

JULY 1986

COMMISSION DECISIONS AND ORDER

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07-16-86	J & C Coal Corporation	SE 85-40	Pg. 1113
07-22-86	Bob Crumby	CENT 85-96	Pg. 1114
07-22-86	Cabin Coal Corporation	KENT 85-149	Pg. 1116
07-24-86	Hard Rock Coal Co., Inc.	KENT 85-148	Pg. 1118
07-24-86	Silas Noble v. Patsy Jane Coal Corp.	KENT 86-17-D	Pg. 1123
07-24-86	Coors Energy Company	WEST 86-40-R	Pg. 1124
07-25-86	Volcanite Limited	WEST 86-78-M	Pg. 1127
07-28-86	Carlson Mining Company	PENN 86-63	Pg. 1129
07-30-86	Sec. Labor for Sterling Schultz v. Cleveland Cliffs Iron Co.	LAKE 86-39-DM	Pg. 1133



JULY 1986

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

Emery Mining Corporation v. Secretary of Labor, MSHA, Docket No. WEST 86-35-R.  
(Judge Morris, June 10, 1986)

Secretary of Labor, MSHA v. Youghioghney & Ohio Coal Company, Docket No.  
LAKE 86-56. (Judge Melick, June 13, 1986)

Odell Maggard v. Chaney Creek Coal Corporation, Docket No. KENT 86-1-D, and  
Secretary of Labor on behalf of Odell Maggard v. Chaney Creek Coal Corporation,  
Docket No. KENT 86-51-D. (Judge Melick, June 17, 1986)

There were no cases filed in which review was denied during July.



COMMISSION DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

July 8, 1986

ROBERT SIMPSON :  
 :  
 v. : Docket No. KENT 83-155-D  
 :  
 KENTA ENERGY, INC. :  
 :  
 and :  
 :  
 ROY DAN JACKSON :

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

I

This case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). 1/ In his decision below, Commission Administrative Law Judge James Broderick concluded

1/ Section 105(c)(1) of the Mine Act provides:

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] of this [Act] 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].

30 U.S.C. § 815(c)(1).

that Robert Simpson was constructively discharged in violation of the Mine Act. 6 FMSHRC 1454, 1463-64 (June 1984)(ALJ). The judge found both Kenta Energy, Inc. ("Kenta"), and Roy Dan Jackson liable, and the judge ordered Simpson reinstated with back pay, interest, attorney's fees, and litigation expenses. 7 FMSHRC at 272, 286 (February 1985) (ALJ).

We granted Jackson's petition for discretionary review of the judge's decision. (Kenta did not seek review). The central issue raised on review is whether the judge properly found that Simpson was discriminated against in violation of the Act. The Secretary of Labor participated as amicus curiae on review, and the Commission heard oral argument. For the reasons that follow, we reverse the judge's decision and we vacate his orders requiring Simpson's reinstatement and affording Simpson monetary relief.

## II

Robert Simpson was employed as a scoop operator at Kenta's No. 1 Mine (known as the Black Joe Mine) from January 1981 until September 20, 1982. The Black Joe Mine, an underground coal mine, located in Harlan, Kentucky, operated one shift per day and employed eight to ten miners. Jackson was the president of Kenta Energy and was responsible for mining operations and for the "hiring and firing" of miners at the Black Joe Mine. 7 FMSHRC at 277.

For almost two years prior to September 3, 1982, Danny Noe was the foreman and shift boss at the mine. As foreman, Noe was certified to conduct the required preshift and on-shift examinations. See 30 C.F.R. § 75.303-.304. Noe injured his back on September 3, 1982, and thereafter did not return to work. The judge found that after September 3, and for the remaining time that Simpson worked at the mine, no supervisor was present at the mine and that the required preshift and on-shift examinations were not conducted. 6 FMSHRC at 1456. These findings are supported by substantial evidence.

Sometime after Noe was injured and before Simpson quit work, the mining operations drove right, off the main heading and in the direction of an abandoned mine, commonly referred to as the "old works." Substantial evidence of record indicates that Simpson and other members of the crew became concerned about cutting into the old works and of being exposed to the dangers of "black damp" (oxygen-deficient air), methane gas, or accumulated water. According to Simpson and others, the miners believed that the old works were 300-400 feet from where they had turned right. However, miners Tony Gentry and Charlie Patterson testified that the mine map indicated that the old works were 850 feet from where the miners had turned right. Tr. 225, 360. Gentry Dep. 13.

Simpson and Robert Nelson, the cutting machine operator, asked Charlie Patterson, who was responsible for ordering supplies and equipment at the mine, to obtain a test auger so that exploratory bore holes could

be drilled in advance of the working face in order to check for black damp, gas, or water. 2/ An auger was ordered but did not arrive until sometime after September 20, 1982.

Simpson testified that after completing his shift on September 20, 1982, he decided not to return to the job because of his concerns about the lack of a foreman and a test auger.

On September 22, Simpson returned to the mine at mid-shift to pick up his personal equipment. Simpson encountered Patterson and told Patterson that he had quit his job because of the lack of a foreman and a test auger. Patterson suggested to Simpson that he return to work, and he would be paid for the whole day. Simpson asked whether there was a foreman or an auger at the mine. When Patterson responded in the negative, Simpson said that "it still wouldn't help me none." Tr. 48, 6 FMSHRC at 1457. Simpson made no attempt to contact Jackson to explain why he had quit. 3/

Approximately one month later, Simpson learned that a mine foreman had been hired and a test auger acquired. Simpson testified that he then attempted to telephone Jackson to ask for his job back but that he was unable to reach Jackson. Tr. 50, 6 FMSHRC at 1457.

Sometime in December 1982, Simpson and Jackson met by chance at an auto parts store. Simpson then told Jackson that he had quit because of concerns about the lack of a foreman and a test auger at the mine. Simpson requested his job back. Jackson replied that there was no present opening at the Black Joe Mine but that Simpson might be able to get a job at another mine. According to Simpson, he also stated, "next time you'll learn not to get a wild hair." Tr. 51, 6 FMSHRC at 1457.

On November 23, 1982, prior to the above encounter with Jackson, Simpson had filed a discrimination complaint under section 105(c) of the Act with the Department of Labor's Mine Safety and Health Administration ("MSHA"). On February 23, 1983, prior to MSHA's determination of the merits of Simpson's claim, Simpson, through private counsel, filed a discrimination complaint directly with the Commission. Following an investigation to determine whether a violation of the Mine Act had occurred, MSHA decided not to prosecute a complaint on Simpson's behalf.

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2/ 30 C.F.R. § 75.1701 requires the drilling of boreholes to a distance of at least 20 feet in advance of the working face when a working place in a mine approaches within 200 feet of any workings of an adjacent mine. At the time Simpson quit, the miners had advanced 250 feet in the direction of the old works. Tr. 84, 132, 363. It appears, according to the mine map (Complainant's Exhibit 1), that the drilling of boreholes was not required as of the time Simpson left the job if the miners were mining in any section other than the No. 5 entry.

3/ As noted above, and as the judge found, Patterson was not a supervisor. 6 FMSHRC at 1462.

The administrative law judge first found that Simpson's decision to leave his job represented a protected work refusal. The judge stated:

[T]here was no qualified supervisor at the mine to perform the required preshift and onshift examinations. [Simpson] and at least some of the other members of the crew believed that they were cutting in the direction of an abandoned mine. The failure to drill test holes in such a situation is hazardous.... [Simpson's] work refusal resulted from a reasonable good faith belief that continuing to work would be hazardous.

6 FMSHRC at 1460. Concerning the requirement that in work refusal situations a miner communicate his safety concerns to the operator prior to or reasonably soon after his work refusal, see, e.g., Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982), the judge found that Simpson had not communicated his safety concerns to Jackson. 6 FMSHRC at 1462. The judge concluded, however, that communication regarding the absence of a foreman and the failure to perform preshift and on-shift examinations at the mine was not necessary because Jackson was deemed to have known about these conditions. The judge stated, "I do not consider that it is necessary in order to invoke the protection of section 105(c), that it be shown that the operator was specifically aware of the reason for a miner's work refusal, if the operator was aware of the hazardous conditions which prompted the refusal...." 6 FMSHRC at 1462.

The judge further determined that Simpson suffered an adverse action, in this case a constructive discharge, because Simpson was subjected to working conditions that were so intolerable that he was forced to quit his job. 6 FMSHRC at 1460-61. The judge found that although Kenta and Jackson were not motivated to maintain the intolerable working conditions because of Simpson's protected activity, their motivation was not determinative as to whether discrimination had occurred. 6 FMSHRC at 1461.

### III

On review, Jackson argues that the judge erred in finding that Simpson was not required to communicate his safety concerns to management. Jackson contends, citing Dunmire and Estle, that a miner is required to report a safety hazard prior to a work refusal when possible, but in any event must report the hazard within a reasonable time after the refusal. Jackson argues that it was reasonably possible for Simpson to communicate his concerns and that the judge erred in finding it would have been futile for Simpson to communicate his concerns to Jackson. Conversely, Simpson and the Secretary assert that there are exceptions to the general communication requirement, futility being one, and that the judge correctly held it would have been futile for Simpson to communicate his safety complaints.

Regarding the issue of constructive discharge, Jackson contends that the judge's holding that Simpson was not required to show that Jackson's conduct was motivated at least in part by Simpson's protected activity was erroneous and contrary to Commission precedent. In response, Simpson and the Secretary argue that it is sufficient for Simpson to demonstrate that Jackson intended him to work under intolerable conditions and that the judge correctly held that Simpson need not prove that Jackson specifically intended that the conditions would cause Simpson to quit. We now turn to a resolution of these issues.

#### IV

We conclude that the judge erred in finding that Simpson was discriminated against in violation of section 105(c) of the Mine Act. First, we find that the judge erred in concluding that Simpson engaged in a work refusal protected under the Mine Act. Second, we further find that the judge erred in holding that Simpson was the subject of a discriminatory constructive discharge. We begin with the work refusal issue.

Under the Mine Act, a complaining miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd. Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n.20. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

A miner has the right under section 105(c) of the Mine Act to refuse to work, if the miner has a good faith, reasonable belief in a hazardous condition. Pasula, 2 FMSHRC at 2793, 2796; Robinette, 3 FMSHRC at 807-12. We agree that Simpson had valid safety concerns. It was reasonable for him to fear for his safety in these circumstances. There was no foreman at the mine and no pre-shift or on-shift inspections were performed. These are blatant violations of the Mine Act. However, where reasonably possible, a miner refusing work must ordinarily communicate or attempt to communicate to some representative of the operator his belief that a safety or health hazard exists. Dunmire and Estle, 4 FMSHRC at 133. See also Miller v. Consolidation Coal Co., 687 F.2d 194, 195-96 (7th Cir. 1982).

The requirement of communication of the safety concerns motivating a miner's work refusal is important. Such communication is a vital aid to both miners and operators in the performance of their duty to prevent and eliminate unsafe and unhealthy conditions and practices in the country's mines. 30 U.S.C. § 801(e). As such, it is a requirement "well suited to promoting the Act's fundamental objective of promoting mine safety and health." Miller, supra, 687 F.2d at 196. See also Dunmire and Estle, 4 FMSHRC at 133.

Exceptions to the communication requirement exist but are limited. It may not be reasonably possible for a miner to communicate his safety concerns in all instances; exigent circumstances may prevent such communication. However, absent such exceptional circumstances, a miner must notify an operator of the hazards he perceives before his work refusal or reasonably soon thereafter. Dunmire and Estle, 4 FMSHRC at 134.

Simpson did not communicate his safety concerns to anyone in authority prior to quitting his job on September 20, or even reasonably soon thereafter. Although his ability to do so concededly was complicated by the absence of any supervisor at the mine site on a regular basis, the judge found, and the parties do not dispute, that Simpson lived approximately four miles from Jackson, that Simpson had known Jackson for about 15 years, and that Simpson previously had gone to Jackson's home on three or four occasions to borrow money from Jackson. 6 FMSHRC at 1457. While the judge found that on the day of the work refusal Jackson and other management personnel were not at the mine site, the record does not reveal any reason preventing Simpson from thereafter otherwise communicating his safety concerns to Jackson. Only after Simpson met Jackson by chance more than two months after Simpson had quit work, and after Simpson knew that the conditions about which he was concerned had been corrected, did Simpson tell Jackson that he had quit because of the absence of a foreman or a test auger at the mine.

The judge excused Simpson's failure to communicate his safety concerns regarding the absence of a foreman and the failure to perform the required examinations because "communication ... would have been futile." 6 FMSHRC at 1462. We disagree. The record clearly indicates that Simpson made no reasonable attempt to communicate his concerns to Jackson. We cannot simply presume that such communication would have been futile. The case law construing the right to make safety complaints and to refuse work under the Mine Act is premised on the belief that communication of hazards and responses to such hazards are the means by which the Act's purposes will be attained. Dunmire and Estle, 4 FMSHRC at 133-135; Secretary of Labor ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993 (June 1983); Secretary on behalf of Pratt v. River Hurricane Coal Co., Inc., 5 FMSHRC 126 (February 1982). Once a reasonable, good faith fear of a hazard is expressed by a miner, an operator has an obligation to address the perceived danger. Pratt, 5 FMSHRC at 133. See also Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1985). Simpson's failure to communicate his fears concerning

the lack of a test auger negated the opportunity for Jackson to address those fears by explaining the exact location of the old works. Even assuming, as the judge did, that Jackson was aware of the absence of a foreman and the failure to conduct the required pre-shift and on-shift examinations, we cannot presume that Jackson would have taken no action had Simpson communicated his concerns to Jackson.

Possible operator awareness of a hazardous condition does not mean that upon complaint by a miner an operator will continue to ignore its duty to correct the hazard. In fact, communication from a miner often provides the impetus for an operator to act and for this reason miners were given such rights in the Mine Act. Here, Simpson had a reasonable basis for believing his working conditions were hazardous. Instead of following any of the statutory mechanisms available for addressing his fears, e.g., requesting an MSHA inspection under section 103(g)(1) of the Act, 30 U.S.C. § 813(g)(1), or communicating his fears to the operator, he simply chose to quit his job. His right to quit in such circumstances is clear, but in so doing he did not trigger any protection under the Mine Act.

V

Assuming arguendo that Simpson engaged in protected activity, we further conclude that the judge erred in finding that Simpson was constructively discharged in violation of the Mine Act. The Commission first addressed the doctrine of constructive discharge in Rosalie Edwards v. Aaron Mining, Inc., 5 FMSHRC 2035 (December 1983). There the Commission held that in order to establish a successful claim of constructive discharge, the miner must show that in retaliation for protected activity by the miner the operator created or maintained intolerable working conditions in order to force the miner to quit. Id. at 2037. Simpson and the Secretary argue here that establishing discriminatory motive is not always required, that it may be presumed. They cite decisions construing Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., and urge us to apply this rationale to the Mine Act. See, e.g., Goss v. Exxon Office Systems Co., 747 F.2d 885, 887-88 (3rd Cir. 1984); Calcote v. Texas Educational Foundation, 578 F.2d 95 (5th Cir. 1978); Muller v. U.S. Steel Corp., 509 F.2d 923, 929 (10th Cir. 1975), cert.denied, 423 U.S. 825 (1975). This same argument was urged by the Secretary and rejected by the Commission in Edwards. We recognize the existence of case law under Title VII not requiring proof of retaliatory motive. We believe, however, that section 105(c) of the Mine Act essentially is an anti-retaliation provision and that the theory of constructive discharge adopted in Edwards is the appropriate approach to be followed under the Mine Act. The Secretary appears to have acknowledged that this determination falls within the Commission's discretion. Or. Arg. Tr. 64-65. See Metric Constructors, supra, 766 F.2d at 472-73; Donovan v. Stafford Construction Co., supra, 732 F.2d at 959.

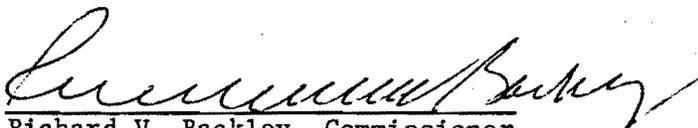
We find no evidence in this record that Kenta or Jackson were motivated to create or to maintain the conditions about which Simpson was concerned because of the exercise by Simpson of any rights protected

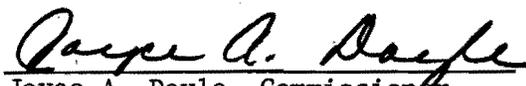
by the Mine Act. Cf. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894-96 (1984); NLRB v. Haberman Construction Co., 618 F.2d 288, 296 (5th Cir. 1980) modified, 641 F.2d 351, 358 (5th Cir. 1981)(en banc); J.P. Stevens and Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972). Therefore, we conclude that Simpson was not the victim of a constructive discharge, and the judge's contrary finding is reversed. 4/

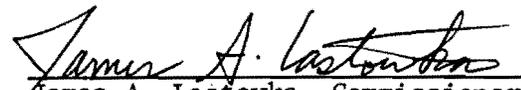
Accordingly, we reverse the judge's finding of discrimination and vacate his award of back pay, interest, attorney's fees, and incidental expenses.

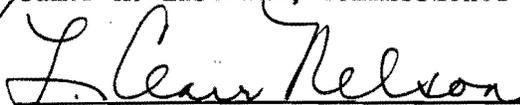
VI

On review, Simpson has moved to reopen the proceedings to determine whether Black Joe Coal Company ("Black Joe") is a legal successor to Kenta, and thus, whether Black Joe should be held liable for Kenta's liability. Simpson relies on the fact that only Jackson petitioned the Commission for review of the judge's decision imposing liability on Kenta and Jackson. Simpson claims that the judge's order therefore is final insofar as Kenta is concerned. The motion is denied. In his petition for review Jackson raised the central issue of whether Simpson was discriminated against in violation of the Act. We have concluded that no discrimination occurred in conjunction with Simpson's leaving the job. Because there is no violation of the Act, there is no liability on behalf of any respondent. In these circumstances, Simpson's argument that he has a binding judgment against Kenta because Kenta did not separately seek review is rejected. See e.g., Arnold Hofbrau, Inc. v. George Hyman Construction Co., Inc., 480 F.2d 1145, 1150 (D.C. Cir. 1973). 5/

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

4/ The administrative law judge also concluded that respondents' refusal to rehire Simpson constituted "a further violation of § 105(c) of the Act." 6 FMSHRC at 1464. We find insufficient record support for this conclusion and therefore reverse.

5/ Chairman Ford did not participate in the consideration or decision of the merits of this case or the subsequent Motion to Reopen.

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Administrative Law Judge James A. Broderick  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

July 16, 1986

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
on behalf of JAMES CORBIN, :  
ROBERT CORBIN, and :  
A. C. TAYLOR :  
v. : Docket No. KENT 84-255-D  
SUGARTREE CORPORATION, :  
TERCO, INC., and RANDAL LAWSON :

BEFORE: Chairman Ford; Backley, Doyle, and Lastowka, Commissioners

ORDER

BY THE COMMISSION:

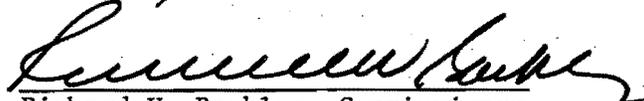
In this matter pending on review, the Secretary of Labor has filed a Motion for Immediate Reinstatement of complainants James and Robert Corbin. Respondent Terco, Inc. ("Terco"), has filed an opposition to the motion.

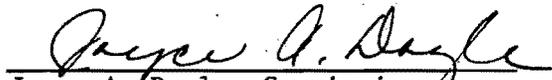
Pursuant to the decisions of the Commission administrative law judge below sustaining the Secretary's complaint of discriminatory discharge, both Corbins were reinstated by Terco in January 1986. Subsequently, Robert was discharged and James was laid off by Terco. Both Corbins have filed further discrimination complaints with the Secretary concerning their subsequent separations from employment. 30 U.S.C. § 815(c)(2).

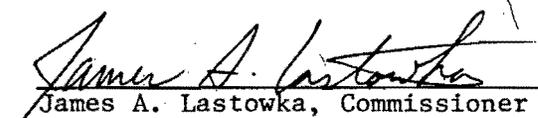
The Secretary has not made a clear showing, nor do we perceive, that an order of reinstatement is warranted at this time. The Secretary's motion and Terco's response disclose conflicting factual assertions surrounding the original reinstatements and the subsequent discharge and layoff. Under the circumstances presented, we conclude that an order of reinstatement at this stage of the present proceeding is inappropriate.

Accordingly, the Secretary's motion is denied. The Commission, however, will expedite the review process in the instant matter.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
James A. Lastowka, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

July 24, 1986

LONNIE JONES :  
 :  
 v. : Docket No. KENT 83-257-D(A)  
 :  
 D&R CONTRACTORS :

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY BACKLEY, DOYLE AND NELSON:

This case involves a complaint of discrimination filed by Lonnie Jones pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982). In his decision on the merits, the Commission Administrative Law Judge concluded that Mr. Jones had been discharged by D&R Contractors ("D&R") on April 25, 1983, in violation of section 105(c)(1) of the Mine Act. 6 FMSHRC 1312 (May 1984)(ALJ). 1/

1/ Section 105(c)(1) of the Mine Act provides:

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] of this [Act] 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].

30 U.S.C. § 815(c)(1).

In a subsequent decision concerning remedies, the judge ordered D&R to pay Jones back wages, certain costs and attorney's fees. 6 FMSHRC 2480 (October 1984) (ALJ). The Commission granted D&R's petition for discretionary review. D&R contends that it was improperly joined as a party to this action. We agree. For the reasons that follow, we reverse the judge's decision and dismiss this proceeding.

Given the nature of our disposition, the following statement of facts is restricted to the procedural history of this case. On May 10, 1983, Jones filed his initial Mine Act discrimination complaint, pursuant to section 105(c)(2) of the Mine Act, with the Department of Labor's Mine Safety and Health Administration ("MSHA"). 2/ His complaint was

2/ Section 105(c)(2) of the Mine Act provides:

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

30 U.S.C. § 815(c)(2).

filed against Ronald Perkins, who was named as foreman of Mingo Coal Company ("Mingo") and D&R. The complaint alleged that Jones was discharged by Perkins on April 25, 1983, because he had exercised his statutory right to refuse to work under hazardous conditions.

After investigating Jones' complaint, MSHA determined administratively that a violation of section 105(c)(1) of the Mine Act had not occurred. MSHA communicated the results of its investigation to Jones in a letter dated June 13, 1983. The letter also advised Jones that if he wished to pursue his claim, he had the right, pursuant to section 105(c)(3) of the Act, to file a discrimination complaint on his own behalf with this independent Commission within 30 days of notice of MSHA's determination. 3/

3/ Section 105(c)(3) of the Mine Act provides:

Within 90 days of the receipt of a complaint filed under [section 105(c)(2)], the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 [United States Code] but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section [106] of this [Act]. Violations by any person of [section 105(c)(1)] shall be subject to the provisions of sections [108] and [110(a)] of this [Act].

30 U.S.C: § 815(c)(3).

On June 27, 1983, Jones timely filed his section 105(c)(3) discrimination complaint with this Commission, naming Mingo as the sole respondent. The complaint was served on Roger Daniel, owner and operator of Mingo.

On August 18, 1983, Mingo filed an answer and a motion for dismissal or summary judgment. In addition to asserting that Jones had never been in its employ, Mingo alleged that Jones had been an employee or partner of D&R, an independent contractor that operated the mine owned by Mingo. Based on this allegation, Mingo argued that D&R was an indispensable party to the action.

On August 22, 1983, Jones filed a motion to join D&R as a party-respondent. In turn, Mingo opposed Jones' motion on the ground that joinder of D&R was untimely. Subsequently, the presiding Commission judge issued an order provisionally joining D&R as a party "for purposes of hearings on all pending motions." Unpublished Order dated October 17, 1983. The judge's order stated that all pending motions would be entertained at the start of the hearing, and that a hearing on the merits would follow, if it were deemed necessary.

The judge's order also directed Jones to serve D&R with a copy of the discrimination complaint. Jones' complaint was served on D&R on October 25, 1983, and D&R filed its answer on November 17, 1983. Among other things, D&R's answer alleged that Jones was not employed by D&R, but rather was a joint venturer or partner of D&R. D&R further asserted that Jones' complaint against D&R should be dismissed because it was time-barred by section 105(c)(3) of the Mine Act, which provides that a miner's complaint is to be filed within 30 days of notification that the Secretary of Labor will not prosecute a complaint on the miner's behalf (n. 3 supra).

The hearing on this matter was held on February 7-8, 1984. Attorneys entered appearances for Jones, Mingo and D&R. At the start of the hearing, the judge heard arguments on Jones' motion to join D&R as a party. Jones' attorney explained that the motion to join was made "because of [Mingo's] allegations ... that D&R Contractors [was] an indispensable party ..., the remedy [was] not to dismiss the case, but to allow for the joinder of D&R...." Tr. 10. However, in response to questions by the judge, Jones' attorney stated his legal position that Jones "was totally an employee of Mingo ... and not [an employee or] partner of D&R...." Tr. 11. He further stated "[s]o far as Mr. Jones is concerned, it's his position there is no evidence that he is an employee or partner of D&R Contractors." Tr. 12. Mingo asserted that its defense to Jones' charge was that Jones was an employee and/or partner of D&R and that Mingo was not responsible for his discharge. After inquiring of the parties whether there were any objections to the dismissal of D&R and receiving negative responses from the attorneys for

both Jones and Mingo, the judge dismissed D&R. Tr. 11-17. <sup>4/</sup> Because Ronald Perkins, D&R's foreman and a partner of D&R, was subpoenaed as a witness, he remained, but was sequestered along with the other witnesses. D&R's counsel also remained, although he did not participate in the hearing.

Jones then presented his case on the merits. In part, he testified about his employment relationship with Mingo and its owner Roger Daniel. At the close of Jones' case, Mingo asserted that Jones had failed to prove his case and moved for summary judgment and a directed verdict. The judge decided to consider the motions overnight.

At the start of the second day of the hearing, on February 8, 1984, the judge denied both of Mingo's motions. The judge opined that if there was to be any finding of discrimination, "the only person chargeable or

4/ The following colloquies are illustrative:

Q. (JUDGE): Do you know of any evidence, through your discovery or any other information, that would lead you to believe that ... Mingo ... and/or D&R ... will produce evidence to show that Mr. Jones was an employee, or partner, of D&R ...?

A. (MR. ARMSTRONG, JONES' ATTORNEY): So far as Mr. Jones is concerned, it's his position there is no evidence that he is an employee or a partner of D&R....

Q. (JUDGE): And that is your legal position?

A. (ARMSTRONG): Yes.

\* \* \* \*

Q. (JUDGE): [L]et's get back to the question of the joinder of D&R....

Mr. Armstrong, you do not see any necessity of retaining D&R as a party, is that correct?

A. (ARMSTRONG): No, your Honor.

Q. (JUDGE): And Mingo ... does not see any necessity of retaining D&R as a party?

A. (MR. BURTON, MINGO'S ATTORNEY): Not as against Mingo....

(JUDGE): Then D&R will be dismissed as a party in this case.

Tr. 11-12, 17.

the only entity chargeable with that would be D&R Contractors and/or Ronald Perkins." Tr. 211. The judge then asked Jones' counsel whether he had any objections to the rejoining of D&R as a party. Jones' counsel had no objection.

Admitting that D&R's joinder was "rather unusual" after Jones' case-in-chief had been completed, the judge noted that D&R's counsel had been present throughout the previous day's proceedings. Tr. 211-12. D&R, however, objected to being rejoined. It argued that the discrimination complaint against it, which had been effected by Jones' August 22, 1983, joinder motion, was time-barred by the relevant 30-day time limit in section 105(c)(3) of the Act. Following a discussion off the record, the judge agreed with D&R's period of limitations argument. The judge based his determination, however, on his mistaken belief that Jones had filed his joinder motion in August 1984 (rather than in 1983). Tr. 215-17. Finding that Jones had not moved to join D&R until well beyond the applicable 30-day filing period in section 105(c)(3) of the Act, the judge concluded, "[T]hat [ruling] I previously made that [D&R is] no longer a party to this proceeding would stand." Tr. 217.

Mingo renewed its motion to dismiss Jones' complaint for failure to join an indispensable party. The judge determined that there was sufficient evidence to proceed against Mingo and denied the motion. Mingo proceeded with its defense. The only witnesses presented by Mingo were Daniel and Perkins. Although D&R's counsel was present, he took no part in their examination or cross-examination. After the testimony of these two witnesses, Mingo rested its case and the judge took the case under advisement.

Two weeks after the conclusion of the hearing, on February 22, 1984, the judge arranged a conference call with the attorneys for Jones, Mingo and D&R. Although there is no transcript or minute of this conversation, it is clear that the judge arranged the call because he had recognized the computational mistake that he had made in ruling on the period of limitations defense raised by D&R. 6 FMSHRC at 1314 n. 2. It appears that during the call the judge informed the parties that his decision not to join D&R on February 8, 1984, was based on his miscalculation of the time that had elapsed from the date of the Secretary's non-prosecution letter to Jones and the date of Jones' subsequent motion to join D&R. Using the correct date of Jones' joinder motion, August 22, 1983, the judge determined that Jones' filing delay of some 35 days was excusable. He told the parties of his intent to rejoin D&R and, according to his written decision in this matter, offered D&R the "opportunity to present additional evidence and/or to cross examine witnesses...." 5/

5/ During this conference call the judge also informed the parties that he intended to dismiss Mingo as a party because he had concluded that Mingo was not Jones' employer and was not responsible for his discharge. On March 7, 1984, the judge issued an order severing Jones' case against Mingo from the present case involving D&R and, on March 8, 1984, reduced his decision in this regard to writing. 6 FMSHRC 632 (March 1984) (ALJ).

D&R appears to have objected to its joinder on two grounds: that it had been dismissed on the first day of the hearing -- with Jones' consent -- and, therefore, had not had the opportunity of participating in the hearing process; and, again, that Jones' motion for joinder was time-barred. D&R followed up its oral objection with a written statement of its objections and a letter informing the judge that D&R was not going to submit any additional evidence. In its objections, D&R repeated that it had been dismissed with Jones' consent and had not participated in the hearing. On March 7, 1984, the judge joined D&R and then severed the case involving D&R from Jones' action against Mingo. Subsequently, D&R was permitted to and did file a brief on the merits of this case.

In his decision on the merits, the judge focused most of his attention on D&R's timeliness argument and the evidence concerning Jones' discharge. The judge rejected D&R's due process objections to its joinder after the hearing. In a footnote generally describing the February 22, 1984, conference call, the judge stated:

D&R Contractors was given opportunity to present additional evidence and to cross-examine witnesses who had appeared at the hearings in this case. It is noted that counsel for D&R Contractors was present throughout the hearings and that D&R Contractors waived the opportunity to present additional evidence and/or to cross-examine witnesses.

6 FMSHRC at 1314 n.2. The judge concluded that Jones' discharge was in violation of section 105(c)(1) of the Mine Act and, in his subsequent remedial order, directed D&R and Ronald Perkins to pay Jones back wages with interest plus costs and his attorney's fees. We subsequently granted D&R's petition for discretionary review.

The procedural error claimed by D&R in this case presents us with a straightforward due process issue: whether the judge's post-hearing joinder of D&R as a party effectively denied the operator an adequate opportunity to defend against the claim of unlawful, discriminatory discharge. We hold that it did. The highly unusual procedure followed by the judge in this case denied D&R the fundamental right to defend itself in a meaningful manner, thereby depriving D&R of due process of law.

The crucial procedural facts are clear. Initially, D&R was joined only provisionally by the judge and was dismissed as a party on the first day of the hearing before any testimony was taken. The grounds of dismissal were substantive -- viz., that D&R was not the responsible employer in this matter. Jones' counsel voluntarily and unequivocally consented to this dismissal. Tr. 10-17; see n. 4, supra. At that point, D&R's potential liability, if any, was terminated. 6/

6/ As noted earlier, the judge reinforced his dismissal of D&R by declining to rejoin it as a party at the conclusion of Jones' case-in-chief. The judge ruled, "[T]hat [ruling] I previously made that [D&R is] no longer a party to this proceeding would stand." Tr. 217; see p. 6, supra.

Nevertheless, despite having dismissed D&R twice as a party in this case, the judge, following a conference call that he initiated, rejoined D&R two weeks after the conclusion of the hearing. We find that this post-hearing joinder is violative of D&R's due process rights and are unpersuaded by the reasons offered by the judge supporting the joinder. The judge noted that counsel for D&R had been present at the hearing, and he relied principally upon the fact that counsel for D&R had been given the opportunity to present evidence and to cross-examine witnesses who had testified at the hearing, but had declined the offer. See 6 FMSHRC at 1314 n.2.

We hold that under the facts of this case the judge's offer to D&R to reopen the record did not afford sufficient due process and thus the post-hearing joinder of D&R was improper. Simply stated, "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Given the fact that D&R was not a party to this litigation when the case was tried before the judge, the reopening of a cold administrative record can hardly be said to satisfy the meaningful time and meaningful manner requirement contemplated by the Court in Mathews v. Eldridge and Armstrong v. Manzo and their progeny. The fact that counsel for D&R was present at the hearing is not persuasive. D&R's counsel did not participate in the hearing -- he was only a spectator. The judge's offering D&R the post-hearing opportunity to present evidence and to cross-examine witnesses (who had testified two weeks earlier) has a hollow ring. Accordingly, to uphold the post-hearing joinder of D&R under the facts of this case would be a serious affront to the principle of due process.

In finding the judge's post-hearing joinder of D&R to be improper, we are mindful of the consequences to complainant Lonnie Jones. Nevertheless, in seeking to uphold Jones' right under the Mine Act to be free of unlawful discrimination, we cannot infringe upon the due process rights of D&R. Moreover, we note that Jones' counsel substantially contributed to the procedural confusion that has plagued this case. As noted above, Jones' counsel voluntarily consented to the pretrial dismissal of D&R as a party. In addition Jones had every opportunity through the Commission's pre-trial discovery process to determine the appropriate employing entity. See 29 C.F.R. §§ 2700.55-.57. As the transcript reveals, Jones' counsel was on express notice, when he consented to D&R's dismissal at the outset of the hearing, that Mingo might well defend on the ground that it was not Jones' employer. In the adversarial system, Jones must live with the consequences of his counsel's consent to D&R's dismissal and his counsel's failure to seek the seasonable rejoinder of D&R.

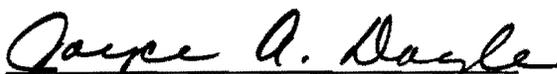
There must be reasonable limits to the dismissal and rejoinder of parties in Commission practice. In this case the sua sponte judicial

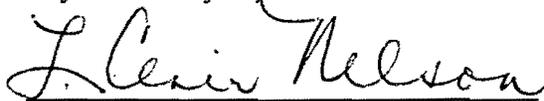
addition of a party after its dismissal with consent and after hearing was fundamentally unfair and contrary to Commission process. Accordingly, we hold that the judge erred in joining D&R. 7/

Finally, we wish to comment briefly upon the judge's sua sponte activity in the attempted post-hearing joinder of D&R. At least under the particular facts of the case, we find the judge's efforts to have been misdirected. The role of the Commission and its judges is to adjudicate, not to litigate, cases -- a procedural axiom followed by this Commission from its formation. See, e.g., Canterbury Coal Co., 1 FMSHRC 1311, 1312-14 (September 1979). Pertinent to our present purposes, parties bring discrimination cases under the Mine Act. The Commission does not solicit, initiate, or revive a party's complaint. The Mine Act provides for the traditional adversarial hearing process familiar to American law and we must be vigilant in respecting that process. 30 U.S.C. § 815.

For the foregoing reasons, the judge's decision is reversed and this proceeding is dismissed with prejudice. 8/

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
L. Clair Nelson, Commissioner

7/ Given our disposition, we do not reach D&R's objection to Jones' complaint on the ground of timeliness nor the substantive merits of Jones' case.

8/ Chairman Ford did not participate in the consideration or disposition of this matter.

Commissioner Lastowka, dissenting:

The administrative law judge concluded that Lonnie Jones was discharged by D&R Contractors in violation of section 105(c)(1) of the Mine Act. On review D&R challenges the judge's decision on procedural grounds only, contending "that it was improperly joined as a party to this action." Slip op. at 2. Agreeing with D&R, my colleagues hold that the joinder below "effectively denied the operator an adequate opportunity to defend against the claim of unlawful, discriminatory discharge ... thereby depriving D&R of due process of law." Slip op. at 7. I agree that the determination of the proper respondent in this discrimination proceeding followed an unusual and tortuous path. I cannot conclude, however, that the judge's ultimate joinder of D&R impugned D&R's constitutional due process rights to a fair hearing.

In evaluating the merits of D&R's procedural objection it must be kept foremost in mind that we are dealing with administrative proceedings provided by Congress to determine civil liability under an important and particularly remedial section of a safety and health statute. Such proceedings, of course, must be conducted consistent with the dictates of due process. Due process, however, does not require that "administrative hearings ... be conducted with all the formalities and strictures of a criminal case." Mack v. Florida State Board of Dentistry, 430 F.2d 862, 864 (5th Cir. 1970), cert. denied, 401 U.S. 954 (1971). Rather, the touchstone of procedural due process in administrative proceedings requires consideration of whether substantial prejudice has occurred. Arthur Murray Studio v. F.T.C., 458 F.2d 622, 624 (5th Cir. 1972). Notably absent from the record in this case is any demonstration of substantial prejudice suffered by D&R as a result of the judge's reconsideration of his previous denial of Jones' joinder motion. Quite to the contrary, as discussed below the record amply demonstrates that no prejudice resulted from the judge's ruling.

First, D&R was named by Jones in his initial complaint of discrimination filed with MSHA 15 days after his asserted illegal discharge. Thus, D&R had prompt notice of Jones' claim against it and cannot assert prejudice based on surprise or faded witness memories. Second, although the complaint filed with the Commission initially named only Mingo Coal Company as respondent, Jones promptly moved to add D&R as a respondent following the filing of Mingo's answer asserting that D&R, not Mingo, was his employer. Third, D&R was offered a hearing once the judge realized that his denial of joinder at the hearing in part had been based on his own obvious computational error in determining a pertinent time period. D&R refused a hearing, however, choosing instead to rely on procedural objections to its "late joinder." Fifth, the rampant confusion evident in this record over the nature of Jones' employment relationship with D&R and Mingo is attributable in large part to the less than clear "partnership" arrangement used in this case, and apparently commonly used in Kentucky, primarily as a device to avoid

obligations under workers' compensation and other programs. Tr. 152-156, 199-206. See also BNA, Mine Safety and Health Reporter, February 5, 1986, at 342 (State of Kentucky to take corrective action addressing use of mining partnership agreements, which are described as "a significant problem area in need of attention", due to widespread confusion over ownership responsibilities). Sixth, as a result of the partnership arrangement, through which Roger Daniel as sole owner of Mingo contracted with D&R, comprised of Ronald Perkins as foreman/partner and Jones and several other miners as additional partners, all of the principals with knowledge of the circumstances surrounding the disputed discharge who testified at the proceedings involving Mingo are the same individuals who would have testified in the proceeding against D&R. Therefore, the witnesses were known to D&R and readily available at the time of its joinder. Reopening the hearing to permit their further testimony and cross-examination and for the introduction of additional evidence does not contravene due process. Little Sandy Coal Sales, 7 FMSHRC 313 (March 1985).

In light of the above, I conclude that the showing of substantial prejudice necessary to sustain a procedural due process objection has not been established in this record. By refusing the judge's offer to reconvene the hearing, D&R deprived itself of the very opportunity to defend against the merits of Jones' complaint that it now protests it has been unfairly denied.

Insofar as the administrative law judge's authority to reopen the hearing is concerned, I cannot agree with my colleagues' suggestion that the judge's actions constituted inappropriate advocacy rather than impartial adjudication. Slip op. at 9. "Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing." City of New Orleans v. Paine, 147 U.S. 261, 266 (1893). Accord, Bookman v. U.S., 453 F.2d 1263, 1264-65 (Ct. Cl., 1972); Faircrest Site Opposition Committee v. Levi, 418 F. Supp. 1099, 1109 n. 3 (N.D. Ohio, 1976). Here, Jones' complaint was still pending within the jurisdiction of the judge. While the case was before him, he determined that he had committed a basic and obvious factual error in denying joinder. He decided to rectify rather than ignore his error. In doing so he acted appropriately; the failure to do so would have been error. 1/

1/ An apt parallel to the judge's actions in the present case might be drawn from the following comments by the court in Faircrest Site Opposition Committee v. Levi, supra:

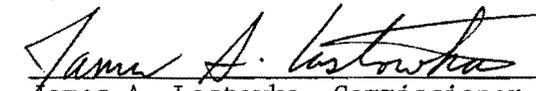
The second action challenged by plaintiff under the arbitrary and capricious standard is the L.E.A.A.'s ultimate decision to issue a negative declaration. Plaintiff points to the fact that the deciding representative of L.E.A.A., Eldon James, changed his mind on this issue no less than three times in less than a month. Clearly such actions are not, to say the least, conducive to the public confidence in the responsibility of Washington administrators; nor is this Court impressed with the procedural

Federal Rule of Civil Procedure 21 provides further support for the judge's action. Rule 21 provides:

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just.

(Emphasis added). Pursuant to Rule 21, the judge possessed the authority to rejoin D&R and his offer to reconvene the hearing to allow it to present its case is a just term for permitting the joinder. See Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure applicable to Commission proceedings insofar as practicable).

In sum, while I agree that "there must be reasonable limits to the dismissal and rejoinder of parties in Commission practice" (slip op. at 8), considering the clear remedial purpose underlying section 105(c) of the Mine Act, to conclude that such limits were exceeded in the present case is to adopt a "hypertechnical and purpose-defeating interpretation." Donovan v. Stafford Construction Co. and FMSHRC, 732 F.2d 954, 959 (D.C. Cir. 1984). Therefore, I respectfully dissent from the majority's dismissal of Jones' complaint.

  
James A. Lastowka, Commissioner

Footnote 1/ continued

lapses and indecisiveness demonstrated by L.E.A.A. in this action. However, the issue herein presented is whether its decision is arbitrary or capricious. These demonstrations of sporadic indecisiveness are merely evidence of said legal characterization; they are not proof thereof.

....[W]hile James' wavering decisions certainly appear on the surface to be the result of arbitrary and capricious action, upon reflection it is apparent that they were not.

418 F. Supp. at 1104-05.

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carrying belt conveyor entries that are the subject of this proceeding are entries in which miners are normally required to work or travel, and, as such, are subject to the pre-shift examination requirements of section 303(d)(1) of the Act and of 30 C.F.R. § 75.303.

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Footnote 1/ continued

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

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

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

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

The case arose when Jones and Laughlin Steel Corporation ("J&L") was issued a citation and withdrawal order by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 104(d)(1) of the Mine Act. The citation and withdrawal order alleged that J&L violated 30 C.F.R. § 75.303 by failing to pre-shift examine certain coal-carrying belt conveyor "flights" before miners entered areas along the flights and began work. 2/ The citation and withdrawal order also alleged that the violations of 30 C.F.R. § 75.303 were significant and substantial and were caused by the unwarrantable failure of J&L to comply with the mandatory standard. 30 U.S.C. § 814(d)(1).

J&L contested the citation and withdrawal order and a hearing was held before a Commission administrative law judge. At the hearing the parties stipulated that the belt conveyors in question transported coal only, that both violations were cited on coal-producing shifts, and that on both occasions an examination of the nature specified in 30 C.F.R. § 75.303 had not been made within three hours preceding the beginning of the shift, or before miners entered and began to work in the areas along the cited belt flights. 3 FMSHRC at 1723-24. 3/

The history of this matter is fully set forth in our previous decision (5 FMSHRC 1209 (July 1983)) and need not be repeated in full here. The judge found that the Secretary had not proved a violation of section 75.303. The judge concluded that the Secretary had cited J&L for failing to pre-shift examine the equipment, i.e., the coal carrying belt conveyors, and that MSHA had failed to establish that the standard and the Act require coal-carrying belt conveyors to be pre-shift examined. 3 FMSHRC at 1734. Therefore, the judge vacated the citation and withdrawal order. 3 FMSHRC 1721, 1734 (July 1981)(ALJ).

The Commission granted petitions for discretionary review filed by the Secretary and the UMWA. 4/ The Secretary argued on review that J&L violated section 303(d)(1) of the Act and 30 C.F.R. § 75.303 because no pre-shift examination was made of areas in the coal-carrying belt conveyor entries where miners were working. 5/ J&L responded that in

2/ As used here the term "flight" refers to one conveyor belt in a connected tandem series of belts. See Bureau of Mines, U.S. Dept. of the Interior, Dictionary of Mining, Mineral, and Related Terms 440 (1981).

3/ Following the hearing, the motion of the United Mine Workers of America ("UMWA") to intervene and file a brief was granted.

4/ The American Mining Congress ("AMC"), the Bituminous Coal Operators Association, and Keystone Bituminous Coal Association filed briefs as amici curiae.

5/ This argument, which distinguished between belt conveyor entries and the belt conveyors themselves, represented a new position for the Secretary. It was not refined and clarified until the Secretary's reply brief to the Commission on review and was not announced to the public until three months after the Commission granted review. 5 FMSHRC at 1212, n. 5; see also MSHA Policy Memorandum No. 82-76 (March 3, 1982).

distinguishing between the belt flights themselves and the entries in which that belt conveyor equipment was located, the Secretary was arguing a position not raised before the judge below. The Commission agreed that the Secretary was improperly attempting to litigate an issue not raised below. 30 U.S.C. § 823(d)(A)(iii). Accordingly, the Commission left the issue of whether the statute and the regulation require the pre-shift examination of coal-carrying belt conveyor entries for a case in which it was properly raised. 5 FMSHRC at 1211-12. The Commission concluded, however, that section 303(d)(1) of the Act and 30 C.F.R. § 75.303 do not require the pre-shift examination of coal-carrying belt conveyors themselves.

The Commission's decision was appealed to the U.S. Court of Appeals for the District of Columbia Circuit by the UMWA. Prior to the appeal Vesta Mining Co. ("Vesta") purchased the mine in question. Vesta then intervened and filed a brief on appeal. (The Secretary and the AMC, participating as amici curiae, also filed briefs.) Before the court, Vesta altered the position taken by its predecessor, J&L, and argued that the question of whether belt conveyor entries had to be pre-shift examined had been properly before the Commission on review. The court conceded that "the distinction between coal-carrying [belt conveyor] equipment and the entries was perhaps not carefully articulated below." Slip op. at 3. Nevertheless, the court reversed the Commission's decision "to the extent that it holds that the parties did not present to the ALJ the question of whether entries in which coal-carrying belts are located are subject to a mandatory pre-shift inspection." Slip op. at 3. The court further stated:

Given that the statute and regulation require a preshift examination of 'the active workings of a coal mine' and that coal-carrying conveyor belt entries in which miners are normally required to work or travel clearly fall within the definition of 'active workings,' the statute and regulation appear to require coal mine operators to conduct a preshift examination of such entries. It would be anomalous if the mere addition of coal-carrying conveyor belts to an entry had the effect of removing the entry from the scope of the preshift examination requirement.

Slip op. at 3. Recognizing, however, that there might be "other considerations not apparent to this Court that bear on the proper interpretation of the statute and regulation," the court remanded the matter to the Commission. Slip op. at 3.

On remand the parties have filed new briefs presenting their positions and arguments on the issue of whether the statute and the standard require pre-shift examinations of coal-carrying conveyor belt entries where miners are normally required to work or travel. The parties present three very different interpretations of how the statute and the standard apply to this case. Vesta argues that the subject areas along the coal-carrying belt conveyor flights are not required to be pre-shift examined for either of two reasons. First, Vesta asserts that the record establishes they are not "active workings," that, is, they are not areas where "miners are normally required to work or travel." Second, assuming that the areas are "active workings," Vesta asserts that they are specifically exempted by the third sentence of section 303(d)(1) and the standard. ("Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun.") The UMWA draws a contrary conclusion. The UMWA asserts that because the third sentence of section 303(d)(1) itself requires the on-shift examination of belt conveyors on which coal is carried, miners are "normally required to work or travel" in the entries. Thus, according to the UMWA, all coal-carrying belt conveyors are active workings and must be pre-shift examined. The Secretary argues that the sole consideration in determining whether a pre-shift examination is required in a coal-carrying belt conveyor entry is whether a particular area in an entry is an "active working." The Secretary asserts that the evidence in this case establishes that "miners are normally required to work or travel" in the cited areas of the coal-carrying belt conveyor flights at issue.

In a succession of federal mine safety and health acts, Congress has demonstrated increasing concern that coal miners be assured of entering underground work areas that provide as safe and healthy an environment as possible. Section 209(d) of the Federal Coal Mine Safety Act of 1952, 30 U.S.C. § 471 *et seq.* (1955), required pre-shift examinations to be conducted in "every active working place" of the underground areas of a gassy coal mine within four hours immediately preceding the beginning of a coal-producing shift. The first sentence of section 303(d)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1976), adopted without change by the 1977 Mine Act, required that pre-shift examinations be performed within three hours immediately preceding the beginning of any shift and throughout all active workings of every coal mine.

The first sentence of section 303(d)(1) sets forth the general pre-shift examination requirement followed by more particular inspection requirements. Thus, the second sentence of section 303(d)(1) contains the more specific requirements for the pre-shift examination of "working sections" and for the pre-shift examination of other specified areas in underground coal mines. The third sentence excepts coal-carrying belt conveyors from the general and particularized pre-shift examination mandates. Clearly, the intent of section 303(d)(1) is to make safer those areas where miners are normally required to work or to travel. We

agree with the court that to remove coal-carrying belt conveyor entries where men normally work or travel from the general pre-shift inspection mandate of the statute and the standard would be a deviation from the statutory pre-shift inspection scheme.

We next consider whether the areas of the coal-carrying belt conveyor entries at issue were "active workings." George Pizoli, mine manager for J&L, testified that on almost every shift at the Vesta No. 5 mine miners were assigned to work at places along the belt as the need arose. Tr. 131-32. Stephen Hajdu, J&L's assistant safety director, testified that anytime during any shift it was possible that miners would be working along coal-carrying belt conveyors and that it was "normal practice" at the Vesta No. 5 mine for men to work in belt entries without a pre-shift examination. Tr. 95-96. Thus, at the Vesta No. 5 mine, it was a normal practice to require miners to work at particular tasks as needed in areas of the coal-carrying belt conveyors, and we conclude that these areas were places where miners were "normally" required to work. Thus, once J&L assigned miners to work in particular areas along coal-carrying conveyor belts, J&L was required by section 303(d)(1) of the Mine Act and by 30 C.F.R. § 75.303 to pre-shift examine those specific areas.

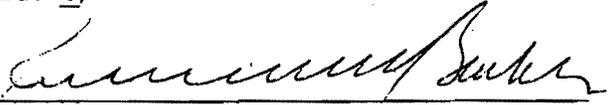
Our conclusion is consistent with the Secretary's interpretation of the pre-shift examination requirements of the Act and the standard relating to the examination of coal-carrying belt conveyor entries. That interpretation requires the pre-shift examination of "[a]ny area of a coal mine in which miners are normally required to work or travel during the shift, including areas along conveyor belt lines in which miners are assigned to work or travel." The interpretation also states that it is the Secretary's policy to require the examination of areas along a belt entry "[w]hen miners are assigned duties." MSHA Policy Memorandum No. 82-7C at 1 (March 3, 1982). 6/ Thus, to comply with the pre-shift examination requirements imposed by the statute and the standard, an operator is not required to pre-shift examine all of the coal-carrying belt conveyor entries in its mine, but only those areas of the entries where miners are assigned duties requiring work or travel. 7/

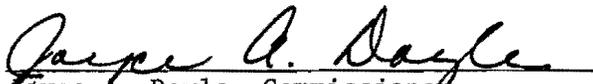
6/ We note that it is also the Secretary's policy to allow the operator to combine, under certain circumstances, the on-shift examination of belt conveyors on which only coal is carried with the pre-shift examination of the areas of coal-carrying belt conveyor entries in which miners are assigned duties. MSHA Policy Memorandum No. 82-7C (March 3, 1982) at 2; see also Sec. Br. on Remand 27-30. Under the facts of the present case the validity of this policy need not be explored here.

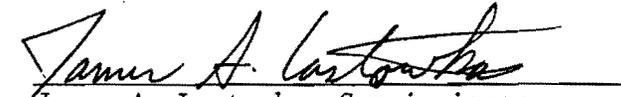
7/ As we have stated previously, the inspection requirements imposed by section 303(d)(1) of the Mine Act must be determined by reading that section as a whole and in a harmonious and consistent manner. 5 FMSHRC at 1212. Consonant with this approach, and based upon the structure of section 303(d)(1) and the statutory and regulatory definition of "active workings," the Commission previously concluded that coal-carrying belt conveyors themselves are not subject to the pre-shift examination requirements of the statute and regulation but must be examined "after each coal producing shift has begun." 5 FMSHRC at 1212-14. These conclusions were not disturbed by the court.

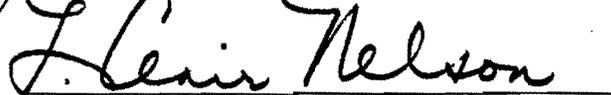
J&L assigned duties to miners requiring work in areas along the coal-carrying belt conveyor flights. J&L did not examine these areas prior to the miners entry into the areas. Accordingly, we reverse the judge and conclude that J&L violated the pre-shift examination requirements of section 303(d)(1) of the Act and mandatory safety standard 30 C.F.R. § 75.303.

Because the judge who heard the case originally is no longer with the Commission, we remand to the Chief Administrative Law Judge for assignment to another judge to determine whether, as alleged, the violations were of a significant and substantial nature and whether the violations were caused by J&L's unwarrantable failure to comply with the Act and the mandatory safety standard. 8/

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

8/ Chairman Ford did not participate in the consideration or disposition of this case.

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Administrative Law Judge George Koutras dismissed the complaint. 5 FMSHRC 2174 (December 1983)(ALJ). The Commission granted the petitions for discretionary review filed by the Secretary and the United Mine Workers of America ("UMWA") and heard oral argument. For the reasons that follow, we reverse the judge's dismissal of the discrimination complaint, conclude that Emerald unlawfully suspended the complainants, and remand to the judge for consideration of appropriate relief.

The events at issue involve the main elevator at Emerald's No. 1 Mine, a large underground coal mine located in southwestern Pennsylvania. At the time of these events, the mine was operating three shifts daily. Hogan and Ventura were working underground on the 4:00 p.m. to midnight shift. Neither miner had any prior disciplinary history. Both were considered good and conscientious employees by their shift foreman, Denny Smith.

The usual route underground and into the mine is via an enclosed elevator that carries a maximum of 24 persons. The elevator shaft is 600 feet deep. The elevator normally runs on automatic mode at a speed of 900 feet per minute.

On December 27, 1982, there were mechanical problems with the elevator. At about 5:30 p.m., Denny Smith rode the elevator underground. After he exited, the elevator did not return automatically to the surface. The elevator constituted one of two required fresh air escapeways. If the elevator could not be repaired within 30 minutes the miners had to be given the option of leaving the mine by the remaining fresh air escapeway--up the slope. Therefore, all of the miners underground, including Hogan and Ventura, were notified of the elevator malfunction. Denny Smith called the underground maintenance foreman who repaired the elevator.

Ventura testified that he was told by Mark Sunyak, a miner who also worked on the 4:00 p.m. to midnight shift and who used the elevator to leave the mine following its repair, that the elevator had not leveled properly at the bottom of the shaft. On the midnight shift of December 28, 1982, the elevator malfunctioned again. Maintenance representatives from Houghton Elevator Company were called to make repairs, which took some time and delayed the entrance of the day shift employees until approximately 9:45 a.m.

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Footnote 1 end.

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].

30 U.S.C. § 815(c)(1).

The elevator malfunctioned again on December 28 when at 3:00 p.m. the doors did not open. Jackie Smith, a maintenance foreman, was called to repair the elevator. He corrected the problem by recycling the power and running the elevator up and down several times.

Later that day, at about 3:50 p.m., Hogan, Ventura, and other afternoon shift miners were standing on the elevator platform when the doors opened and a group of day shift miners exited. Hogan and Ventura testified that the miners exiting the elevator appeared highly agitated, excited, and shaken and were talking about an elevator malfunction that occurred on their ride up. Miners testified that the elevator cage was proceeding up the shaft at the normal speed (900 feet per minute) when, at about 100 feet from the top, it stopped suddenly. The cage appeared to some to fall, stop, start back up, and stop a third time. Those inside the elevator telephoned the elevator control room and Jackie Smith brought the elevator up manually at inspection speed (180 feet per minute). Miners who experienced the elevator incident testified that the stopping and dropping of the elevator jarred them and caused their knees to buckle. Some feared that the cage might fall to the bottom of the shaft, seriously injuring them.

One of the miners on the elevator, Jerry Kessler, testified that immediately upon leaving the cage he advised Denny Smith, the shift foreman, that "there [was] something wrong with the cage, it dropped." Tr. 207, 213. Kessler stated that Smith did not appear to hear him although they were only one and one half feet apart. Kessler proceeded to tell every man he saw on his way to the bathhouse about the incident including Martin Willis, the UMWA's safety committeeman. Kessler told Ventura, "If anybody rides that damn elevator, they are a fool because somebody is going to get killed." Tr. 113.

Willis proceeded to the mine foreman's office to see what management intended to do about the incident. Meanwhile, Jackie Smith ran the empty elevator up and down without a recurrence of the incident and the afternoon crew was ordered to enter the mine via the elevator.

As the afternoon shift began caging down, Hogan and Ventura separately approached management representatives and told them that they believed that the elevator was unsafe and that they would not cage down. Ventura testified that he asked Alan Hager, the mine foreman, who had arrived at the elevator platform, whether he was aware of the problems with the elevator. Hager responded that there was nothing wrong. Hogan testified that he told Hager he did not believe the elevator was safe and that he was invoking his individual safety rights. Both Hogan and Ventura also asked Jackie Smith about the malfunction of the elevator and testified that Smith told them he did not know what was wrong with the elevator and could not guarantee that it was safe. However, Smith testified that he told Hogan and Ventura that he had not found anything wrong with the elevator and that it was "the safest piece of equipment at the mine." Tr. 386.

Hogan and Ventura were called to mine foreman Hager's office where they met with Hager and other management officials. Hager offered to take the two miners into the mine by either the slope car or by running the elevator manually. When safety questions were raised about these options, Hager withdrew the offer to transport the miners in by the slope car. The miners were then assigned alternate work at surface areas of the mine, which they performed.

Hager then called the state and federal inspectors, who arrived at about the same time as John Lusky, a mechanic from the Houghton Elevator Company who had been called by management to examine the elevator. Hager had previously told Hogan and Ventura that, depending on the result of the investigation of the elevator by the inspectors, they might be disciplined. At about 8:00 p.m., after testing the elevator and replacing several parts, Lusky advised the inspectors, Hager and other management personnel that he considered the elevator to be safe and that none of the elevator safety features were defective. The inspectors, who also examined the elevator, did not issue any citations for safety violations.

Hager then summoned Hogan and Ventura to his office. He told them that in management's view nothing was unsafe about the elevator at the time of their refusal to cage down and that, therefore, they would receive a five-day suspension. Hager's stated reason for the suspensions was that the miners had interfered with management's right to direct the workforce and that the complainants had acted "arbitrarily and capriciously and not in good faith" in refusing to ride the elevator. Tr. 55, 125. 2/

Hogan and Ventura subsequently filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging discrimination under § 105(c)(1) of the Mine Act. Following an investigation by MSHA, the Secretary filed with the Commission a discrimination complaint on behalf of Hogan and Ventura.

After a hearing on the merits, the Commission judge concluded that the complainants' work refusals were not protected by the Mine Act and that the five-day work suspensions did not constitute unlawful retaliation under section 105(c). In reaching this conclusion, the judge focused solely upon the so-called "drop incident" of December 28. He concluded that the earlier mechanical problems with the elevator could not serve as a basis for a good faith, reasonable belief that the elevator was hazardous. 5 FMSHRC at 2211. The judge found that at the time of their work refusal on December 28, the complainants did not possess a good

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2/ Hager testified that under the Bituminous Coal Wage Agreement of 1981 (the "Contract") a dispute between miners and management may be resolved by calling in state and federal mine inspectors. According to Hager, if the inspectors find that the conditions complained of do not constitute a violation of any safety standards, management is free under the Contract to discipline the miners.

faith, reasonable belief that riding the elevator was hazardous. The judge was influenced by what he termed the complainants' lack of "credible first-hand information indicating that the elevator would more than likely fall to the bottom of the shaft if they were to ride it." 5 FMSHRC at 2212. The judge further found that the miners had failed to communicate the "drop incident" to management as the reason why they refused to ride the elevator. 5 FMSHRC at 2210, 2213. Additionally, the judge was impressed with what he viewed as Emerald's positive and affirmative steps to address the elevator problems. 5 FMSHRC at 2206.

On review, the Secretary and the UMWA argue that in evaluating the complainants' good faith, reasonable belief that the elevator was hazardous, the judge incorrectly applied an "objective" test rather than the applicable test -- whether the miners had a reasonable basis for believing that riding the elevator was hazardous. They also argue that the judge erred in focusing solely upon the "drop incident." They assert that the prior malfunctions of the elevator were known to Hogan and Ventura and influenced their decision on December 28 to refuse to ride the elevator. They further contend that Hogan and Ventura adequately communicated their safety concerns to management.

Conversely, Emerald accepts the judge's emphasis of the "drop incident" as the focal point for analysis of the complainants' good faith, reasonable belief that the elevator was hazardous, and argues that the judge correctly found that Hogan and Ventura did not adequately communicate that incident as the basis for their work refusals. Alternatively, Emerald contends that the complainants' work refusals should be viewed as continuing ones during which Emerald provided assurances and took remedial action so as to remove the refusal from the Act's protection.

We conclude that the judge erred in finding that Hogan and Ventura were not discriminated against in violation of section 105(c) of the Mine Act. First, we find that the judge erred in concluding that the complainants did not possess a good faith, reasonable belief that the elevator was hazardous. Second, we find that the judge erred in concluding that the miners did not communicate sufficiently their safety concerns to Emerald. We begin with the issue of the miners' good faith, reasonable belief.

Under the Mine Act, a complaining miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd. Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by

proving that (1) it was also motivated by the miner's unprotected activity, and (2) it would have taken the adverse action in any event for the unprotected activity alone. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved a virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

A miner has the right under section 105(c) of the Mine Act to refuse work, if the miner has a good faith, reasonable belief in a hazardous condition. Pasula, 663 F.2d at 1217 n. 6, 1219; Miller v. Consolidation Coal Co., 687 F.2d 194, 195 (7th Cir. 1982); Secretary of Labor on behalf of Phillip Cameron v. Consolidation Coal Co., 7 FMSHRC 319 (March 1985), on remand 7 FMSHRC 1682 (October 1985), aff'd sub. nom. Consolidation Coal Co. v. FMSHRC and Secretary of Labor on behalf of Phillip Cameron, No. 85-2369, slip op. at 8-9 (4th Cir. July 8, 1986); Robinette, 3 FMSHRC at 807-12. However, this right to refuse to work is not unconditional. Where reasonably possible, a miner refusing work should ordinarily communicate or attempt to communicate to some representative of the operator his belief that a safety or health hazard exists. Simpson v. Kenta Energy Inc., KENT 85-155-D, slip op. at 5-7, 8 FMSHRC \_\_\_\_ (July 8, 1986); Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982); See also Miller, 687 F.2d at 195-96.

Initially, we conclude that the judge's view regarding the scope of the complainants' safety concerns is overly narrow and unsupported by the record. The record clearly reveals that from December 27 up to the complainants' refusal to ride the elevator on December 28, the elevator malfunctioned several times. The "drop incident" which preceded the complainants' refusal to ride was but the latest in a series of malfunctions. Hogan and Ventura were aware of these incidents. In concluding that the elevator problems on December 27 could not serve as a basis for a good faith, reasonable belief that the elevator was hazardous at the time of the work refusal on December 28, the judge emphasized the fact that the complainants knew that the earlier problems had been corrected. 5 FMSHRC at 2210-11. Regardless of whether the complainants knew that the prior problems had been corrected, the problems provided a valid basis for the complainants' safety concerns in light of the subsequent occurrence of further problems. The elevator malfunctions created an atmosphere in which the complainants understandably distrusted the elevator's reliability, and we conclude that the prior problems logically cannot be severed from the overall mood of distrust which, for the complainants, culminated in the "drop incident."

With this in mind, we find that it is clear from the overwhelming weight of the evidence that the complainants possessed a good faith belief that riding the elevator would be hazardous. A good faith belief simply means an honest belief that a hazard exists. The purpose of this

requirement is to remove from the Mine Act's protection work refusals involving fraud or other forms of deception. Robinette, 3 FMSHRC at 808-10. Hogan and Ventura knew that the elevator had malfunctioned on their December 27 shift. They were told of subsequent malfunctions. They observed and talked to miners who were involved in the so-called "drop incident" immediately after it happened. Thus, they had sufficient reason to have a good faith belief that the elevator was defective at the time they refused to ride it. There is nothing in the context of events to suggest an ulterior motive. Nor does the record indicate any evidence in either employees' personnel history suggesting a likelihood of pretext or ulterior motive for their actions. Equally important, each complainant initially acted individually, without knowledge of the intentions of the other. We therefore hold that Hogan and Ventura had a good faith belief that it would be hazardous to ride the elevator and that the judge's contrary conclusion is not supported by substantial evidence.

In addition to being held in good faith, the miner's belief in a hazard must be reasonable. Unreasonable, irrational, or completely unfounded work refusals do not warrant statutory protection. Robinette, 3 FMSHRC at 811. This requirement necessitates a showing that the miner's honest perception of a hazard be a reasonable one under the circumstances. Cameron, No. 85-2369, slip op. at 8-9 (4th Cir. July 8, 1986); Robinette, 3 FMSHRC at 812; Haro v. Magma Copper Co., 4 FMSHRC 1935, 1944 (November 1982). Thus, reasonableness is to be evaluated from the viewpoint of the refusing miner at the time of refusal. Objective proof that an actual hazard existed is not required. Robinette, 3 FMSHRC at 810; Haro, 4 FMSHRC at 1943-44; Pratt v. River Hurricane Coal Co., Inc., 5 FMSHRC 1529, 1533-34 (September 1983). 3/

In finding that the complainants did not possess a reasonable belief that the elevator was hazardous to ride, the judge made errors of law and of fact and applied an objective standard. The judge held that Hogan and Ventura knew, prior to their refusal, of the efforts of Hager to locate and correct the problem with the elevator, including test runs of the elevator with the union president on board. The judge also held that the complainants knew that Hager had summoned state and federal inspectors and that, prior to their refusal, Hogan and Ventura had received Hager's offer to take them into the mine by operating the elevator on manual mode. 5 FMSHRC at 2209. The record contains uncontroverted evidence that the complainants had, at best, only limited knowledge of inconclusive testing that had been performed before the afternoon shift began to cage down in the elevator. At the time of his

3/ In interpreting the Contract to permit the discipline of a miner when the complained of conditions are found not to be violations of mandatory safety standards, Emerald runs the risk of imposing discipline in violation of section 105(c) of the Mine Act. See Oral Arg. Tr. 47-48. The fact that the perceived hazard does not violate a mandatory health or safety standard does not mean the miner lacked a good faith, reasonable belief in the hazard at the time of his refusal. Robinette, 3 FMSHRC at 411-12.

refusal to board the elevator, Hogan was not aware of any steps taken by management to locate the reason for the elevator drop, or of any repairs or maintenance done on the elevator after the incident. Hogan knew only that the empty cage had been run up and down a few times. Further, Hogan was not aware that the union president had ridden in the cage or that the Houghton mechanic had been summoned. Similarly, at the time of his refusal, Ventura was unaware of any testing of the elevator. He knew only that management was unaware of the source of the elevator's problems and had summoned the Houghton mechanic. Moreover, there is no question but that Hager's offer to manually cage down the complainants and Hager's call to state and federal inspectors came after Hogan and Ventura refused to ride the elevator. Hager's testimony alone makes this clear. 4/

In evaluating the reasonableness of the complainants' belief that the elevator was hazardous, the judge concluded that the malfunctions of the elevator prior to the "drop incident" could not serve as a basis for a reasonable belief that the elevator was hazardous. The judge noted that repairs had been made. 5 FMSHRC at 2211. While it is true that the complainants were aware that the problem of December 27 had been corrected, they did not know whether any subsequent repairs had been made. More importantly, given the fact that the complainants heard from the other miners that the elevator continued to malfunction, it was reasonable, regardless of the repairs to the elevator, for the complainants to assume that the elevator was experiencing continuing and repeated safety problems, the underlying causes of which were unknown.

On December 28, Hogan actually saw the miners as they got off the elevator or immediately after they got off the elevator. His first hand impression was that they were agitated and that a few of them were so upset that they were "really scared" and "actually white." Tr. 34. Both Hogan and Ventura heard a number of miners report that something serious had just happened on the elevator. These observations corroborated and heightened their already existing concerns regarding the safety of the elevator. Given the complainants' knowledge of the elevator's prior malfunctions and the complainants' observation of and discussions with miners immediately after the "drop incident," we conclude that the great weight of the evidence establishes that the complainants did possess a reasonable belief that riding the elevator would be hazardous. The complainants were not required to be presented with "first-hand information indicating that the elevator ... would more than likely fall to the bottom of the shaft if they were to ride on it." 5 FMSHRC at 2212.

We recognize that management attempted to address complainants' fears. Hager talked to the complainants in his office. Hager initially

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4/ The judge was impressed that the inspectors did not issue any citations and that no cause for the elevator stopping was discovered. 5 FMSHRC at 2209. The fact that a subsequent investigation fails to confirm an actual violative condition does not vitiate the reasonableness of a miner's work refusal. Robinette, 3 FMSHRC at 411-12.

told the complainants that they could enter the mine via the slope, which offer was later retracted. He also offered to have the elevator operated manually. The Houghton mechanic was called. Jackie Smith, the maintenance foreman, also talked to Hogan and Ventura after their initial refusal. The judge found that Smith told the complainants that he did not find anything wrong with the elevator and that it was safe.

A continuing work refusal in the face of corrective measures taken by management at some point loses the protection of the Mine Act. Bush v. Union Carbide Corp., 5 FMSHRC 993, (June 1983). However, we conclude that Hager and Smith did not convey sufficient information to the complainants to allay their reasonable fears. They were told by Hager and Smith that the elevator was safe, but they were not told what caused the malfunctions or why it was now considered safe. They were told that the mechanic from the elevator company was coming to inspect the elevator, but when they were told the results of his inspection they were also simultaneously informed that they were being suspended. They were told that they could enter the mine by going down the slope, but this offer was withdrawn. They were told that they could enter the mine while the elevator was operated manually, but manual operation of the elevator would not assure its safety if something other than the elevator's electric controls was defective. Finally, although Hogan learned, following his refusal to ride the elevator, that test runs of the elevator had been made with an empty cage, he reasonably discounted these tests because of the lack of weight on the elevator.

Not only must a miner have a good faith, reasonable belief in the hazard that is the basis for his work refusal, "where reasonably possible, a miner refusing work should ordinarily communicate ... to some representative of the operator his belief in the safety or health hazard at issue." Dunmire and Estle, 4 FMSHRC at 133. See also Simpson, KENT 85-155-D, slip op. at 5-7, 8 FMSHRC \_\_\_ (July 8, 1986). The judge found that the only basis for the complainant's work refusal was the "drop incident" and that Hogan and Ventura "did not communicate the asserted elevator 'dropping' to anyone at anytime prior to their work refusal." 5 FMSHRC 2213. Like the judge's analysis of the reasonableness of the complainants' refusal, we find his analysis of the communication requirement too restrictive.

In Dunmire and Estle, 4 FMSHRC at 134, the Commission stated, "[O]ur purpose is promoting safety, and we will evaluate communication issues in a common sense, not legislative manner. Simple, brief communication will suffice...." In articulating a safety complaint, a miner need not make a detailed statement as to the nature of the hazard, as long as the operator has notice of the hazard that the miner believes exists. The goal is to adequately apprise the operator so that it may address the perceived hazard. Simpson, KENT 85-155-D, slip op. at 6, 8 FMSHRC \_\_\_ (July 8, 1986). Thus, the communication must be evaluated not only in terms of the specific words used, but also in terms of the circumstances within which the words are used and the results, if any, that flow from the communication.

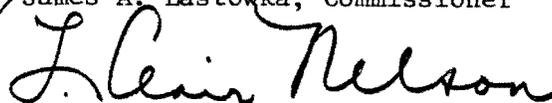
The record indicates that Hogan and Ventura individually advised Denny Smith and Alan Hager that they did not believe the elevator was safe. Smith and Hager confirmed that the complainants expressed concern to them about the safety of the elevator. It is clear that the complainants' questions and statements stimulated Emerald to act. Emerald understood the substance of the complainants' concerns and moved to address the hazard the complainants perceived. Hager summoned a mechanic from Houghton to inspect the elevator. He also called the state and federal mine inspectors who reviewed the elevator's operation. Consequently, in these circumstances, we conclude that the complainants' statements and questions regarding the safety of the elevator were sufficient to satisfy the obligation of a miner who refuses work to articulate the reason for his work refusal.

Thus, we hold that the complainants had a good faith, reasonable belief that riding the elevator was unsafe, and that they adequately communicated their safety concerns to mine management. We further conclude that the complainants' initial refusal to ride the elevator was protected by section 105(c) of the Mine Act, and that before their fears could be sufficiently allayed by management they were suspended for their protected activity. The judge's contrary conclusions are not supported by substantial evidence and are contrary to law.

There is no dispute that the five-day suspension of Hogan and Ventura was motivated by the complainants' protected activity. Accordingly, we reverse the judge's finding that no violation of section 105(c) occurred and we remand for determination of appropriate remedies. 5/

  
Joyce A. Doyle, Commissioner

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

---

5/ Chairman Ford and Commissioner Backley did not participate in the consideration or decision of the merits of this case.

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**ADMINISTRATIVE LAW JUDGE DECISIONS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
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JUL 1 1986

CARL HOLCOMB, : DISCRIMINATION PROCEEDING  
Complainant :  
 :  
v. : Docket No. WEVA 86-135-D  
 :  
COLONY BAY COAL COMPANY, :  
Respondent :

DECISION

Appearances: Carl Holcomb, pro se; Thomas L. Woolwine, Coal Labor Inc., for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job with Respondent because of safety complaints. Respondent's position is that Complainant was fired for insubordination. Pursuant to notice, the case was heard in Beckley, West Virginia on May 19, 1986. Carl Holcomb testified on his own behalf, and called as witnesses Richard Wells, Gary Walker, Jr., Edward Kincaid, and Joe C. Rotenberry; James Steven Mink, Robert T. Bolen, and James R. Caldwell testified on behalf of Respondent. Both parties have submitted posthearing written arguments. I have carefully considered the entire record and the contentions of the parties in making this decision.

FINDINGS OF FACT

From July 19, 1981 until November 8, 1985, Complainant worked as a bulldozer operator for Respondent's coal company. He moved overburden that had been dislodged by drilling and blasting to uncover the coal seams in a strip mine. Respondent produced coal which entered into interstate commerce, and its operation affected interstate commerce. Complainant had previously worked in the coal mining industry for more than ten years as a truck driver, bulldozer operator, grader operator and loader operator. Complainant is a skilled bulldozer operator. In the opinion of Respondent's superintendent, "he's one of the best dozer men I've ever seen." (Tr. 166)

Complainant contends that as he continued on the job, management put more and more pressure on him, forcing him to work while others were "just playing and carrying on." (Tr. 11) Complainant alleges that he was always required to work in hard rock and in dusty places and that he was given the dangerous assignment on the top of the highwalls. He also stated that he was unfairly denied sick leave rights and "could not get a grievance filed with the Committeeman." (Tr. 12)

Complainant had been placed on probation in 1984 after apparently threatening the General Superintendent. He was suspended with intent to discharge following the incident, but the discipline was reduced to one year probation during the grievance procedure.

In mid-1984, Complainant's dozer was used in an attempt to clear an area of burning coal in a 5-block seam. The heat apparently burned the seals around the air conditioning unit in the cab. This resulted in more dust coming in the cab through the air conditioner, causing Complainant bronchial problems. Complainant asked his foreman and superintendent for a transfer to less dusty conditions. When the transfer was refused, Complainant filed a grievance but the company would not meet with him on the grievance. However, on May 31, 1986, Respondent conducted a dust sample survey of the cab of his dozer. The sample was taken to the MSHA Field Office where it showed 1.0 milligrams of respirable dust. On June 3, 1985, Complainant filed a request under section 103(g) of the Act for an MSHA inspection of the environment in his bulldozer. An MSHA inspector came to the mine and examined the bulldozer. He found two holes in the bottom of the blower compartment which were not sealed. The holes and dust vents were sealed and on June 6, 1985 a dust sample was collected which showed 0.8 milligrams of dust per cubic meter of air (0.8 mg/m<sup>3</sup>). Complainant continued to complain of dust in his cab, and further work was done on the seals in June and July 1985. Complainant filed a second 103(g) complaint on October 9, 1985 alleging excessive dust in his cab. An outside contractor was called in to clean and reseal the unit and an MSHA inspector inspected the unit on October 11, 15 and 16, 1985. Respirable dust samples were taken on October 11 and October 15 which showed 1.2 mg/m<sup>3</sup> and 0.8 mg/m<sup>3</sup> respectively.

Complainant states that the dust in his cab resulted in bronchial problems and he was treated for respiratory problems at the Southern West Virginia Clinic beginning in May 1985 by Dr. Norma J. Mullins. Dr. Mullins made a diagnosis of asthma exacerbated to some degree by exposure to dust. Complainant was treated with medication and an inhaler, and was referred to Dr. D. L. Rasmussen on November 14, 1985: X-rays showed no

evidence of coalworkers pneumoconiosis; pulmonary function studies showed no lung impairment.

On November 7, 1985, Complainant, who normally worked from 7:00 a.m. to 5:00 p.m. asked his foreman Tom Bolen to bring his paycheck, because he intended to leave at about 3:00. Bolen went for the check, but did not bring it to Complainant who kept working until about 4:00. At that time Complainant drove to his own vehicle and took off his mining gear as the foreman drove up. Complainant told him he could take the check and stick it. Complainant then drove home. Bolen went to the mine office and reported the incident to the Superintendent and the Union Management Communications Committee. Bolen requested a meeting concerning the incident and one was scheduled for the next morning, November 8.

Bolen approached Complainant after he began work on November 8, and asked him to come to the office for a meeting. Complainant refused. Bolen returned to the office and informed the superintendent James Caldwell. Caldwell returned to the mine site with two union committeemen who urged Complainant to come to the meeting. He again refused. Caldwell called the Union District Representative, at whose direction the committeemen returned to Complainant, but he again refused to come to the office for a meeting. Complainant was then given a written suspension from work subject to discharge. The action was stated to be "based on gross insubordination displayed toward management and for refusing to follow specific directives of management." Complainant filed a grievance which was denied. He took the matter to arbitration and the arbitration upheld the discharge in an award issued December 27, 1985.

#### ISSUES

- 1) Did Complainant's discharge on November 8, 1985 result from activities protected under the Act?
- 2) If it did, what remedies is Complainant entitled to?

#### CONCLUSIONS OF LAW

##### I. JURISDICTION

Complainant was a miner; Respondent was a mine operator. Both were subject to the Act, and I have jurisdiction over the parties and subject matter of this proceeding.

##### II. PROTECTED ACTIVITY

To establish a prima facie case of discrimination, Complainant must show that he was engaged in activity protected under the Act, and that the adverse action was motivated in any part by that activity. Houser v. Northwestern Resources Company, 8 FMSHRC \_\_\_ (June 20, 1986), and cases cited therein.

The evidence before me clearly establishes that Complainant complained to his supervisors on many occasions of excessive dust in his cab. These complaints were related to what Complainant believed was an unhealthy working environment. They constituted activity protected under the Act. The requests Complainant made under section 103(g) of the Act for MSHA investigations of his working environment were also protected activity. Complainant was experiencing excessive dust in his cab, even though the dust samples were within allowable limits. Respondent admitted that Complainant's cab was dustier than the other bulldozers at the mine site. However, the evidence establishes that Respondent was making reasonable efforts to take care of the problem, including calling in an outside contractor. There is no probative evidence that Respondent was deliberately causing excessive dust in Complainant's work environment, nor was any credible motive for such a practice suggested.

The incident involving the alleged threat made by Complainant to the Superintendent was not protected activity, and this is so regardless of fault, since it did not involve any employment health or safety matter. Nor is the incident involving Complainant's check in itself activity protected under the Mine Safety Act.

#### ADVERSE ACTION

Complainant was discharged. Is there any evidence that the discharge was motivated in any part by the protected activity described above? Complainant testified that on October 11, 1985 after an MSHA inspection, as Complainant was driving home, he met Superintendent Caldwell driving up the road about 50 to 60 miles per hour and "he run me clean out of the road when he came through." (Tr. 17) On the succeeding days, Caldwell began checking Complainant's work area frequently, which he had never done before. Complainant was off work from October 25 to October 29, 1985 and from the latter date until he was discharged the company "didn't let up. They kept pushing me to do more. The more work I done, the more they wanted me to do." (Tr. 21)

Complainant believes that these facts show that Respondent was retaliating against him for his complaints to management and to MSHA about his dusty environment. However, there is no evidence of such a retaliatory intent. I have carefully considered this evidence, and Complainant's other evidence,

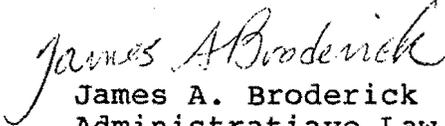
written and oral, and conclude that it does not establish that his discharge was motivated in any part by his protected activity. Therefore, he has failed to establish a prima facie case of discrimination.

Even if a prima facie case were established, the evidence clearly establishes that Respondent would have taken the adverse action for unprotected activity alone, viz, for Complainant's verbal abuse of his foreman, and his repeated refusal to attend a company-union meeting to discuss the matter. See Houser v. Northwestern Resources Company, supra; Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982).

For the above reasons, I conclude that the evidence does not establish that Complainant was discharged for activity protected under the Mine Act. No violation of section 105(c) of the Act has been shown.

ORDER

Based on the above findings of fact and conclusions of law, the Complaint of Discrimination and this proceeding are DISMISSED.

  
James A. Broderick  
Administratiave Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

July 2, 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 86-51-M  
Petitioner : A. C. No. 45-00764-05508  
: :  
v. : Parker Pit  
COLUMBIA ASPHALT & GRAVEL, :  
Respondent :  
:

ORDER DISAPPROVING SETTLEMENT  
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

I am unable to approve the Motion To Approve Settlement filed by the Solicitor on June 30, 1986, because it fails to provide necessary information and contains many inaccuracies.

For Citation No. 2667782 the Solicitor recommends a reduction from \$136 to \$70, but gives no reasons.

For Citation No. 2667784 he recommends a nominal reduction from \$136 to \$130, but here again, gives no reasons.

For Citation No. 2667785 a very substantial reduction from \$136 to \$45 is recommended and in support thereof the Solicitor states that the wiring referred to in the citation was in excellent condition. However, the citation itself states that the electric feed cable to the water pump was deteriorating. Can a deteriorating wire be in excellent condition?

In seeking a reduction from \$136 to \$45 for Citation No. 26677786 the Solicitor refers to the excellent condition of the wiring (paragraph 3(b)), but as his motion subsequently recognizes, that violation dealt with guarding (paragraph 3(d)).

The Solicitor advises that the operator did not receive any assessed violations during the prior 24 months. However, the printout attached to his penalty petition shows 19 violations.

The Solicitor must explain the foregoing discrepancies before any settlement, much less one like this involving such substantial reductions, is approved.

This is a simple and routine case. I have difficulty in understanding how the Solicitor could submit such a faulty motion. Such a submission results in extra and unnecessary work for both this Commission and the Solicitor. And of course, it does not further the purposes of the Act.

Finally, I note that the Solicitor filed a Notice of Settlement on February 20, 1986, but did not file his settlement motion until more than four months later. This case has been pending far too long.

Accordingly, it is ORDERED that subject settlement motion be Disapproved and that the Solicitor submit the necessary information on or before August 1, 1986.



Paul Merlin  
Chief 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 3 1986**

JOHN A. GILBERT,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 86-49-D
	:	MSHA Case No. BARB CD 85-61
SANDY FORK MINING COMPANY,	:	
INCORPORATED,	:	
Respondent	:	
SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 86-76-D
ON BEHALF OF	:	MSHA Case No. BARD CD 85-61
JOHN A. GILBERT,	:	
Complainant	:	No. 12 Mine
v.	:	
	:	
SANDY FORK MINING COMPANY,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Tony Opegard, Esq., and Stephen A. Sanders, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Hazard, Kentucky, for John A. Gilbert;  
Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;  
William A. Hayes, Esq., Middlesboro, Kentucky, for Respondent.

Before: Judge Melick

Background

On August 8, 1985, John A. Gilbert filed a complaint with the Department of Labor, Mine Safety and Health Administration (MSHA), alleging that on August 7, 1985, he had been discharged by Sandy Fork Mining Company, Incorporated (Sandy Fork) in violation of section 105(c)(1) of the Federal Mine

Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act."<sup>1/</sup> It is not disputed that the Secretary of Labor began his investigation pursuant to section 105(c)(2) upon receipt of that complaint.<sup>2/</sup> Subsequently, after the expiration of the 90-day notification period following the receipt of that complaint provided under section 105(c)(3) of the Act the Secretary advised Mr. Gilbert by letter dated November 15, 1985, that the investigation of his complaint had not been

1/ Section 105(c)(1) reads as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings 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.

2/ Section 105(c)(2) reads in part as follows:

"Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint. . . ."

completed and that it had not yet been determined whether or not a violation of section 105(c) had occurred.<sup>3/</sup>

Thereafter, on December 23, 1985, Mr. Gilbert filed his own complaint with this Commission pursuant to section 105(c)(3) and Commission Rule 40(b), 29 C.F.R. § 2700.40(b).<sup>4/</sup> Subsequently on February 24, 1986, the Secretary filed his own complaint with this Commission on behalf of Mr. Gilbert against Sandy Fork Mining Inc. under section 105(c)(2) and proposed a civil penalty for the alleged violation. On April 3, 1986, the Secretary filed a motion to dismiss maintaining that Mr. Gilbert's complaint filed under section 105(c)(3) (Docket No. KENT 86-49-D) should be dismissed as without a jurisdictional basis in light of the complaint filed by the Secretary on behalf of Mr. Gilbert (Docket No. KENT 86-76-D).

#### Motion to Dismiss

In his motion to dismiss the Secretary argues that he need not comply with the requirements of the Act that he make a determination as to whether or not discrimination has occurred within 90 days of his receipt of a complaint. He further argues that should the aggrieved individual file his own complaint under section 105(c)(3) after the statutory 90-day period, that case will become null and void as lacking a jurisdictional basis if the Secretary later decides to file a complaint of his own under section 105(c)(2).

Indeed the Act itself does not provide express guidance as to the procedures to be followed by an individual complainant under section 105(c) in the event the Secretary does not make his decision (as to whether a violation of the Act

<sup>3/</sup> Section 105(c)(3) of the Act provides in part as follows:

"Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

<sup>4/</sup> Commission Rule 40(b) reads as follows:

"A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary."

has occurred) within the 90-day time frame set forth under section 105(c)(3).

It is clear however that Congress intended that the miner have the right to file a complaint on his own upon the failure of the Secretary to act within the prescribed 90-day period. Indeed in recognition of this Congressional intent this Commission promulgated its Rule 40(b) under which the aggrieved miner is specifically provided the right to file his own complaint under these circumstances. Secretary on behalf of Hale v. 4-A Coal Company, Inc., 8 FMSHRC \_\_\_\_\_, Docket No. VA 85-29-D, slip opinion p. 3 n. 3 (June 25, 1986). This administrative interpretation is entitled to great weight. Chevron, U.S.A., Inc. v. National Resources Defense Council, 104 S.Ct. 2778 (1984); Manufacturers Ass'n v. National Resources Defense Council, 105 S. Ct. 1102 (1985); Federal Election Commission v. Democratic Senatorial Campaign Committee, 102 S.Ct. 38 (1981) and Zenith Radio Corp. v. United States, 98 S.Ct. 2441 (1978).

Such a construction is, moreover, consistent with the liberal construction to be accorded safety legislation. Whirlpool Corp. v. Marshall, 100 S. Ct. 883 (1980). More specifically this construction is essential to accomplish the objective of the statute and to avoid unjust and oppressive consequences to aggrieved miners where the Secretary fails to act within the prescribed time. Caminetti v. United States, 37 S. Ct. 192 (1917). Administrative notice may be taken of a recent case in which the Secretary delayed almost 4 years before deciding not to represent a miner on his 105(c) complaint. (Dan Thompson v. Cypress Thompson Creek, MSHA Case No. 82-27). The miner is seriously prejudiced by such delay as witnesses move, memories fade and documents are lost or destroyed, and may suffer unwarranted economic hardship. Such a result is clearly contrary to the objectives of the Act.

Under the circumstances it is clear that this judge has jurisdiction to entertain Mr. Gilbert's case (under section 105(c)(3) and Commission Rule 40(b)) as well as the Secretary's case brought on behalf of Mr. Gilbert under section 105(c)(2) of the Act. The Secretary's Motion to Dismiss is denied.

#### The Merits

In order to establish a prima facie violation of section 105(c)(1) of the Act, it must be proven by a preponderance of the evidence that Mr. Gilbert engaged in an activity protected by that section, that adverse action was taken against him and that this adverse action was motivated

in any part by that protected activity. Secretary on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981). See also Boich 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. Gilbert maintains that he was unlawfully discharged on August 7, 1985, because of his refusal to operate a continuous miner on August 6, 1985, under conditions which he claims were unsafe. More specifically he argues that he refused to operate the continuous miner because of hazardous roof conditions at the face of the No. 3 entry in Sandy Fork's No. 12 mine, and that Sandy Fork subsequently discharged him without addressing his safety concerns. A miner's work refusal is protected under section 105(c) of the Act if the refusal is based on the miner's good faith and reasonable belief in a hazardous condition. Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); and Secretary v. Metric Constructors Inc., 6 FMSHRC 226 (1984) aff'd sub nom. Brock v. Metric Constructors Inc., 766 F.2d 469 (11th Cir. 1985).

At the time of his discharge Mr. Gilbert had only 3-1/2 years experience as a coal miner and all of that was in the employ of Sandy Fork. He had been a continuous miner operator for 2-1/2 of those 3-1/2 years and was working in that capacity on August 6, 1985. As Gilbert and his crew were entering the mine on that date the miner operator on the previous shift warned them that the roof was "bad and breaking up." Gilbert and the other miner operator on his shift, Carmine Caldwell, then checked the section and the faces. According to Gilbert they checked the five headings and the No. 4 kickback.

Gilbert recalled that in the No. 3 entry there was a hill seam on the left side of the rib and a crack in the top having dirt or yellow mud in it. On the right side of the entry there was a fresh stress crack that had dropped 1/2 inch to 1 inch. According to Gilbert the No. 4 heading had previously been abandoned because of a hill seam that had dropped from 4 to 5 inches. Accordingly coal was being mined in the No. 4 entry by way of a kickback (See Appendix A & B attached). Gilbert recalled that in the crosscut approaching the No. 4 kickback there was also a hill seam 1/2 inch to 1-1/2 inches wide with mud in it.

Because of the top conditions Gilbert and Caldwell received permission from section foreman Willie Sizemore to "run together." Thus one operator could keep watch for the other rather than simultaneously operating both machines as

was customary. According to Gilbert, however, after examining the face areas he told his partner that he was going to refuse to cut coal because of dangerous conditions. Gilbert then left his job assignment to find his section foreman (Sizemore) and located him about 4 to 5 breaks from the face. Gilbert says that he told Sizemore he was afraid of the top and asked him what he would do about it. Sizemore responded that he would have crib blocks placed under the noted roof areas and would stand by and observe the roof as they worked. Gilbert was apparently dissatisfied and told Sizemore that they needed longer bolts or collars. However before Sizemore could take any remedial action Gilbert walked out of the mine.

Outside the mine Gilbert met Ed Spurlock the general mine foreman. Gilbert told Spurlock that he was afraid of the top and asked Spurlock how he intended to support the roof. Spurlock told Gilbert to check back the next day. Gilbert went home and returned the next day around 9:00 a.m. He later talked to Sandy Fork superintendent Willy Begley after Begley had been underground to inspect the area of Gilbert's complaint. Gilbert says that he told Begley that they needed collars and longer bolts for roof support in the area and asked Begley how they were going to support it. According to Gilbert, Begley responded that "they were supporting it the best way they could." Gilbert claims that he then requested to work at another mine or away from the faces at the No. 12 mine but Begley responded that the only job available was as miner operator at the No. 12 mine. Gilbert then handed over his safety equipment and left the mine.

According to Superintendent Begley, Gilbert visited him at his home on the evening of August 6. Gilbert said he was afraid of the top and wanted to know what Begley was going to do about getting him another job. Begley told Gilbert to meet him at the mine the next morning. Primarily because of Gilbert's complaint Begley entered the mine the next morning and examined all the faces. At a later meeting Gilbert again told Begley that he was afraid of, and would not work at, the No. 12 mine but would accept a transfer to another mine. Begley told Gilbert that the only work then available was at the No. 12 mine. According to the undisputed testimony of Begley, Gilbert could have even then returned to work at the No. 12 Mine but rather, walked off the job.

According to the undisputed testimony of section foreman Willie Sizemore, Gilbert and his partner were assigned to begin cutting the No. 4 kickback at the beginning of his shift on August 6, and there was 4 to 5 hours of work to be done in that entry "to catch the right side up." It is undisputed that Gilbert was to begin cutting with the continuous miner in the No. 4 kickback where the larger "X" appears on

Exhibit R-8 (Appendix A). It is further undisputed that Sizemore told Gilbert to complete the No. 4 kickback before moving to the No. 3 entry where the hill seam was. However before they even began cutting in the No. 4 kickback Sizemore met Gilbert coming out. Gilbert told Sizemore that he was afraid of the top in the No. 3 entry. Sizemore then told Gilbert that he was going to have cribs built on both sides of the No. 3 entry before they began cutting in that entry. Gilbert responded by saying that he wanted to talk to Superintendent Begley and Mr. Phipps and proceeded to leave the mine.

According to Sizemore, Gilbert never did state what he wanted done to make the roof safe and did not ask for alternate work.<sup>5/</sup> After Gilbert left the mine Sizemore spent the remainder of the shift building cribs in the No. 3 entry. Sizemore opined that Gilbert knew he would not force him to work under what Gilbert believed was unsafe roof because on prior occasions, when miners were concerned about roof conditions, Sizemore himself had worked the mining equipment.

Darrell Huff, a graduate mining engineer and Sandy Fork's chief engineer and acting safety director, examined the No. 4 kickback on the morning of August 7. He noted on Exhibit R-9 (Appendix B) the location of the hill seam in the crosscut approaching the No. 4 kickback. This testimony is consistent with the location of the hill seam in the crosscut described by Gilbert himself.<sup>6/</sup>

Within this framework of evidence I find that Gilbert did not at the time of his work refusal entertain either a reasonable or a good faith belief that to continue working in

---

<sup>5/</sup> In light of the undisputed evidence that Gilbert had some 4 to 5 hours of work then remaining in the No. 4 entry, an area he did not challenge as being unsafe, I find Sizemore's testimony (that Gilbert neither requested alternate work nor stated what additional roof control he desired) to be the more credible.

<sup>6/</sup> Indeed only one witness, MSHA Inspector Gary Harris, claimed that there was a hill seam existing in the No. 4 kickback where Gilbert was to begin working at the beginning of his shift on August 6. This testimony conflicts with that of both Gilbert and Huff. Inspector Harris testified that hill seams were required under the roof control plan to be strapped. Since there was no strapping in the No. 4 kickback Harris would undoubtedly have cited Sandy Fork for a violation of its roof control plan if indeed a hill seam existed in the No. 4 kickback. For these reasons I believe Harris was in error about the existence of an exposed hill seam in the No. 4 kickback.

the No. 4 kickback, as he was expected to do for some 4 to 5 hours at the commencement of his shift on August 6, 1985, would have been hazardous. It is not disputed that Gilbert was indeed assigned to cut coal in the No. 4 kickback for some 4 to 5 hours before moving on to the No. 3 entry which he claimed was then hazardous. Gilbert cites no specific hazard within the No. 4 kickback and indeed there is no credible evidence that any unusual hazard did in fact exist in the No. 4 kickback. Thus even assuming, arguendo, that a hazardous condition then existed in the No. 3 entry, Gilbert's refusal to work in the No. 4 kickback was not reasonable.

Moreover since there were still 4 to 5 hours of work to be done in the not unsafe No. 4 kickback Gilbert's refusal to perform work in that location demonstrated a lack of good faith. It was clearly premature for Gilbert to have exercised any work refusal for alleged hazards in the No. 3 entry some 4 to 5 hours before he would be expected to work in that entry and before any of the supplemental roof support promised by his section foreman had been erected. Indeed the uncontradicted evidence shows that section foreman Sizemore had assured Gilbert that before any work would be done in the No. 3 entry (the only entry about which Gilbert expressed any fears to Sizemore) he would have additional crib blocks set up for roof support. It was incumbent on Gilbert to at least wait and see what additional support would be provided before exercising a work refusal. Accordingly the work refusal was neither reasonable nor made in good faith.

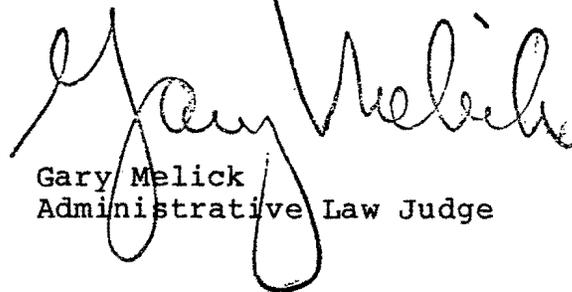
I also observe that Gilbert had not been discharged and was given the opportunity to return to work on August 7, the day after he refused to work and walked out of the mine. At that time there had already been a roof fall in the No. 3 entry and conditions had significantly changed. Indeed it appears that when Gilbert was told on August 7, that he could return to his job in the No. 12 mine as a continuous miner operator he declined and insisted on being transferred to a different mine. At this time he had been given no specific work assignment and could not have known where in the No. 12 mine he would be working. Thus again he could not at this time have entertained a reasonable or a good faith belief that he would have been required to work in a hazardous condition. <sup>7/</sup>

In the context of whether Gilbert acted in good faith it is also significant that he had been, for some time before his work refusal, attempting to transfer to the day shift.

7/ This evidence also supports Respondent's contention that Gilbert was never actually discharged and therefore suffered no adverse action.

Indeed only a few weeks before he walked of the job Gilbert told coworker Harvey Gibbs that he wanted to work the day shift and told Gibbs that, if necessary, he would quit to get on the day shift. In addition, scoop operator Lonnie Cecil said that Gilbert told him on several occasions that he might have to quit to get on the day shift. Gilbert had also requested only the day before he walked off the job to transfer to the day shift. Thus it appears that Gilbert's refusal to work and his insistence on transferring to another mine may actually have been motivated by a pressing desire to work on a different shift.

In any event since I have found that Mr. Gilbert did not entertain either a reasonable or a good faith belief in any hazardous condition warranting a work refusal in the No. 4 kickback where he was expected to be working for 4 to 5 hours I do not find that his work refusal was protected under the Act. Moreover I find that Gilbert was never in fact discharged and suffered no adverse action by the operator. He gave up his job voluntarily on August 7, 1985, at a time when he was not faced with any specific designated hazard. See footnote 7, supra. Under the circumstances Mr. Gilbert's complaint of unlawful discharge must be denied and these cases dismissed.



Gary Melick  
Administrative Law Judge

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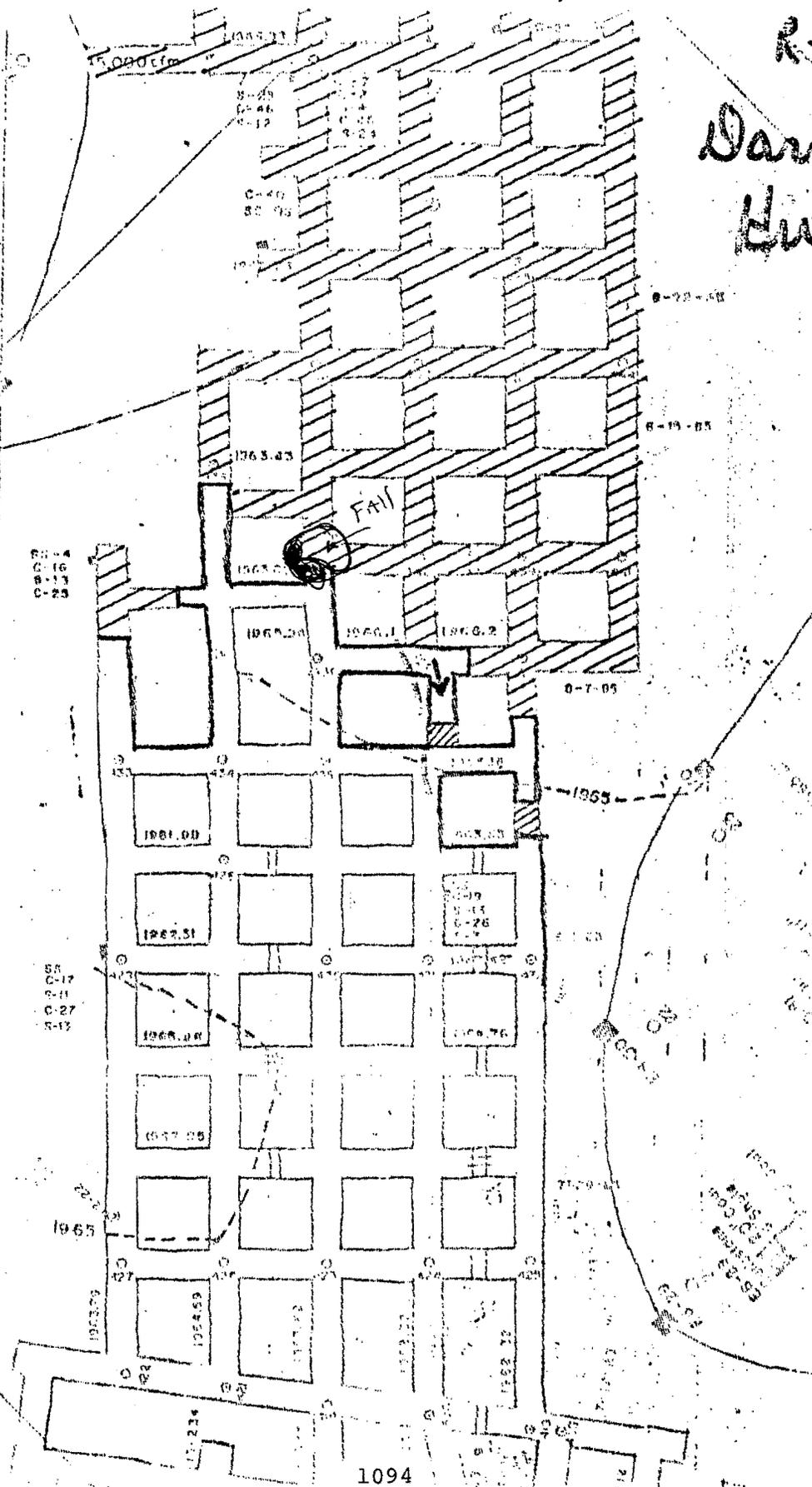
APPENDIX B

RETURN

R-9

Daniel Huff

AREA NOT MINED PRIOR TO MR. GILBERTS WORK REFUSAL AND LEAVING THE JOB SITE.



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**JUL 8 1986**

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 86-28-D  
ON BEHALF OF FRANK WILLIAMS :  
AND BUDDY R. MAYNARD, : PIKE CD 85-14  
Complainants :  
: No. 1 Mine  
v. :  
: :  
WEST FORK COAL COMPANY, A :  
Corporation, :  
Respondent :

DECISION

Before: Judge Fauver

This proceeding was brought by the Secretary in behalf of Frank Williams and Buddy R. Maynard for reinstatement and other relief under section 105(c) of the Federal Mine Safety and Health Review Act, 30 U.S.C. § 801, et seq., based upon an alleged discriminatory discharge, and for a civil penalty under section 110(i) of the Act for such violation.

Respondent ceased all operations in October, 1985, and filed a petition for bankruptcy on May 19, 1986, in the United States Bankruptcy Court, Western District of Virginia.

The above parties and the Trustee in Bankruptcy have moved to settle this case by an order for certain limited relief and withdrawal of the prayer for civil penalty, on the grounds of inactivity and anticipated dissolution of Respondent and the futility of the imposition of a civil penalty. It is expected that a claim will be filed in the bankruptcy proceeding based upon the order in this case.

I have reviewed the representations and documentation submitted, and conclude that the proposed settlement is consistent with the purposes of the Act. Accordingly, the motion to approve the settlement will be granted.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.
2. Respondent violated section 105(c) of the Act by discriminatorily discharging Frank Williams and Buddy R. Maynade from its No. 1 Mine on May 31, 1985.
3. The Secretary is entitled to an order for permanent reinstatement of Frank Williams and Buddy R. Maynard in Respondent's employ with full restoration of their employment status and rights, including seniority and back pay, retroactive to May 31, 1985, with interest (computed in accordance with the interest formula reported in the Commission's decisions) from that date until payment is made.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall offer permanent reinstatement to Frank Williams and Buddy R. Maynard, within 30 days of this Decision, with full restoration of their employment status, including retroactive seniority and backpay.

4. Based upon the approval of the above settlement, the hearing scheduled for July 8, 1986, is CANCELLED and these proceedings are CONCLUDED.

  
William Fauver  
Administrative Law Judge

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West Fork Coal Company, Rt., 1, Box 207A, Honaker, KY 24260  
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226, Rosedale, VA 24280 (Certified Mail)

Mr. Jim Arrington, Vice President, West Fork Coal Company, P.O.  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 9, 1986

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 85-198
Petitioner	:	A. C. No. 15-15035-03501
	:	
v.	:	Green River Terminal Mine
	:	
GREEN RIVER TERMINAL	:	
INCORPORATED,	:	
Respondent	:	

ORDER OF RECISSION  
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

The Solicitor has filed a Motion for Recission in this case. The facts are as follows.

On September 10, 1985, the Solicitor filed a penalty petition in this case assessing a \$20 penalty against the operator. On April 15, 1986, the operator was ordered to answer the petition or show cause for its failure to do so. In a letter of April 21, 1986, the operator reported that the penalty had been paid. Based on this information, an order of dismissal was issued on May 27, 1986. The Solicitor, contending that the penalty had not been paid, filed a motion for recission on June 19, 1986 and moved for a default. Further investigation indicates that the operator paid \$20 to MSHA on January 29, 1986. The Solicitor maintains, however, that the payment of January 29, 1986 was for another violation not involved in this case. The operator apparently believes it does not owe anything.

Rather than grant the Solicitor's motion for default at this time, the fairer course would be for both parties to check their records, consult with each other and report back to me in writing within 21 days.

Accordingly, the motion for rescission of the order of May 27, 1986 is GRANTED and the parties are ORDERED to communicate, by telephone or otherwise, and to report the results of their discussions in writing to me no later than 21 days from the date of this order.



Paul Merlin  
Chief 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 11 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 86-6-M  
Petitioner : A.C. No. 29-01936-05503  
: :  
v. : Sundt Crusher  
: :  
M.M. SUNDT CONSTRUCTION CO., :  
Respondent :

ORDER OF DISMISSAL

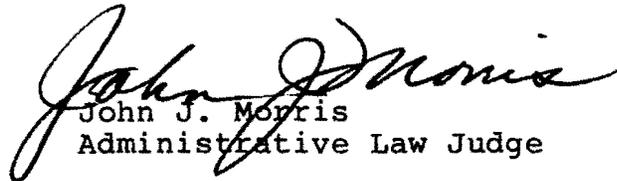
Before: Judge Morris

Respondent failed to comply with a prehearing order issued on June 6, 1986 and further failed to comply with an order to show cause issued on June 26, 1986.

Accordingly, I find respondent in default and I enter the following:

ORDER

1. The order of June 26, 1986 granting the Secretary additional time to comply with the prehearing order is vacated.
2. The notice of contest filed by respondent is dismissed.
3. Citation 2091027 and the proposed penalty of \$20 are affirmed.
4. Citation 2091028 and the proposed penalty of \$20 are affirmed.
5. Respondent is ordered to pay to the Secretary the sum of \$40 within 40 days of the date of this order.

  
John J. Morris  
Administrative Law Judge

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M. M. Sundt Construction Company, Mr. Brian H. Murphy, Loss Control Manager, P.O. Box 27507, Tucson, AZ 85726 (Certified Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

**JUL 11 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 86-31-M  
Petitioner : A.C. No. 31-00052-05504

v. :

MARTIN MARIETTA AGGREGATES, :  
Respondent :

Pomona Quarry

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 86-28-M  
Petitioner : A.C. No. 31-00052-05501 J2K

v. :

YATES CONSTRUCTION CO., INC., :  
Respondent :

Pomona Quarry

ORDER DENYING MOTIONS  
FOR SUMMARY DECISION

On June 18, 1986, Respondent Martin Marietta Aggregates (Martin Marietta) filed a Motion for Summary Decision together with a memorandum of law in support of the motion, affidavits of Charles K. Moore, Al Van Drop and Ira Michael Shepard, Esq. The last named affidavit included attachments. On June 26, 1986, Respondent Yates Construction Company, Inc. (Yates) filed a Motion for Summary Decision adopting the motion, memorandum and attachments previously filed by Martin Marietta. On July 1, 1986, the Secretary filed a Response to the Motion, together with an affidavit of Merle E. Slaton. On July 9, 1986, Martin Marietta filed a Reply to the Secretary's Response.

In this consolidated proceeding, Martin Marietta is charged with two violations, one of 30 C.F.R. § 56.3005 and the other of 30 C.F.R. § 56.18002(a). Yates was originally charged with three violations, but has agreed to pay the assessed amounts in two of them subject to the court's approval, and is presently contesting only the alleged violation of 30 C.F.R. § 56.3005.

30 C.F.R. 56.3005 provides as follows:

Persons shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted.

The alleged violative condition in the Martin Marietta citation issued May 1, 1985 is described in part as follows:

On April 15, 1985, loose and unconsolidated material came off the top of a 35-40 foot wall causing the loader operator . . . to retreat . . . the loader backed into the rear of a truck waiting to be loaded, fatally injuring the driver . . . .

On September 9, 1985 the citation was modified to include the following:

The unsafe ground conditions were not corrected and the area was not posted or barricaded.

The citation issued to Yates on April 16, 1985, reads in part:

A loader had been working under a high wall, when loose material was visible. The loose material came out of the wall and the loader operator trying to get out of the way of the falling material backed the loader into the rear of a truck . . . fatally injuring the truck driver. . . .

The two citations are describing in different words the same incident which occurred at about 9:00 a.m. on April 15, 1985.

Martin Marietta submitted affidavits of the Plant Manager and Pit Foreman that preshift examinations of the site of the accident performed at about 6:45 a.m. on April 15, 1985 did not reveal any indication of loose material, cracks or other hazardous conditions. Martin Marietta also referred to the depositions of Federal Inspectors Thel Hill and Merle Slaton. Hill, who issued the citations, was asked:

Q. Okay. Could you tell me what proof you have that there was loose and unconsolidated material on the high wall before the work started?

A. Before the work started?

Q. Yes.

A. I have no way of knowing.

Slaton, a supervisory inspector, testified that he did not take pictures of the site and did not speak to anyone who saw the site before work started who told him that there was loose material on top of the high wall. When asked what proof he had of loose and unconsolidated material on the high wall before work started, he replied, "General conditions."

The Secretary submitted an affidavit from Slaton with its Response to the Motion in which he stated that on April 16, 1985, he observed several cracks at the top of the wall which in his opinion were of such nature that they could not have resulted from a recent failure or collapse of the wall.

I conclude that the entire record including the pleadings, depositions and affidavits does not show that there is no genuine issue as to any material fact concerning the citations above referred to. On the contrary, the record affirmatively shows an issue of fact whether there were unsafe ground conditions not promptly corrected which resulted in the accident. Martin Marietta attempts to discredit Slaton's affidavit, terming it "conjecture" and contrasts it with its (Martin Marietta's) "direct evidence." In deciding a motion for summary judgment, it is not my responsibility to weigh the evidence, but only to determine whether an issue of material fact exists. I conclude that on this issue, it does. Summary decision is therefore not appropriate as to the alleged violations of 30 C.F.R. § 56.3005.

30 C.F.R. 56.18002(a) provides:

(a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

Citation 2385994 issued to Martin Marietta on May 1, 1985 charges it with not having a competent person check the working conditions of the area on a daily basis.

The Motion for Summary Decision argues that the citation should be vacated since the standard does not require a preshift or commencement of shift examination, and only two hours of the shift had passed at the time of the accident. It further asserts that two preshift inspections were made and attaches affidavits from the plant manager and pit foreman that they each inspected the work area at approximately 6:45 a.m. The affidavit of Inspector Slaton attached to the Secretary's Response states that the Plant Manager Charlie Moore told Slaton "that there had been

no inspection of the area in question." In the depositions of Slaton and Hill each testified that Moore told them that he had not inspected the area in question. Slaton testified that Moore said no one inspected before the shift began. There is clearly an issue of fact as to whether an inspection was made prior to the accident. The citation charges that the mine operator was not having a competent person check the working conditions of the area on a daily basis. The issues before me are whether that allegation is correct and whether it constitutes a violation of the standard. I do not believe the record to date establishes that there is no dispute as to the first issue.

Therefore, I conclude there is a a genuine issue as to a material fact concerning this citation. Summary decision is not appropriate.

Accordingly, the motion for Summary Decision is DENIED. The case will be called for hearing on August 27, 1986 in accordance with the notice issued June 23, 1986.

*James A. Broderick*  
James A. Broderick  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**JUL 14 1986**

GREENWICH COLLIERIES,	:	CONTEST PROCEEDINGS
DIVISION OF PENNSYLVANIA	:	
MINES CORPORATION,	:	Docket No. PENN 85-188-R
Contestant	:	Order No. 2256015; 3/29/85
	:	
v.	:	Docket No. PENN 85-189-R
	:	Order No. 2256016; 3/29/85
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 85-190-R
ADMINISTRATION (MSHA),	:	Order No. 2256017; 3/29/85
Respondent	:	
	:	Docket No. PENN 85-191-R
	:	Order No. 2256018; 3/29/85
	:	
	:	Docket No. PENN 85-192-R
	:	Order No. 2256019; 3/29/85
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 86-33
Petitioner	:	A. C. No. 36-02405-03614
	:	
v.	:	Greenwich No. 1 Mine
	:	
GREENWICH COLLIERIES,	:	
Respondent	:	

PARTIAL SUMMARY DECISION

Before: Judge Maurer

Counsel for the Greenwich Collieries, Division of Pennsylvania Mines Corporation ("PMC") has moved for summary decision in these cases under Commission Rule 64, 29 C.F.R. § 2700.64.

These cases involve five (5) orders issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 (the "Act") on March 29, 1985, as the result of an investigation of a multiple fatality mine explosion which had occurred in the Greenwich No. 1 Mine on February 16, 1984, and their associated civil penalties.

PMC avers that the orders are invalid on the following three grounds:

1. The Orders were not issued as a result of, and the alleged violations were not detected during, an inspection, as required by § 104(d)(1); on the contrary, MSHA concluded that the alleged violations had occurred based on an investigation after the alleged violations no longer existed;
2. The Orders were not issued within 90 days of the issuance of the § 104(d)(1) citation upon which they were based; and
3. The Orders were not issued forthwith as is required by the Act.

Furthermore, PMC contends that these orders cannot be modified to section 104(a) citations because they were not issued with "reasonable promptness."

On February 16, 1984, an explosion occurred at the Greenwich No. 1 Mine. Three miners were killed and several others were injured. Shortly after the explosion, MSHA organized an investigation team, and began the accident investigation. The underground inspection portion of the investigation was begun on February 25, 1984, and was completed on April 5, 1984, and numerous citations and orders were issued to PMC. Additionally, beginning on March 27, 1984, and until April 27, 1984, sworn statements were received from 66 persons who participated in the mine recovery operations or persons who could have had knowledge of the conditions in the affected areas prior to the explosion. On September 6, 1985, the Secretary issued his final report on this investigation.

On March 29, 1985, thirteen (13) months after the explosion, the Secretary issued the five (5) section 104(d)(1) orders which are contested herein. The orders each state that they are based on Citation No. 2016261, a section 104(d)(1) citation which was issued to PMC on February 24, 1984, approximately one year earlier.

I find that these orders were issued as a result of the accident investigation that followed the explosion as opposed to an inspection and for violations which no longer existed. The orders were in fact terminated at the same point in time that they were issued. I conclude, therefore, that the essential underlying facts surrounding the issuance of these orders are not in dispute and I find that PMC is entitled to a partial summary decision as a matter of law.

The first issue raised by PMC herein concerning the validity of these section 104(d) orders, to wit, that they are invalid because they were not issued based on a finding by an MSHA inspector of an existing violation observed or detected during an inspection, but rather are based on an investigation of pre-existing, terminated violations is dispositive.

In the recent past, five Commission Administrative Law Judges have considered and consistently decided the issue presented in the instant case. See, Westmoreland Coal Company, Docket Nos. WEVA 82-34-R et al. (May 4, 1983) (Judge Steffey); Emery Mining Corporation, 7 FMSHRC 1908, 1919 (1985) (Judge Lasher); Southwestern Portland Cement Company, 7 FMSHRC 2283, 2292 (1985) (Judge Morris); Nacco Mining Company, 8 FMSHRC 59 (1986), review pending (Chief Judge Merlin); Emerald Mines Corporation, 8 FMSHRC 324 (1986), review pending (Judge Melick), and White County Coal Corporation, \_\_\_\_\_ FMSHRC \_\_\_\_\_ (June 9, 1986) (Judge Melick).

I do not think it necessary to restate herein the rationale of those decisions. I agree with the extensive rationale set forth in Judge Steffey's Westmoreland decision and those that have followed it pertaining to this issue.

I find that Order Nos. 2256015-2256019 are invalid as section 104(d)(1) orders because an order issued under section 104(d) should be based on an inspection as opposed to an investigation and the above orders state on their face that the violations which had allegedly occurred are based on an investigation and no longer then existed.

Section 104(a), on the other hand, allows MSHA to issue citations on the basis of an inspection or an investigation and permits the issuance of a citation even though the alleged violative condition or practice is no longer in existence at the time of its issuance. The only condition being that it be issued "with reasonable promptness." I conclude that under the totality of the circumstances herein, the above orders, modified by this decision to § 104(a) citations, were issued "with reasonable promptness."

In accordance with the foregoing, the motion of PMC for summary decision is granted in part and denied in part. The orders at bar are hereby modified to citations under section 104(a) of the Act. Therefore, further proceedings will be required to dispose of all the issues in the captioned cases.

  
Roy J. Maurer  
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 14 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 86-118  
Petitioner : A.C. No. 46-02450-03516  
v. :  
GRAFTON COAL COMPANY, : Harrison County Mine  
Respondent : (Kincheloe No. 4 Job)

DECISION

Appearances: William T. Salzer, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Philadelphia, Pennsylvania for Petitioner;  
James R. Christie, Esq., Clarksburg, 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," charging one violation against the Grafton Coal Company (Grafton) of the regulatory standard at 30 C.F.R. § 707.1605(k). The issues before me are whether Grafton has committed the violation as alleged and if so whether that violation was of such nature as could have significantly and substantially contributed to the cause and effect of a coal or other 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 the criteria set forth in section 110(i) of the Act.<sup>1/</sup>

<sup>1/</sup> The violation herein was cited under section 104(d)(1) of the Act and it is alleged that it was caused by the "unwarrantable failure" of the operator to comply with the standard. However, since the citation was not contested within 30 days of its issuance as required under section 105(d) of the Act the issue of whether or not the violation was caused by the "unwarrantable failure" of the operator to comply is not before me in this civil penalty proceeding. See Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (1979) and Wolf Creek Collieries Co., 1 FMSHRC \_\_\_\_ (1979).

The citation before me, No. 2702082, alleges a "significant and substantial" violation of the noted standard and alleges as follows:

Berms or guards were not provided on the outer bank of elevated roadway for a distance of approximately 800 feet, where two International 350 pay haulers were observed hauling spoil material to the dumping location at the Kincheloe Pit.

The cited standard requires that "berms or guards . . . be provided on the outer bank of elevated roadways."

Inspector James M. Bailey of the Federal Mine Safety and Health Administration (MSHA) was conducting a regular inspection at the Grafton Coal Company Kincheloe Pit on October 16, 1985, when he observed two International 350 pay haulers carrying overburden over the haulage road. According to Bailey the elevated portion of the road was approximately 800 feet long and rose to an elevation of 40 feet above the surrounding ground. One side of the road abutted the hillside and the other side, unprotected by any berm or guard, sloped down an embankment. It is not disputed that the embankment at its steepest location had a 68% slope.

Bailey recalled that the road was approximately 14 to 15 feet wide with the exception of two locations where the trucks could pass and that the pay haulers were approximately 14 feet wide. These measurements were rough estimates not made with a tape measure or other measuring device. According to Bailey there was absolutely no evidence of any berm along the entire length of the elevated road and no evidence that any berm had ever existed there.

Bailey concluded that under the circumstances it was reasonably likely for serious injuries or fatalities to occur if one of the vehicles should overtravel the road and overturn down the unprotected embankment. He also observed that the road was composed of nature spoil material and that rain would make the material slippery and more likely for a vehicle to lose control. Bailey also believed that the violation was the result of operator negligence. According to Bailey the mine foreman, Al Schrock, admitted that he knew the roadway was not bermed. Bailey had also issued three citations over the preceding year for similar violations at other Grafton mines.

Grafton Safety Director, Steve Cvechko was not present at the Kincheloe Pit on the date of the violation. Cvechko did however pace off the cited road and found it to be 25 feet wide at its narrowest location. He opined that the

outslope or embankment at the upper portion of the road was 68% and acknowledged that a truck overtraveling the embankment would likely overturn. When Cvechko had last been at the cited Kincheloe Pit he saw a knee-high berm over 300 to 400 feet along the upper road. He acknowledged however that the berm could have been subsequently graded off.

The surface foreman at the Kincheloe Pit, Allen Schrock, claims that the elevated portion of the cited roadway (the upper 500 feet) had "somewhat of a berm, about a foot or so high." Schrock acknowledged that a berm was required there and thought that it was only a "matter of opinion" as to the adequacy of the berm he claims was there. Schrock conceded however that he had no conversation with Inspector Bailey about the adequacy of his alleged berm. Schrock further conceded that he knew MSHA required the berms to be of axle height and that the axle height of the 350 haulage vehicle was 1-1/2 to 2 feet.

In evaluating the conflicting evidence before me I find the testimony of Inspector Bailey to be the more credible. If there had been "somewhat of a berm" in place as Schrock claims and there was only a "difference of opinion" as to its adequacy it would be reasonable to expect some discussion between Schrock and Inspector Bailey about the matter. Schrock concedes that there was no such discussion. In addition if a berm of some size was in place and only its height was at issue, it would be reasonable to expect that Bailey would have taken some measurements to more precisely determine the adequacy of such a berm. Similarly if Schrock had actually believed in good faith that his alleged berm was adequate it would be reasonable to expect that he too would have measured that berm in the presence of Inspector Bailey to prove his point. Finally, I find Schrock's testimony that he had "somewhat of a berm" so equivocal as to be lacking in probative evidentiary value. Within this framework I find that a serious violation has been proven as charged and that it was "significant and substantial." Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

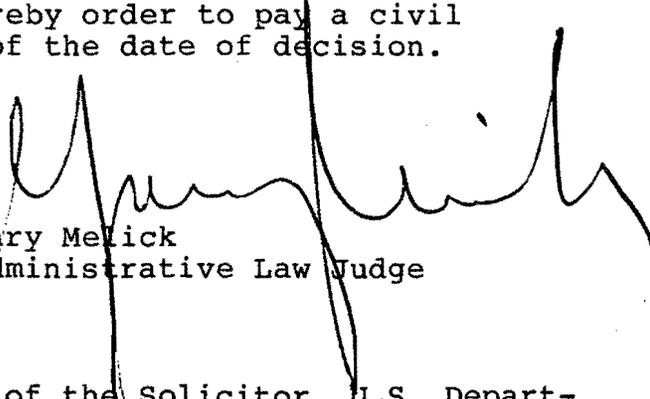
Particularly since Grafton officials knew that a berm was required along the outer bank of its elevated haul road, it is clear that the violation was caused by its negligence. The fact that the Grafton Safety Director also had knowledge of three prior citations for inadequate berms at other Grafton Mines in the region also suggests laxity in compliance with the cited standard. This factor adds to the finding of operator negligence herein.

In determining the appropriate penalty in this case I have also considered that the operator is of moderate size and has a history of 3 violations of the standard here at

issue over the 13 month period preceding the instant violation. I also observe that the operator abated the violative condition promptly and in a good faith manner. Under the circumstances I find that the Secretary's proposed penalty of \$600 is appropriate.

ORDER

Grafton Coal Company is hereby order to pay a civil penalty of \$600 within 30 days of the date of decision.



Gary Melick  
Administrative Law Judge

Distribution:

William T. Salzer, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Building, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

James R. Christie, Esq., PO Box 2150, Clarksburg, WV 26302 (Certified Mail)

rbg

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

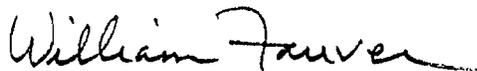
July 16, 1986

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 85-40
Petitioner	:	A.C. No. 40-02268-03527
	:	
v.	:	Docket No. SE 85-46
	:	A.C. No. 40-02268-03528
J & C COAL CORPORATION, a/k/a	:	
J C Corporation,	:	Pee Wee No. 1
Respondent	:	Campbell County, TN

**ORDER MODIFYING DECISION  
TO CORRECT OVERSIGHT**

FOR GOOD CAUSE SHOWN, the Secretary's Motion for Modification of Decision and Order is GRANTED.

WHEREFORE IT IS ORDERED that the Decision and Order dated May 7, 1986, are MODIFIED to add "Citation No. 2475963" with a Civil Penalty of "\$79" to the columnized items at page 5; to change the total amount of civil penalties from "\$3,042" to "\$3,121" in both places where a total appears at page 5; and to change six monthly payments of \$507 each to the following: "five monthly payments of \$520 each beginning June 1, 1986, and becoming due on the first day of each successive month and a final payment of \$521 due on November 1, 1986."



William Fauver  
Administrative Law Judge

Distribution:

Charles F. Merz, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Stuart P. Bradley, Treasurer, J & C Coal Corporation, P.O. Box 174, Jacksboro, TN 37757 (Certified Mail)

Mr. Charles M. Asbury, President, J & C Coal Corporation, P.O. Box 174, Jacksboro, TN 37757 (Certified Mail)

kg

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

July 22, 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 85-96  
Petitioner : A. C. No. 14-01116-03501 IIF  
v. : Fort Scott Mine  
BOB CRUMBY, :  
Respondent :

ORDER VACATING DEFAULT  
ORDER OF ASSIGNMENT

Before: Judge Merlin

On July 23, 1985, the Secretary filed a proposal for penalty against the respondent for an alleged violation of the Federal Mine Safety and Health Act of 1977. Because no answer had been received, the respondent was ordered on January 28, 1986 to file an answer within 30 days or to show good reason for his failure to do so. As of May 29, 1986 the Commission had received no response and on that date the respondent was found in default and ordered to pay \$625, the full amount of the proposed penalty. However, on June 12, 1986, the Commission received a letter from the respondent stating that it had filed an answer. Further investigation revealed that respondent had filed his answer with the Solicitor, but not with the Commission. The answer was postmarked February 22, 1986, well within the 30-day period for response granted by the order of January 28, 1986. The Solicitor now has forwarded the respondent's answer to the Commission which should have been done at the time. Although the answer should have been filed with the Commission rather than the Solicitor, the operator is pro se. Accordingly, I accept the answer as timely filed.

The default of May 29, 1986 was based on a mistake of fact, i.e. that no answer was filed. I find it is the interest of justice to vacate the default and to allow the case to proceed.

Accordingly, the Order of Default of May 29, 1986 is hereby RESCINDED.

This case is hereby assigned to Administrative Law Judge Gary Melick.

All future communications regarding this case should be addressed to Judge Melick at the following address:

Federal Mine Safety and Health  
Review Commission  
Office of Administrative Law Judges  
Two Skyline Place, Suite 1000  
5203 Leesburg Pike  
Falls Church, VA 22041

Telephone No. 703-756-6261



Paul Merlin  
Chief Administrative Law Judge

Distribution:

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

Mr. Bob Crumby, Box 186, Arcadia, KS 66711 (Certified Mail)

/gl

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**JUL 22 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 85-149  
Petitioner : A. C. No. 15-10271-03502  
: :  
v. : Lancer Tipple Mine  
: :  
CABIN COAL CORPORATION, :  
Respondent :

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for Petitioner;  
Richard Sims, President, Cabin Coal Corporation,  
Prestonsburg, Kentucky, pro se.

Before: Judge Maurer

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with a violation of the safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing was held on the merits at Prestonsburg, Kentucky, on May 30, 1986.

Samuel V. Trossky, a surface mine inspector employed by MSHA, had occasion on April 22, 1985, to inspect the Lancer Tipple.

On that occasion he observed a front end loader moving coal from the stock pile and taking it to the hopper. He issued § 104(a) Citation No. 2468999 for a violation of 30 C.F.R. § 77.1605(a) because the windshield of that vehicle had numerous cracks directly in the line of sight of the operator so as to impair his vision.

The front end loader had to go up a 5-foot elevated ramp to dump coal into the hopper and therefore because

of the driver's impaired vision, he possibly could run into the hopper, or maybe run into a truck according to the inspector. However, the inspector testified that he didn't know how likely it would be that the operator would run into something and he further testified that there was infrequent vehicular traffic in the area this front end loader was operating in and no pedestrian traffic.

The facts of this case establish a non-S&S violation of the cited regulation and I conclude that a civil penalty of \$20 is appropriate.

Conclusions of Law

1. The Commission has jurisdiction to decide this case.
2. Respondent violated the mandatory safety standard published at 30 C.F.R. § 77.1605(a) as alleged in Citation No. 2468999.
3. The violation was not "significant and substantial" within the meaning of the Act.
4. The appropriate penalty for the violation is \$20.

ORDER

Citation No. 2468999 is affirmed as non-significant and substantial and the respondent IS ORDERED to pay a civil penalty of \$20 to the Secretary within 30 days of the date of this decision.



Roy J. Maurer  
Administrative Law Judge

Distribution:

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

Richard Sims, President, Cabin Coal Corp., Goble-Roberts Addition, Prestonsburg, KY 41653 (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**JUL 24 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 85-148  
Petitioner : A.C. No. 15-14218-03504  
v. :  
: No. 1 Strip  
HARD ROCK COAL CO., INC., :  
Respondent :

DECISION

Appearances: Theresa Ball, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee  
for Petitioner;  
Frank Dossett, Esq., LaFollette, Tennessee 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," charging Hard Rock Coal Co., Inc. (Hard Rock) with one violation of the regulatory standard at 30 C.F.R. § 77.1303(uu) and thereby causing the death of miner Don Douglas on November 5, 1984. The issues before me are whether Hard Rock committed the violation as alleged and if so whether the violation was of such a nature as could have significantly and substantially contributed to the cause and effect of a coal or other 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 the criteria set forth in section 110(i) of the Act.

The one citation at issue, No. 2057047, charges a "significant and substantial" violation of the cited standard and, as amended, alleges that: "(w)here charging operations were being conducted and electric detonators were being used the operator failed to withdraw the men to a safe location upon the approach of an electrical storm." The cited standard requires that "when electric detonators are used, charging shall be suspended and men withdrawn to a safe location upon the approach of an electrical storm."

It is not disputed that during the course of the day on November 5, 1984, Robert Baird, an employee of Wash Ridge Coal Company had loaded five rows of drill holes (approximately 34 holes) with explosives in preparation for blasting overburden along the face of the Hard Rock No. 1 surface mine located in Kensee, Kentucky.<sup>1/</sup> Baird was loading the explosives under the general direction of his supervisor, Roger Kidd. Kidd showed Baird the type of delay blasting caps to be used in the various holes to provide a sequential blast with a 50 millisecond separation between rows. In accordance with accepted practice Baird did not connect the shot wires to the lead line in order to prevent accidental ignition from stray electrical sources or static electricity. Baird knew that the explosives could nevertheless even then be triggered by lightning.

Baird had finished loading the holes by 3:00 p.m. and at that time took his afternoon break. He was waiting for his supervisor to return to check his work and to detonate the explosives. According to Baird the shots were usually set off at 5:30 p.m. after the end of the shift.

Upon his arrival at the job site around 6:30 that morning Baird found wet and muddy conditions from rain the night before. However, according to Baird, until the lightning actually struck later in the afternoon the weather was sunny and clear. As late as 3:15 in the afternoon Baird observed that the sky was clear and blue with no clouds, no rain, and no thunder. The first indication of any storm was when lightning struck and triggered the explosives. Baird recalled that even after the lightning struck there was no rain and no further lightning. Baird testified that he was

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<sup>1/</sup> The evidence shows that Hard Rock Coal Co., Inc., is the owner and operator of the subject strip mine and accordingly had been issued the corresponding identification number from the Federal Mine Safety and Health Administration for the operation of that mine. On the day in question a number of employees of the Wash Ridge Coal Company, (Wash Ridge), including Robert Baird, supervisor Roger Kidd and the deceased, Don Douglas, were assigned by Danny Ray Chambers and his father, Dean Chambers, to work for Hard Rock. Danny Ray Chambers was at that time Superintendent for both Hard Rock and Wash Ridge and was President of Hard Rock and Vice President of Wash Ridge. Dean Chambers was then President of Wash Ridge and Vice President of Hard Rock. According to Danny Chambers, he and his father generally made all the decisions for both companies and from time to time would interchange employees as needed on various jobs. Under the circumstances supervisor Roger Kidd was during relevant times an agent of Hard Rock.

aware of the dangers presented from an approaching electrical storm and that he would have moved clear of the explosives had he seen any evidence of an electrical storm.

When the lightning struck and prematurely set off the explosives the overburden was thrown upon front-end-loader operator Donald Douglas who was working in the pit below. Douglas was buried by the debris and asphyxiated by external chest compression as he was pinned in the cab of his loader.

Supervisor Roger Kidd was driving out of the pit along the pit road shortly after 3:00 p.m. that day with co-worker Art Bowlen. As they drove around a "point" on the mountain a dark cloud came into view. Kidd told Bowlen that they had better get Baird "off the shots" but within 30 to 60 seconds he saw the flash of lightning and the explosion. Kidd said that as soon as he saw the dark cloud he wanted to first warn Baird who was on the top of the shots and then warn Douglas who was working in the pit below. According to Kidd there was no rain or other sign of adverse weather before the dark cloud appeared and the lightning struck and even after that there was only some drizzle.

Ted Ivey was also working at the mine that day. He testified that the weather was clear before the accident and there was no sign of bad weather. Arvil Lewallen was also working at the mine. According to Lewallen the sun was shining at the time the lightning struck and there was no warning of its approach.

Other witnesses testified concerning storm activity in surrounding areas that day. MSHA Inspector James Payne recalled that there were several heavy rain storms in Jellico, Tennessee, about 2 "air miles" from the mine site. Payne thought that it had last rained in Jellico that day about 30 minutes before he left the office at 4:02 p.m. The weather had cleared by the time he left the office however and was clear upon his arrival at the mine site. Payne acknowledged that it was unusual for electrical storms to be in the region at that time of the year.

Helen Douglas, the widow of the deceased, testified that she left Corbin, Kentucky in her car at about 3:30 p.m. that day and was thereafter driving south on highway I-75 in and out of heavy rains and electrical storms. She recalled hearing an explosion as she drove along highway I-75 within approximately 2 miles of the mine site.

It is well established that under the Act an operator may be held liable for violations of mandatory safety standards regardless of fault. Secretary v. El Paso Rock Quarries, Inc., 3 FMSHRC 35 (1981). Thus for purposes of determining whether the cited violation occurred it is immaterial whether

the operator was negligent. There is no dispute in this case that electric detonators were being used by the mine operator, that an electrical storm did in fact approach, and that neither the shot loader, Robert Baird nor the deceased, who was working in the pit below, were withdrawn to a safe location. The violation is thus proven as charged. As the facts in this case clearly demonstrate the violation was also quite serious and "significant and substantial." Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

I find however that the operator is chargeable with but little negligence. The uniform testimony of those trial witnesses present at the mine site that day was that the weather was clear and sunny until moments before the lightning struck. Indeed one of the miners who it would be expected would be the most sensitive to weather conditions, Robert Baird, specifically observed that only a few minutes before the lightning struck the sky was clear. With Baird's knowledge that lightning could trigger the explosives he was standing over it is not reasonable to believe he would have remained in this area had there been any evidence of an approaching electrical storm.

In addition supervisor Roger Kidd testified that as he rounded a "point" on the pit road he observed for the first time a black cloud approaching. He expressed his intent to warn Baird but the lightning struck within 30 to 60 seconds before any warning could be given. In the absence of any directly contradictory evidence I am constrained to find that indeed the operator could not reasonably have known of the approaching storm in time to withdraw his miners to a safe location.

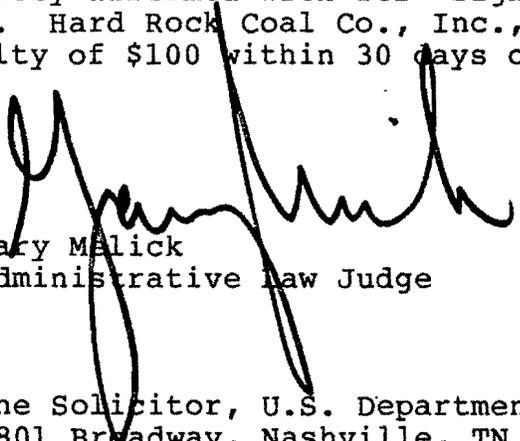
In reaching this conclusion I have not disregarded the testimony of other witnesses concerning evidence of heavy rains and electrical storms as close as 2 miles to the mine site. According to one witness however, apparently because of the mountainous terrain, it is not unusual for storms in the area to be localized. Thus Mrs. Douglas observed as she drove along highway I-75 that she was passing in and out of such storms as she passed from one hollow to another.

I have also considered the Secretary's argument that the operator was negligent for allowing the deceased, in the first place, to work in the pit area while explosives were being loaded in the overburden area above. Whether or not the operator was negligent in this regard is not however relevant to whether or not the operator was negligent in violating the specific standard at bar. The standard at bar does not forbid work in the pit area while explosives are being loaded in an overburden area above but rather requires only the withdrawal of miners to a safe place upon the approach of an electrical storm.

In assessing a penalty herein I have also considered that the operator is relatively small in size, has a minimal history of reported violations, and had abated the violation in good faith in accordance with the Secretary's directions.

ORDER

Citation No. 2057047 is hereby affirmed with its "significant and substantial" findings. Hard Rock Coal Co., Inc., is directed to pay a civil penalty of \$100 within 30 days of the date of this decision.



Gary Malick  
Administrative Law Judge

Distribution:

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

Frank Dossett, Esq., Fleet Building, LaFollette, TN 37766 (Certified Mail)

rbg

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**JUL 24 1986**

SILAS NOBLE, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 86-17-D  
: MSHA CASE NO BARB CD 85-34  
PATSY JANE COAL CORPORATION, :  
Respondent : Surface No. 1 Mine

ORDER OF DISMISSAL

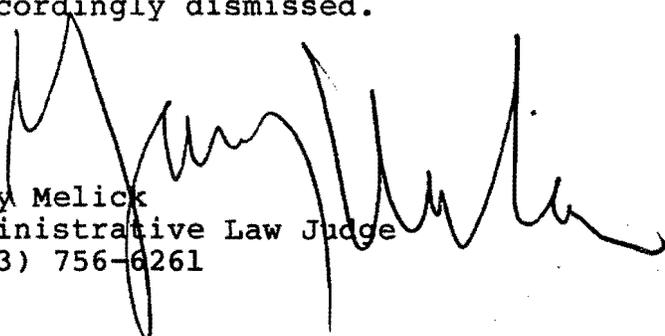
Before: Judge Melick

The Complainant, Silas Noble, alleges in a Complaint of Discrimination that he was laid off because "[a]t the time I was laid off they kept people that had less seniority than I had." Respondent thereafter moved to dismiss the Complaint on the grounds that it failed "to state a claim upon which relief can be granted under section 105(c)."

An Order to Show Cause was then issued providing the Complainant with an opportunity to explain why this case should not accordingly be dismissed. No response to that Order has been filed and the Respondent's Motion to Dismiss is thus granted.

The captioned case is accordingly dismissed.

Gary Melick  
Administrative Law Judge  
(703) 756-6261



Distribution:

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(Certified Mail)

Randall Scott May, Esq., Barret, Haynes, May, Carter & Roark,  
P.S.C., P.O. Drawer 1017, Hazard, KY 41701 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUL 24 1986

COORS ENERGY COMPANY,	:	APPLICATION FOR REVIEW
Applicant	:	
	:	Docket No. WEST 86-40-R
v.	:	Order No. 2831341; 11/14/85
	:	
SECRETARY OF LABOR,	:	Keenesburg Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
	:	
COORS ENERGY COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 86-186-R
	:	Citation No. 2831343; 11/14/85
	:	
v.	:	
	:	Docket No. WEST 86-187-R
	:	Citation No. 2831344; 11/14/85
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Keenesburg Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Earl K. Madsen, Esq., Bradley, Campbell & Carney, Golden, Colorado, for Applicant/Contestant; James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Carlson

Docket number WEST 86-40-R came on regularly for hearing at Denver, Colorado on June 17, 1986. The matter arose out of an imminent danger withdrawal order issued by a representative of the Secretary of Labor on November 14, 1985, under section 107(a) of the Mine Safety and Health Act of 1977. The order, number 2831341, did not allege in block 9 of the Secretary's citation and order form that the condition or practice which accounted for the imminent danger was caused by a violation of a mandatory safety standard. The narrative description of the conditions which caused the order to issue, however, referred to two citations written under section 104(a) of the Act which the Secretary's inspector issued contemporaneously with the order. The alleged 104(a) violations, citations numbered 2831343 and 2831344, were described in the order as "contributing factors to the order."

In the instant proceeding, the parties jointly requested they be permitted to resolve all three matters, the order and two citations, in the single proceeding since all three arose out of what was essentially a single occurrence.

The parties also represented that the two citations should have been before the Commission for adjudication since Coors Energy had lodged timely contests with the Secretary at the same time as it filed its application for review of the withdrawal order. Counsel for Coors produced documentation for this claim, including copies of the receipts for certified mail signed by an agent for the Secretary and copies of the contests dated December 9, 1985, the same date as the application for review in the file of docket WEST 86-40-R, the 107(a) case. At the hearing the Secretary stipulated that the two notices of contest were timely filed (Tr. 5).

Nevertheless, as this judge has verified, the files of the Commission's Docket Clerk contain no records that the notices of contest were received and docketed. They show only that the application for review of 107(a) withdrawal order 2831341 was received and docketed.

At the hearing this judge concluded upon the record that Coors Energy had done all those things required of it by the applicable law and regulations to contest the two citations. It followed that the operator was entitled to have its contests docketed. This has now been done by the assignment of docket numbers and assembling of files for each contest. Citation number 2831343 was assigned docket number WEST 86-186-R; Citation number 2831344 was assigned docket number WEST 86-187-R. Also, in accordance with a determination made by this judge at the hearing, the order and citation dockets are now consolidated for decision.

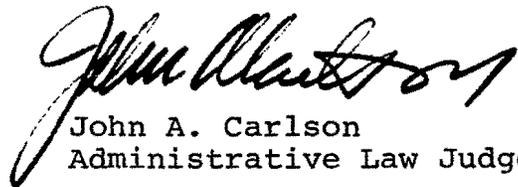
We now turn to the parties proposed agreement for disposition of the three dockets. The Secretary agrees to withdraw the 107(a) order on grounds that post-order conferences with the operator convinced the Secretary's representatives that its issuance was not warranted.

Coors Energy, on the other hand, moved to withdraw its contest of the two citations for violations of mandatory safety standards, conditioned upon the granting of the Secretary's motion to re-classify the violations from "significant and substantial" to "non-significant and substantial."

Having considered the representations and explanations of the parties, I conclude that the actions proposed are appropriate and should be approved.

One further matter merits consideration. The parties also recited for the record an agreement that the penalties for each of the two citations should be set at \$20.00. Some question exists, however, as to whether this case is in the proper posture to assess penalties. The contests of citations at stake here involve only the question of violation and special findings which relate to violation. Consequently, no order is issued here respecting penalty. The penalty aspect of the parties' agreement is firmly on the record, however, and may surely be effected administratively without difficulty.

In accordance with the foregoing, the 107(a) order challenged by Coors Energy in docket WEST 86-40-R is ORDERED vacated; the citations contested in WEST 86-186-R and WEST 86-187-R are ORDERED affirmed; and the violations involved in both are ORDERED reduced from "significant and substantial" to "non-significant and substantial."



John A. Carlson  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

July 25, 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 86-78-M  
Petitioner : A. C. No. 51-00086-05501  
v. :  
Puuwaawaa Pit & Mill  
VOLCANITE LIMITED, :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed for approval a settlement agreement for the two violations involved in this matter. The original assessed penalties were \$1,300 and the proposed settlements are \$865.

Citation No. 2086735 was issued for violation of 30 C.F.R. § 55.9022 because the berms on the east side of the operator's pit bank were not built high enough to prevent rubber-tired equipment from going over the edge. Citation No. 2086736 was issued for violation of 30 C.F.R. § 55.3003 because of the excessive height of the east bank of the pit. The original assessments were based upon the fact that a dozer operator had been killed after driving off the edge of the pit. However, it now appears from the materials filed that the dozer operator had a stroke while driving the dozer and that this was the cause of the accident. Indeed, the Solicitor advises that there was no relationship between the height of the bank and the accident. The Solicitor further states that there is insufficient evidence to attribute the accident to the inadequate height of the berms. However, violations did exist and they were serious. Based upon the foregoing circumstances the proposed reduction for Citation No. 2086735 is from \$1,000 to \$665. The proposed reduction for Citation No. 2086736 is from \$300 to \$200. Finally, the Solicitor sets forth that the operator has no previous history of violations and is very small, having only 197 man-hours of production per year.

The representations of the Solicitor are accepted.

Accordingly, the settlement agreements are APPROVED and the operator is ORDERED TO PAY \$865 within 30 days of the date of this decision.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style with a large initial "P" and "M".

Paul Merlin  
Chief Administrative Law Judge

Distribution:

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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 28 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 86-63  
Petitioner : A. C. No. 36-01423-03503  
 :  
v. : Carlson No. 1 Strip  
 :  
CARLSON MINING COMPANY, :  
Respondent :

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia, Penn-  
sylvania, for Petitioner;  
Mr. Alan Carlson, New Castle, Pennsylvania, for  
Respondent.

Before: Judge Maurer

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. section 801, et seq., the "Act," in which the Secretary charges the Carlson Mining Company with a violation of the mandatory safety standard at 30 C.F.R. § 77.409(a). The general issues before me are whether the company has violated the regulatory standard as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation.

The hearing was held as scheduled on May 22, 1986, at New Castle, Pennsylvania. Documentary evidence, including the deposition of Inspector Klingensmith was received into evidence and oral testimony was received from both parties.

The Mandatory Standard

Section 77.409(a) of the mandatory standards, 30 C.F.R. § 77.409(a) provides as follows:

§77.409 Shovels, draglines, and tractors.

(a) Shovels, draglines, and tractors shall not be operated in the presence of any person exposed to a hazard from its operation and all such equipment shall be provided with an adequate

warning device which shall be sounded by the operator prior to starting operation.

The Cited Condition or Practice

Citation No. 2402051 cites a violation of 30 C.F.R. § 77.409(a) for the following conditions:

The warning device, which shall be sounded by the operator prior to starting operations, for the Fiat Allis FD 50 bulldozer serial no. 42504006 operating at pit 004-0 was not operative.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 7-9):

1. No. 1 Carlson Strip Mine is owned and operated by the respondent, Carlson Mining Company.

2. Carlson No. 1 Strip is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding Administrative Law Judge has jurisdiction over the proceedings.

4. Citation No. 2402051, and its termination, were properly served by an authorized representative of the Secretary upon an agent of the respondent at the date, time, and place stated on the citation, and may be admitted into evidence for the purpose of establishing its issuance.

5. The parties stipulate to the authenticity of their exhibits, but not to the relevancy or truth of the matters asserted therein.

6. The alleged violations were abated in a timely fashion.

7. The total annual production of Carlson No. 1 Strip is, approximately, eighty thousand tons of coal per year.

8. The computer printout reflecting the operator's history of violations is an authentic copy, and may be admitted as a business record of the Mine Safety and Health Administration.

9. The imposition of the proposed civil penalty will have no effect on the respondent's ability to remain in business.

#### Discussion and Analysis

The inspector who issued the instant citation testified by deposition that he visited the Carlson Strip Mine on October 30, 1985. While there he observed the cited bulldozer operating on the bench area from a distance of approximately a thousand feet away. When he got up to the equipment, about ten (10) minutes after first observing it, the operator had just pulled it over to the side of the bench and was getting off of it. He inspected it there and talked to the equipment operator at that time about the condition of the safety equipment. He states that the bulldozer operator made no mention of the dozer being out for repairs. Thereafter, he issued the subject citation for the inoperative start-up warning device.

The start-up alarm's purpose is to give a warning to people before the equipment is moved forward.

He also marked the significant and substantial box on the citation because this piece of equipment operates in an area where there are people and other equipment also operating. The particular hazard he identified was the danger to a person or persons who might be afoot in the area when this equipment was working without the start-up warning device operating and thereby exposing them to a possibly serious injury.

The respondent does not dispute the fact that the start-up warning device was inoperative but rather the respondent's defense is that the bulldozer was not operating on the day in question. Respondent sponsored the testimony of Mr. Gerald McCurdy, who testified to the effect that although he had started the bulldozer that morning to see if he could find a reported leak, he had not moved the machine prior to the arrival of the inspector.

Therefore, on the ultimate issue of whether or not the bulldozer in question was operating that morning, I must make a credibility finding between the inspector's testimony and that of Mr. McCurdy. The record demonstrates that the inspector's notes and the citation itself, written at or near the time of the violation, agree with his later testimony by deposition on all pertinent points. Further, the respondent was unable to shake his testimony by cross-examination concerning possible misidentification of the bulldozer. Mr. McCurdy, on the other hand, while steadfastly maintaining that he had not operated the dozer that

morning, was unable to satisfactorily account for his time between 7 and 8:30 a.m., the hour and a half just prior to the issuance of the citation. I therefore make the necessary credibility finding in favor of the Secretary's witness.

In accordance with the testimony recited herein of Inspector Klingensmith which I find to be credible, I conclude that the cited violation did occur and that it was "significant and substantial" as that term is defined by National Gypsum Co., 3 FMSHRC 822 (1981) and Mathies Coal Co., 6 FMSHRC 1 (1984).

Considering the criteria in section 110(i) of the Act, I conclude that the civil penalty proposed in this case, i.e., \$58, is appropriate under all the circumstances.

ORDER

Citation No. 2402051 is AFFIRMED. Carlson Mining Company is ORDERED to pay a civil penalty of \$58 within 30 days of the date of this decision.



Roy J. Maurer  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

July 30, 1986

SECRETARY OF LABOR,	:	DISCRIMINATION COMPLAINT
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 86-39-DM
ON BEHALF OF STERLING	:	
SCHULTZ,	:	MSHA Case No. MD 85-03
Complainant	:	
	:	Tilden Mine
v.	:	
	:	
CLEVELAND CLIFFS IRON CO.,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

The Secretary filed this complaint on behalf of Sterling Schultz alleging that on September 18, 1984, Respondent intimidated Complainant because he assisted MSHA inspectors in conducting safety and health inspections. Respondent denied the allegation. The case does not involve any claim for back pay or damages. On July 22, 1986, the Secretary filed a Motion to Dismiss this proceeding. It included a settlement for the Secretary and Respondent. Respondent agrees to abide by section 105(a) of the Act and states that it will not take any disciplinary action against Complainant for exercising his rights under section 105(a). Respondent states that Complainant's personnel records do not contain any reference to the incidents of September 18, 1984, for which this complaint was filed. Respondent regrets the incident of September 18, 1984, and any misunderstanding that may have arisen from it.

Based on the facts stated in the motion and the agreement of the parties, the motion is GRANTED, and this proceeding is DISMISSED.

  
James A. Broderick  
Administrative Law Judge

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