 FMSHRC at 2485-86.

2/ The APA defines "ex parte communication" as:

> an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding....

5 U.S.C. § 551(14).

3/ We stated in Knox County:

> As Congress explained in enacting section 557(d):
>
> > The purpose of the provisions ... is to insure that agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome.
>
> * * * *
>
> > In order to ensure both fairness and soundness to adjudication ..., the ... [APA] require[s] a hearing and decision on the record. Such hearings give all parties an opportunity to participate and to rebut each other's

(Footnote continued)

To be prohibited, a communication must not only be ex parte but also must bear on the merits of a case. To warrant discipline, the communication must be knowingly and willfully made. It is clear that the telephone conversation of March 28, 1984, between Judge Kennedy and Mr. Malik was initiated by Judge Kennedy, involved only one party to the pending litigation, was not on the public record, and was without prior notice to the other party, the Secretary of Labor. In short, the conversation was ex parte. Therefore, we must next determine, on the basis of the record developed in this inquiry, whether the communication was prohibited in that it concerned the merits of the case.

Based upon the affidavits in this record, we conclude that the following substantive matters were discussed during the conversation: (1) the state of the settlement negotiations; (2) the MSHA investigative report; and (3) the judge's opinion of Mr. Moncrief. We are not troubled by the portion of the conversation that concerned the status of settlement negotiations. The discussion involved the question of whether the case had been settled and whether the settlement check had been sent. As such, it was a permissible status inquiry by the presiding judge.

On the other hand, those portions of the conversation that dealt with the MSHA investigative report referenced the merits of the case and were prohibited. Mr. Malik states that he and Judge Kennedy discussed the MSHA investigation file, and that Judge Kennedy suggested that "it might be helpful" if Mr. Malik received the file. Judge Kennedy had every reason to believe that the MSHA investigative report contained subject matter relating to the grounds of the Secretary's discrimination complaint, and therefore was relevant to potential defenses as well. At the time of the ex parte conversation, the case had not been settled and the report was a potential piece of evidence. In communicating about the report, in an off-the-record and ex parte manner, Judge Kennedy discussed an aspect of the merits of the case. Judge Kennedy had previously ordered the Secretary to produce the report, and it may be that he urged Mr. Malik to seek the report in order to pressure the Secretary to comply with the order. However, if Judge Kennedy believed that production of the report was necessary to a resolution of the case he should have sought to compel compliance with his order by proper judicial process. An ex parte and off-the-record suggestion to counsel for one of the parties is no substitute for orderly and valid legal procedure.

Fn. 3 continued

> presentations. Such proceedings cannot be fair or soundly decided, however, when persons outside the agency are allowed to communicate with the decisionmaker in private and others are denied the opportunity to respond.

[H.R. Rep. No. 880, Parts I & II, 94th Cong., 2d Sess. 2 (Part I), 18 (Part II)(1976), reprinted in 1976 [3] U.S. Code Cong. & Ad. News, Legis. Hist. 2184, 2227.] See also Raz Inland Navigation Co., Inc. v. ICC, 625 F.2d 258, 260 (9th Cir. 1980). The implications of the purposes mentioned by Congress are obvious: Improper ex parte contacts may deny a party "his due process right to a disinterested and impartial tribunal." Rinehart v. Brewer, 561 F.2d 126, 132 (8th Cir. 1977). Diminishing public confidence in the affected tribunal is the likely and unacceptable result.

3 FMSHRC at 2485.

Moreover, an ex parte, off-the-record suggestion by a judge that a party seek a particular piece of evidence is incompatible with the requirements of the Mine Act and the APA that adjudicative records in Commission proceedings be developed through the adversarial system. When the development of evidence is influenced by such a judicial "suggestion" to one party, the integrity of the record and, consequently, of the Commission may be compromised. See, e.g., U.S. Lines v. FMC, 584 F.2d 519, 537-43 (D.C. Cir. 1978); Home Box Office, Inc. v. FCC, 567 F.2d 9, 51-59 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977).

We also conclude that those portions of the conversation in which Judge Kennedy criticized Mr. Moncrief were prohibited. In his affidavit, Mr. Malik stated that the judge "complained about the manner in which [Mr. Moncrief] was handling the case," and that the complaints were derogatory. The merits of a case include not only the grounds of a proceeding or a defense to it but also any communication that may indirectly or subtly influence the outcome of a proceeding. PATCO v. FLRA, 685 F.2d 547, 563 (D.C. Cir. 1982). A judge's off-the-record, derogatory comments about counsel for one party made to opposing counsel could influence the behavior, tactics, and arguments of opposing counsel and, thus, affect the substantive outcome of the proceeding.

We turn to the question of whether Judge Kennedy and Mr. Malik "knowingly and willfully" engaged in the prohibited aspects of their discussion. Judge Kennedy initiated and pursued the conversation with regard to the investigative report and Mr. Moncrief. Judge Kennedy knew what he was saying. He raised the subjects intentionally. His participation was knowing and willful. The judge's participation in the conversation was not an innocent, albeit misguided, first-time occurrence. Cf. United States Steel Corp., supra, 6 FMSHRC at 1408-09. Judge Kennedy has been warned previously that the prohibitions against ex parte communications are vital to the integrity of the Commission's process. Knox County, 3 FMSHRC at 2483, 2486; Inverness Mining Co., 5 FMSHRC 1384, 1388 n. 3 (August 1983)(both cases involving our review of proceedings presided over by Judge Kennedy). To be fully aware of the prohibitions, and nevertheless to initiate and participate in a prohibited ex parte communication is unacceptable.

We recognize that any conversation requires two parties. Mr. Malik also knew that the conversation was ex parte. Although we conclude that his participation was knowing, there are mitigating circumstances with regard to willfulness. Mr. Malik was responding to the presiding judge, who initiated the contact and raised the prohibited subject. Further, Mr. Malik advised the Secretary's counsel following the conversation that the conversation had occurred. Moreover, Mr. Malik stated that this was the first time that he had been contacted in such an ex parte fashion by a judge. We credit Mr. Malik's assertion that he was surprised by the call and that he was a reluctant participant. Thus, although we conclude that his participation in the prohibited ex parte conversation violated Commission Rule 82, we are persuaded that his lesser role in this affair warrants no more than a cautionary warning that the Commission should have been notified on the record of the communication and that prohibited communications are to be strictly avoided in the future.

The judge, on the other hand, has no excuse. We expect Commission judges, regardless of personal opinions, to abide by the law. As we have stressed, Judge Kennedy previously has been reminded expressly of the necessity of complying with the letter and the spirit of Commission Rule 82. His actions in this case demonstrate an intransigent disregard of applicable procedures. They impugn this independent agency's credibility and undermine its status as an impartial adjudicative body. We condemn Judge Kennedy's actions in the strongest terms and retain, for further consideration, the question of appropriate discipline. 4/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 10, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. SE 84-4-M
v.	:	
BELCHER MINE, INC.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"), Commission Administrative Law Judge Joseph B. Kennedy issued a decision approving a settlement agreed to by the parties. 6 FMSHRC 1052 (April 1984)(ALJ). We granted the Secretary of Labor's petition for discretionary review of that decision. The Secretary asserts that the judge's decision contains unsupported and unwarranted allegations of perjury and subornation of perjury, and unsubstantiated defamatory remarks beyond the proper scope of a settlement approval. We agree.

Belcher Mine, Inc. ("Belcher") operates an open-pit limestone quarry located in Aripeka, Florida. On August 1, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Alonzo Weaver, observed a bulldozer operator positioning a mobile crusher unit by means of a draw bar attached to the bed of the crusher. The crusher's draw bar was beneath a structural steel boom that extended some 70 feet from the unit. The boom was supported by steel girders anchored to the crusher's bed and a wire rope suspension cable. The inspector observed the operator of the crusher beneath the boom.

The inspector questioned Belcher's foreman, Floyd Miles, about the crusher, which he believed to be a different unit from that which he had observed during an earlier inspection. The inspector observed, upon detailed examination, that the anchor points that held the crusher's suspension frame in place were damaged. The right anchor had worn through and the left anchor exhibited a break in a previous repair weld. As a result, the inspector issued a combined imminent danger withdrawal order under section 107(a) of the Mine Act, 30 U.S.C. § 817(a), and a citation under section 104(a) of the Act, 30 U.S.C. § 814(a), alleging a violation of 30 C.F.R. § 56.14-26. 1/

Subsequently, the Secretary of Labor proposed a civil penalty for the alleged violation. Belcher contested the penalty, and the jurisdiction of this independent agency attached. Judge Kennedy was the administrative law judge assigned by the Commission to hear the matter. At the hearing, the inspector testified that the bulldozer positioning the crusher appeared to have a faulty clutch, causing it to lurch. The inspector stated that this jolting action could have caused the crusher's already weakened suspension frame to break free of its anchors. If the anchors failed, the frame supporting the boom could have collapsed and anyone below the boom would have been injured. According to the inspector, the anchors had been broken for some time, as rust had developed on the surface of the breaks in the anchor points.

During Inspector Weaver's direct testimony, Judge Kennedy asked him whether Belcher's foreman, Mr. Miles, had known about the condition of the anchor before the inspection, and the inspector replied that he believed so. On cross-examination by Belcher's president, Warren Hunt, the inspector again opined that Miles or the company superintendent, Robert King, knew that the structural support was broken prior to his issuance of the order and citation. Mr. Hunt also asked Inspector Weaver whether he had found the same crusher in acceptable condition during his previous inspection. The inspector responded that the crusher that he had previously inspected was a different unit. Mr. Hunt elicited testimony on the number of crushers at the mine. The inspector maintained that there were three crushers; Mr. Hunt insisted that there were two.

To determine how many crushers were at the mine, Judge Kennedy directed the Secretary's counsel, Kenneth Welsch, to furnish for the record a copy of the inspector's contemporaneous notes from his August 1 inspection. The judge stated that he wanted further clarification of this question following the lunch-hour recess. When the hearing reconvened, Mr. Welsch was unable to explain the discrepancy between the assertions of the inspector and Mr. Hunt as to the number of crushers at the mine.

1/ 30 C.F.R. § 56.14-26 provides:

> Mandatory. Unsafe equipment or machinery shall be removed from service immediately.

He stated that he was willing, for purposes of this case, to have the judge assume that the crusher inspected on August 1 was the same crusher examined during the earlier inspection. The judge commented to the effect that this concession ended the controversy. However, he marked the inspector's contemporaneous notes for identification and received them into evidence.

Judge Kennedy questioned the inspector about an entry in his notes concerning employee comments about the alleged violation. The comments read: "Been that way for a week or more. Scared to get near it." Exh. PX-5. When Judge Kennedy asked the inspector, "Who told you that?", Mr. Welsch objected based upon the informer's privilege. The judge overruled the objection and continued to seek to determine the identity of the employee who had made the comments. Mr. Welsch resisted the judge's inquiry into this area and informed the judge that an assurance of confidentiality had been extended to the employee. Judge Kennedy nevertheless asked the inspector whether the employee was present in the courtroom. Mr. Welsch instructed the inspector to answer the judge's question. The inspector responded that the employee was present.

Belcher's representative, Mr. Hunt, then informed the judge that he had just learned that an individual (either his foreman or superintendent) had known about the condition of the crusher prior to the issuance of the withdrawal order. This fact apparently conflicted with what Mr. Hunt had previously been told. After a recess suggested by the judge, Mr. Hunt advised the judge that Foreman Miles had known about the cracked support for at least a week prior to the August 1 inspection. Mr. Hunt then proceeded to offer to pay a civil penalty for the violation.

Judge Kennedy stated that he considered the violation to warrant a $750 penalty and that, if the parties wished to enter into a settlement agreement to that effect, he would approve it. Mr. Hunt agreed and Mr. Welsch moved for a $750 penalty assessment. In a bench decision, Judge Kennedy ordered the settlement approved. The judge subsequently issued a written decision confirming the bench decision. 6 FMSHRC at 1052.

In his written decision Judge Kennedy found, inter alia, that "Pursuant to [Department of Labor] policy ... the inspector repeatedly evaded my questions about what [Foreman] Miles said about the hazardous condition [of the anchors]." 6 FMSHRC at 1053. His decision purported to contain quotations of the inspector's testimony including the following statement: "I don't recall whether he said anything about how long it had been there." 6 FMSHRC at 1053-54. The judge concluded that this testimony was false and that the Secretary's counsel, Mr. Welsch, "made no attempt to correct the false testimony." 6 FMSHRC at 1054. Judge Kennedy also stated that at the time Mr. Welsch offered to furnish the inspector's contemporaneous notes of the August 1 inspection, Mr. Welsch knew that the notes contained a statement by an employee of the operator that the anchors had "been that way for a week or more." Id. The judge opined that "the only employee the inspector had talked to on August 1 about the anchor was Mr. Miles." Id. Judge Kennedy concluded, "But again the [S]olicitor made no attempt to correct the inspector's false testimony." Id.

As part of his discussion of the informer's privilege issue raised by Mr. Welsch, Judge Kennedy stated that he found "it hard to accept that the Solicitor is so legally obtuse and ethically confused as to believe a grant of confidentiality to an informer takes precedence over a witness's solemn oath to tell the truth. Or that the informer privilege justifies palming off perjured testimony in an adjudicatory proceeding." 6 FMSHRC at 1055. The judge stated that he made these observations and findings "because I am disturbed, as I believe the Commission will be disturbed, to learn of the extremes to which the Solicitor may go in turning a deaf ear to false and misleading testimony." Id. Judge Kennedy went on to "condemn in the strongest terms possible the subornation that occurred and serve warning that if it happens again I shall feel compelled to refer the matter to the Commission and the criminal division for such disciplinary action as they deem appropriate." 6 FMSHRC at 1056. Throughout his decision, Judge Kennedy also made a number of comments critical of what he labelled "the admininstration's policy" of "cooperative enforcement."

We turn first to Judge Kennedy's allegations of criminal conduct. Upon careful review of the record, we conclude that Judge Kennedy's accusations of perjury and subornation are not supported by the record and were inappropriately made in his decision.

Any accusation of criminal conduct is a grave matter, not to be undertaken lightly, especially by a jurist schooled in the law and aware of the requirements of due process. Under the United States Code, perjury and subornation of perjury are felonies, punishable by fines of up to $2,000 and imprisonment of up to five years. 18 U.S.C. §§ 1621, 1622 (1982). Essential elements of the crime of perjury include a statement on a material matter, willfully made, which the witness does not believe to be true. Bronston v. United States, 409 U.S. 352, 357 (1973). The essential elements of the crime of subornation of perjury include proof that perjury was committed, and that the suborner knowingly and willfully induced or procured the witness to give false testimony. See, e.g., United States v. Brumley, 560 F.2d 1268, 1275-77 (5th Cir. 1977).

An examination of the portion of the transcript containing the allegedly perjured testimony indicates that the judge was questioning Inspector Weaver about Foreman Miles' reaction to the issuance of the withdrawal order, what Foreman Miles knew about the damaged condition of

the anchors, and when such knowledge was gained. 2/ An examination of the inspector's answers reveals that he was attempting to respond to the judge's questions without revealing the identity of the employee who had informed him of the unsafe condition. On review, the Secretary concedes this fact. Petition for Review at 11. Answers by a witness that are

2/ The colloquy between Judge Kennedy and Inspector Weaver follows:

JUDGE KENNEDY: Well, Mr. Miles was with you when you--

THE WITNESS: He was with me that day -- [August 1, 1984]

JUDGE KENNEDY: What did he say?

THE WITNESS: Whether or not he was aware of it or not? He was aware of it. He saw it -- he was right there with me.

JUDGE KENNEDY: Is that the first time he saw it?

THE WITNESS: No, sir. I don't think so. I don't think it was the first time.

JUDGE KENNEDY: What did he say, if anything? If he didn't say anything, just tell me; or if he did, tell me to the best of your recollection what he said.

THE WITNESS: (Pauses.)

JUDGE KENNEDY: You both walked up and you both looked at this condition?

THE WITNESS: I don't recall whether I asked him specifically how long it had been there --

JUDGE KENNEDY: I am not asking you that -- I am just asking you --I assume he looked at it and you made a decision right then that you were going to issue a closure order; correct?

THE WITNESS: Yes, I said, "This is a hazard. I am going to have to pull the people out of this operation until it is repaired ["] --

JUDGE KENNEDY: And I assume -- I assume that -- that came as a bit of a shock to him or was he perfectly bland about it?

THE WITNESS: No, sir. He was --

(footnote 2 continued)

merely unresponsive to questions, however, will not support a finding of perjury. Cf. Bronston v. United States, 409 U.S. at 357-62. Furthermore, questions that are susceptible to different interpretations by a witness will also not support such a finding. Cf. United States v. Bell, 623 F.2d 1132, 1135-37 (5th Cir. 1980). We find that Judge Kennedy's questions themselves are not without ambiguity. Had Judge Kennedy explicitly asked Inspector Weaver whether he had ever discussed with Foreman Miles when the latter first learned of the condition of the anchors, and had the inspector untruthfully denied any such discussion, the matter might stand in a different light. The questions, however, are susceptible of different interpretations and on this record the literal truthfulness of the inspector's testimony can not be discounted. Thus, we find that the judge's conclusion that the inspector perjured himself is not supported by this record. Further, the record is silent concerning any attempt by Mr. Welsch to induce Inspector Weaver to testify falsely. Thus, we conclude that the judge's charge of subornation is likewise unfounded.

Footnote 2 end.

> JUDGE KENNEDY: (Interrupting) You are going to shut his full operation down here and he is the foreman.
>
> THE WITNESS: No sir. No sir. I told him, I said, "I will give you time to get hold of Mr. King here if you would like ["] --
>
> JUDGE KENNEDY: Right.
>
> THE WITNESS: (Continuing) -- and he said, "No," -- the way I recall it, he said, "No, that won't be necessary. I will go ahead and shut it down. And contact Mr. King." Whether or not he did, I don't know.
>
> JUDGE KENNEDY: That was all he said, then?
>
> THE WITNESS: That was all he said.
>
> JUDGE KENNEDY: He wouldn't say anything about whether he --
>
> THE WITNESS: (Interrupting) I don't recall if he did.
>
> JUDGE KENNEDY: All right. So then you shut him down right at 9 o'clock.

Tr. 39-41 (emphasis added).

The Secretary also points out that Judge Kennedy supported his allegation of perjury by misquoting record testimony. A comparison of the relevant portion of the judge's decision with the corresponding section of the transcript indicates that Judge Kennedy did misquote Inspector Weaver. The judge states:

> Weaver finally testified that "all Miles said was that he would shut the crusher down and contact Mr. King. That was all he said. I don't recall whether he said anything about how long it had been there." This was not true.

6 FMSHRC at 1053-54. No testimony identical to the purported quotation appears in the transcript. Needless to say, Judge Kennedy's attribution of misquoted testimony to a witness being accused of perjury is inexcusable.

The Secretary further argues that the judge's abuse of authority in making unsupported allegations of criminal conduct is rendered even more egregious by the fact that the accusations were made in a public written decision, without prior notice, thereby denying the accused an opportunity to respond to the charges. We agree that Judge Kennedy's methods violated the due process rights of the accused individuals and applicable Commission procedural rules.

In a recent decision, the U.S. Court of Appeals for the Eighth Circuit addressed the propriety of similar judicial accusations of personal misconduct. Gardiner v. A.H. Robins Co., Inc., 747 F.2d 1180 (1984). In Robins, a U.S. District Court judge attacked the personal reputations and honor of persons involved in pending litigation. The court of appeals held that the judge's comments implicated the constitutionally protected liberty interests of those attacked, and that the accused were entitled to adequate notice and an opportunity to be heard by an impartial tribunal. 747 F.2d at 1190-94. Here, Judge Kennedy's decision not only attacked the personal reputations of Inspector Weaver and Mr. Welsch, but also accused them of felonious criminal activity. In this regard, Judge Kennedy assumed the conflicting roles of grand jury, prosecutor, jury, and presiding judge in issuing his pronouncements. Jurisdiction over federal criminal matters resides with the United States Department of Justice and the federal criminal justice system. If Judge Kennedy had reason to believe that crimes had been committed, he should have referred the matter to the appropriate authorities at the Department of Justice. Cf. Pontiki Coal Corp., 6 FMSHRC 1131 (May 1984).

Furthermore, if Judge Kennedy was of the opinion that Mr. Welsch, as an attorney practicing before the Commission, had engaged in conduct warranting disciplinary action, the judge is particularly aware that he should have referred the matter to the Commission pursuant to Commission Procedural Rule 80. 29 C.F.R. § 2700.80. Commission Rule 80 provides the necessary due process protections of adequate notice and opportunity to be heard denied Mr. Welsch by the judge. Recently, we found it

necessary to disapprove of Judge Kennedy's continued failure to abide by Rule 80. See T.P. Mining, Inc., 7 FMSHRC ___ (FMSHRC Docket No. LAKE 83-97-D, July 2, 1985). There we stated:

> Judge Kennedy's comments with regard to [an attorney who appeared before him] contain assertions of unethical and unprofessional conduct which, had they been well-founded, would have been grounds for a disciplinary proceeding. We have previously cautioned Judge Kennedy that such allegations made in the course of a proceeding, without the required disciplinary referral, deprive the accused of elementary procedural safeguards. Canterbury Coal Co., 1 FMSHRC 335, 336 (May 1979). By now, Judge Kennedy should know how to make a disciplinary referral. Canterbury Coal Co., 1 FMSHRC at 336; James Oliver and Wayne Seal, 1 FMSHRC 23, (March 27, 1979); In re Kale, 1 BNA MSHC 1699 (FMSHRC Docket No. D-78-1, November 15, 1978). In this case, Judge Kennedy's demonstrated insensitivity to the legitimate interests and rights of those appearing before the Commission, and his disregard of the Commission's rules and our prior warnings on this subject, warrant our gravest concern.

T.P. Mining, supra, slip op. at 5.

The Secretary also maintains that the judge's decision focused on matters far beyond the scope of a settlement approval. The Secretary contends that the judge made defamatory remarks in his decision concerning Mr. Welsch's assertion of the informer's privilege, MSHA's allegedly lax enforcement of the Mine Act, and the personal reputations of Inspector Weaver and Mr. Welsch.

It is clear from the record that Mr. Welsch advanced a proper reason for assertion of the privilege, namely, to preserve the anonymity of one of Belcher's employees who had furnished information to Inspector Weaver under an assurance of confidentiality. Tr. 95-101. We recently outlined the basic principles governing the application of the informer's privilege to Mine Act proceedings. Secretary of Labor on behalf of Logan v. Bright Coal Co., Inc., 6 FMSHRC 2520 (November 1984):

> The informer's privilege is the well-established right of the government to withhold from disclosure the identity of persons furnishing information of violations of the law to law enforcement officials. Roviaro v. United States, 353 U.S. 53, 59 (1957). See generally Annot., 8 ALR Fed. 6 (1971). The purpose of the privilege

> is to protect the public interest by maintaining a free flow of information to the government concerning possible violations of the law and to protect persons supplying such information from retaliation. Roviaro, 353 U.S. at 59; Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, (5th Cir. 1972). The privilege is qualified, however, and where disclosure is essential to the fair determination of a case, the privilege must yield or the case may be dismissed. Roviaro, 353 U.S. at 60-61.

6 FMSHRC at 2522-23. We also detailed the procedures that an administrative law judge should follow in order to determine the existence of the privilege while balancing the competing interests of confidentiality and disclosure:

> The judge should order the Secretary to turn over the ... material withheld for an in camera inspection. In evaluating this material, the judge should first determine whether the information sought by the respondents is relevant and, therefore, discoverable. If he concludes that the material is discoverable, he should then determine whether the information is privileged. Application of the informer's privilege should be based upon the definition of "informer" adopted above.
>
> Recognizing that the informer's privilege is qualified, if the judge concludes that the privilege is applicable, he should next conduct a balancing test to determine whether the respondents' need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest. Drawing the proper balance concerning the need for disclosure will depend upon the particular circumstances of this case, taking into account the violation charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Among the relevant factors to be considered are the possibility for retaliation or harassment, and whether the information is available from sources other than the government.

6 FMSHRC at 2525-26.

In the instant proceeding, the issue of the informer's privilege arose at the time of the hearing and its invocation obligated the judge to consider it in a fair and judicious manner. Here the judge made no attempt to conduct an in camera inspection of material offered to support

the existence of the privilege. Instead, he conducted his inquiry into the applicability of the privilege in a hostile manner during an open hearing with the operator and prospective witnesses present. Tr. 95-101. Although the events in this case preceded our decision in Bright Coal, supra, the approach adopted by the judge nonetheless violated the requirement in Commission Procedural Rule 59 that "A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner." 29 C.F.R. § 2700.59 (emphasis added).

The judge's active pursuit of testimony concerning the statements made by an employee of Belcher to Inspector Weaver blinded him to his responsibilities under Commission Rule 59. The judge pressed Mr. Welsch for an indication of the identity of the informant and Mr. Welsch resisted that inquiry. Tr. 96-98. Then, after narrowing the choice of potential informants in his own mind down to one of two prospective witnesses for Belcher, the judge asked Inspector Weaver whether the employee referred to in his notes was in the courtroom. Tr. 100. Mr. Welsch again appropriately objected to the question. Upon being overruled he advised Inspector Weaver that he must answer the judge and the inspector responded in the affirmative. Tr. 100-01.

The judge intimated at the hearing that, since section 105(c)(1) of the Mine Act prohibits discrimination against miners who testify or are about to testify in Mine Act proceedings, the claim of informer's privilege was unnecessary. He stated: "I mean, what more protection could a man have?" Tr. 99. This observation, if made in good faith, is at best naive. We would expect the judge to recognize that "the possibility of deterrence arising from post hoc disciplinary action is no substitute for a prophylactic rule that prevents the harm...." NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 239-40 (1978). Our Rule 59 is such a rule, and is intended to prevent the disclosure of the identity of a miner-informant to the operator or his agent. Only in "extraordinary circumstances" is such a disclosure justified. The judge made no attempt, either at the hearing or in his written decision, to set forth the "extraordinary circumstances" necessary to justify his actions. In fact, he failed on each occasion to even mention Rule 59. The procedures adopted by Judge Kennedy at the hearing did serious violence to Rule 59. 3/

The record reveals that Mr. Welsch objected strenuously to the judge's line of questioning and was resolute in his assertion of the informer's privilege. This earned him a personalized, unsupported,

3/ It is important to stress that proof as to the existence of the violation would not in any way have been affected by counsel for the Secretary's attempted reliance upon the informer's privilege. Here, the inspector testified that he believed the violative condition (i.e., the defective anchors) had existed for "several weeks" because of the presence of rust on the surface of the breaks. Tr. 37; see also, Tr. 33-36. Accordingly, the Secretary placed into the record evidence relevant to negligence.

defamatory thrashing in the judge's decision. The judge used such phrases as "legally obtuse," "ethically confused," and "ethical astigmatism."

There is no justification for these comments. 4/ As stated in T.P. Mining, supra:

> [T]he judge's criticism of counsel was unnecessary and the language used was intemperate. Words such as "incompetence," "unprofessional," "ineptitude," "ethically improper," "reprehensible," and "irresponsible," when published without support and broadcast to the public, not only wound the advocate personally--they damage professionally. In unjustly maligning one who appears before him, a judge not only demeans himself, but dishonors this Commission. Such unwarranted rebukes can only lessen public confidence in this independent agency's ability to serve its statutory role as a temperate and even-handed decision maker.

Slip op. at 5.

Finally, Judge Kennedy's decision contains certain passages expressing his opinion that MSHA was not vigorously enforcing the Mine Act. The Secretary argues that there is no evidence in this record to support the judge's charges of lax enforcement on the part of the agency. He contends that the judge's remarks are merely an attempt to broadcast his personal perception of enforcement policies, and in no way relate to a proper order approving settlement in this case.

In evaluating Judge Kennedy's comments it is important to consider separately the actions of Inspector Weaver and the government agency as a whole. Inspector Weaver did not agree with the Belcher superintendent's assessment that the cited condition was not hazardous because the bulldozer operator was protected by roll bars. The judge noted that Inspector Weaver, despite this disagreement, reduced the gravity and seriousness of the violation. The reason offered by the inspector for this "incorrect" assessment was, "I would tend to be more lenient with the operator than possibly I should, but I, I feel like that certainly that I don't want to hurt him bad enough to put him out of business." Tr. 54. Given the

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4/ Standard 3(a)(3) of the Code of Judicial Conduct provides:

> A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

inspector's issuance of an imminent danger order, his action in reducing his gravity findings, so as not to "hurt" the operator, was erroneous and ill-founded. However, this mistake was conceded by the inspector at trial, and the existence of a greater degree of gravity was argued to the judge by the Secretary's counsel. In any event, we find no evidence in the record to suggest that the reduction in the gravity of the violation made by the inspector was attributable to what the judge averred was "the administration's 'spirit of cooperation'" and "policy of appeasement." Thus, Judge Kennedy's comments are unsupported.

Absent record support, we can only assume that Judge Kennedy's remarks were an attempt to disseminate his personal perceptions of MSHA's enforcement policies. Judicial decisions issued by the Commission and its judges are not appropriate forums for such personal forays.

Based on the foregoing discussion, all remarks in the judge's decision discussed above and found to be unsupported by the record are hereby stricken. No party disputes on review the appropriateness of the civil penalty proposed in the settlement. The $750 penalty was agreed to by the parties and approved by the judge. We find it appropriate and supported by the record. Therefore, we affirm the judge's settlement approval on the narrow grounds on which it should have rested in the first place. Cf. Inverness Mining Co., 5 FMSHRC 1384, 1388-1389 (August 1983) (striking offensive statements from a settlement approval decision issued by Judge Kennedy). 5/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 3 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 85-43 A.C. No. 36-00809-03536
v.	:	
BCNR MINING CORPORATION, Respondent	:	Newfield Mine
BCNR MINING CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 84-173-R Order No. 2252336; 5/25/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Newfield Mine

DECISION

Appearances: James E. Culp, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner/Respondent; B. K. Taoras, Esq., Meadow Lands, Pennsylvania, for Respondent/Contestant.

Before: Judge Kennedy

This matter came on for an evidentiary hearing in Pittsburgh, Pennsylvania on Thursday, June 6, 1985. After presentation of MSHA's case-in-chief the operator commenced its defense. During a recess taken during the defense-in-chief, the parties, after a discussion with the trial judge, moved for approval of a settlement of the penalty case and withdrawal of the review case. Based on an independent evaluation and res nova review of the circumstances the trial judge granted the motion, and directed the parties file a confirming written motion.

That motion having been received, it is ORDERED that the approval given from the bench on June 6, 1985, be, and

hereby is, CONFIRMED. It is further ORDERED that the operator pay the amount of the penalty agreed upon, $160, on or before Friday, July 19, 1985, and that subject to payment the captioned matters be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 5 1985

UNITED MINE WORKERS OF AMERICA, ON BEHALF OF OLIVER HARVEY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 85-61-D
	:	MSHA Case No. MORG CD 84-7
v.	:	
	:	Kitt No. 1 Mine
KITT ENERGY CORPORATION, Respondent	:	

DECISION

Appearances: Michael Aloi, Esq., Manchin & Aloi, Fairmont, West Virginia, for Complainant;
B. K. Taoras, Esq., Kitt Energy Corporation, Meadowland, Pennsylvania, for Respondent

Before: Judge Melick

This case is before me upon the complaint of the United Mine Workers of America (UMWA) on behalf of Oliver Harvey pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that Mr. Harvey was suspended without pay from the Kitt Energy Corporation (Kitt Energy)[1] in violation of section 105(c)(1) of the Act.[2]

In order for the Complainant to establish a prima facie violation of section 105(c)(1) of the Act, it must prove by a preponderance of the evidence that Mr. Harvey engaged in an activity protected by that section and that his suspension

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[1]Mr. Harvey was initially discharged on March 17, 1984, but this discharge was subsequently modified in arbitration to a suspension without pay for 30 days.

[2]Section 105(c)(1) of the Act provides in part as follows:
"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discriminate against or otherwise interfere with exercise of the statutory rights of any miner . . . in any coal or other mine subject to this act because such miner . . . has filed or made a complaint under or related to this act, including a complaint notifying the operator or the operator's agent, . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise of such miner . . . on behalf of himself or others of any statutory right afforded by this Act."

was motivated in any part by that protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd Cir. 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983), and NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.

In this case Mr. Harvey asserts that he refused to comply with his supervisor's work order on the morning of March 17, 1984, because he was afraid that to do so might overly strain the muscles in his back. His suspension based upon that work refusal, it is argued, was therefore based upon his exercise of an activity protected by the Act. A miner's exercise of the right to refuse work is a protected activity under the Act so long as the miner entertains a good faith, reasonable belief that to work under the conditions presented would be hazardous. Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). In addition, a miner may under certain circumstances refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations. Bjes v. Consolidation Coal Corp., 6 FMSHRC 1411 (1984).

Kitt Energy does not dispute that Mr. Harvey was suspended based upon his refusal to carry out his supervisor's work order but argues that Harvey did not entertain a good faith, reasonable belief that to carry out the work order would indeed have been hazardous. The operator also maintains that Mr. Harvey did not communicate his safety concerns to any representative of management in accordance with the Commission decision in Secretary ex rel. Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

The evidence shows that Oliver Harvey, a miner employed by Kitt Energy since 1978, was assigned on the morning of March 17, 1984, to the work crew of section foreman Roger Davidson. Davidson and his seven member crew entered the mine shortly after midnight. After conducting his safety examination Davidson directed some of the work crew including Mr. Harvey to obtain supplies needed for the roof bolter. Without complaint Harvey helped load the supplies (including roof bolts, plates and 25 pound boxes of resin) onto a scoop. The supplies were then carried by the scoop and unloaded next to the roof bolter.

Davidson then directed four of the men, including Harvey, to bring ventilation tubes approximately 100 feet from the Number 3 entry to the Number 2 entry. After what Davidson felt was an inordinate amount of time and the miners had still not returned with the tubing, Davidson traveled to the Number 3 entry to find out what the problem was. He found the four miners sitting around the scoop arguing about

how to move the tubes up to the face. Some wanted to first empty the scoop of some coal spillage and others wanted to convey the tubes that had already been loaded.

Davidson was somewhat irritated over the delay and the continued inaction of the crew. According to Davidson the scoop would not in any event have been able to pass the parked roof bolter and it would have been faster to hand-carry the tubes. Davidson therefore elected to have the crew hand-carry the tubes. He divided the group into two pairs and directed them to carry two tubes each. The oval shaped tubes were 10 feet long and 18 inches wide at the widest point, were constructed of fiberglass and weighed 49 pounds. Two of the miners, Randy McAtee and Richard Bolyard, picked up two tubes and proceeded to carry them as directed but Harvey and John Howell proceeded to carry only one tube. Foreman Davidson again directed Harvey and Howell to take two tubes but they refused without trying. What then happened is in dispute.

Harvey alleges that he then told Davidson that he could not carry two tubes because his back was bothering him.[3] Harvey says that he also told Davidson that he had taken off the day before because of his back. Harvey testified that he "knew if I would carry two tubes I would have to be carried out of the mine. I know the limits of my back." Harvey also admitted, however, that he thought Davidson was being unfair in making the men carry the tubes when he thought the scoop could have been used. He implied that Davidson was having a bad night and was taking-it-out on the crew. According to Harvey, conditions were also bad in the area expected to be traveled, including water, coal spillage, and a roof clearance of only 4 feet in some locations. Harvey conceded however that before his work refusal he had not actually seen the crosscut to be traveled and did not know how deep the alleged water was. Harvey also acknowledged that McAtee and Bolyard had successfully carried two tubes through that area without complaining.

Davidson testified on the other hand that the conditions in the area to be traveled were good. The coal height was 5.4 to 5.6 feet and the bottom was in "excellent" shape. The one puddle in the 18 foot wide crosscut was only 10 to 12 feet wide leaving a clear 6 foot walkway. According to Davidson, Harvey made no mention of his back in refusing to work but said only that there was no way that he was going to carry two tubes "in this top." After several refusals Davidson called outside to Terry Louk the assistant shift

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[3]According to the testimony of Randy McAtee and John Howell at the arbitration proceedings, Harvey did in fact say to Davidson that he could not carry two tubes because of his back. Neither McAtee nor Howell testified in the case before me.

foreman who told Davidson to repeat the order and to advise the miners that they faced suspension if they disobeyed. Howell and Harvey were so informed but continued to refuse the assigned task. It is not disputed that when Louk later appeared underground and gave Harvey and Howell a chance to explain their problem both said they had no problem and offered no explanation for their work refusal. Both Harvey and Howell were thereafter suspened with intent to discharge.

Even assuming, arguendo, that Mr. Harvey did communicate to his foreman in the manner alleged I do not find that he has met his burden of proving that he entertained a good faith, reasonable belief that to perform the requested work under the conditions presented would be hazardous. Robinette, supra.

Indeed, credible evidence does not exist to support Harvey's allegations of a bad back. Earlier on his work shift he helped load supplies, including 25 pound boxes of resin, without any apparent difficulty or complaint. In addition, although Mr. Harvey contends that he had been hospitalized for a back condition 4 or 5 years earlier and had reinjured his back the day before this incident, he provides no corroborating medical evidence. The absence of any medical corroboration to show the existence of a back condition at the time of his work refusal is particularly damaging to the credibility of his case. The fact that Harvey failed to report his alleged back "reinjury" on the day before his work refusal (as he admittedly knew was required by company policy) and his failure to have asserted this alleged condition as his reason for refusing to perform the assigned task when given an opportunity to do so in the presence of shift foreman Terry Louk, also reflects negatively on his credibility.

Harvey's past practices are also inconsistent with his present allegations. Harvey testified that because of his back problems he had on two occasions, in 1979 and again in 1980, told his then foreman, Lee Hawkins, before the corresponding work shift, that he did not know whether he could perform the job that day and purportedly told Hawkins that if he could not do the job he would go home. In contrast, at the beginning of the shift at issue herein, Harvey gave no such notice and made no such request of his foreman but rather waited until he was given an apparently unpleasant task before raising a complaint about his alleged bad back. If Harvey was in fact suffering from a back condition before his shift on March 17, it may reasonably be inferred from his past practices that he would have, as before, requested light work or other special consideration prior to the commencement of his shift.

The absence of good faith is also evidenced by the failure of either Harvey or his partner, Howell, to have even

attempted to carry two tubes. Indeed it may reasonably be inferred from Harvey's testimony that the real reason for their work refusal was their feeling that Davidson was being unfair in not allowing them to use the scoop to carry the tubes and that Davidson was somehow taking-it-out on them for having had a bad night.

Under all the circumstances it is clear to me that Harvey did not at the time of his work refusal entertain a good faith, reasonable belief that performance of the assigned task would have been hazardous within the meaning of the Act. Accordingly, the complaint herein must be denied and this case dismissed.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 8 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No: KENT 85-67 A.O. No: 15-03987-03507
v.	:	River Queen Surface Mine
PEABODY COAL COMPANY, Respondent	:	

SUMMARY DECISION AND ORDER

Before: Judge Maurer

STATEMENT OF THE CASE

This case concerns the petition for civil penalty filed by the Secretary of Labor pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act", for a violation of the regulatory standard at 30 C.F.R. § 48.30. The case is before me on stipulated facts for a ruling on Cross Motions for Summary Decision, filed pursuant to 29 C.F.R. § 2700.64.

Citation No. 2337820 was issued on August 24, 1984 by MSHA Inspector Hubert Sparks pursuant to § 104(a) of the Act, and the "condition or practice" cited is described as follows:

> A violation of this section exists in that employees regularly working on the third shift (12 midnight to 8 A.M.) were required to receive annual refresher training on the first shift (8 A.M. to 4 P.M.) on March 30, 1984. The River Queen Mine does not rotate or cross-shift employees as a normal practice.

APPLICABLE REGULATORY PROVISIONS

The cited regulatory standard, 30 C.F.R. § 48.30(a) reads as follows: "Training shall be conducted during normal working hours; miners attending such training shall receive the rate of pay as provided in § 48.22(d) (Definition of normal working hours) of this Subpart B."

Section 48.22(d) referred to above provides as follows:

> "Normal working hours" means a period of time during which a miner is otherwise scheduled to work. This definition does not preclude scheduling training classes on the sixth or seventh working day if such a work schedule has been established for a sufficient period of time to be accepted as the operator's common practice. Miners shall be paid at a rate of pay which shall correspond to the rate of pay they would have received had they been performing their normal work tasks.

STIPULATIONS

1. Peabody Coal Company owns and operates the River Queen surface coal mine located in Muhlenberg County, Kentucky.

2. River Queen surface mine is subject to the Federal Mine Safety and Health Act of 1977.

3. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

4. River Queen surface mine operates daily, the times for said shifts being: 1st shift - 8:00 A.M. to 4:00 P.M.; 2nd shift - 4:00 P.M. to 12:00 P.M.; 3rd shift - 12:00 A.M. to 8:00 A.M.

5. In August, 1984, the total numbers of miners working each shift were as follows: 1st shift - 169; 2nd shift - 124; 3rd shift - 66; stagger - 4.

6. Management at River Queen surface mine does cross shift employees; cross shifting is the practice of changing a previously scheduled work shift during the week.

7. From January 1, 1984 to August 24, 1984, the following employees were cross shifted for reasons other than training:

Name	Normal Shift	Shift Worked	Date
Wm. Bartlett	2nd	1st	03/12/84
Jerry Bean	2nd	3rd	01/14/84
Bill Whitaker	2nd	1st	08/16-21/84
Mike Thorpe	2nd	1st	08/13-19/84
Rick Allen	3rd	2nd	01/24/84
Bill Drake	2nd	3rd	08/84
Bill Johnson	2nd	1st	01/26/84

Harold Frost	3rd	1st	02/23-3/5/84
Lee Stone	3rd	1st	All 1984
Welby Sellers	2nd	1st	All 1984
D. Stevens	3rd	1st	08/19/84
B. Fleming	1st	3rd	08/19/84
B. Larkins	3rd	2nd	05/20/84
G. Baggett	3rd	2nd	05/06/84
L. Browning	2nd	1st	08/19/84
D. Stevens	3rd	2nd	07/01/84
G. Stewart	1st	3rd	06/17/84
W. Munday	2nd	1st	05/27/84

8. On August 24, 1984, MSHA Inspector Hubert Sparks issued a 104(a) citation to Peabody Coal Company alleging a violation of 30 C.F.R. Section 48.30 at River Queen surface mine in that employees working on the third shift were required to receive annual refresher training on first shift on March 30, 1984.

9. In fact, four (4) third shift employees were required to receive annual refresher training on first shift on March 30, 1984.

10. Payment of the penalty assessed by the Mine Safety and Health Administration for the citation involved in this case would not affect the ability of Peabody Coal Company to remain in business.

ISSUE

The question presented is whether or not Peabody Coal Company had a "common practice" of cross-shifting at the River Queen Surface Mine on March 30, 1984, the date of the alleged violation.

DISCUSSION AND FINDINGS

The facts in this case are not in dispute. Four third shift employees were admittedly cross-shifted for purposes of obtaining required annual refresher training on the first shift on March 30, 1984. Peabody maintains that the operator has the right to cross-shift miners for the purpose of obtaining this required training if cross-shifting is a common practice at the mine. There is some support for this position. See, e.g., Consolidation Coal Company, 4 FMSHRC 578 (1982) (ALJ). However, the threshold question is whether such a common practice existed at this mine in March 1984. "Common practice" to the undersigned administrative law judge means that which is generally done, the prevalent practice.

While it is acknowledged that Peabody did cross-shift workers before March 1984 for purposes other than training, the issue is whether this was of such frequent and ordinary occurrence so as to rise to the status of a "common practice". I conclude that it did not. In the three months prior to March 30, 1984, three second shift employees out of 124 worked one day each on a different shift and two third shift employees out of 66 worked a different shift during that period--one man for one day and the other for approximately two weeks. No first shift employee of which there were 169 was cross-shifted during this time period. In making this finding, I am cognizant of the fact that two workers were stipulated to have been cross-shifted for the entire period of time covered by the stipulation, i.e., January 1 to August 24, 1984, but I find that this amounts to a de facto change of shift rather than cross-shifting. Accordingly, I find as a fact that of 363 miners working at this mine, only five were cross-shifted during the three-month period prior to March 30, 1984. Therefore, I find that Peabody Coal Company did not have a "common practice" of cross-shifting miners at the River Queen Surface Mine for reasons other than training on, or during the three months prior to, March 30, 1984.

In view of the foregoing findings, I conclude that the petitioner here has established a violation of 30 C.F.R. § 48.30(a) inasmuch as the required training was not conducted during normal working hours, and the citation is therefore AFFIRMED.

Further, considering the criteria in section 110(i) of the Act, I conclude that a penalty of $20, as proposed, is appropriate.

ORDER

Respondent IS ORDERED to pay the $20 civil penalty assessment within thirty (30) days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 8 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. SE 85-2 A.C. No. 01-01247-03619
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: George D. Palmer, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner; Harold D. Rice, Esq., and R. Stanley Morrow, Esq., Birmingham, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In this case, the Secretary seeks penalties for two alleged violations of the mandatory safety standard contained in 30 C.F.R. § 75.1403-5(g). The parties have submitted the case for decision on stipulated facts.

STIPULATION

The parties have stipulated to the following facts and issues:

1. The Operator is the owner and operator of the subject mine.

2. The Operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction in this case.

4. The MSHA Inspector who issued the subject citations was a duly authorized representative of the Secretary.

5. True and correct copies of the subject citations were properly served upon the Operator.

6. Copies of the subject citations and determination of violation at issue are authentic and may be admitted into evidence for the purpose of establishing its issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein.

7. Imposition of a penalty in this case will not affect the Operator's ability to do business.

8. The alleged violation was abated in good faith.

9. The Operator's history of prior violations is average.

10. The Operator's size is medium.

The parties agree that the condition or practice described in the citation occurred and that the belt described in the citation was a coal-carrying belt.

The parties further agree that the decision in Docket No. SE 84-23 on the coal-carrying issue should determine the merit of this case. The mine inspector's evaluation of the violation is set forth in Section III at the bottom of the citation attached hereto as "Exhibit A". The petitioner's analysis of the violation against petitioner's regulation for determining the penalties to be proposed is set forth on the second page of the proposed assessment. The parties agree that the proposed penalties of $119 and $157 are appropriate if violations are found to have occurred.

I accept the stipulation and find the facts stipulated to.

CONCLUSIONS OF LAW

Subsequent to the submission of the above stipulations, the Commission decided the cases of Secretary v. Jim Walter I, 7 FMSHRC ___, Docket No. SE 84-23 (April 29, 1985) and Secretary v. Jim Walter II, 7 FMSHRC ___, Docket No. SE 84-57 (April 29, 1985). They decided that 30 C.F.R. § 75.1403-5(g) applied to coal-carrying belt conveyors. Following that

decision, I conclude that violations have been established in this case before me. Considering the stipulated facts in the light of the criteria in section 110(e) of the Act, I conclude that the penalties assessed by MSHA are appropriate.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay, within 30 days of the date of the decision, the following civil penalties.

CITATION	PENALTY
2482694	$119
2482622	157
	$276

James A. Broderick
Administrative Law Judge

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H. Gerald Reynolds, Environmental Counsel, Jim Walter Corp., P.O. Box 22601, Tampa, FL 33622 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 8 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 85-44 A.C. No. 01-01247-03636
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: George D. Palmer, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner; Harold D. Rice, Esq., and R. Stanley Morrow, Esq., Birmingham, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In the case, the Secretary seeks penalties for two alleged violations of mandatory safety standards. The parties have agreed to a settlement of one of the alleged violations and have submitted the other for decision on stipulated facts.

CITATION 2483275

This citation charged a violation of 30 C.F.R. § 75.323 because the mine foreman, the mine superintendent and the assistant mine superintendent were not countersigning the approved weekly examination book. The violation was originally characterized as significant and substantial, and was assessed at $136. Petitioner has modified the citation and deleted the significant and substantial characterization. The settlement motion states that the gravity criterion was evaluated too high and the parties pr pose to settle for a payment of $75. I conclude that the settlement is in the public interest and should be approved.

STIPULATION

The parties have stipulated to the following facts and issues concerning citation 2483267 and submit the case for decision based on the stipulation:

1. The Operator is the owner and operator of the subject mine.

2. The Operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction in this case.

4. The MSHA Inspector who issued the subject order was a duly authorized representative of the Secretary.

5. A true and correct copy of the subject order was properly served upon the Operator.

6. The copy of the subject order and determination of violation at issue are authentic and may be admitted into evidence for the purpose of establishing its issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein.

7. Imposition of a penalty in this case will not affect the Operator's ability to do business.

8. The alleged violation was abated in good faith.

9. The Operator's history of prior violations is average.

10. The Operator's size is medium.

The parties agree that the condition or practice described in the citation occurred and that the belt described in the citation was a coal-carrying belt.

The parties further agree that the decision in Docket No. SE 84-23 on the coal-carrying issue should determine the merit of this case. The mine inspector's evaluation of the violation is set forth in Section III at the bottom of the citation attached hereto as "Exhibit A". The petitioner's analysis of the violation against petitioner's regulation for determining

the penalties to be proposed is set forth on the second page of the proposed assessment. The parties agree that the proposed penalty of $136.00 is appropriate if a violation is found to have occurred.

I accept the stipulation and find the facts stipulated to.

CONCLUSIONS OF LAW

Subsequent to the submission of the above stipulations, the Commission decided the cases of Secretary v. Jim Walter I, 7 FMSHRC ___, Docket No. SE 84-23 (April 29, 1985) and Secretary v. Jim Walter II, 7 FMSHRC ___, Docket No. SE 84-57 (April 29, 1985). They decided that 30 C.F.R. § 75.1403-5(g) applied to coal-carrying belt conveyors. Following that decision, I conclude that a violation has been established in the case before me. Considering the stipulated facts in the light of the criteria in section 110(i) of tha Act, I conclude that the penalty assessed by MSHA, $136 is an appropriate penalty for the violation.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay, within 30 days of the date of this decision, the following civil penalties.

CITATION	PENALTY
2483275	$ 75.00
2483267	136.00
	$211.00

James A. Broderick
James A. Broderick
Administrative Law Judge

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JUL 9 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 84-96-M
	:	A.C. No. 11-02667-05501
v.	:	
	:	Denton Mine
OZARK-MAHONING COMPANY, Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
Victor Evans and W. G. Stacy, Ozark-Mahoning Company, Rosiclare, Illinois, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for one violation of the regulatory standard at 30 C.F.R. § 57.15-4. The general issue before me is whether the Ozark-Mahoning Company (Ozark-Mahoning) has violated the cited regulatory standard and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e. whether the violation was "significant and substantial." If a violation is found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The Citation at bar (Number 374906) alleges as follows:

> Two employees were observed operating jackleg percussion type drills and were not wearing any type of eye protection. The employees were working in the south end drift of the mine. Flying rock chips from collaring holes while drilling could result in an injury to the eyes.

The cited standard provides that "all persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes."

It is undisputed that on May 24, 1984, two Ozark-Mahoning employees, Dennis Darell and Wendell Hicks, were collaring drill holes (the process of starting the drill bit into a hole) and drilling without wearing safety glasses or other eye protection. According to the undisputed testimony of Inspector George Laumondiere of the Federal Mine Safety and Health Administration (MSHA), rock fragments and chips fly out from the face while drilling and particularly while collaring holes. He therefore concluded that the miners were likely to suffer serious eye injuries or the loss of an eye. Laumondiere had himself once suffered eye injuries losing five days of work when he was a miner working with a drill under similar circumstances without eye protection.

It is not disputed that safety glasses were available but the decision to wear those glasses was essentially left to each miner. One miner understood he was to wear them whenever "there is any danger of getting things in your eyes" but another miner had never received any instructions relating thereto. There is no evidence that any miner had ever been disciplined for not wearing safety glasses.

Both Darrell and Hicks admitted that during the drilling process they did occasionally get objects in their eye but neither had yet suffered any serious injuries. In addition both miners felt that it was a greater hazard to wear protective glasses because the lens became foggy, greasy and dirty in the mine atmosphere thereby affecting vision during critical operations.[1]

By way of defense Ozark-Mahoning cites statements attributed to unidentified MSHA inspectors that it was not necessary to wear safety glasses "all of the time" and evidence that the inspectors themselves do not "always" wear safety glasses while underground. The purported defenses are irrelevant however since the violation herein relates specifically to the failure of drillers to wear safety glasses during drilling operations. The violation is accordingly proven as charged. In light of the seriousness of the

[1]Ozark-Mahoning does not however raise a "greater hazard" defense based on this evidence.

potential injuries and the undisputed evidence of the probability of such injuries I also find that violation was "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

In assessing the penalty in this case I have also considered that the operator is of moderate size and has no reported history of violations. While Inspector Laumandiere testified that the violation was abated when the mine superintendant obtained safety glasses for the drillers the evidence shows that the miners have continued to perform drilling operations without the use of safety glasses and without any disciplinary action by management. Under the circumstances it appears that Respondent has in fact not abated the violative conditions. In addition, in light of the clear absence of past enforcement of the cited standard by the mine operator I find that the violation was due to operator negligence. Under the circumstances I find that a penalty of $350 is appropriate.

ORDER

Ozark-Mahoning Company is hereby ordered to pay a civil penalty of $350 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 9 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 85-56 A.C. No. 36-00837-03536
v.	:	Lancashire No. 24-B Mine
BARNES & TUCKER COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

This matter is before me on the parties' motion to approve settlement of the captioned matter in the amount of $150.

Based on an independent evaluation and res nova review of the circumstances, I find the settlement proposed is in accord with the purposes and policy of the Act. MSHA admits that issuance of the failure to abate closure order was in error. Further, an exploration of the merits during the course of a teleconference with counsel on July 1, established that the evidence to support the violation was marginal.

Accordingly, it is ORDERED that the motion be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the penalty agreed upon, $150, on or before Friday, July 26, 1985, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 9, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 84-23 A.C. No. 01-00758-03569
v.	:	No. 3 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

This case is before me pursuant to the Commission's Order of Remand dated April 29, 1985 which directed further proceedings and findings as to whether the conditions cited constituted a violation of the subject safeguard.

On May 6, 1985, I ordered the parties to submit briefs on or before June 8, 1985 with respect to whether or not the admitted conditions constituted a violation. The operator now advises that it and the Solicitor have agreed to a settlement in the amount of $119 which is the originally assessed amount. Accordingly, I find the conditions constituted a violation and APPROVE the recommended settlement.

The operator is ordered to pay $119 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 9, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 84-57 A.C. No. 01-00758-03592
v.	:	No. 3 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

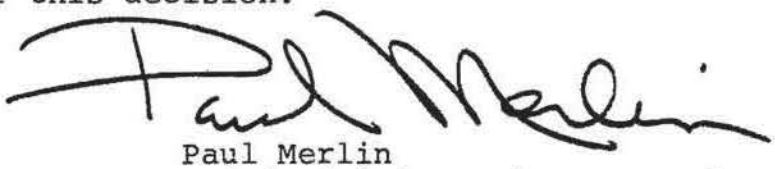
DECISION APPROVING SETTLEMENT

Before: Judge Merlin

This case is before me pursuant to the Commission's Order of Remand dated April 29, 1985 which directed further proceedings and findings as to whether the conditions cited constituted a violation of the subject safeguard.

On May 6, 1985, I ordered the parties to submit briefs on or before June 8, 1985 with respect to whether or not the admitted conditions constituted a violation. The operator now advises that it and the Solicitor have agreed to a settlement in the amount of $119 which is the originally assessed amount. Accordingly, I find the conditions constituted a violation and APPROVE the recommended settlement.

The operator is ordered to pay $119 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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JUL 10 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ROBERT RIBEL, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEVA 84-33-D MSHA Case No. MORG CD 83-18 Federal No. 2 Mine
v.	:	
EASTERN ASSOCIATED COAL CORPORATION, Respondent	:	

SUPPLEMENTAL DECISION ON THE MERITS

Before: Judge Koutras

On June 18, 1985, the Commission remanded this matter to me for consideration, and its remand order states in pertinent part as follows:

> [T]he merits portion of this case is remanded to the judge for the limited purpose of making specific findings of fact, along with any credibility determinations necessary to resolve key, conflicting testimony, and for an analysis of those findings consistent with established Commission precedent. 30 U.S.C. § 823(d)(2)(C). On remand, the judge is directed to analyze in detail whether a prima facie case of discrimination was established. In particular, the judge is to determine what actually occurred at the August 5, 1983 meeting between longwall coordinator Michael Toth and the miners of the midnight shift, and that meeting's relationship, if any, to the allegation that the decision to suspend Ribel with intent to discharge was a violation of section 105(c).

Supplemental Findings and Conclusions

The record in this case establishes that Mr. Ribel, along with several of his co-workers, was the focal point for an on-going dispute with mine management with regard to

the issue of "double cutting" coal on the longwall section. Mr. Ribel took the position that such a practice was inherently unsafe, and mine management took the position that it was safe. Mine safety committeeman James Merchant confirmed that Mr. Ribel and the other complaining miners spoke to him about the double cutting in May, 1983, and that meetings were held with Michael Toth, the longwall coordinator, and representatives of the UMWA, at which the issue was discussed. Mr. Merchant also alluded to discussions with MSHA several years earlier over the issue of double cutting.

As a result of the dispute concerning the issue of double cutting, Mr. Ribel and two of his co-workers (Kanosky and Wells), informed their supervisor and foreman, Jack Hawkins, that they would not double cut anymore. As a result of this, a meeting was held with the safety committee and mine management, and the decision was made by Mr. Hawkins' supervisors that the complaining miners did not have to double cut. Subsequently, in early May, 1983, Mr. Hawkins met with the recalcitrant miners, including Mr. Ribel, and in an effort to convince them to change their minds about double cutting, he purportedly discussed several "options" with them. Subsequent allegations by the employees that these "options" included threats by Mr. Hawkins to take away certain work-related privileges, i.e., overtime, favorable work assignments, led to a May 31, 1983, discrimination complaint to MSHA by Mr. Ribel and the other miners. Although Mr. Hawkins denied giving the employees any "options," and denied threatening them, he conceded that the issue of "double cutting" was frequently discussed with his crew as early as March and April, 1983, and that he had spoken with Mr. Ribel and the other miners on at least 10 or 15 occasions about the matter.

Mr. Hawkins candidly admitted that he spoke with Mr. Ribel and the other miners on many occasions about their initial refusal to perform double cutting, and that he did so out of concern that production on his shift was suffering and that his shift was far below the production of other shifts where double cutting was taking place. Although Mr. Hawkins denied that he ever threatened Mr. Ribel, or gave him "options" in connection with his refusal to double cut, Mr. Hawkins' continuous contacts and conversations with his crew over this subject supports a conclusion that coal production was uppermost in Mr. Hawkins' mind. Since Mr. Ribel was instrumental in curtailing production on his shift by his refusal to double cut, and since Mr. Ribel obviously influenced Mr. Wells and Mr. Kanosky to join him in his protests, as well as the discrimination complaint filed against Mr. Hawkins, one can reasonably conclude that

Mr. Ribel did not ingratiate himself to Mr. Hawkins, and that Mr. Hawkins was not too enchanted with Mr. Ribel. As a matter of fact, Mr. Hawkins testified that his goal of 300 carloads of coal production was not being met, and that everyone else on his crew except for Mr. Ribel, Mr. Wells, and Mr. Kanosky were "willing to go along with me" (Tr. 484).

Mr. Hawkins testified that he had discussed the fact that his crew was the only crew which did not engage in double cutting with both his supervisor and the mine safety department (Tr. 553). He conceded that production was "number one in my book" (Tr. 556), and that mine management expected him to "motivate" his crew to get them to double cut coal so as to increase production (Tr. 601). Mr. Hawkins also confirmed that he discussed the double cutting issue with MSHA Inspector Cross, the individual who conducted the discrimination investigation (Tr. 621).

In addition to the complaints over the question of double cutting, Mr. Hawkins alluded to a complaint and a request for an investigation by the safety committee concerning two face shields being pulled down at the same time, and while he was not certain whether Mr. Toth spoke to an inspector about the incident, Mr. Toth made a decision to discontinue the practice (Tr. 622). Mr. Hawkins also stated that the union's complaints to a state mine inspector, including complaints about the manner in which he was firebossing the section, resulted in the inspector visiting the mine on August 4, 1983, and interviewing Mr. Hawkins, members of his crew, and Mr. Toth. Although Mr. Hawkins testified that the state inspector found no wrong-doing on the part of mine management, he confirmed that the inspector "didn't like being drug in on it" because the complaints were "just a management-union conflict" (Tr. 624). The inspector suggested that a meeting be held to resolve their differences, and the meeting held on the midnight shift on August 5, 1983, was for that purpose (Tr. 625).

As the longwall coordinator, Mr. Michael Toth was responsible for all production and safety on the longwall section (Tr. 633), and he would also have occasion to review production delays and loss of production during any particular shift (Tr. 640).

Mr. Toth admitted that he was aware of the problems between Mr. Hawkins and his crew, and that he had "a definite interest" in these problems. He confirmed that he met "many times" with the crew and with the safety committeemen

about complaints which were made over alleged unsafe practices (Tr. 697-698). Although Mr. Toth denied that he was aware of any discussions between Mr. Hawkins and his crew concerning the issue of double cutting, and could not recall any specific complaints by the safety committee over that issue, he conceded that the subject had been "talked about several times" (Tr. 638). He also confirmed that he was aware of the fact that Mr. Ribel had filed a discrimination complaint with MSHA on May 31, 1983 (Tr. 665), and that everyone at the mine was aware of the problems between Mr. Hawkins and his crew (Tr. 665).

Mr. Toth testified that the August 5, 1983, meeting was the result of a request made by a state mine inspector that Mr. Toth meet with Mr. Hawkins and his crew to resolve the "bickering" or "personal grudge" which existed between Mr. Hawkins and members of his crew (Tr. 646). Although Mr. Toth denied threatening anyone at the meeting with the loss of their jobs, he conceded that it was possible that a miner could be disciplined or lose his job if he made groundless safety complaints against his foreman, and that taken in this context, he admitted that he may have said something about job losses (Tr. 672). Mr. Toth also admitted that he was somewhat chagrined at Mr. Wells for laughing or smirking while he was speaking, and that he remarked to Mr. Wells "Danny, don't think for one minute that you can't be on the shit end of the stick" (Tr. 650). After making this remark, Mr. Toth abruptly left the meeting in charge of Mr. Hawkins, with a remark to Mr. Hawkins that maybe "he could do some good with them" (Tr. 650).

Four of the miners who were at the August 5th meeting testified that Mr. Toth made the remarks attributed to him. Mr. Wells testified that Mr. Toth mentioned the fact that he was getting tired of all of the safety complaints and that if they did not stop, miners could end up losing their jobs (Tr. 221-222). Mr. Kanosky believed that Mr. Toth was directing his remarks to him, as well as to Mr. Ribel and Mr. Wells (Tr. 289).

Mr. Reeseman testified that Mr. Toth became upset at Mr. Wells during the meeting and remarked to Mr. Wells that "all of this petty stuff that has been going out to the safety department, every day, and every day, is going to stop, or you will be next" (Tr. 406). Mr. Hayes testified that Mr. Toth remarked to Mr. Wells that "he would be next" and would "come out on the shitty end of the stick" over the safety grievances which had been filed on the section (Tr. 420).

Given all of the aforementioned facts and circumstances, I conclude and find that it is abundantly clear from this record that both Mr. Toth and Mr. Hawkins were hostile towards Mr. Ribel because of his prior safety and discrimination complaints over the issue of double cutting. I also believe that it is clear from the record that the animosity which was displayed by mine management (Toth and Hawkins), was the direct result of Mr. Ribel's resistance to the double cutting of coal, his leadership role in convincing at least two other members of his crew to join in on his protests, and his filing of a discrimination complaint against Mr. Hawkins. It also seems obvious to me that Mr. Ribel's activities in this regard impacted on mine production, placed Mr. Hawkins in the position of being the only section foreman whose crew did not produce adequately, and caused Mr. Toth daily operational problems, all of which adversely impacted on an otherwise smooth mining operation.

Although I ultimately held in Docket No. WEVA 84-4-D, that Mr. Ribel and the other complaining miners had failed to establish a prima facie case with respect to their discrimination complaint in connection with the double cutting of coal issue, Mr. Ribel's right to complain about that practice, including his right to file safety or discrimination complaints, remains intact and protected, and mine management may not retaliate or otherwise discriminate against him for exercising his rights in this regard.

Mr. Toth discovered that the telephone wire had been cut after he instructed a mechanic to check the telephone because it had not been paging. Upon opening the phone, the mechanic discovered that the wire appeared to have been cut, and he so informed Mr. Toth. Mr. Toth immediately went to the head gate to summon Mr. Ribel, and he brought him to the telphone station and asked him to look at the telephone. In the presence of at least two mechanics (Toothman and Foley), Mr. Toth asked Mr. Ribel - "Rob, what's that look like to you" (Tr. 661). Mr. Ribel responded that it appeared that the phone wire had been cut, and Mr. Toth agreed with him (Tr. 661). Mr. Toth then concluded that Mr. Ribel had cut the wire, and his conclusion was based on his belief that Mr. Ribel was the only person who had an opportunity to do so.

Given the background of animosity and acrimony which obviously existed between Mr. Ribel and mine management, I find it doubtful that Mr. Ribel would openly make himself vulnerable to discharge by cutting a telephone wire while his adversaries Mr. Toth and Mr. Hawkins were present on the

section. Further, given the fact that Mr. Toth was personally checking on the telephone system, and in view of management's suspicions that miners were deliberately sabotaging the telephones, I find it doubtful that Mr. Ribel would place himself in the position of being "fingered" as the responsible party. Assuming that Mr. Ribel was a party to the prior acts of alleged telephone sabotage, since the culpable party or parties had not as yet been discovered, I find it rather unlikely that Mr. Ribel would do anything to cast suspicion on him. Since Mr. Ribel had an otherwise clear employment record, and there is no indication that he did not perform his job properly, or had ever been in any trouble on the job, I find it doubtful that he would risk his livelihood by sabotaging a telephone while his bosses were on the section.

Mr. Toth has conceded that his conclusion that Mr. Ribel was the person who cut the wire was based on "circumstantial evidence." Mr. Toth's rationale for pointing the finger at Mr. Ribel was his belief that Mr. Ribel was the only person who had access to the phone and the opportunity to cut the wire. My previous finding was that this was not so, and that other individuals who were present on the section had ready access to the telephone and also had an opportunity to cut the wire in question.

Although it may be true that at the time Mr. Toth confronted Mr. Ribel about the damaged telephone wire, Mr. Toth believed that he had the "right man," I believe that Mr. Toth's conclusion that Mr. Ribel was the guilty party was influenced in part by Mr. Toth's hostility and animosity towards Mr. Ribel and certain members of his crew. I believe that this hostility was the result of the disruptive and protracted safety confrontations between Mr. Hawkins and his crew, and the fact that Mr. Ribel and several of his co-workers chose to make safety and discrimination complaints over the practice of double cutting and other mining practices.

I believe that one can reasonably conclude that Mr. Toth considered Mr. Ribel to be a disruptive force among his crew, particularly in light of the decreased production which resulted from Mr. Ribel's leadership role in refusing to double cut. Further, shortly before the discovery of the cut wire, Mr. Toth had abruptly left a meeting with Mr. Ribel's crew after being provoked by Mr. Wells. The remarks attributed to Mr. Toth against Mr. Wells, which I believe were made, were construed by several members of the crew as

threats to their jobs. Although Mr. Toth denied that he made direct threats, he admitted making some remarks about possible disciplinary action against miners who made unfounded safety complaints. Given the background of conflict and hostility which existed, I can understand why some of the crew members may have viewed Mr. Toth's comments as job threatening. I can also understand Mr. Toth's frustration over Mr. Hawkins' inability to control his crew or to get more production out of them, and the frustration and anger that he obviously felt over his confrontation and words with Mr. Wells. Given all of this turmoil, I believe that Mr. Toth seized upon the opportunity to blame the wire cutting on Mr. Ribel, and rather than conducting a thorough investigation into the matter, he made a rather cursory decision that Mr. Ribel was the guilty party. In making that decision, I believe that Mr. Toth was motivated in part by his hostility and animosity towards Mr. Ribel, and that by singling him out for suspension and discharge, Mr. Toth somehow hoped to end all of the conflict which had directly affected his operation.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 12 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 85-28
	:	A.C. No. 11-00784-03553
v.	:	
	:	Docket No. Lake 85-43
SAHARA COAL COMPANY, INC., Respondent	:	A.C. No. 11-00784-03557
	:	
	:	Mine No. 21

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Charles N. Wheatley, Esq., Sahara Coal Company, Inc., Chicago, Illinois, for Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," for two violations of regulatory standards. The general issues before me are whether Sahara Coal Company, Inc. (Sahara) has violated the regulations as alleged and, if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

DOCKET NO. LAKE 85-28

The one citation at issue in this case (Number 2322574) alleges a significant and substantial violation of the standard at 30 C.F.R. § 75.1710-1 and charges as follows:

> The canopy on the continuous mining machine in working section ID003-0 was not located and installed in such a manner that the operator, when at the tram controls would have been protected from falls of roof. The machine however was being operated by remote control and the operater was positioned outside the canopy approximately 8 feet from the canopy. This

condition existed at the time of a fatal roof fall accident.

It is not disputed that the cited standard required that the continuous mining machine "be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the . . . controls . . [he is] protected from falls of roof, face, or rib, or from rib and face rolls." The Secretary acknowledges, however, that prior to the alleged violation he had authorized Sahara to operate its continuous mining machines by remote control so long as those controls were "located so that the operator would not be in danger by roof falls that may occur near the equipment." The Secretary is now claiming that Sahara violated this policy exception in that the operator of the continuous mining machine was purportedly operating this machine in an area endangered by a roof fall.

The Secretarial policy exception herein is similar to the attempted modification of a standard discussed in Secretary v. King Knob Coal Company, Inc., 6 FMSHRC 1417 (1981). The Commission held in King Knob that the Secretary's attempted modification of a regulatory standard lacked the force and effect of law. The standard cited therein was accordingly construed without reference to the Secretarial policy. Within this legal framework and considering the undisputed evidence that the continuous mining machine cited in this case was being operated outside the protective canopy, it is apparent that there was a violation of the cited standard.

Reliance by Sahara on Secretarial policy may however affect the negligence chargeable and thereby the amount of penalty to be imposed in this case. Accordingly the fact that the continuous mining machine operator was using the remote control unit outside the protective canopy would not in itself demonstrate negligence in light of Secretarial policy permitting the use of such controls under certain circumstances. The issue is whether the remote controls were used by the machine operator in an area endangered by roof falls.

On the basis of the evidence discussed infra in connection with Citation Number 2201537, I find that section foreman Tom Killman indeed had knowledge that the subject work area was in fact endangered by roof falls. It was undisputed that the miner operator was working near and under drummy roof and that he was told by Killman to do so. The mine operator was accordingly negligent and the use of the remote control device in such close proximity to drummy and fractured roof was a serious and a "significant and substantial"

violation. See Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

In determining the amount of penalty to be assessed herein I have also considered that the operator is moderately large and has a moderate history of violations. Inasmuch as this violation is included within and merges with the violation charged in Citation No. 2201537, a reduced penalty of $300 is warranted and is accordingly assessed.

DOCKET NUMBER LAKE 85-43

The one citation in this case (Number 2201537) alleges a violation of the regulatory standard at 30 C.F.R. § 75.200 and charges as follows:

> Subnormal roof conditions, a separation of the roof strata at about 30 inches and drummy roof, were encountered in the face of the 27 northwest entry outby for about 30 feet and no supplemental support was installed. The approved roof control plant stipulates that where subnormal roof conditions are encountered, supplemental support such as longer bolts, post or crossbars will be installed. This condition was discovered during a fatal roof fall investigation that occurred at the mine.

The operator's roof control plan provides that "in active working areas, where subnormal roof conditions are encountered, the minimum roof-control method will be supplemented with either longer and/or additional roof bolts, posts, or cross bars."

Much of the essential evidence is not in dispute. Richard Thompson, a continuous miner operator was warned at the beginning of his shift on August 28, 1984, by the miner operator from the previous shift about a crack 30 inches into the roof in the Number 2 Entry. Thompson related this information to co-workers Kane and Hanna and to his section foreman Tom Killman.

Upon Killman's return from his preliminary inspection of the working places the work crew proceeded to the suspect entry to check the roof. There is no dispute that the roof sounded drummy in the area near the face. Thompson also observed a crack in the roof running parallel to the entry and nearby there was an 18 inch drop in the coal seam. Thompson found the roof in the area to be "rough" and noted that this too was an indication of poor roof conditions. In spite of these conditions Foreman Killman decided to take a ten foot cut in the entry that would allow them to clear the next crosscut. He apparently intended to later return to the

bad roof and insert longer 48 inch roof bolts into the drummy area. Before Killman left he told the crew to "be careful" and "watch the top for movement or falling".

Another continuous miner operator, Larry Kane, then took one 10 foot cut on the right side of the entry, backed the miner up, and took another two loads of coal. The rock at the face then suddenly broke off crushing parts of the continuous miner. Kane moved further back with the remote box as he tried to work the continuous miner free. At this point Thompson saw dust begin falling from the vertical crack. He yelled, then turned and ran toward the cross-cut. Kane was unable to escape and was crushed and killed by the falling roof.

Loreen Hanna, an experienced roof bolter, confirmed that Thompson had warned the crew about the crack 30 inches into the roof. Killman and the work crew then checked the roof and found it to be drummy and visually abnormal. According to Hanna the roof was indeed subnormal and dangerous to work under. Since Hanna then had only 30 inch bolts available Killman sent for 48 inch bolts. Mining nevertheless proceeded without the 48 inch bolts and the fatal roof fall occurred before they were installed.

Based on this testimony, MSHA Special Investigator Edward Richie opined that subnormal roof conditions did in fact exist at least 30 feet from the face of the Number 2 Entry prior to the first roof fall and, in accordance with the roof control plan, supplemental support should have been installed before mining progressed.

According to mine superintendant James Teal, drummy sounding roof, the existance of a crack 30 inches into the roof and a visible crack running parallel to the entry did not indicate subnormal roof and, therefore, supplemental roof support was not in fact required by the roof control plan. In this regard Teal notes that the union mine examiner did not cite any subnormal conditions in the mine examiner's book during the preceding preshift examination. The relevant entry in the preshift examiner book indicates however that the Number 2 Entry could have been examined as early as 7 o'clock the previous evening so that conditions arising in the entry thereafter would not have been observed. Moreover since it appears reasonably likely that the drummy roof conditions were discovered only late in the second shift, the preshift examiner could very well have been unaware of the deficiencies in the Number 2 Entry at the time he made his entry in the preshift books.

In any event, in light of the convincing and credible testimony of the experienced miners who observed the roof

conditions firsthand and the equally convincing expert testimony of MSHA Special Investigator Edward Ritchie, I reject the self-serving testimony of Superintendant Teal. Indeed, according the the undisputed evidence even Foremen Tom Killman recognized that drummy sounding roof, visible fractures in the roof running down the length of an entry, and evidence of gaps and fractures 30 inches up into the roof were evidence of dangerous subnormal roof conditions. In obvious recognition of the problem, Killman directed one of the miners to bring up longer 48 inch roof bolts for supplemental support. The failure of Killman to have required installation of such supplemental roof support before allowing mining to continue under the circumstances was serious and a "significant and substantial" violation of the operator's roof control plan and the cited standard.

Since it is not disputed that Foreman Killman knew of the hazardous roof conditions there can be no question but that he was grossly negligent in ordering his work crew to continue mining in close proximity to that hazardous roof. That gross negligence is attributable to the mine operator. Secretary v. Ace Drilling Company, 2 FMSHRC 790 (1980). The evidence indicates that after recovering the buried continuous miner the operator abated the violation by abandoning the cited entry. Considering the extreme hazard presented by the violative conditions and the gross negligence exhibited I find that a penalty of $10,000 is appropriate.

ORDER

Sahara Coal Company, Inc., is hereby directed to pay civil penalties of $10,300 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUL 12 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 83-69-M A.C. No. 48-00152-05512
v.	:	FMC Mine
FMC CORPORATION, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., and Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Respondent.

Before: Judge Lasher

This proceeding, arising under the Federal Mine Safety and Health Act of 1977 1/ calls for interpretation and application of the mandatory safety standard provided in the second sentence of 30 U.S.C. § 57.9-6 which provides:

> 57.9-6 Mandatory. When the entire length of a conveyor is visible from the starting switch, the operator shall visually check to make certain that all persons are in the clear before starting the conveyor. When the entire length of the conveyor is not visible from the starting switch, a positive audible or visible warning system shall be installed and operated to warn persons that the conveyor will be started.
>
> (emphasis added).

During an inspection of the FMC Mine on November 22, 1982, MSHA Inspector William W. Potter issued Citation No. 2008100 under Section 104(d)(1) of the Act. The citation alleged:

> "The conveyor belt for panel 7CM does not have adequate start-up warning system. The visible warning used

1/ 30 U.S.C. § 801 et seq. (1982), herein the Act.

on this conveyor is flashing lights. From the light at the crusher feeder it is approximately 1000 feet to the next working light. There was another warning light installed approximately 750 feet from the crusher feeder but this light was not working. There was approximately 700 feet of this belt that was not protected by a start-up warning system. If the other light had been working there would have still been approximately 400 feet of this belt that was not protected by a start-up warning system. The services Supt. allowed this belt to be released to the production crews to use in this condition. This conveyor has been operating in this condition since day shift on the 7th of this month. Maintenance and clean-up persons are required to work on and around this conveyor. This is the 4th cititation (sic) to be issued on this practice since 5/05/81. The same person has been the Services Supt. during this time. During previous meetings with the company it had been determined that these warning lights should not be over 400 feet apart and at no time over 500 feet apart, at 400 feet a person would not be over 200 feet from a warning light. When a belt has been running there is dust in the air and this will cut the visibility considerably". 2/

At the commencement of the hearing, the parties stipulated that the entire length of the conveyor belt in question was not visible from the starting switch, thus making operative the last (second) sentence of 30 U.S.C. § 57.9-6. The Respondent had installed a visible warning system-as distinguished from an audible warning system which is also authorized by the regulation-consisting of three flashing 200-watt, 250 volt bulbs. 3/ A bulb was placed at each end of the 1000-foot conveyor belt in question, and the third light was installed 375 feet from the inby end, making it a distance of approximately 625 feet (Tr. 66) from the outby end. 4/ The three bulbs, which cast a white light, flash automatically for a period of 30 seconds after the conveyor belt is started before the belt actually starts to move. One or more of the three lights can actually be seen-are visible to the naked eye-from any point along the 1,000-foot length of the conveyor.

2/ Following the issuance of the Citation, the Respondent abated the allegedly violative condition by installing two additional lights along the conveyor belt (Tr. 58, 112, 113; Termination of Citation).

3/ There is no audible warning system along the conveyor.

4/ The inspector indicated the middle (burnt-out) bulb was 750 feet (Tr. 12, 14, 34) from one end of the belt and 250 feet from the other (Tr. 13, 14, 32, 34). The spacing distances supplied by Respondent's witness of 625 feet and 375 feet appear to be more precise and to have resulted from careful measurements and are accepted (Tr. 66-67, 94-97, 110, 111).

At the time of Inspector Potter's inspection the middle light was not working. It was the Inspector's opinion that even had the middle light been working, the "start up warning system" was inadequate to warn miners working at the more extreme distances from the nearest warning lights.

The reliable evidence of record indicates that even from a distance of 750 feet 5/ a flashing light would be visible to the naked eye if there was not a lot of dust (Tr. 54). The question posed by this record is whether or not such flashing light, although actually visible, would be sufficient to attract the attention of a miner working in the area and alert him to the danger created when the conveyor belt is started up (Tr. 92). In this connection, it should be noted at the outset that there are no specific spacing distances (including the "400-foot" requirement emphasized by the Inspector) provided in the mandatory regulation cited (30 C.F.R. § 57.9-6) nor any other regulation or requirement published in the Act, the Federal Register (Tr. 26), or any safety or health plan submitted by Respondent and approved by MSHA. Nor was there any written memorandum of understanding or agreement with respect to the distances between such lights reached between MSHA (including the inspector) and Respondent (Tr. 57, 132). Although on direct examination Inspector Potter testified he had discussed the matters with Respondent's management 6/, Respondent's witnesses adamantly and persuasively denied that they acquiesced in the inspector's position as to spacing distances between lights. Respondent's Mine Safety Supervisor, David L. Thomas, also testified that the Inspector had not been consistent in the past with respect to the distances he thought appropriate (Tr. 125-132). 7/ The Inspector's testimony also was somewhat confused about prior light-spacing citations involving the same conveyor belt system (Tr. 16, 20, 22, 25-28).

It should be noted initially that the gravamen of the alleged infraction-as cited - is that the 3-light system itself was inadequate even with consideration of the fact that one light was burned out on the occasion the Citation was issued. This was the apparent basis upon which the matter was tried by both parties.

5/ The maximum distance a miner would be from any light - with the middle bulb working - would be 625 feet.

6/ Leaving just an inference that some understanding had been reached.

7/ Since this testimony was not rebutted by Petitioner it is credited. Further, the similar imprecision of the Citation itself with respect to distances lends credence to Respondent's position.

The essential issue is whether the 3-light visual warning system in place on November 22, 1982, was sufficient to warn miners working along the conveyor belt. There is no question but that a miner actually facing any of the lights from any place along the belt would be able to see the flashing light if he were facing it (Tr. 52-54, 59). Nevertheless, the Inspector gave the flat opinion that if one were "turned around facing the conveyor" when the light came on, "it would not draw (one's) attention at all" (Tr. 53). According to the Inspector, this would be true even if there were no dust (Tr. 53).

In direct contradiction to the Inspector, Respondent's safety engineer, Charles Wilkinson, Jr., testified that the visual warning system was adequate because of the "illumination" from the lights, and that he had never seen the area so dusty that the light could not be seen (Tr. 91). He indicated that the illumination from the lights would be seen even in dusty conditions-and that such conditions do not occur very often (Tr. 69-72, 85-86, 89-92, 102).

Since there is no precise standard as to spacing distances for lights under a positive visible warning system, no approved plan for such, nor even a voluntary agreement or understanding between the operator and MSHA, the question of adequacy must rest upon the subjective judgments and opinions of witnesses. The Inspector's opinion that the visible warning system in question was not adequate to warn miners working in the area along the conveyor is weakened by the convergence of several factors. To begin with, as noted above, there is no clear standard with specific subfactors against which the alleged infraction can be tested. The looseness and generality in the wording of the Citation itself was repeated at hearing by the government's witness. There were discrepancies and possibly confusion, both as to the spacing distances between the lights and the areas involved in Citations which were previously issued. The Inspector's belief that some concrete standard as to spacing distances had been created by prior enforcement and or by agreement between the parties was credibly denied by Respondent. The record otherwise lacks support or corroboration (such as experimental testing and the testimony of miners) for the opinion relied upon by the government. By contrast, the opinion of Respondent's expert witness seemed to be based on a closer knowledge of the conditions existent in the area of the mine involved and to some extent it was less general and more detailed in rationale. Evaluation of the system even with the middle light not functioning leads one to conclude that it was sufficient to warn in view of the superior force of Respondent's evidence relating to the general visibility of the end lights and the "illumination" therefrom when they were activated.

Accordingly, on the basis of this record, the position of Respondent as to the sufficiency of its positive visible warning system on November 22, 1982, is accepted. The petition for Assessment of Civil Penalty is found to lack merit.

ORDER

Citation No. 2008100 dated November 22, 1982, is VACATED.

Michael A. Lasher, Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 12 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 85-101 A.C. No. 46-05992-03510
v.	:	
CANNELTON INDUSTRIES, INC., Respondent	:	Indian Creek No. 2 Preparation Plant

DECISION

Appearances: Jonathan M. Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; William C. Miller II, Esq., Cannelton Industries, Inc., Charleston, West Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for one violation of the regulatory standard at 30 C.F.R. § 77.1710(g). The general issues before me are whether the cited violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violation was "significant and substantial", and the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.[1]

[1]Cannelton does not dispute that a violation of the cited standard did in fact occur but contends that it was merely an insignificant technicality. Since Respondent did not contest this section 104(d)(1) citation pursuant to section 105(d) of the Act, I am without authority to consider the special "unwarrantable failure" finding in this civil penalty proceeding. See Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (1979) and Wolf Creek Collieries Company, 1 FMSHRC ____, (1979). There is nevertheless ample evidence to support such a finding. See discussion of operator negligence infra.

Citation number 2147345, issued under section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. § 77.1710(g) and reads as follows:

> Two men were observed working in an unattenable [sic] position sealing a leak in an overhead pipe. One man was standing on top of the sieve bend structure leaning forward up and out applying compound to a ruptured pipe, about 4-8 feet higher than the height of the sieve bend structure. The height of sieve bend structure is about 15 feet above floor level. A fall from said position could result in a serious injury. The area at the base consisted of sieve bend structure and a vibrator screen deck. Safety equipment such as a lifeline, safety belt and ladder was not used during this work procedure.

The cited standard provides, in relevant part, as follows:

> Each employee working . . . in the surface work areas of an underground coal mine will be required to wear protective . . . devices as indicated below: . . . (g) Safety belts and lines where there is a danger of falling . . . ."[2]

The violation is "significant and substantial" if (1) there is an underlying violation of a mandatory safety standard as admitted herein, (2) there is a discrete safety hazard, (3) there is a reasonable likelihood that the hazard contributed to or result in injury and (4) there is reasonable injury in question will be of a reasonably serious. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

Much of the essential evidence is not in dispute. Gary King, a Cannelton employee for 14 years, found a leaky pipe on the third floor of the preparation plant and reported this condition to his supervisor, foreman Charles Williams. Williams thereafter directed another employee, Douglas Price to pick up some "water plug" (a putty-like material used for patching leaks) for the pipe repairs and they proceeded to the problem area. Williams had the plant shut down, then left the work site to take a phone call at the plant office. Before he left, Williams gave no specific instructions on how

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[2]See Southwestern Illinois Coal Corporation, 5 FMSHRC 1672 (1983) and Southwestern Illinois Coal Corporation, 7 FMSHRC __ (May 15, 1985) for the Commission's interpretation of the standard at issue.

to complete the task. Both Price and King testified that they had performed similar tasks many times before and therefore knew what to do without any specific instructions. Price had worked for 10 years and King 5 years at the Cannelton plant under the supervision of Williams.

After Williams left, King climbed onto the sieve box platform, 15 inches wide and 54 inches long. Price mixed the "water plug" and handed it to King from 6-1/2 to 7 feet below. Using the "water plug" King began repairs on the pipe while standing on the sieve box and leaning on another pipe. Price then joined King to assist. In order to get into position he had to "duck walk" on the 8 inch diameter pipe some 12 to 14 feet above the floor level. Price then crouched on the pipe while holding onto a beam with one hand and applied dry "water plug" with the other hand. At the same time Price was also apparently able to hold onto a can containing 6 to 8 pounds of the patching material.

Both King and Price had previously performed repairs from similar elevated positions without a safety belt or lifeline in the presence of foremen and were never told it was unacceptable. Price claims that he could not in any event have used the safety belt available at the plant because its 30 inch tether was too short. It is undisputed that there was only one safety belt available near the plant and that belt had only a short extension or tether of approximately 30 inches. There is no evidence that any lifeline was available at the plant.

Joseph LonCavish, inspector for the Federal Mine Safety and Health Administration (MSHA) was conducting a regular inspection of the plant in the presence of his supervisor Richard Browning, when he saw Price and King working in an elevated position without safety belts or lifelines. While there was some disagreement over the distance the miners could have fallen (estimated as from 4 to 10 feet) both concluded that there was indeed a danger of falling onto the vibrator screen or the sharp metal edging around the screen and receiving serious and permanently disabling injuries e.g. limb, rib and head fractures. It is not disputed that such a fall was reasonably likely and that such serious injuries were likely to result. Accordingly I conclude that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Company, supra.

The violation was also the result of gross negligence. Both King and Price had admittedly on prior occasions performed similar tasks from elevated positions while not using safety belts or lifelines without correction or discipline

from supervisory personnel. There is, moreover, no evidence that employees had been specifically trained in the use of safety belts and lifelines. Indeed, from Price's testimony it appears that he did not know how to use a safety belt and lifeline in connection with the job he was performing. Finally, the evidence shows that only one safety belt was even available at the plant (with only a 30 inch tether) and that no lifeline was available. Under the circumstances only one employee could have used a safety belt at a time and, without a lifeline, was of little value.

It may reasonably be inferred from the nature of the job to be performed that superintendant Williams knew, or could reasonably have expected, that two employees would have been working on the pipe repairs from an elevated position. Finally, Williams gave no instructions before he left the repair site to use a safety belt and lifeline and, by his past practices of allowing previous work on such tasks without safety belts and lifelines, implicitly condoned the unlawful practice. Within this framework it is clear that superintendent Williams was grossly negligent. This negligence is imputed to the mine operator. Secretary v. Ace Drilling Company, 2 FMSHRC 790 (1980). Negligence may in any event be found in this case based alone on the lack of supervision and training of the two employees concerning the use of safety belts and lifelines and the lack of discipline for failing to use that equipment under similarly hazardous conditions. Secretary v. A. H. Smith Stone Company, 4 FMSHRC 13 (1893).

In assessing a penalty herein I have also considered that the mine operator is large in size and has a moderate history of violations. The evidence shows that the instant violation was abated by the instruction of employees on the use of safety equipment to be used in elevated areas of the plant and the acquisition of necessary safety equipment. Under the circumstances a civil penalty of $850 is appropriate.

ORDER

Citation number 2147345 is affirmed. Cannelton Industries, Inc., is ordered to pay a civil penalty of $850 within 30 days of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 15 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 85-33 A.C. No. 36-00907-03544
v.	:	
	:	Shannopin Mine
SHANNOPIN MINING COMPANY, Respondent	:	

DECISION

Appearances: Joseph T. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Jane A. Lewis, Esq., Thorp, Reed & Armstrong, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", for a violation of the Respondent's Ventilation System and Methane and Dust Control Plan under the regulatory standard at 30 C.F.R. § 75.316. The general issue before me is whether Shannopin Mining Company (Shannopin) has violated the cited regulatory standard and, if so, whether that violation is of such a nature as could significantly and substantially contribute the cause and effect of a mine safety or health hazard i.e., whether the violation was "significant and substantial." If a violation is found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.[1]

The citation at bar (number 2252689) alleges in relevant part as follows:

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[1]Inasmuch as Respondent did not contest the section 104(d)(1) citation at bar pursuant to section 105(d) of the Act, I am without authority to consider the special "unwarrantable failure" finding in this civil penalty proceeding. See Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (1979) and Wolf Creek Collieries Company, 1 FMSHRC _____, (1979). There is nevertheless ample evidence to support such a finding. See discussion of operator negligence, infra.

> The ventilation system - methane and dust control plan was not being complied with in that examinations of the bleeder entries that were open around the gob area of 4A, 006 section was [sic] not being recorded and no dates were found in the area to show that examinations are being made.

It is not disputed that in accordance with Shannopin's Ventilation System and Methane and Dust Control Plan then in effect the assistant foreman or a mine examiner was required to travel and examine on a weekly basis all bleeder entries including those in the areas cited. It is further undisputed that the mine examiner was required to record the results of such examination in a book retained at the mine for such purpose and that the mine examiner was required to date and initial certain locations within the inspected area to show that the examinations in fact had been made as required.

On May 7, 1984 Inspector Joseph Koscho of the Federal Mine Safety and Health Administration (MSHA), began his examination of the right side bleeder entries around the gob area of the 4A, 006 section from point B to point C on the mine map in evidence (Joint Exhibit 1). According to Koscho no dates or other indicia existed to show that this bleeder area had been inspected within the previous 7 days. Koscho had been inspecting the Shannopin Mine since 1978 and was familiar with the practices of its mine examiners in placing dates and initials along coal ribs, posts and in other conspicuous places to show that the areas had been examined.

Upon emerging from the right side bleeders Koscho met Shannopin's General Assistant, Frank Klink, and the UMWA representative of miners, Floyd Hornick. He informed Klink of the absence of any examination record for the right side bleeder area and Klink responded by suggesting that the inspection party proceed to the left side bleeders. The group then inspected the left side bleeders from point E on the mine map, past point G to point F on said map (Joint Exhibit 1).

Although it is admitted that Klink knew the location of the "dateboards" and other sites the mine examiners used to note their examinations in the bleeder entries he was unable to point out to Inspector Koscho any such location where an examiner had notated an examination within the previous 7 days. Indeed, it is undisputed that Inspector Koscho was in fact directed by Klink away from a location where three dateboards were known by Klink to be located. Klink also admitted at one point that he did not know whether the mine examinations had in fact been made. According to Koscho the

most recent date of examination found in the approximately 1,000 feet he traveled through the bleeders was not within 1 month of the date of the inspection at bar.

Shannopin Safety Director Melvin Pennington was aware shortly after the inspection on May 7 that Inspector Koscho was unable to find any initials and dates of inspections in the areas of the bleeder entries but nevertheless did not either check the bleeder entries himself to see whether the dates and initials appeared nor did he delegate someone to check that matter. General Mine Foreman James Price also knew of the impending citation but he too did not seek to verify whether the inspection dates had been properly recorded in the bleeder entries.

Richard Gashie was the mine examiner (fireboss) responsible during relevant times for inspecting the cited bleeder entries. Gashie testified that he was in fact making the required inspections in these areas and had signed and dated a number of locations including the three dateboards near the point of deepest penetration of the section (the area Klink avoided showing inspector Koscho) and an area near point F (Joint Exhibit 1) on an angle stopping. Gashie was never asked by any mine official to point out the location of any of his initials and dates that he claims he placed throughout the cited bleeder entries. He further claims that his entries in the mine examiners books corresponded to the written work assignment given him each day.

Following his underground inspection, Inspector Koscho checked the mine examiner's book to determine whether entries corresponding to an inspection of the cited bleeder entries had been made. Based on his experience at this mine since 1978, he concluded from the entries in the book that the bleeders had not been inspected. Shannopin maintains that the entry made by Gashie on May 2, 1984, that "4A left return to 1 left regulator passable" shows that the left bleeder entries had been examined by Gashie as required. It also claims that the entry by Gashie on May 3, 1984 that "4A right returned to steele shaft passable" shows that the right bleeder entries had also been examined as required. According to Koscho, these entries show only that the mine examination was made in areas outby the cited bleeder entries.

At the time of his inspection Koscho asked Safety Director Pennington whether they were in fact "walking the bleeder" in the 4A section. Pennington consulted with Mine Foreman Price. After examining the books they then concluded that although the book entries were being noted as "returns" rather than "bleeders" they had nevertheless been inspected.

Price explained at hearing that the cited area could be characterized as either a "bleeder" or a "return" although the area outby the position of the retreat mining would be properly characterized as a "return" but not as a "bleeder". Inspector Koscho disagreed and defined "bleeder" as anything inby the gob area. According to Koscho the term "return" cannot properly be used for the same area since a "return" ventilates the last working place outby the gob area.

Within this framework of evidence I find that a mine examination had not in fact been performed within 7 days preceeding the inspection at bar and, accordingly, the violation has been proven as charged. The credible evidence shows that the mine examiner's initials and dates of inspection did not exist in either the right or left bleeder entries of the cited section. Inspector Koscho testified that he found no such notations (within the necessary 7-day time frame) in the cited areas. In addition, the general assistant at Shannopin, Frank Klink, who accompanied Koscho during the course of his inspection of the left bleeder entries, was unable to locate or point out any such notations in that area of the mine. Indeed it is not disputed that during the course of this inspection Klink actually directed Koscho away from three dateboards where proper notations should have been located.

In addition, even though Shannopin management was immediately aware of Koscho's inability to find any notations by a mine examiner in the bleeders it did nothing to prove to Koscho that the proper notations had in fact been made. It would have been a very simple matter for mine personnel to have shown Koscho the dates and initials of the mine examiners. It may reasonably be inferred that they did not do so because in fact such notations did not exist. Within this framework I can give but little credence to the self-serving testimony of former mine examiner Gashie that he did in fact perform the proper examinations and dated and initialed the required locations in the mine.

Since I have found that the notations had not been placed by the mine examiner in either the right or left bleeder entries as required by law I am also convinced that proper inspections of those bleeders had not been performed. Such notations are not only required by law, they are the best evidence to show that a mine examiner has in fact been present in the areas required to be inspected. It is highly unlikely that a miner examiner would fail to make such notations if he in fact was performing his job as required. Since I have found that the mine examinations had not been made it is also apparent that proper entries could not have

been made in the mine examiners book to show that the required inspections had been made. Accordingly the violations are proven as charged.

I further find that the failure to have inspected the bleeders was a "significant and substantial" and serious violation. A violation is significant and substantial if: (1) there is an underlying violation of a mandatory safety standard, (2) there is a discrete safety hazard, (3) there is a reasonably likelihood that the hazard contributed to will result in an injury and (4) there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretrary v. Mathias Coal Company, 6 FMSHRC 1 (1984). In this regard it is undisputed that in the absence of the weekly inspections of the bleeder entries, methane and noxious gases could very well accumulate without the knowledge of the mine operator. A change in barometric pressure or temperature could result in the circulation of explosive gasses out of the gob areas into the working areas where electrical equipment could trigger an explosion or fire. Serious injuries or fatalities would likely result.

I also find that the violation was the result of operator negligence. It is clear from the absence of dates in the bleeder entries for a period of at least 1 month preceding the inspection that the inspections had not been carried out for a significant period of time. In addition, since neither the General Assistant at Shannopin, Frank Klink, nor the Safety Director, Melvin Pennington, had any knowledge as to whether the weekly inspections were being made when questioned by inspector Koscho on May 7, it is apparent that responsible officials were not checking to see that the mine examiner was performing his job. Indeed it appears that General Mine Foreman Price was relying only upon entries in the mine examiner's book to determine that the examinations had been taking place. Significantly Price did not seek to verify, even after Koscho brought the deficiencies to his attention, whether the mine examiner's notations actually appeared in the cited bleeder entries. Under all the circumstances I find that the violation was the result of operator negligence.

In determining the amount of penalty to be assessed in this case I am also considering that the mine operator is medium in size and has a moderate history of violations. There is no dispute that the cited conditions were abated as required. Under the circumstances I find that a civil penalty of $500 is appropriate.

ORDER

Shannopin Mining Company is hereby ordered to pay a civil penalty of $500 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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JUL 17 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 85-57-M A.C. No. 15-00061-05508
v.	:	MJM Mine & Mill
MAGOFFIN-JOHNSON & MORGAN STONE COMPANY, Respondent	:	

DECISION

Before: Judge Kennedy

This matter is before me on the parties responses to my show cause order of June 7, 1985. This order required the parties to show cause why the decision in Secretary v. Adams Stone Corporation and Magoffin, Johnson & Morgan Stone Company, 7 FMSHRC 692, Judge Steffey, (May 1985), does not collaterally estop MJM from claiming that (1) it is not owned and controlled by Stuart Adams Stone Corporation, or (2) is not financially capable of paying the $105 penalty proposed in this proceeding for the single violation charged.

After reviewing the parties' responses, the decision in Adams Stone, and the undisputed facts of record, I find:

1. That in the prior proceeding the operator had a full and fair opportunity to litigate the claim that it was not an instrumentality owned and controlled by the single enterprise entity doing business under the name of Stuart Adams Corporation and Subsidiaries (SACS) and that it is not financially able to pay monetary penalties.

2. That these are the sole issues contested in this proceeding.

3. That the operator represents it is unable to attend an evidentiary hearing or to submit

any evidence on the contested issues that was not considered by Judge Steffey in the Adams Stone case. 1/

4. That Judge Steffey's decision in Adams Stone was not appealed and has by operation of law become a final decision of the Commission.

5. That under the twin doctrines of res judicata and collateral estoppel Judge Steffey's finding that MJM is an instrumentality owned and controlled by the single enterprise entity

1/ I note that Judge Steffey strongly condemned respondent's counsel, David H. Adams, Esq., for his "contemptuous approach" to compliance with the Commission's rules and judges' orders. Judge Steffey also admonished counsel for his repeated failures to appear at requested hearings or to present witnesses in support or explanation of his arguments or claims. Since the Commission has not moved to reprimand or strike sua sponte Judge Steffey's censure of Mr. Adams or to reprimand the judge for having the temerity to discipline Mr. Adams without referring the matter to the Commission pursuant to Rule 80, I assume the Commission believes Judge Steffey's derogatory comments on Mr. Adams professionalism were merited and well within the scope of the judge's jurisdiction and authority.

On other occasions, however, the Commission has declined to take disciplinary action for such "contemptuous" conduct on the ground that every lawyer that appears before the Commission is entitled to "flout" a judge's orders and authority on at least one occasion. Disciplinary Proceeding, D-84-1, 7 FMSHRC 623 (May 1985). The Commission's condonation of instances of unprofessional or unethical conduct also seems to be influenced by whether errant lawyers enjoy a protected status as a member of the Office of the Solicitor or a past close personal relationship with a member of the Commission or its staff. T.P. Mining, Inc., LAKE 83-97-D, decided July 2, 1985, 7 FMSHRC ___; Belcher Mine, Inc., SE 84-8-M, decided July 10, 1985, 7 FMSHRC ___; Disciplinary Proceeding, D-85-1, decided June 25, 1985, 7 FMSHRC ___; United States Steel Corp., 6 FMSHRC 1404 (1984).

This ambivalence on the part of the Commission and its draconian sanctions for even merited criticism of those who enjoy a specially protected status demeans the status of its judges; undermines public confidence in the Commission's neutrality; and encourages condonation of lawyer conduct that would be deemed unacceptable by the courts.

doing business under the name Stuart Adams Corporation and Subsidiaries (SACS) is final and conclusive on MJM in this proceeding.

6. That Judge Steffey's finding that MJM is financially capable of paying monetary penalties is final and conclusive in this proceeding.

7. That Judge Steffey's finding in Adams Stone that MJM failed to sustain its burden of showing that payment of monetary penalties will impair its ability to do business is final and conclusive in this proceeding.

Since the fact of violation is admitted and the sole issue contested is MJM's ability to pay, this is not a proceeding to determine responsibility for violating the law but only whether MJM and the single enterprise entity of which it is a part can pay the $105 penalty assessed. The Supreme Court has encouraged the use of the single enterprise entity theory to penetrate schemes that employ corporate shells or proprietary corporations to circumvent enforcement of regulatory statutes. NBC Energy, Incorporated, 4 FMSHRC 1860, 1861 (1982). Indeed, Congress has exempted regulatory enforcement proceedings, such as this penalty proceeding, from the automatic stay provisions of the Bankruptcy Act. 11 U.S.C. § 362(b)(4); Leon's Coal Company, 4 FMSHRC 572 (1982).

Since, as Judge Steffey found, MJM is a mere instrumentality of the larger SACS enterprise it will be appropriate for the Secretary to seek recovery from the SACS enterprise if MJM defaults in payment of the penalty assessed. But since this has not occurred and since Adams Stone found MJM failed to sustain its burden of showing that payment of much larger penalties would result in economic jeopardy to MJM it is unnecessary to reassign liability at this stage.

If, the Secretary is unable to collect the penalty from MJM, he may pursue collection proceedings against the SACS enterprise and, if necessary pierce the corporate veil and collect from the stockholders of SACS. See NBC Energy, supra, WRW Corporation, 7 FMSHRC 245, 259 (1985).

Finally, I find that where, as here, there is an identity of parties and legal issues and where, as here, MJM has had a full and fair opportunity to litigate its financially

failing operator defense, accepted principles of issue preclusion, whether characterized as res judicata or collateral estoppel, operate to foreclose further redundant litigation of the defense in this proceeding. Windsor Power House Coal Company, 6 FMSHRC 2773, 2773 (1984).

For these reasons, I conclude that the violation charged did, in fact, occur and that payment of the small penalty assessed will not impair MJM's ability to continue in the business of mining limestone. Further, after considering the other criteria I find the gravity was serious, the negligence high and the amount of the penalty warranted, $105.

Accordingly, it is ORDERED that for the violation found the operator pay a penalty of $105 on or before Friday, August 2, 1985.

Joseph B. Kennedy
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

JUL 17 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 85-185
	:	A.C. No. 36-03298-03507
v.	:	
	:	Laurel Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of $500 for a violation of section 105(c) of the Act. The citation in question was issued as a result of the Commission's June 15, 1984, affirmation of my previous decision of November 23, 1982, finding a violation of section 105(c) in the matter of Richard E. Bjes v. Consolidation Coal Company, PENN 82-26-D, 4 FMSHRC 2043.

By motion filed with me on July 11, 1985, pursuant to 29 C.F.R. § 2700.30, the parties seek approval of a proposed settlement disposition of the case, the terms of which require the respondent to pay a civil penalty assessment in the amount of $400 for the violation in question.

Discussion

In support of the proposed settlement disposition of this matter, the parties state that they have discussed the alleged violation and the six statutory criteria stated in section 110(i) of the Act. Further, they have submitted a complete discussion and full disclosure as to the facts and circumstances surrounding the issuance of the violation, and they have filed full information concerning the criteria found in section 110(i).

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED and the settlement IS APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $400 in satisfaction of the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 18 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 84-27 A.C. No. 36-03425-03545
v.	:	Maple Creek No. 2 Mine
U.S. STEEL MINING CO., INC., Respondent	:	

DECISION

Appearances: Joseph T. Crawford, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner.
Louise Q. Symons, Esq., U. S. Steel Mining Company, Inc., Pittsburgh, Pennsylvania.

Before: Judge Fauver

This civil penalty case involves a citation,* No. 2105356, issued by a Federal mine inspector under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. The citation alleges a violation of 30 C.F.R. § 75.200, on the ground that Respondent violated its roof control plan by failing to put up a warning sign to keep people from going under unsupported roof.

* Originally, the inspector issued an order under section 104(d)(2) of the Act, but at the hearing the Secretary moved to convert the order to a section 104(d)(1) citation, because a "clean" inspection had intervened before the relevant inspection. The motion was granted.

The case was heard in Pittsburgh, Pennsylvania.

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

FINDINGS OF FACT

1. At all relevant times, Respondent's Maple Creek No. 2 Mine, an underground coal mine, produced coal for sale or use in or substantially affecting interstate commerce.

2. On August 31, 1983, about 7:00 a.m., Respondent's continuous miner operator made a cut 10 to 13 feet into No. 28 Room, on the midnight to 8:00 a.m. shift. The continuous miner operator failed to hang a reflectorized sign on the last row of roof bolts, to warn people not to enter the cut area, which was unsupported roof. The cut was not roof-bolted or otherwise roof-supported until approximately 1 1/2 hours after the cut was made.

3. Before the end of his shift, Jack Settles, the midnight shift foreman, called outside and told Ron Franczyk, the next shift foreman, that he (Settles) expected to have No. 28 room roof-bolted before the next shift came into the working section. However, a problem with the roof-bolting operation occurred, and the cut area was not roof-bolted for at least 1 1/2 hours and not until a Federal inspector detected that the roof was not roof-supported and there was no warning sign.

4. When the day shift crew came into the section, they were accompanied by Federal Mine Inspector Joseph F. Reid and Barry Armel, the union walkaround.

5. When Reid and Armel entered No. 28 Room, about 9:00 a.m., the cut area was not roof-supported, a roof-bolting machine was not in the room, and a reflectorized warning sign was not in place.

6. The preshift examination time, date, and initials in Room 28 were placed there by the day shift foreman, who knew when he inspected the room that the cut area was not roof-supported and that there was no warning sign. He did not report the lack of a warning sign in his preshift examination report and did not take any steps to have a warning sign put up for his shift, until the inspector cited a violation.

7. The approved roof control plan, at page 12, provided that:

> "A reflectorized warning device shall be placed immediately outby each unsupported area, and at all openings leading to the unsupported area. Such sign(s) shall be conspicuously placed so any person entering such area can observe the sign."

8. When Inspector Reid and Mr. Armel entered Room 28, Armel almost walked under the unsupported roof, because there was no warning sign, but Reid put out his arm and stopped him from doing so.

DISCUSSION WITH FURTHER FINDINGS

Respondent does not dispute a violation of the roof-control plan, and therefore a violation of 30 C.F.R. § 75.200, but contends that it was merely a "technical violation" because (1) the midnight shift foreman planned to roof-bolt the area immediately, and this would have been done but for an unforseen problem with the roof-bolting operation, and (2) during the time the sign was not there (about 1 1/2 hours), no one was exposed to the roof and anyone who might go into Room 28 knew that the area was unsupported and therefore did not need a sign. In Respondent's view, "it was simply a case of the man with the responsibility deciding that the sign was superfluous based upon the facts available to him at the time that the three people in the section were fully aware of the condition of No. 28 room." Resp.'s Br. p. 3. However, the area remained unsupported for about 1 1/2 hours, far longer than the continuous miner operator's assumption as to when it would be roof-bolted, and two persons went into the room that he did not anticipate being there, i.e. Inspector Reid and the walkaround. The assumption that a sign was not needed was unwarranted and led to an unwarrantable violation of the roof control plan and 30 C.F.R. § 75.200. The violation was an act of negligence, attributable to Respondent; the negligence was compounded by the day foreman's preshift examination, which established management's actual knowledge of the missing sign and unsupported roof.

Respondent contends that the violation should not be deemed serious, on the ground that no one was endangered. However, I find that permitting unsupported roof without a warning sign for 1 1/2 hours was a serious violation that could significantly and substantially contribute to a serious or fatal injury. The failure to put up a warning sign endangered the walkaround and could easily have endangered a larger inspection team; it also presented a potential danger to employees who might have been mislead by the conditions to assume the whole roof in Room 28 was roof-bolted. The assumptions made by Respondent's employees in not complying with the warning sign requirement are the kind that can lead to a disaster or serious accident in mining. Safety standards are there for the protection of personnel who go into the mines; they are not there to be stretched or bypassed by individual employees or by mine management.

Respondent produces about 11,000,000 tons of coal per year and its Maple Creek No. 2 Mine produces about 760,000 tons of coal per year. Respondent is a large operator; the subject mine is large; a civil penalty otherwise appropriate for the violation would not have an adverse effect on Respondent's ability to continue in business. It is presumed that Respondent's compliance history at this mine is a least average. Respondent made a good faith effort to abate the violation after it was cited by the inspector.

Considering the criteria of section 110(i) of the Act for assessing a civil penalty, I find that an appropriate penalty for this violation is $1,000.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. On August 31, 1983, Respondent violated 30 C.F.R. § 75.200 as alleged in Citation No. 2105356.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a civil penalty of $1,000 within 30 days of this Decision.

William Fauver

William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 26 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 85-43 A.C. No. 01-01247-03633
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: George D. Palmer, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner; Harold D. Rice, Esq., and R. Stanley Morrow, Esq., Birmingham, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Petitioner seeks a civil penalty for an alleged violation of 30 C.F.R. § 77.1710(e), because two employees of a contractor working on mine property were not wearing protective footwear. Respondent denies liability for the violation committed by an independent contractor. Pursuant to notice, the case was heard in Birmingham, Alabama, on June 18, 1985. Ona L. Jones testified on behalf of Petitioner. Gary Nicosia testified on behalf of Respondent. Both parties waived their rights to file post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

There is no significant dispute as to the facts in this case. On July 18, 1984, on the basis of a 103(g) complaint, the MSHA inspector observed two employees of the Dependable Drilling Company working on the mine surface drilling a hole for a waterpipe

from the surface into the mine. Neither of the employees had protective footwear. They were handling a drill stem weighing in excess of 100 pounds, and in the judgment of the inspector, protective footwear was required. This occurred at about 6:30 a.m. The Inspector did not have an MSHA I.D. number for Dependable Drilling, and the MSHA office was not open at the time. He discussed the matter with Respondent's Safety Director, who said that Dependable Drilling did not have an MSHA I.D. number, and suggested that the citation be issued to Respondent. The citation was issued to Respondent. It was later modified to show the contractor's I.D. number, but a penalty was assessed against Jim Walter.

On December 2, 1981, Respondent entered into a "Blanket Contract" with Dependable Drilling Company whereby the latter agreed to perform work detailed on Purchase Orders issued by Jim Walter. On May 31, 1984, such a Purchase Order was issued to the contractor to drill a hole according to certain specifications for a fixed price. The terms of the December 2, 1981 contract were incorporated by reference in the Purchase Order. The contract provides that the contractor shall have "absolute and entire charge, control and supervision of the work . . . shall hire and discharge all workmen . . . the contractor agrees to comply . . . with the requirements of all statutes . . . and rules of all governing bodies . . . ." Jim Walter did not exercise any control over Dependable or its employees except to make sure it was drilling the hole according to the specifications in the Purchase Order. The work on the contract began June 26, 1984, and was completed August 10, 1984. This was the only work performed by Reliable at the subject mine. The drilling was performed at a point about 150 feet from Jim Walter's safety office. Jim Walters had a rule that hard hats and hard toed shoes be worn on mine property, and it enforced the rule against its employees.

The evidence does not establish that Jim Walter contributed to the existence of the violation, nor that it had control over the existence of the hazard. No Jim Walter employees were exposed to the hazard. The violation was abated on the same day the citation was issued when Dependable's employees obtained and were wearing hard-toed footwear.

ISSUE

Whether the citation was properly issued to Respondent, the "production-operator"?

CONCLUSIONS OF LAW

In the case of Secretary v. Cathedral Bluffs Shale Oil Company, 6 FMSHRC 1871 (1984), appeal docketed, No. 84-1492 (D.C. Cir. 1984), the Commission held that citing the production operator for a violation arising from the work activities of an independent contractor was improper in the absence of exposure to the hazard by the employees of the production operator, or control over the condition that needs abatement by the production operator. That decision is controlling here: Respondent's employees were not even minimally exposed to the hazard, and there is no evidence that it had any control over the condition which needed abatement: obtaining and requiring the contractor's employees to wear hard-toed shoes.

The Secretary argues that administrative convenience justified citing the production-operator: The inspector did not know whether the contractor had an MSHA I.D. number. He also argues that in these circumstances, the Secretary had discretion to cite the operator, the contractor, or both. These arguments have been rejected by the Commission. I conclude that the citation was improperly issued to Respondent.

ORDER

Based upon the above findings of fact and conclusions of law, citation no. 2482404 issued July 18, 1984 is VACATED, and the penalty proceeding based on the citation is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 29 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 84-198 A.C. No. 15-12977-03508
v.	:	
KING JAMES COAL COMPANY, INC., Respondent	:	Docket No. KENT 84-199 A.C. No. 15-12977-03510

SUMMARY DECISIONS AND ORDERS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of $236 for eight alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations.

These cases have been pending in the Commission since August, 1984, and they were recently reassigned to me for adjudication. In view of the respondent's failure to communicate with the petitioner's counsel concerning its present whereabouts, and its failure to submit certain documentation concerning its financial condition, I issued an Order on June 13, 1985, requiring the parties to show cause as to why the respondent should not be held in default and the cases disposed of by summary order pursuant to 29 C.F.R. § 2700.63, assessing MSHA's proposed civil penalties as final.

Discussion

The respondent has failed to respond to the petitioner's request to furnish information concerning its financial condition, and has also failed to respond to my previous order concerning the proposed disposition of these cases. Under the circumstances, I conclude and find that the respondent is in default, and that these proceedings may be disposed of pursuant to the Commission's summary disposition procedures found in 29 C.F.R. § 2700.63.

ORDER

In view of the respondent's default, and pursuant to the provisions of 29 C.F.R. § 2700.63(b), the respondent is assessed civil penalties for the violations in question, as follows:

KENT 84-198

Citation No.	Date	30 C.F.R. Section	Assessment
2294251	2/23/84	75.316	$ 20
2294252	2/27/84	75.1722(b)	39
2294254	2/27/84	75.313	20
2294255	2/27/84	75.1719-1(d)	20
2294256	2/27/84	75.1100-2(e)(2)	39
2294257	2/27/84	75.1101	39
2294258	2/27/84	75.400	39
			$216

KENT 84-199

Citation No.	Date	30 C.F.R. Section	Assessment
2294253	2/27/84	75.1719-1(d)	$ 20

Respondent IS ORDERED to pay civil penalties in the amounts shown above for the violations in question, and payment is to be made to the petitioner within thirty (30) days of the date of this order.

George A. Koutras
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Sherman L. Green, President, King James Coal Company, Inc., Route 1, Box. 7-C, Sidney, KY 41564 (Certified Mail)

Mr. Jimmie Coleman, King James Coal Company, Inc., Route 1, Box 7-C, Sidney, KY 41564 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 29, 1985

JAMES O. TURNER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 84-201-D
v.	:	
	:	BARB CD 84-26
CHANEY CREEK COAL COMPANY, Respondent	:	

ORDER OF DEFAULT

On July 13, 1984, Complainant filed a Complaint of discrimination against you based on section 105(c) of the Federal Mine Safety and Health Act of 1977. On August 7, 1984, you were Ordered to file your Answer to the Complaint or show good cause for not doing so. No Answer has been received.

Since you have not responded to the Order to Show Cause, judgment by default shall enter in favor of the Complainant.

The Complainant is also ORDERED to submit a detailed statement describing the relief to which he believes he is entitled.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Mr. James O. Turner, Rt. 1, Box 267, Baxter, KY 40806
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Chaney Creek Coal Company, P. O. Box 282, Manchester, KY 40962
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JUL 30 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 82-91 A.C. No. 36-03247-03021
v.	:	Cooper No. 2 Prep. Plant
BRADFORD COAL COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. I have considered the representations and documentation submitted, including the hearing transcript and exhibits, and I conclude that the proffered settlement is appropriate under the criteria in section 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved penalty in the amount of $16 within 30 days of this Decision. Upon such payment this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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JUL 30 1985

BENEDICT J. STRAKA, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 85-231-D
v.	:	
	:	PITT CD 85-6
CONSOL PENNSYLVANIA COAL COMPANY,	:	
	:	Bailey Mine
Respondent	:	

DECISION

Before: Judge Fauver

This proceeding was brought by Benedict J. Straka under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The Complaint states the following:

> Sometime in February, 1984, I filed an employment application with Consolidation Coal Co., at the Bailey Mine. Sometime in August of 1984 (either the 22nd to the 27th), I took an employment test. (aptitude test). To my knowledge I passed this test. Since August of 1984, this company has continued to hire coal miners, by January of 1985, there were approximately 130 men employed there.
>
> My complaint is this. I believe I am being discriminated against, because I had previously worked for Consolidation Coal at the Laurel Mine in Central City and having belonged to the union therein (Local UMW 1979). The Bailey mine at which I applied for employment is being operated as a non-union mine.

> It is my belief that this mine is to remain non-union by hiring only non-union miners and people who have a union mining background stand little chance of employment at the Bailey mine unless of black or female origin.
>
> On March 19th, I spoke to a man named Carl Mikolish. He has a brother-in-law named William Rosner. Mr. Rosner was my supervisor at times at the Laurel Mine. He was one of three shift maintainence foreman at the Laurel Mine, when it was operating. According to Carl Mikolish, Bill Rosner applied for work at the Bailey mine at the early part of March, 1985. The following week, he was given a pre-employment interview, a week after that he was scheduled for a physical exam. He began working sometime during the week of March 19 to the 23rd. He began working at the Bailey mine as a general inside laborer. I held the job of general inside laborer at the Laurel Mine the last two years I worked there.

Pursuant to section 105(c)(2) of the Act, Mr. Straka first filed a complaint with the Secretary of Labor (Mine Safety and Health Administration). After investigation, the Secretary found that no violation of section 105(c) had occurred. Mr. Straka then exercised his right to file a complaint before this independent Commission.

Respondent has moved to dismiss the Complaint for failure to state a claim for which relief can be granted under section 105(c)(1) of the Act.

Section 105(c)(1) of the Act provide:

> (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.

I agree with the motion to dismiss. The Complaint does not allege or indicate that Mr. Straka was in any manner discriminated against because of an activity covered by section 105(c)(1) of the Act or that his exercise of a right afforded by the Act was interfered with in any way.

ORDER

WHEREFORE IT IS ORDERED that Respondent's Motion to Dismiss is GRANTED and this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Mr. Benedict Straka, 44 Walter Street, Jenners, PA 15546 (Certified Mail)

Karl T. Skrypak, Esq., Consol Pennsylvania Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 31 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF CHRIS STEUER, Complainant	:	DISCRIMINATION PROCEEDING Docket No. LAKE 85-73-DM MD 84-36
v.	:	Cliff Sand & Gravel Wash Plant
CLIFF SAND & GRAVEL, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On July 25 and July 29, the Secretary filed a Motion to Dismiss and approve a settlement in the above proceeding. The complaint filed herein alleged that complainant Chris Steuer was discharged from his position with respondent on August 14, 1984 in violation of section 105(c) of the Act.

The motion states that complainant Chris Steuer has returned to work for another employer and that he lost approximately one week of wages after his discharge from Respondent. Mr. Steuer does not wish to be reinstated at Respondent. Respondent has agreed to pay Mr. Steuer the sum of $1,000 as lost wages and the Solicitor has received a check made out to Mr. Steuer in that amount, less FICA deductions.

Respondent has agreed to post a notice at its offices that it supports section 105(c)(1) of the Act; Respondent has stated that it will not discriminate against any employee for activity protected under the Act; Respondent states that none of the personnel records of Chris Steuer contain any reference to the incidents of August 14, 1984 set forth in his complaint and no such reference will be inserted in the future. The Secretary waives his right to request the assessment of a civil penalty for the alleged violation.

I have duly considered the motion and conclude that it is in the best interest of the complainant and is consistent with the purposes of the Act.

Therefore, the settlement agreement is APPROVED, and this proceeding is DISMISSED.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 31 1985

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 85-69-R
v.	:	Citation No. 2412582; 12/14/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Martinka No. 1 Mine

ORDER VACATING CITATION
AND DISMISSING PROCEEDING

Before: Judge Broderick

On July 29, 1985, the Secretary filed a "motion to withdraw" the citation contested herein. The citation was issued for a violation of section 103(f) because of the failure of contestant to pay the two UMWA walkaround representatives for the time they accompanied MSHA inspectors during an inspection of the subject mine. Further investigation revealed that the two inspectors were travelling together, and therefore only one walkaround representative need be paid. The citation is being vacated by MSHA.

Therefore, the above proceeding is moot and this case is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

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