JULY 1987

Commission Decisions

Administrative Law Judge Decisions

JULY 1987

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

Local Union 1889, Dist. 17, UMWA v. Westmoreland Coal Company, Docket No. WEVA 81-256-C. (Interlocutory Review of May 20, 1987 Order by Judge Melick.)

Jim Walter Resources, Inc. v. Secretary of Labor, MSHA, Docket Nos. SE 86-105-R, SE 87-8. (Judge Weisberger, May 29, 1987)

Youghiogheny & Ohio Coal Company v. Secretary of Labor, MSHA, Docket Nos. LAKE 86-121-R, LAKE 87-9. (Judge Melick, June 5, 1987)

Mettiki Coal Corporation v. Secretary of Labor, MSHA, Docket Nos. YORK 87-2-R, YORK 87-3-R, YORK 87-5. (Judge Melick, June 13, 1987)

Helen Mining Company v. Secretary of Labor, MSHA, Docket Nos. PENN 86-94-R, PENN 86-181. (Judge Weisberger, June 12, 1987)

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

Joel T. Arnoldi v. Asarco, Inc., Docket No. WEST 85-161-DM. (Judge Morris, June 3, 1987)

Secretary of Labor, MSHA v. Rushton Mining Company, Docket No. PENN 87-74. (Judge Broderick, June 11, 1987)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 1, 1987

LOCAL UNION 1889, DISTRICT 17, UNITED MINE WORKERS OF AMERICA (UMWA)	:	
v.	:	Docket No. WEVA 81-256-C
WESTMORELAND COAL COMPANY	:	
and	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This compensation proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), was commenced in 1981 and, on cross-petitions for interlocutory review, is before the Commission for the third time. The petitions are granted and, because time is of the essence at this stage of this protracted litigation, briefing is suspended and we dispose of the petitions by summary order. On the following bases, this matter is remanded to presiding Judge Gary Melick.

In September 1986, the Commission remanded this case for further proceedings to determine whether a nexus sufficient to support an award of compensation existed between certain violations of mandatory standards and the mine explosion and imminent danger order involved in this case. 8 FMSHRC 1317, 1329-30 (September 1986). We additionally stated: "If such a relationship is determined, the judge shall take appropriate action to identify the affected miners and the amount of compensation due to each." 8 FMSHRC at 1330. On the remand proceedings before Judge Melick, the parties became engaged in disputes as to the scope and the terms and conditions of discovery. Following certain rulings by the judge in a May 20, 1987 order, the parties filed these cross-petitions for interlocutory review seeking review of that order. Upon receipt of the petitions, the Commission stayed further proceedings before the judge.

With respect to the petition filed by respondent Westmoreland Coal Company ("Westmoreland"), we hold that the judge erred in treating the individual miner claimants as mere witnesses to this proceeding entitled to payment of witness fees for participation in the depositions sought by Westmoreland. In our practice in compensation proceedings, the individual miner claimants are deemed to be parties (see generally UMWA Dist. No. 31 v. Clinchfield Coal Co., 1 IBMA 31, 47 (1971)), even if their miner's representative, as here, is actually prosecuting the compensation complaint as a party on their behalf. (30 U.S.C. § 821; 29 C.F.R. § 2700.4(a).) The general rule in federal practice is that parties ordinarily are not entitled to the payment of witness fees, and we reverse the judge's authorization of such fees in the circumstances of this proceeding. See, e.g., Barth v. Bayou Candy Co., Inc., 379 F. Supp. 1201, 1205 (E.D. La. 1974).

Concerning the UMWA's petition, for the reasons stated above, we reject the UMWA's contention that the individual miner parties are entitled to special witness protection under Commission Procedural Rule 59, 29 C.F.R. § 2700.59 (protection from disclosure of the names of miner witnesses and informants). Further, we affirm the judge's ruling that Westmoreland may depose the miners on the subject of the circumstances of their idlement. This subject is clearly relevant in discovery by either party and is within the scope of our remand order. Cf. Loc. U. No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp., 3 FMSHRC 1175, 1176-79 (May 1981). However, we hold that the question of whether any of the miners received state unemployment compensation is irrelevant to this proceeding and may not be pursued in discovery. Cf., e.g., Boich v. FMSHRC, 704 F.2d 275, 286-87 (6th Cir.), vacated in other part on other grounds, 719 F.2d 194, 196 (6th Cir. 1983).

Finally, all participants in this six-year litigation must be aware of the need to move with dispatch to resolve the issues remaining so that this proceeding may be concluded at the earliest possible date.

On the foregoing grounds, our previously directed stay is dissolved and this matter is remanded to the judge for expeditious proceedings consistent with this order. */

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 6 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ALVIN CASEY, Complainant	:	DISCRIMINATION PROCEEDING Docket No. VA 86-45-D
v.	:	
BRENT COAL CORPORATION, Respondent	:	

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant; Robert J. Breimann, Esq., and Joseph W. Bowman, Esq., Street, Street, Street, Scott and Bowman, Grundy, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant Alvin Casey contends that he was laid off from his job as mine foreman with Respondent on August 15, 1985, because he refused to work under unsafe conditions. Pretrial discovery was initiated by both Complainant and Respondent. Pursuant to notice, the case was called for hearing on March 10, 1987, in Bluefield, West Virginia. It was continued on March 31, 1987, in Bristol, Virginia. Respondent orally moved to dismiss the complaint at the commencement of the hearing. The motion was denied.

Alvin Casey, James Church, Minnie Mae Church, Robert Nichols, Arnold Carico, and Dorsey Evans testified on behalf of Complainant. Paul Horn, Gary Lester, Terry Lee Taylor, Robert Dale, and Billy Horn testified on behalf of Respondent. Both parties have filed post hearing briefs. I have considered the entire record, and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Complainant Alvin Casey worked for Respondent as a coal miner for approximately two years. He worked for other mines operated by Respondent's President, Billy Horn, for about 10 or 11 years of the approximately 13 years he worked in the coal mining industry. He worked as a shot fireman, roof bolter operator, cutting machine operator and mine foreman. He was certified as a shot fireman, but was not certified as a mine foreman. He has a fifth grade education, and a very limited ability to read. During his last several months with Respondent, Casey worked as a foreman on the second shift. The second shift was supposed to be a maintenance shift, but coal was produced about 80 percent of the time. Casey was paid $8.75 per hour, and, because he acted as foreman, received pay for 9 hours although he worked only eight.

Respondent was the owner and operator of the subject mine. The mine was developed through three old abandoned mines. Respondent was given permission by MSHA to go through the old workings and develop them into an active mine. Seals were constructed and ventilation provided. The mine was ventilated by an exhaust fan, pulling intake air across the working face, and down the return air course, exiting the mine at the fan. In August 1985, there were nine working headings, being mined on a left to right cycle. The intake air and return air were separated by permanent stoppings erected in crosscuts as the mining cycle progressed. The coal was removed by belt.

The mine was 30 to 34 inches in height. It produced from 30,000 to 50,000 tons of coal annually. The maximum number of employees was fourteen. During the two year period prior to August 14, 1985, forty seven violations were paid by Respondent, eighteen of which were denominated significant and substantial.

On August 6, 1985, on the day shift, a scoop cut through in the Number 3 heading to an old abandoned mine. The cut through occurred approximately 70 feet inby the last open crosscut. The day shift foreman, Gary Lester, called Respondent's President, Billy Horn, who directed him to withdraw the miners from the area to the intake side. Horn went into the mine with a flame safety lamp and methane detector. He crawled down the Number 3 heading and into the abandoned mine. He did not detect any methane or oxygen deficiency at the mouth of the heading. After proceeding 30 to 40 feet into the abandoned mine, the flame on the flame safety lamp diminished slightly, showing some oxygen deficiency. He returned to the mouth of the heading. After checking the ventilation, he instructed the men to stay on the intake air side, and began assembling material to construct a seal. Casey testified that when he arrived at the mine for the second shift,

Horn told him that he was ill, because "he got a whiff of bad air from where he cut into that old abandoned mines." (Tr. I, 32.) Horn denied making the statement and denied having become ill. I accept Horn's testimony on this matter and reject Casey's. Casey hung a flame safety lamp at the mouth of the Number 3 Entry, and his crew worked in Entries 4 through 9. Casey testified that he went up Entry 3 about 20 feet and his flame safety went out. This testimony was not corroborated by James Church who was present at the time.

A seal was constructed the next day (August 7) on the day shift by Gary Lester. The seal was built of cement block and mortar approximately 10 feet outby the cut through, which had been filled with rock and debris from the mine before the seal was commenced. The seal was airtight. After the seal was completed, the day shift began to fill the entry outby the seal with stone, rock and mine debris, to protect the seal, according to Horn, from being struck by mine equipment. This work (called "gobbing" the area) was not completed during the day shift on August 7. Horn testified that he told Casey of the seal and instructed him to continue the gobbing outby the seal. Casey denies that he was told of the seal or that he knew of it. He testified that he could see through the heading into the old abandoned mine for "a couple or three days after" the cut through. (Tr. I, 41.) On this issue I accept the testimony of Horn and Lester that a seal was constructed on August 7. I find Casey's testimony not credible. I also find that Casey was told that the seal had been built. James Church, who worked under Casey, testified that he was told of the seal. (Tr. I, 96.) Casey's crew did some gobbing of the area outby the seal on August 7. The gobbing was completed during the first shift on August 8, and a mud plaster seal was constructed at the mouth of the No. 3 heading. A flame safety lamp was maintained in the vicinity of the No. 3 heading. The construction of the seal did not conform to the approved sealing plan for the mine in that a test pipe was not constructed to test the mine atmosphere behind the seal. Further, because of the gobbed area outby the seal, it was not possible to inspect the integrity of the seal daily as MSHA regulations require.

On or about August 5, 1985, Casey approached Horn and asked for a raise in pay. Casey said he had another job, and would quit if he did not get a raise. Horn told him that the company's financial circumstances would not allow him to give Casey a raise. Casey renewed his request on August 12, and was told that nothing could be done at the time, but perhaps later on he could be given a raise. Casey stated he had another job as soon as the prospective employer obtained a continuous miner which was on order. On August 14, at the conclusion of the day shift, Gary Lester told Casey that a scoop was broken down and he would

need to use the man trip to bring repair parts to the No. 2 heading where the scoop was located. Casey's crew entered the mine and found that the cutting machine was between heading two and three. Casey found that the cable in the supply box had been shortened (apparently by Lester), and ordered his crew out of the mine. The shortening of the cable by Lester had occurred previously and upset Casey. I find as a fact that Casey did not indicate that he was withdrawing the crew because he was concerned about "bad air" in the mine, or that he was afraid to proceed to the No. 2 heading, but rather because he was upset on account of the cable. Horn was not at the mine that day. The following day, August 15, Casey came to the mine early in his street clothes. Horn asked him why he withdrew his crew, and Casey replied that he could not work with Gary Lester anymore and that he quit. I find that Casey did not complain to Horn about bad air. He asked Horn for a lay off slip in order to draw unemployment benefits until he was called to work on his new job. Casey did not return to Respondent's mine after that date.

On about August 22, 1985, Respondent's pillaring plan was approved by MSHA, and the miners began to remove pillars. In about 3 or 4 weeks, the pillars were all removed, and the mine was abandoned.

Casey received unemployment compensation after a hearing before the state employment security agency. He began working for H&H Coal Company about 9 weeks after leaving Respondent. He worked with H&H about 8 days before quitting because he "couldn't stand to work in the low coal." (Tr. I, 50.) The coal seam at H&H was about 24 inches high. He has not worked since leaving H&H.

ISSUES

1. Was claimant subjected to adverse action by Respondent for activity protected under the Act?

2. If he was, to what remedies is he entitled?

CONCLUSIONS OF LAW

JURISDICTION

Respondent was subject to the Act in the operation of the subject mine. Complainant Casey was a miner and protected by Section 105(c) of the Act. Respondent is a small operator and has an average history of prior violations.

PASULA RULE

Under the Act, a miner can establish a prima facie case of discrimination by showing that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The operator may rebut the prima facie case by showing either that no protected activity took place, or that the adverse action was not motivated in any part by the protected activity. A miner has the right to refuse to work if he has a good faith reasonable belief that the work is hazardous. Pasula, supra, Simpson v. Kenta Energy, Inc., 7 FMSHRC 1034 (1986). Such refusal is activity protected under the Act.

PROTECTED ACTIVITY

The cut through to the old mine created a potentially hazardous condition on the return air side (headings 1, 2 and 3) in the subject mine. Claimant's refusal to work in headings 1, 2, and 3 on August 6 and 7, 1985, before the seal was constructed, was therefore protected. I have found as a fact that Casey was informed that the seal was constructed. Although the seal did not conform to MSHA requirements, or the provisions of 30 C.F.R. § 75.303 (requiring a daily examination of seals), I have found as a fact that Casey and his crew worked in the first three headings between August 8 and August 14. Therefore, I conclude that he did not refuse to work because of a good faith, reasonable belief that the work was hazardous.

ADVERSE ACTION

I have found that Casey quit his employment and was not discharged. I also conclude that he was not constructively discharged because of intolerably unsafe working conditions. See Simpson v. Kenta, supra. The evidence shows that he quit because he thought he deserved a raise, because of disputes with Gary Lester, and because he believed that he had a better job lined up. Therefore, I conclude that he was not subjected to adverse action under the Act.

MOTIVATION-CREDIBILITY

The critical issue in this case is why Casey left the Respondent's employ. Was it because he feared that his safety and the safety of his crew were jeopardized by the threat of bad air coming from the old works? Or was it because he was denied a raise, and did not get along with his fellow-foreman Gary Lester?

The resolution of this issue depends almost entirely on the credibility of Casey and of Horn. I have found Casey's denial that he knew of the seal not credible: Church who worked under Casey was told of it and worked in the return headings after the seal was constructed, as did others on Casey's crew. Casey's testimony that he could see from the mouth of the heading into the old mine (more than 70 feet away) for 2 or 3 days after the cut through is inherently incredible. I have found the testimony of Billy Horn, Respondent's President to be credible concerning Casey's statements when he left his job and prior thereto. For these reasons I find that Complainant Casey was not subjected to adverse action by Respondent because of activity protected under the Act. A violation of section 105(c) has not been established.

ORDER

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

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUL 7 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 86-8-M
	:	A.C. No. 05-04036-05501
v.	:	Docket No. WEST 86-9-M
	:	A.C. No. 05-04036-05502
COUNTY OF OURAY, COLORADO, Respondent	:	Docket No. WEST 86-66-M
	:	A.C. No. 05-04036-05503
	:	Ouray County Gravel Pit

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Richard P. Tisdel, Esq., Tisdel, Mathis, Reed, Hockersmith & Bennett, Ouray, Colorado, for the Respondent.

Before: Judge Morris

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

A hearing on the merits took place on September 4, 1986, in Grand Junction, Colorado.

Stipulation

At the hearing it was agreed that respondent, Ouray County, is a County and as such a political subdivision of the State of Colorado. Further, respondent operates the mine and it has 36 employees, including one at the site in question. Respondent further admitted the violations and penalties with the exception of Citation 2376690 in docket number WEST 86-9-M. The parties further stipulated that the briefs in Jefferson County Road and Bridge Department, 9 FMSHRC 56 (1987), could be entered as post-trial briefs in these cases.

Summary of the Evidence

Collin R. Galloway, a duly authorized representative of the Secretary of Labor, inspected the Ouray County gravel pit on June 24, 1985 (Tr. 18, 19). As a result the inspector issued Citation 2376690 for the alleged failure of respondent to notify MSHA of the accident. 1/ The accident, which caused a fatality, occurred when a highwall fell on a front-end loader (Tr. 19, Ex. P1, P2).

Galloway's investigation disclosed that the fatality was discovered at the quarry at 2:30 p.m. on June 24, 1985 (Tr. 21, 22).

MSHA's records indicate that the agency was notified by telephone at 0945 hours on June 25, 1985 (Tr. 20, 33). Agency policy requires immediate notification. The primary purpose of the regulation is to insure that no further lives are endangered in any recovery operation. Further, the purpose of the regulation is to insure that the accident site is not substantially altered (Tr. 22). It is MSHA's policy to direct recovery operations (Tr. 30, 31). In the inspector's opinion there was no one present at the scene with the necessary expertise to conduct the recovery operations (Tr. 31, 32). However, the inspector admitted he was not knowledgeable as to the experience of those present (Tr. 32, 33).

In this situation the recovery operation started at 3:15 p.m., when the victim was pronounced dead. During the recovery it was necessary to withdraw personnel twice because of additional sloughing of the highwall. The victim was removed from under the highwall after five and one-half hours (Tr. 23, 24, 28, 34).

1/ 30 C.F.R. § 50.10, the regulation allegedly violated, provides as follows:

§ 50.10 Immediate Notification

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

No MSHA personnel were present during the recovery operations and the inspector believed this factor involved a hazard to the recovery team (Tr. 24, 34).

During the recovery operations the loader was adjacent to the foot of the 45 to 50 foot highwall (Tr. 27, 28). The angle of repose of the highwall was 90 degrees (Tr. 28).

Patrick O'Donnell and Ronald Phelps testified for respondent.

Patrick O'Donnell, the Ouray County Administrator, is involved in all aspects of county government (Tr. 36). The County's gravel pit is operated as part of the County's Road and Bridge Department.

The United States Government through its agency, BLM, 2/ owns the land. BLM has issued a Free Use Permit to Ouray County to extract gravel from the pit with county employees and equipment (Tr. 37, 66, Ex. R1) The pit consists of 39.87 acres (Tr. 69). None of the materials that are removed are sold, bartered or traded (Tr. 38, 40, Ex. R1). Ouray County does not engage in commerce with the products from the gravel pit. The material is screened and used only for road construction in Ouray County, Colorado (Tr. 39).

BLM inspects the pit and their inspectors will point out any problems they observe (Tr. 40).

The witness was present at the site at approximately 3:15 p.m. He attended to the removal of the deceased who had been buried by a 45-foot vertical highwall. O'Donnell also checked the top of the highwall for fractures (Tr. 41, 42, 62, 63). After his inspection O'Donnell directed that the recovery operations cease (Tr. 43). Thereafter, they attempted to remove the equipment by pulling it out with a cable. They were unsuccessful with this effort (Tr. 43).

An attempt at removal by using a backhoe was also unsuccessful (Tr. 43, 44). The witness and the County Commissioner finally were able to remove the deceased (Tr. 44). Subsequently, after considerable gravel had been removed, they were able to start the trapped loader and remove it (Tr. 44).

2/ Bureau of Land Management

During the rescue operations it had not occurred to O'Donnell to notify MSHA (Tr. 44, 45). Mr. O'Donnell had previously met with MSHA's representative Phelps but he had never been told of the necessity of contacting MSHA in the event of an accident (Tr. 45). O'Donnell was not aware of the 24-hour number in Washington, D.C. (Tr. 45). O'Donnell notified MSHA and BLM the following morning (Tr. 46).

The recovery operations terminated about 10:30 p.m. (Tr. 46).

Before the fatality, on May 20, 1985, MSHA Inspector Ron Phelps conducted a CAV inspection at the gravel pit (Tr. 46, 47). This was the first MSHA inspection in the 20 years that the pit has been in operation (Tr. 47, 49). The purpose of the CAV inspection was to determine if there were any problems at the pit. No penalty assessments are issued as a result of a CAV inspection. The pit is operated on a seasonal basis and it was not in operation at the time of the CAV inspection (Tr. 48). As a result of the inspection, non-penalty CAV notices were issued (Tr. 49, Ex. R2, R3). The notices dealt mainly with deficiencies in screening equipment and shielding (Tr. 51).

As a result of the fatality, MSHA issued six citations to Ouray County.

None of the citations in the instant cases deal with the matters that were discussed in the prior CAV report (Tr. 52). The County did everything required of them by the CAV notices. Further, if the County had been advised of any other deficiencies it would have abated any violative conditions (Tr. 53).

Citation 2355137 deals with operations under a dangerous highwall. This highwall was not in existence on May 20 (Tr. 53). An illegal highwall is one that exceeds the height of the loader bucket, or about 14 feet (Tr. 54, 62). There was such a highwall in existence on May 20 but the County was not advised of any such deficiency (Tr. 54, 79, 80).

Citation 2355138 deals with failure to establish standards for safe control of a pit highwall. The situation in regard to this regulation was the same on June 25 as it was on May 20 (Tr. 54).

Citation 2355139 deals with the failure to provide a suitable communication system. There was no such system in existence on May 20 (Tr. 56).

Citation 2376689 deals with an employee operating alone in the workplace. On May 20 this was the customary practice at the site (Tr. 56).

After receiving the citations the County submitted a new mining plan to BLM (Tr. 57).

With the exception of Citation 2376690 (failure to notify MSHA), all of the conditions for which the County was cited after the fatality, existed on May 20, 1985 (Tr. 80).

O'Donnell had heard that a BLM official had told Ouray County that the highwall had to be sloped on an angle of one to three. But that was for reclamation (Tr. 63-65).

The witness believed the people involved had sufficient expertise to conduct recovery operations but in failing to notify it, MSHA was denied the opportunity to make a similar judgment (Tr. 65).

Ronald Phelps, an MSHA inspector with 20 years of mining experience, conducted the CAV inspection at the County pit (Tr. 82, 83).

At the time of the inspection he inspected the highwall where the fatality subsequently occurred (Tr. 84). When the regulation uses the term highwall it does not distinguish between a highwall and a pit wall or pit face (Tr. 85). The highwall at the time of the CAV inspection was sloped to a safe angle of repose of one-and-one-half to one. The highwall did not constitute a hazard at that time (Tr. 86).

During his first visit the inspector discussed the County's mining methods with Mr. O'Donnell. At that time the inspector advised him that the pit must meet minimum sloping requirements (Tr. 87, 89). Mr. O'Donnell indicated they followed a safe angle of repose of approximately two to one (Tr. 88). During their conversation the inspector also indicated that they should be cautious about mining the toe of the highwall (Tr. 88). During the CAV inspection the highwall was discussed with Pat O'Donnell and Ken Williams, a County Commissioner (Tr. 89). Areas of the pit with vertical highwalls were discussed (Tr. 89, 90). At the base of the highwall, there was considerable slough that would prevent a person from being exposed to the hazardous conditions (Tr. 90).

At the time of the CAV inspection the inspector did not think there was a hazard because the vertical wall area was blocked off from employees (Tr. 91).

At the time of the CAV inspection the inspector was advised that the County was not mining the area at the vertical highwall.

In additon, the area under the vertical highwall was blocked off so employees could not go into the area (Tr. 91). In areas where they planned to mine there was a safe angle of repose (Tr. 91).

Inspector Phelps' field notes made at the time indicated the highwall sloping was discussed [with Pat O'Donnell and Ken Williams] (Tr. 94; Ex. P5).

The witness visited the site approximately 30 days after the fatality. Exhibits P1 and P2 depict the highwall. No condition as indicated in the photographs existed at the time of the CAV inspection. If he had observed the loader operating under the highwall he would have immediately issued a withdrawal order. He would also have caused the highwall to be sloped at a safe angle of repose and benches installed (Tr. 95, 96).

Phelps prepared the CAV notices. Their purpose was to disclose hazardous conditions and give the operator a time to correct them (Tr. 96). Notices are only written on conditions as they exist at the time of an inspection. First-aid training and first-aid supplies are mentioned in R3 but not R2 (Tr. 98; Ex. R2, R3). These were not put in the CAV notices because the crew was not on site to see if anyone had a first-aid card; further, the inspector could not determine if first-aid supplies were kept on the pickup truck. The pickup truck was not on the site (Tr. 98).

The witness inquired about the method of operations, the equipment used and the number of employees who normally worked at the pit. He also learned they had a radio on the pickup (Tr. 98, 99). The inspector spent about two hours going over various subparts of 30 C.F.R. with Mr. O'Donnell (Tr. 99). The communication system working alone would not have helped Martinez since he was working alone.

The witness agrees with O'Donnell's testimony that a highwall with a vertical surface in excess of 14 feet would be unsafe. When the inspector visited the site he saw vertical surfaces in excess of 14 feet (Tr. 100). These areas had apparently been mined some time in the past (Tr. 101).

In rebuttal, witness O'Donnell testified he did not remember any discussions with Phelps about the highwall.

O'Donnell acted on the CAV notices he received from MSHA. He would have taken action on the highwall if he had received such a notice.

Discussion

Respondent generally asserts that the issues in the instant cases are identical to the issues involved in Jefferson County Road and Bridge Department, 9 FMSHRC 56 (1987).

The identity urged by respondent is limited to certain threshold issues of jurisdiction and defective filing procedures, hereinafter discussed. Respondent's additional arguments address estoppel and the substance of the violation of Citation 2376690 (Tr. 8-14, 113-115).

The County argues that the Secretary lacks authority to enforce the federal Mine Act against respondent for a number of reasons.

Initially, it is asserted that Congress in passing the Act did not intend to regulate states or political subdivisions thereof. This is so because neither the statutory definition of "operator" or "person" speak to the regulation of state or local governments. Cognizant of federalism concerns, Congress explicitly brings state and local governments within the purview of the statutory scheme if it intends to regulate their activity. For example, Congress so acted in amending the Fair Labor Standards Act, 29 U.S.C. § 203(d), (x). See also Garcia v. San Antonio Metropolitan Transit Authority, _____ U.S. _____, 105 S.Ct. 1005 (1985).

This issue is a matter of statutory construction and legislative intent.

The federal Mine Act defines an operator as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine..." (emphasis added) 30 U.S.C. § 802. In the preamble of the Act Congress explicitly stated that it recognized "the existence of unsafe and unhealthful conditions and practices in the Nation's ... mines (emphasis added). Accordingly, the Act was promulgated to meet the "urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's ... mines in order to prevent death and serious bodily harm ..." (emphasis added). It is apparent here that a mine operated by a county is one of the Nation's mines. The Act was designed and Congress declared that "the first priority of all in the coal or other mining industry must be the health and safety of its most precious resource - the miner", 30 U.S.C. § 801.

A reading of the legislative history establishes the clear intent of Congress. S. Rep. No. 95-181, 95th Cong., shows the congressional views:

> The Committee believes that it is essential that there be a common regulatory program for all operators and equal protection under the law for all miners. Thus, a principal feature of the bill is the establishment of a single mine safety and health law applicable to the entire mining industry.
>
> Further, the Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act. (Emphasis added)
>
> S.Rep. No. 95-181, 95th Cong., 1st Sess. (1977), reprinted in 95th Cong., 2nd Sess. Legislative History of the Federal Mine Safety and Health Act of 1977, 601, 602.

Sand, gravel and crushed stone operations, whether privately operated or operated by a local government unit have been covered by the federal mine safety law since 1966 when the Federal Metal and Nonmetallic Mine Safety Act (Metal Act) was enacted. Historically there has never been any serious question that sand and gravel are minerals and that their extraction is mining, Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir., 1979); Marshall v. Nolichuckey Sand Co. Inc., 606 F.2d 693 (6th Cir., 1979). Sand and gravel operations are classical mining operations. The methods and equipment used in sand and gravel mining are similar, if not identical to, the methods and equipment used in the mining of many other minerals. The hazards faced by workers engaged in extracting sand, gravel, and crushed stone are similar and in many cases they are identical to the hazards faced in other mining operations.

The Metal Act was repealed in 1977 and all mining operations were placed under the present statute. However, the safety and health standards applicable to sand, gravel, and crushed stone operations issued under the Metal Act continue in effect under the 1977 Act.

Because sand, gravel, and crushed stone operations are "mines", as defined in section 3(h)(1) of the Act, they are subject to the provisions of the Act and the regulations issued thereunder. The fact that a pit is operated by a governmental unit

rather than a private party is immaterial. When a state or local government engages in an activity subject to Congressional regulation, such as in operating a railway or a mine, the state or local government is subject to regulation in the same manner as a private citizen or corporation. Parden v. Terminal Ry. of Ala. State Docks Dept., 377 U.S. 184, 84 S.Ct. 1207 (1964).

Respondent further argues that Congress explicitly brings state and local governments within the purview of the statutory scheme if it intends to regulate their activity citing such legislative action in amending the Fair Labor Standards Act, 29 U.S.C. § 203(d)(1) and relying on Garcia v. San Antonio Metropolitan Transit Authority, supra.

I agree that Congress certainly may legislate by particularly naming those entities that are subject to the legislation. In fact, Congress did so in extending minimum-wage coverage over a period of time while gradually expanding the coverage.

When FLSA was enacted in 1938, its wage and overtime provisions did not apply to local mass-transit employees, the subject of the Garcia case, §§ 3(d), 13(a)(9), 52 Stat. 1060, 1067. In 1961 Congress extended minimum-wage coverage to employees of any mass-transit carrier whose annual gross revenue was not less than one million. Fair Labor Standards Amendments of 1961, §§ 2(c), 9, 75 Stat. 65, 71. In 1966 Congress extended FLSA coverage to state and local government employees for the first time. Fair Labor Standards Amendments of 1966, §§ 102(a) and (b), 80 Stat. 831. In 1974 Congress provided for the progressive repeal of the surviving overtime exemption for mass transit employees. Fair Labor Standards Amendments of 1974, § 21(b), 88 Stat. 68. At the same time Congress simultaneously brought the States and their subdivisions further within the ambit of the FLSA by extending FLSA coverage to virtually all state and local government employees, §§ 6(a)(1) and (6), 88 Stat. 58, 60, 29 U.S.C. §§ 203(d) and (x).

As noted above, Congress gradually expanded FLSA coverage and finally specifically included states and local governments. Congress could have specifically named the states and counties in the Mine Act but it is not obliged to legislate in that fashion. In addition, the gradual extension of the FLSA coverage indicates a piece-meal approach to coverage under that Act. A similar legislative approach did not occur in the enactment of the federal Mine Act. The broad statutory definitions, supported by the legislative history, establish that Congress intended to include all mines and miners within the ambit of the federal Mine Act.

Respondent further contends that its gravel pits are not subject to the Act's coverage because its products neither enter commerce nor affect it.

The evidence is uncontroverted that the gravel from the mines is not sold. It is, in fact, used exclusively to surface the county roads. In addition, Ouray County's roads do not extend beyond the boundaries of the State of Colorado.

The Act encompasses within its coverage the following:

> Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner shall be subject to the provisions of this chapter. 30 U.S.C.A. § 803.

Further, commerce is defined as follows:

> (b) "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof. 30 U.S.C.A. § 802(b).

The issue to be addressed is whether the County's gravel operations "affect commerce." As a threshold matter the term "affecting commerce" has been given a broad judicial interpretation. Garcia v. San Antonio Metropolitan Transit Authority, supra; Marshall v. Kraynack, 604 F.2d 231 (3d Cir. 1979); Godwin v. OSHRC, 540 F.2d 1013 (1976)(9th Cir); United States v. Dye Construction Co., 510 F.2d 78 (1975)(10th Cir.); Brennan v. OSHRC, 492 F.2d 1027 (2d Cir. 1974); Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82.

In this case the testimony of witness O'Donnell is uncontroverted that the gravel is used solely on county roads. The extracted materials are not sold, bartered or traded. However, it is apparent that if the County relinquished its lease it would be required to purchase the material from a commercial source. The lease and removal of the gravel accordingly "affects commerce" as that term is contemplated by the above-cited case law.

Morton v. Bloom, 373 F. Supp. 797 (D.C. Pa. 1973), relied on by respondent, presents a unique factual situation of a mine operated by one man. In that circumstance, the Court ruled that the local nature of the mine did not affect commerce. The case has not been followed as precedent for later decisions. In short, it appears to have a very narrow application not applicable here.

The Commission has yet to consider the jurisdictional issues raised here but decisions by judges of the Commission have held that a governmental gravel operation is subject to the federal Act. New York State Dept. of Transportation, 2 FMSHRC 1749 (1980), Laurenson, J.; Island County Highway Department, 2 FMSHRC 3227 (1980), Morris, J.; Salt Lake County Road Dept., 2 FMSHRC 3409 (1980), Vail, J.

Respondent further contends that it was not properly sued. Specifically it relies on Section 30-11-105, C.R.S. 3/ Colorado appellate courts have construed this statute and held that an action brought against a county under a designation that does not comply with the statute is a nullity and no valid judgment can be entered, Calahan v. County of Jefferson, 163 Colo. 212, 429 P.2d 301 (1967).

I reject respondent's argument.

This is not a proceedings under the Colorado statutes but it is an adjudicatory proceedings provided for in 30 U.S.C. § 113(a) and the applicable Rules of Procedures, 29 C.F.R. § 2700 et seq. To like effect on this issue see the case decided by the Interior Board of Mine Operations in Harlan No. 4 Coal Company, 4 IBMA 241 (1975).

An additional issue centers on whether the Secretary can be estopped in the factual scenario involved here. Respondent asserts estoppel arises because MSHA conducted a CAV inspection before the Martinez fatality occurred. Briefly stated, the County complied

---

3/ The cited statute provides:

> 30-11-105. Title of suits by or against county.
>
> In all suits or proceedings by or against a county, the name in which the county shall sue or be sued shall be, "The board of county commissioners of the county of ....; but this provision shall not prevent county officers, when authorized by law, from suing in their name of office for the benfit of the county.

and corrected all of the deficiencies raised by the CAV inspection. Therefore, if the CAV inspector had mentioned the defective highwall the County would have corrected the defect and thereby avoided the subsequent fatality.

At the outset I agree that equitable estoppel is a rule of justice which, in its proper field, prevails over all other rules. City of Chetopa v. Board of County Com'rs, 156 Kan 290, 133 P.2d 174, 177 (1943). Generally four elements must be present to establish the defense of estoppel. These are (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. United States v. Georgia Pacific Company, 421 F.2d 92, 96 (1970), (9th Cir.).

In this case it is clear that the CAV inspector did not learn that mining was ever taking place under the highwall. The authority for a CAV inspection arises from an MSHA memorandum. The thrust of the memorandum mandates such inspections may only be made when the mine is not operating.

I credit the inspector's testimony and expertise in this respect. If he had observed a miner working under the highwall he would have issued an immediate withdrawal order. Further, the inspector's notes reflect that he discussed the sloping of the highwall with the County officials at the CAV inspection. For these reasons it is clear the party to be estopped had not been apprised of the operative facts. In sum, he had not been advised that the County was mining at the highwall (Ex. P5).

A factual setting might well arise that would invoke the doctrine of equitable estoppel. However, the doctrine should only be applied in limited circumstances, otherwise, it would deprive miners of the protection of the Mine Safety Act because of a public official's erroneous act. Maxwell Company v. NLRB, 414 F.2d 477 (1969); Udall v. Oelschlaeger, 389 F.2d 974 (1968). For a general discussion of the doctrine of collateral estoppel also see the Commission decision of King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

Respondent's final argument addresses the substance of the single contested citation for the violation of § 50.10.

The uncontroverted evidence establishes that Mr. Martinez was killed at the quarry and his body discovered at 2:30 p.m. on June 24, 1985. MSHA was not notified until 0945 hours the following

morning. The facts are that the County did not "immediately" contact MSHA. Accordingly, the citation should be affirmed.

Based on the record and the stipulation of the parties I conclude that the Commission has jurisdiction to decide this case. Further, all citations and penalties herein should be affirmed.

Based on the stipulation, the facts and the foregoing conclusions of law I enter the following:

ORDER

The following citations and proposed penalties are affirmed:

WEST 86-8-M

Citation	Penalty
2376545	$20
2376546	20
2376547	20
2376548	20

WEST 86-9-M

Citation	Penalty
2355137	$200
2355138	500
2355139	50
2376688	200
2376689	100
2376690	50

WEST 86-66-M

Citation	Penalty
2633933	$54
2633934	20

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 8, 1987

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 86-29-R
	:	Order No. 2605648; 12/2/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 3 Mine

ORDER OF DISMISSAL

Before: Judge Merlin

In light of the Commission's decision in Jim Walter Resources, Inc. v. Secretary of Labor, 9 FMSHRC 903 (1987), the Solicitor advises MSHA is vacating Order No. 2605648 which is the subject of the above-captioned case. In addition, the operator states that it withdraws its request for hearing.

Accordingly, this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 8, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 86-273
	:	A. C. No. 36-06123-03502 BPO
v.	:	
	:	Smith Mine
PERRY DRILLING COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

The Commission has been informed by the operator, and the Secretary confirms, that the penalty assessed in this case has been paid. Accordingly, this case is DISMISSED.

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 9 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 86-391
	:	A.C. No. 46-06448-03501 GF7
v.	:	
	:	Rock Lick Preparation Plant
DOVER ELEVATOR COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty proposal filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $58 for an alleged violation of mandatory safety standard 30 C.F.R. § 77.400(a), as stated in a section 104(a) Citation No. 2584200, issued to the respondent on April 21, 1986. Petitioner has filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of a proposed settlement of the case. The respondent has agreed to pay the full amount of the proposed civil penalty assessment.

Discussion

The proposed settlement is for 100 percent of the initial proposed civil penalty assessment for the violation in question. In support of the proposed settlement disposition of this case, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. In addition, the petitioner has submitted a full discussion and disclosure as to the facts and circumstances surrounding the issuance of the violation in question.

Conclusion

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

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $58 in satisfaction of the violation in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 9 1987

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 87-222-R
	:	Citation No. 2699139; 6/5/87
v.	:	
	:	Arkwright No. 1 Mine
	:	
	:	Docket No. WEVA 87-223-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 2708499; 6/5/87
	:	
	:	Humphrey No. 7 Mine
	:	
	:	Docket No. WEVA 87-224-R
	:	Citation No. 2902641; 6/5/87
	:	
	:	Osage No. 3 Mine
	:	
	:	Docket No. WEVA 87-225-R
	:	Citation No. 2707824; 6/5/87
	:	
	:	Pursglove No. 15 Mine
	:	
	:	Docket No. WEVA 87-226-R
	:	Citation No. 2902614; 6/5/87
	:	
	:	Blacksville No. 1 Mine
	:	
	:	Docket No. WEVA 87-227-R
	:	Citation No. 2902888; 6/5/87
	:	
	:	Blacksville No. 2 Mine
	:	
	:	Docket No. WEVA 87-228-R
	:	Citation No. 2699155; 6/5/87
	:	
	:	Loveridge No. 22 Mine
	:	
	:	Docket No. WEVA 87-229-R
	:	Citation No. 2705133; 6/5/87
	:	
	:	Robinson Run No. 95 Mine

DECISION

Appearances: Michael R. Peelish, Esq., Consolidation Coal Co., Pittsburgh, Pennsylvania, for Contestant; James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Maurer

These cases are before me upon a notice of contest and motion to expedite filed by the Consolidation Coal Company (Consol) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," and Commission Rule 52, 29 C.F.R. § 2700.52, challenging the validity of eight § 104(a) citations. One citation, as listed above, was issued to each of the eight Consol mines herein involved. A hearing was held in Morgantown, West Virginia, on June 16, 1987.

The issue in this case is whether a violation of the mandatory standard at 30 C.F.R. § 75.1101-23(a) existed as alleged in the virtually identical eight citations. The model citation reads as follows:

> The program being used for instruction of all miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface and proper evacuation procedures to be followed in the event of an emergency has not been approved by the District Manager.

The cited standard at 30 C.F.R. § 75.1101-23(a) provides as follows:

> Each operator of an underground coal mine shall adopt a program for the instruction of all miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency. Such program shall be submitted for approval to the District Manager of the Coal Mine Health and Safety District in which the mine is located no later than June 30, 1974.
>
> (1) The approved program of instruction shall include a specific fire fighting and evacuation plan designed to acquaint miners on all shifts with procedures for:
>
> (i) Evacuation of all miners not required for fire fighting activities;

(ii) Rapid assembly and transportation of necessary men, fire suppression equipment, and rescue apparatus to the scene of the fire; and

(iii) Operation of the fire suppression equipment available in the mine.

(2) The approved program of instruction shall be given to all miners annually, and to newly employed miners within six months after the date of employment.

FINDINGS OF FACT

1. Consol owns and operates the eight mines listed in the caption of this decision.

2. On or before June 30, 1974, Consol submitted a program for the instruction of miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface and proper evacuation procedures to be followed in the event of an emergency to the appropriate MSHA District Manager for each of the eight mines herein involved. These programs were approved by the appropriate District Manager between the first of May and the end of July 1974.

3. At the time of approval, it is generally agreed that each of these eight programs contained the current information with regard to the required emergency procedures including specific data concerning escape routes and locations of fire fighting equipment, as well as an evacuation and fire fighting plan.

4. By memorandum dated May 6, 1987, directed to all underground coal mine operators, Ronald Keaton, the District Manager for the Third District of MSHA, informed Consol of the following:

> Our records indicate that your approved Program of Instruction, Fire Fighting and Evacuation Plan, is outdated and needs to be updated. Please provide an updated program within seven days from receipt of this letter. Please include an updated map showing escapeways, exits, and routes of travel to the surface. In the future, this plan will be reviewed every six months. If you wish to include an updated escapeway system and any revisions to your program with your ventilation plan, please indicate so in your program submittal. Failure to respond could result in a violation of 75.1101-23.

5. On May 26, 1987, Consol responded to Mr. Keaton's memorandum of the 6th. They furnished the requested information, but only as a "courtesy" and for "informational

purposes only," specifically stating that "[I]t is not being submitted for approval."

6. On May 27, 1987, Mr. Keaton informed Consol by letter that failure to submit the required update data for amendment and approval purposes could result in withdrawal of the approval for the programs and plans then currently on file with MSHA. He further informed Consol that failure to have an approved plan could result in a violation of 30 C.F.R § 75.1101-23(a).

7. Subsequently, Mr. Keaton ordered a review of the section 75.1101-23(a) programs for the eight mines herein involved. In general terms, he found them to be antiquated plans.

8. More specifically, for each of the eight mines enumerated above:

(a) The deficiencies noted in the approved § 75.1101-23 (a) programs and plans for the Robinson Run No. 95 mine included:

(1) Areas listed as active working sections which are currently abandoned and/or sealed.

(2) All current active mining sections are not contained in the plan.

(3) Designated escapeways have changed, several of those noted in the plan are inaccessible and those in use are not listed in the plan.

(4) The location of electrical equipment is different and all current locations are not listed.

(5) The location of firefighting equipment is different and all current locations are not listed.

(b) The deficiencies noted in the approved § 75.1101-23(a) programs and plans for the Arkwright No. 1 mine included:

(1) Outdated locations for firefighting equipment are listed.

(2) Incorrect data regarding mine rescue teams is listed.

(3) Escape shafts are listed which no longer exist and current escapeways are not listed.

(4) Working sections are listed which no longer exist.

(5) Incorrect names and telephone numbers for mine officials to be contacted are listed.

(6) Longwall mining is done at this mine and the plan contains no firefighting procedures for longwall mining.

(c) The deficiencies noted in the approved § 75.1101-23(a) programs and plans for the Loveridge No. 22 mine included:

(1) Several of the listed "fire areas" are in abandoned areas of the mine and/or sections which are no longer active.

(2) Several designated escapeways are no longer used or usable.

(3) Firefighting equipment locations are outdated.

(d) The deficiencies noted in the approved § 75.1101-23(a) programs and plans for the Blacksville No. 1 mine included:

(1) The noted designation color key for intake escapeway on mine maps has changed.

(2) Escapeways are designated in the evacuation plan which no longer exist.

(3) Locations are noted for firefighting equipment which have changed.

(4) Locations are noted for telephones which have changed.

(5) Locations are noted for sealing (emergency) materials which have changed.

(6) Several working sections listed no longer exist.

(7) Longwall section firefighting programs are omitted despite the existence of longwall mining.

(8) Ventilation fans are listed which may no longer exist.

(e) The deficiencies noted in the approved § 75.1101-23(a) programs and plans for the Blacksville No. 2 mine included:

(1) Areas designated as escapeways which are no longer used.

(2) Locations of firefighting equipment which have changed.

(3) Locations of sealing (emergency) materials which have changed.

(4) Ventilation fans are listed which no longer exist.

(5) Most working sections no longer exist as listed in the evacuation plan.

(f) The deficiencies noted in the approved § 75.1101-23(a) programs and plans for the Osage No. 3 mine included:

(1) Working sections are listed which no longer exist.

(2) Ventilation fans are listed which no longer exist.

(3) Escape shafts are listed which no longer exist.

(4) The locations for fire outlets include areas which are no longer present and exclude areas which currently exist.

(5) The two currently active sections for the mine are not included in the plans.

(6) The names and telephone numbers of personnel to be contacted in emergencies are not accurate.

(7) The mine contains longwall mining areas but no longwall section fire fighting procedures are listed.

(g) The deficiencies noted in the approved § 75.1101-23(a) programs and plans for the Pursglove No. 15 mine included:

(1) Working sections are listed which no longer exist.

(2) Ventilation fans are listed which no longer exist.

(3) Escape shafts are listed which no longer exist.

(4) Locations for fire outlets are not accurate in that some listed outlets no longer exist and other existing outlets are not listed.

(5) The current active sections of the mine are not listed.

(6) There are no longwall section firefighting procedures listed.

(7) The names and telephone numbers of personnel to be contacted in emergencies are not accurate.

(h) The deficiencies noted in the approved § 75.1101-23(a) programs and plans for the Humphrey No. 7 mine included:

(1) Outdated locations were listed for firefighting equipment.

(2) Incorrect mine rescue team information was noted.

(3) Outdated listings of ventilation fans.

(4) Escape facilities and escape shafts are listed which no longer exist.

(5) Working sections are listed which no longer exist.

(6) The names and telephone numbers of personnel to be contacted in emergencies are not accurate.

9. None of the plans contained provisions detailing the location and use of self-contained self-rescuers, which are now an indispensable piece of equipment used in emergency evacuations.

10. Several of the programs included references to practices and procedures which have since been modified and/or made illegal by subsequent changes in MSHA regulations, such as the 15 minute fan shutdown removal from area provisions, the use of gas masks, and equipment movement provisions.

11. On June 4, 1987, Mr. Keaton notified Consol that the foregoing section 75.1101-23(a) programs were disapproved because they were out of date and inaccurate in the respects noted above and because the operator had not submitted relevant updated programs for approval.

12. On June 12, 1987, each of the above eight mines was issued a section 104(a) citation for a violation of 30 C.F.R. § 75.1101-23(a).

13. In May of 1986, Mr. Keaton had written a similar memorandum to that in evidence as Exhibit No. JX-1 and dated May 6, 1987 (see Finding of Fact No. 4). There was a non-response to that earlier memo, but no follow-up enforcement was carried out. No citations were issued at that time or subsequently until June 12, 1987.

14. Consol conducts training for miners at each of these eight mines on a regular basis, giving instruction in fire fighting and evacuation procedures utilizing current information concerning escapeways, exits, routes of travel to the surface, etc. In this regard, I specifically find that Consol utilizes the old 1974 plans and programs for this purpose only to the limited extent that the more general portions of those documents are still applicable in 1987.

15. Consol also conducts fire drills and mock mine evacuations on a regular basis at these eight mines.

16. However, none of the evacuation and fire fighting plans actually being used today, in 1987, by Consol for new miner training or newly employed miner training or fire drills or evacuation drills have been approved by the District Manager under 30 C.F.R. § 75.1101-23(a).

17. From MSHA's standpoint, the lack of up-to-date approved evacuation and fire fighting programs could conceivably in the event that that information was needed by MSHA personnel because of a mine fire or other evacuation emergency, hinder mine rescue or other emergency operations to the extent that those MSHA personnel were assisting with the emergency and needed current data.

18. Insofar as specific mine information is or was included in those plans and programs of 1974, which were on file with MSHA, I find that as generally acknowledged most of it is inapplicable to the current situation at the mines and would be of little or no use to MSHA in the event of an emergency.

19. These original section 75.1101-23(a) plans, which were submitted and approved by MSHA in May-July 1974 remained

in effect as the approved program until June of 1987, even though the specific details of these plans were outdated for many years. Mr. Keaton explained that they had their attention focused in other areas. It was just a matter of priorities.

DISCUSSION, FURTHER FINDINGS OF FACT, AND CONCLUSIONS OF LAW

On it's face, the cited regulation, 30 C.F.R. § 75.1101-23(a), contains two requirements. The first requires the operator to adopt a program for the instruction of miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface and proper evacuation procedures to be followed in emergencies. The regulation also clearly requires that such a program, once adopted, be submitted for approval to the District Manager of the Coal Mine Health and Safety District in which the mine is located no later than June 30, 1974. Consol complied with this requirement in a timely fashion back in 1974. I note here that there is no stated regulatory requirement for this program ever to be submitted for approval again.

The second requirement contained in this subsection is that contained in (a)(2) wherein it requires that the approved program of instruction be given to all miners annually, and to newly employed miners within six months after they are employed. This plainly has not been done by Consol for many years, at least not in the particular mine specific areas of these programs for the simple reason that the specifics have changed many times over in the intervening thirteen years. It would be ridiculous for example to instruct a miner to go to a long-closed escape facility in the event of an emergency just because that was part of the approved plan (circa 1974).

MSHA's position in this case is that their interpretation of the regulatory requirements should prevail albeit that those "requirements" are admittedly not directly stated in so many words. That interpretation is, at least in the Third District of MSHA, and at least since May 6, 1987, that these plans and programs approved back in 1974 need to be reviewed and updated every six months, in order to retain their approved status. This has a lot of common sense appeal since there obviously are significant changes going on in an active, producing coal mine that would significantly affect fire-fighting and evacuation plans and procedures, at least insofar as specific particulars are concerned. However, one has to first wonder why MSHA doesn't require this review and updating by regulation rather than by District Manager memorandum, and secondly, why it took them thirteen years to get around to it.

It is a matter of hornbook law that courts must accord great deference to an agency's construction of regulations which it has drafted and continues to administer. See generally, Udall v. Tallman, 380 U.S. 1 (1965). To uphold the interpretation, a court need not find the agency's interpretation to be the only or the most reasonable one. City of Aurora v. Hunt, 749 F.2d 1457, 1462 (10th Cir. 1984). "A regulation must be interpreted so as to harmonize with and further and not conflict with the objective of the statute it implements." Emery Mining Corp. v. Secretary of Labor (MSHA), 744 F.2d 1411, 1414 (10th Cir. 1984); (quoting, Trustees of Indiana University v. United States, 223 Ct. Cl. 88, 618 F.2d 736, 739 (1980)). In Emery, the issue before the Court was the proper interpretation of the words "annual refresher training" found in 30 C.F.R. § 48.8. While the Court found that it was possible to construe the words to permit training given up to 23 months apart on a calendar year basis, the Court emphatically rejected such construction as undermining the Act, concluding that it is "at odds" with the language and objective of the statute [to train each 12 months], "even if arguably consistent with the language of the regulation."

However, contrary to MSHA's "interpretation," with regard to the first requirement of § 75.1101-23(a); that pertaining to the submission of programs and plans for the approval of the District Manager, on or before June 30, 1974, I specifically find that this is clearly a one-time requirement. It is not subject to any other interpretation because the wording is quite clear and incapable of being "interpreted" to mean something else. Further, the policy memorandum issued by the District Manager, which is in evidence as Exhibit JX-1 is not enforceable and its contents conflict with the plain meaning of § 75.1101-23(a). There is no language in this regulation that would inform an interested party that periodic reviews at six-month intervals are required. If that is what was intended, the drafter could very easily have included a comma and a follow-on phrase after "June 30, 1974" to the effect ". . .June 30, 1974, and thereafter, at intervals of at least every six months." But he didn't.

The Secretary is aware of similar regulatory language since two other regulations requiring the submission, review, and subsequent approval or disapproval of plans do include such language. The regulation at 30 C.F.R. § 75.200 provides that "[A] roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. . . .Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs

or inadequacy of support of roof or ribs. . ." And, in 30 C.F.R. § 75.316, it is provided that "[A] ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. . . . Such plan shall be reviewed by the operator and the Secretary at least every 6 months."

This type of language establishing automatic review of approved plans is conspicuously missing in 30 C.F.R. § 75.1101-23, and I find that Mr. Keaton and his memorandum of May 6, 1987, cannot now legally and belatedly supply the missing words.

That said, it is still incumbent upon Consol to comply with all of § 75.1101-23(a), including subsection (a)(2), which states that the approved program of instruction be given to the miners in their employ. Therein lies the problem for Consol and that is the exact violation cited in the eight virtually identical citations. As I found in Finding of Fact No. 16, none of the eight mines involved herein are actually using the approved program of instruction that was submitted and approved back in 1974. Not that they should be under the circumstances, but the fact is, they are not. I accept as credible evidence the contestant's proffered testimony that the operator is still using the more general portions of those plans, but the fact remains that large portions, the majority of the plans, are simply out of date and unusable for emergency training. Thus, the paradox—the operator need not by the stated terms of the cited regulation do anything to update or revise the once-approved program, however, since they must train their miners in accordance with § 75.1101-23(a)(2) using an approved program, there is a de facto requirement to have a current, approved program. Neither a current, unapproved program or an approved, outdated program will suffice as a practical matter. Therefore, it follows that "something" has to be submitted to MSHA in order to make the actual program of instruction also the approved program of instruction, even though the regulation per se is silent on the subject.

At the hearing, and in their respective briefs, the parties argue the current status of the 1974 plans. The Secretary urges that those plans, once admittedly approved long ago are now disapproved by fiat of the District Manager. Consol, on the other hand, argues that the District Manager's actions were arbitrary and capricious and without the force and effect of law. After much reflecting I don't think that issue is particularly relevant to the alleged violation herein because regardless of whether or not Consol did or didn't

have an "approved" program filed with MSHA at the time the citations were issued, the fact is they were not actually using it to instruct their miners as required by 30 C.F.R. § 75.1101-23(a)(2). The fact that Consol might very well have been using an adequate "unapproved" program or a "self-approved program" in some or all of their mines does not satisfy the regulatory requirement of subsection (a)(2). Therefore, I find a violation of 30 C.F.R. § 75.1101-23(a)(2), as alleged, in each of the eight citations at bar.

A violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission has explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). (Emphasis deleted). They have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. 6 FMSHRC at 1836.

In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event. The Commission has consistently held that proof that the injury-causing event is reasonably likely to occur is what is required. See, e.g., U.S. Steel Mining Co., 7 FMSHRC at 1125; U.S. Steel Mining Co., 7 FMSHRC 327, 329 (March 1985).

The violation I have already found. The discrete safety hazard here is that miners could be inadequately trained if

the program of instruction under which they are actually trained in such important areas as fire fighting and evacuation procedures is inadequate. I do not make any finding that the program they actually use is inadequate, only that it is unapproved and might be inadequate. In this regard, I note that MSHA has not passed on the adequacy of the training program they actually use, primarily because Consol has not submitted it for approval, but has recently "disapproved" the 1974 program which they haven't used for years anyway.

It is axiomatic that an inadequate, incomplete or deficient program of instruction covering these important subjects could reasonably lead to injury and/or loss of life in the event that an emergency should occur requiring immediate action. Again, I do not know if the programs Consol is actually using are inadequate, incomplete or deficient, but I do know they are unapproved, and therefore could or might be all three. Also, as I set out in Findings of Fact Nos. 17 and 18, since MSHA's official file copies of the operator's fire fighting and evacuation plans and programs are out-of-date and generally inapplicable to the current situation at the mine, any assistance that MSHA personnel might provide in the mine rescue and/or fire fighting operations could conceivably be delayed while they sought current information to act on.

Accordingly, I find the instant citations to be properly designated "significant and substantial."

In light of the foregoing, it is ORDERED that Citation Nos. 2699139, 2708499, 2902641, 2707824, 2902614, 2902888, 2699155, and 2705133 ARE AFFIRMED and that the operator's notices of contest of same be DISMISSED.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 10 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 86-291
	:	A. C. No. 36-04007-03512
v.	:	
	:	Mack Mine
ENERGY SUPPLY, INCORPORATED/ DONRAY INDUSTRIES, INCORPORATED, Respondent	:	
UNITED MINE WORKERS OF AMERICA ON BEHALF OF JEFFREY STENNETT, Complainant	:	COMPENSATION PROCEEDING
	:	Docket No. PENN 86-228-C
v.	:	Mack Mine
ENERGY SUPPLY, INCORPORATED/ DONRAY INDUSTRIES, INCORPORATED, Respondent	:	

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary; Vasilis C. Katsafanas, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

The above Civil Penalty Proceeding is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary (Petitioner) on November 5, 1986, alleging a violation by Energy Supply, Incorporated (Respondent) of 30 C.F.R. § 77.404(a). An Answer was filed by the Respondent on January 15, 1987. On February 6, 1987, I ordered the above Civil Penalty Proceeding to be consolidated with Docket No. PENN 86-228-C, as identical issues were involved in both cases i.e., the propriety of the issuance of Order No. 2695927. Pursuant to notice, these cases

were scheduled for hearing on May 5, 1987, in Pittsburgh, Pennsylvania. On April 29, 1987, a communication was received from the United Mine Workers of America, the representative of the Complainant in the above compensation case, indicating that it will not appear at the hearing on May 5, 1987, and would rely on evidence presented by the Secretary in the above Civil Penalty Proceeding regarding whether Order No. 2695927 was properly issued. The Civil Penalty Proceeding, Docket No. PENN 86-291, was heard on May 5, 1987, in Pittsburgh, Pennsylvania. Wendell Hill testified for the Petitioner and Raymond L. Hulings testified for the Respondent. At the hearing, Counsel for both Parties indicated that a settlement had been reached with regard to the following Citations: 2695932, 2695934, and 9945451 and Order No. 2695934. The Secretary, subsequently, on May 12, filed its Motion to Approve Settlement concerning these citations. For the reasons that follow, these Motions have been granted.

Petitioner filed its brief on June 25, 1987 and Respondent filed its brief on June 15, 1987.

Regulatory Provision

30 C.F.R. § 77.404(a) provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Issues

1. Whether Respondent violated 30 C.F.R. § 77.404(a).

2. If a violation of Section 77.404(a), supra, occurred, was it of such a nature as could have significantly and substantially contributed to the cause and effect of a safety hazard.

3. If a violation of Section 77.404(a), supra, occurred, whether such violation was caused by Respondent's unwarrantable failure to comply with Section 77.404(a).

Findings of Fact and Conclusions of Law

I have jurisdiction to hear and decide this case. The Respondent owns and operates the Mack Mine which is subject to the provisions of the Federal Mine Safety and Health Act of 1977.

On May 15, 1986, at approximately 9:30 a.m., Wendell Hill, a MSHA Inspector, in the course of an inspection at Respondent's Mack Mine, issued a 104(d)(2) Order in which he alleged that a Ford Truck, Model 800, that had a drill mounted on it, was not being maintained in good operating condition inasmuch as the

drive engine "will not operate," and the differential gears were "damaged." The Respondent does not contest the existence of the above conditions. Its owner and operator, Raymond Hulings indicated, in essence, that the truck's engine and gears had been inoperable for approximately 2 month prior to May 15, 1986. Although the truck's brakes were fully operable, it is clear that because the engine and gears were not operable, the truck was not maintained in a safe operating condition. Also, although the truck was not being used in a fashion that required its engine and gears to function, it was not removed from service as it was being used as a platform for a drill rig that was mounted on it, and was pushed or pulled by a bulldozer, 3 to 4 times a shift, to transport the drill to various drilling sites. As such, I conclude that Section 77.404(a) has been violated.

Upon the truck being pulled by a bulldozer from one drilling site to another the operator of the bulldozer, and the person sitting in the truck's cab to control it, would both be facing in the same direction. Accordingly, there would not be any possibility of visual communication between the two. Further, audio communication would be difficult. Thus, some degree of hazard would be created if the truck would be pulled down a grade. In this situation, the truck would not have the benefit of the braking power of its engine, and its rate of descent would be controlled solely by its brakes. Hence, there would be some degree of risk of a collision with the bulldozer. However, it was essentially the uncontradicted testimony of Hulings, that the truck is pulled at a speed of approximately one or two miles an hours, and that more than half the time when the truck is moved, it is moved along the bench which is level.

When the Order in question was issued, there was no lighting system in the area of the highwall. Thus, when the truck was being pushed by a bulldozer during an afternoon shift after sunset, the area behind the truck towards the highwall, would be illuminated only by the lights on the rear of the truck, as well as the headlights from the bulldozer. Also, were the person in the cab of the truck to apply the brakes to stop the truck, the operator of the bulldozer would notice a slight decrease in speed of the bulldozer and an increase in its RPMs. However, the application of the truck's brakes would not stop the bulldozer from pushing it. Accordingly, the failure to remove the truck from service, did create some degree of risk of the bulldozer pushing the truck over the highwall or causing it to come in contact with and injure a spotter who might be working in the area behind the truck.

I conclude that there is no evidence that the fashion in which the truck was used, when being pulled or pushed by the bulldozer, created any reasonable likelihood of a injury that

would of a reasonably serious nature. (See, Mathies Coal Co., 6 FMSHRC 1 (January 1984). In this connection, I note the uncontradicted testimony of Hulings, that the bulldozer pulling the truck was moving at about 1 or 2 miles an hour, and that more than half the time the truck was being pulled on a level grade. Also, when the truck was being pushed by the bulldozer, the blade of the bulldozer was not raised high enough to prevent the bulldozer operator from being able to see the operator of the truck who was facing him. In this regard, I rely more on the testimony of Hulings, whose testimony was based on his personal knowledge, rather than the upon testimony of Hill, whose knowledge in this regard was based upon what others told him. Taking into account the facts that the back of the drill had 12 volt flood lights, that the bulldozer travels at only 1 or 2 miles an hour, and that the operators of the truck and bulldozer were in visual contact, I find that the evidence does not establish that the failure to remove the 800 truck resulted in any reasonable likelihood of a reasonably serious injury. Therefore, based upon all of the above, I conclude that the violation by Respondent of 30 C.F.R. § 77.404(a), was not significant and substantial (See Mathies Coal Co., supra).

At the date the Order herein was issued, Hulings, Respondent's owner and operator, had known for 2 months that the engine and the gear of the 800 truck was inoperable. In spite of this, Respondent did not repair the truck nor did it remove it from service. Accordingly, I find that the violation of section 77.404(a), was due to Respondent "unwarrantable failure." (U. S. Steel Corp., 6 FMSHRC 1423 (June 1974).

Based upon the statutory criteria in Section 110 of the Federal Mine Safety and Health Act of 1977, I find that a penalty of $100 is appropriate for the violation of 30 C.F.R § 77.404(a).

Subsequent to the hearing, on May 14, 1987, the Petitioner has filed a Motion to Approve a Settlement Agreement for Citation No. 2695932, Citation No. 9954451, and Order No. 2695934. A reduction in penalty from $123 to $80 was proposed. I have considered the representations and documentation submitted, and I conclude that the proffered settlements are appropriate under the criteria set forth in Section 110(i) of the Act.

On May 22, 1987, the United Mine Workers of America and Energy Supply Incorporated filed a Joint Stipulation wherein they agreed that if Order No. 26959527 is found to have been properly issued, then Jeffery Stennett will be entitled to compensation pursuant to Section 111 of the Federal Mine Safety and Health Act of 1977. The Parties further stipulated that Energy Supply Incorporated will, within 15 days of the issuance of a final decision in PENN 86-291, pay Jeffery Stennett $526.05 plus interest

at the rate of 10 percent per annum. Considering this Stipulation, and the fact that I have found that Order No. 2695972 was properly issued, I conclude that Jeffery Stennett is entitled to compensation pursuant to section 111 of the Act, in the amount of $526.05 plus interest at the rate of 10 percent per annum.

ORDER

It is ORDERED that:

1. The operator pay the sum of $223, within 30 days of this decision, as a civil penalty for the violations found herein.

2. The operator pay Jeffery Stennett, within 15 days of this decision, $526.05 plus interest at the rate of 10 percent per annum.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 14, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 87-48
	:	A. C. No. 33-01159-03725
v.	:	
	:	Powhatan No. 6 Mine
NACCO MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENTS
ORDER TO PAY

On June 22, 1987, the Solicitor submitted a motion for settlement of the four violations presented on the penalty petition. The originally assessed penalties totaled $9,000 and the proposed settlements were for $7,000. On June 26, 1987, I advised the parties by telephone that I would not approve the motion as submitted. Thereafter the parties again conferred. On June 30, 1987, the Solicitor submitted an amended motion for settlement and proposed settlements totaling $7,500.

On July 16, 1986, MSHA conducted an investigation of a nonfatal mine accident that took place on the surface of NACCO's Powhatan No. 6 Mine on July 15, 1986. The investigation reported that at approximately 2:55 p.m. a road grader, while ascending the roadway, drifted backwards gaining speed as it descended the roadway. The grader overturned and injured the man who was running it. The subject citations arise from this incident.

Citation No. 2824598 was issued for a violation of 30 C.F.R. §77.403a(c)(1) because the grader did not have a rollover protective structure ("ROPS"). The Solicitor advises that although the lack of a ROPS was a violation of the cited standard, it was not a cause of the accident. The absence of a ROPS did not cause the grader to roll backwards. The existence of the ROPS might possibly have reduced the gravity of the injury, but in and of itself, did not contribute to the occurrence of the incident. Moreover, the grader was equipped with a substantial enclosed metal cab. The cab, however, did not rise to the level of being a ROPS. Finally, the grader had existed in this condition on the mine property for fifteen years without prior incident and without being cited by MSHA. Based upon the foregoing, gravity and negligence are somewhat less than originally thought. The

original assessment was $2,500 and the proposed settlement is $2,000. I approve the settlement which is a substantial amount.

Citation No. 2824599 was issued for a violation of 30 C.F.R. § 77.1605(k) because on the roadway where the accident occurred berms or guards were not provided. However, the MSHA inspector determined that the lack of berms or guards had no causal relationship to the accident. The grader rolled off on the right side of the road where berms were missing, not the left side. Furthermore, the 31 feet cited on the right was far removed from the accident site. The original assessment was $1,000 and the proposed settlement is $300. In light of the particular circumstances, set forth herein, I approve the recommended settlement.

Citation No. 2824600 was issued for a violation of 30 C.F.R. § 77.1710(i) because suitable seat belts had not been provided in the cab of the road grader. MSHA determined that the inadequacy of the seat belt did not cause the accident nor its severity. The Solicitor explained the method in which the grader is operated as follows:

> The use of the grader often requires that the operator stand up to view the area on either side of the grader and to observe the operation of the grader's blade beneath him. In this method of operation, the standard type of seat belt cannot be engaged. To compensate for the operational necessity of standing and to overcome the inadequacy of the standard seat belt in this situation, the operator is attempting to obtain and install seat harnesses that will allow attachment while standing.

It does not appear that MSHA ever has required the operator to have a seat harness other than the standard belt. The original assessment was $500 and the proposed settlement is $200. In light of the particular circumstances, set forth herein, I approve the recommended settlement.

Citation No. 2827922 was issued for a violation of 30 C.F.R. § 77.1605(b) because the grader had inadequate brakes. Repair work done on the braking system, the previous Saturday, resulted in the plugging of one of the hydraulic brakelines. Based on this, it was concluded that the brakes were inadequate and this inadequacy was the cause of the aforementioned accident. The original assessment was $5,000 and this is the proposed settlement. The Solicitor puts forward several mitigating factors, none of which I find persuasive. The Solicitor also states why the operator

believes that if the brakes had been applied properly under the stalled engine conditions, the grader would have held. I also reject this proposition as based upon a series of unfounded assumptions. I approve the recommended settlement, however, which is a substantial amount because it accords with the high degree of gravity and negligence presented.

The foregoing settlements also have taken into account and are based upon the Solicitor's representations regarding the other statutory criteria under section 110(i) of the Act.

In light of the foregoing the recommended settlements are APPROVED and the operator is ORDERED TO PAY $7,500 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 15 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 87-35 A.C. No. 11-02662-03549
v.	:	No. 1 Mine
WHITE COUNTY COAL CORPORATION Respondent	:	
WHITE COUNTY COAL CORPORATION Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 87-18-R Citation No. 2816261; 11/5/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Pattiki Mine

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

Docket No. LAKE 87-35 is a petition for assessment of a civil penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Docket No. LAKE 87-18-R is a notice of contest seeking review of the citation involved in the penalty case. Petitioner has filed a motion to approve a settlement agreement and to dismiss both cases. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in section 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved penalty of $900 within 30 days of this Decision. Upon such payment both proceedings are DISMISSED.

William Fauver
Administrative Law Judge

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JUL 15 1987

ERNEST R. LAFON, JR., Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. VA 87-1-DM
VIRGINIA LIME COMPANY, Respondent	:	MD 86-16
	:	Kimballton Mine

ORDER OF DISMISSAL

On July 10, 1987, Counsel for Respondent filed with the Commission an order endorsed by Counsel for Complainant which indicated that all matters in controversy between the Parties have been settled, and requested that the action be dismissed with prejudice.

Accordingly, it is ORDERED that the above case be DISMISSED with prejudice.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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July 16, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 87-92
	:	A. C. No. 36-00917-03653
v.	:	
	:	Lucerne No. 6 Mine
HELVETIA COAL COMPANY, Respondent	:	
	:	
HELVETIA COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. PENN 87-51-R
v.	:	Citation No. 2693665; 11/10/86
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 87-52-R
	:	Citation No. 2693666; 11/10/86
	:	
	:	Docket No. PENN 87-53-R
	:	Citation No. 2693667; 11/10/86
	:	
	:	Docket No. PENN 87-54-R
	:	Citation No. 2693668; 11/10/86
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	:	Docket No. PENN 87-55-R
	:	Citation No. 2693669; 11/10/86
	:	
	:	Docket No. PENN 87-56-R
	:	Citation No. 2693670; 11/10/86
	:	
	:	Docket No. PENN 87-57-R
	:	Citation No. 2693671; 11/10/86
	:	
	:	Docket No. PENN 87-58-R
	:	Citation No. 2693672; 11/10/86
	:	
	:	Docket No. PENN 87-59-R
	:	Citation No. 2693673; 11/10/86
	:	
	:	Docket No. PENN 87-60-R
	:	Citation No. 2693674; 11/10/86
	:	
	:	Lucerne No. 6 Mine

DECISION APPROVING SETTLEMENT
ORDER TO PAY
ORDER OF DISMISSAL

Before: Judge Merlin

The Solicitor has filed a motion to approve settlements of the ten violations involved in this case. The total of the originally assessed penalties was $1,000 and the total of the proposed settlements is $605.

The motion discusses the violations in light of the statutory criteria set forth in section 110(i) of the Act. The subject citations were issued for violations of 30 C.F.R. § 48.27(c), because the operator had assigned ten miners to participate in the moving of a piece of equipment under energized trolley wire who were not specifically trained or instructed regarding this task. The Solicitor represents that a reduction from the original assessment is warranted for the following reasons:

> The reduction is proposed because of a genuine dispute or misunderstanding between the parties regarding the requirements of task training. The operator was of the opinion that the miners had to be task trained only if and when they became needed in the operation and only for the specific task they would perform. For example, a miner would be specifically task trained on how to jack up the piece of equipment when and if it was required during the move. MSHA required, however, that the miners be task trained and instructed in the general safety aspects of moving equipment under energized trolley wire once they were assigned the job and before they were actually placed. Therefore, if an emergency situation occurred, as one did, every miner involved would have been trained in the safety procedures of the task. Because of this honest difference in interpretation, the parties propose that the negligence of the violations be reduced to moderate.

The subject citations were originally assessed at $100 each. The motion proposes that Citation Nos. 2693665, 2693666, 2693667, 2693670, 2693671, 2693672, and 2693673 be reduced to $65 for the violation. With respect to Citation Nos. 2693668, 2693669, and 2693674, the motion proposes an assessment of $50, because "the

three miners cited in [those] citations. . . had been trained as motormen. [Thus], [t]heir training would have included some aspects of moving off-track equipment."

I accept the Solicitor's representations and approve the recommended settlements. The parties should be aware, however, that I assume from the proposed settlement that the operator now understands what is required of it.

Accordingly, the motion to approve settlements is GRANTED and the operator is ORDERED TO PAY $605 within 30 days from the date of this decision.

It is further ORDERED that the corresponding review cases, Docket Nos. PENN 87-51-R, PENN 87-52-R, PENN 87-53-R, PENN 87-54-R, PENN 87-55-R, PENN 87-56-R, PENN 87-57-R, PENN 87-58-R, PENN 87-59-R and PENN 87-60-R, pending before me are hereby DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 17 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION ON BEHALF OF MARK R. KRAUS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 87-67-D
	:	VINC CD 87-03
v.	:	
	:	Green Ridge Mine
GREEN RIDGE MINING, INC., Respondent	:	

ORDER OF DISMISSAL

On July 14, 1987, the Secretary filed a Motion to Dismiss predicated upon a Consent Agreement, executed on July 9, 1987, which sets forth the terms of the settlement of this case and which indicates that the Parties agree, that the Complaint and Application for Reinstatement be dismissed with prejudice.

Accordingly, the Complaint and Application for Reinstatement is dismissed with prejudice, and it is ORDERED that this case be DISMISSED with prejudice.

Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

July 17, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) ON BEHALF OF BRIAN S. OUSLEY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 87-85-DM
	:	MD 86-18
v.	:	
	:	C.P.L. Plant
METRIC CONSTRUCTORS, INC., Respondent	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS OR FOR SUMMARY DECISION

In its Answer, filed on June 16, 1987, Respondent moved to dismiss "or For Summary Decision." On June 23, 1987, the Secretary, on behalf of the Complainant, filed a motion to extend the time to reply to Respondent's motion. On June 24, 1987, an order was entered extending the time for the Secretary to reply to this motion until July 13, 1987. On July 14, 1987, the Secretary filed its response to the Respondent's motion.

In essence, the basis for the Respondent's motion is that the complaint herein is time-barred. The alleged act of discrimination occurred on January 21, 1986, and a complaint was filed with MSHA on February 3, 1986. MSHA conducted an investigation but did not, within 90 days after the filing of the claim with MSHA or at any time, issue any determination of a violation of the Federal Mine Safety and Health Act. On May 12, 1987, a complaint of discrimination was filed with the Commission.

Judge Broderick, in Secretary v. Jim Walter Resources, Inc., 9 FMSHRC 263 (February 1987), analyzed the relevant law with regard to the time obligations of the Act. I concur in his analysis as follows:

> The Act further provides that upon receipt of a complaint by a miner, the Secretary shall commence an investigation within 15 days, and if he determines that discrimination has occurred, shall immediately file a complaint with the Commission. It directs the Secretary to notify the miner within 90 days of the receipt of a complaint of his determination whether a violation has occurred. The Legislative History of the

> Act makes it clear that this time limitation is not jurisdictional and that Complainant should not be prejudiced by the failure of the Government to meet its time obligations. S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 624 (1978). However the Commission has held that a long delay coupled with a showing of prejudice to the operator may subject the complaint to dismissal. Secretary/Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905 (1986). (Secretary v. Jim Walter Resources, Inc., supra, at 266).

In essence, it is Respondent's position that the complaint herein is frivolous and that there is no justification for the delay by the Secretary in filing the complaint more than a year after the period established in the Act. Without making any decision as to the merits of this action, I find that the allegations in the complaint do state a cause of action under the Act, and as such the complaint is not frivolous. Furthermore, according to the affidavit of July 9, 1987, of William H. Berger, ("Attach" 4 to the Secretary's response), the case was received in the Atlanta Regional Solicitor's Office on June 11, 1986, and in August 1986, when Berger contacted the Complainant about the case, he was informed that the latter had instituted a State Court Action arising out of the same transaction alleged in the MSHA complaint, except that "the State Law supposedly provided for punitive damages." Berger then informed the Complainant and his attorney, Ronald S. Webster, that the Department of Labor would not proceed with his case while the State Court proceeding was ongoing. Berger stated that he was told by both the Complainant and Webster, on several occasions, that they desired to proceed in State Court because of the possibility of recovering punitive damages. Berger stated in his affidavit that in mid December 1986 he was informed, by the Complainant, that the State Court had denied any claim for punitive damages and that he, the Complainant, wished to proceed with the MSHA claim. The case was subsequently transferred to the National Solicitor's Office on March 11, 1987. Based upon the affidavit of Berger, I conclude that there was some justification for the Secretary's delay in filing a complaint in this matter.

In addition, the Respondent alleges that it has suffered substantial prejudice, by reason of Respondent's delay in bring this action, in that all material witnesses have been laid off, and that it has been denied an opportunity to conduct discovery and defend the claim while witnesses and documentary evidence were readily and inexpensively available. Respondent also argued

that the residences of key witnesses, including Elmer Podratz and Michael O. Webb, are outside the State of Florida and unknown. However, it appears from the affidavit of John K. Day, Jr., that Podratz (who left the Respondent on or about July 10, 1986), and Webb (who left the Respondent on May 15, 1987) are, to the best of Day's knowledge, residing in Charlotte, North Carolina and Louisiana respectively. No facts are alleged to establish any reason why Podratz and Webb cannot be subpoened to testify in this matter. The same pertains to Duke Roberts and James Wilkerson who, accordingly to the affidavit of Day, left the Respondent on May 28, 1987 and January 9, 1986 respectively, and, to the best of Day's knowledge, are residing in Virginia and Washington State respectively.

According to Day's affidavit, Fred K. Coogle and Robert Baker left the Respondent on July 9, 1986 and October 6, 1986, and as to each of them Day indicated "I do not know his current whereabouts." Respondent has not described in any detail the scope of any prospective testimony of Coogle and Baker. As such, it has not been established that their testimony is critical to Respondent's case. Further, Respondent has not set forth any facts which would establish that Coogle and Baker can not be served with a subpoena. The fact that Day does not know their current whereabouts does not establish that Respondent has no way of locating these individuals.

According to the affidavit of Day, the other individual having knowledge as to the fact and circumstances surrounding the Complainant's termination is John Camball, who is currently employed by Respondent and certainly is available to testify.

Therefore, accordingly, I find that Respondent has not shown material legal prejudice attributable to the Secretary's delay in filing the complaint with the Commission. (See Secretary/Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905 (June 1986).

Based upon all the above, and in the interest of justice, it is ORDERED that Respondent's Motion to Dismiss or for Summary Decision is DENIED.

Avram Weisberger
Administrative Law Judge
(703) 756-6210

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 17 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 87-111
	:	A.C. No. 36-00963-03633
v.	:	
	:	Mathies Mine
MATHIES COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On July 10, 1987, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $126 and the parties proposed to settle for $50.

The motion states that there were several mitigating factors justifying a reduction in the penalty. The violation charged was failure to adequately ventilate a battery charger. The charger was not in service and was not energized. It was located in a steel fireproof enclosure and equipped with a fire extinguisher. The charge and its cable were protected with short circuit and overload protection.

I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $50 within 30 days of the date of this decision.

James A. Broderick
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 20 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-116-M A.C. No. 04-01616-05503
v.	:	Santa Margarita Mine
KAISER SAND & GRAVEL COMPANY, Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Mr. Clair E. Hay, Safety Manager, Kaiser Sand and Gravel Company, Pleasanton, California, pro se.

Before: Judge Cetti

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (Mine Act). The proceeding was initiated by the filing of a petition for assessment of a civil penalty by the Secretary of Labor pursuant to Section 110(a) of the Mine Act. After notice to the parties, a hearing on the merits was held before me on May 21, 1987. The parties presented oral and documentary evidence and submitted the matter for decision, without exercising their right to file post-trial briefs.

On January 28, 1986, a MSHA inspector conducted an inspection of the Santa Margarita Quarry and Mill operated by Kaiser Sand & Gravel Company at Santa Margarita, San Luis Obispo County, California. As a result of the inspection the mine inspector issued a citation charging the operator with a significant and substantial violation of Title 30 C.F.R. § 56.14001 which requires guarding of tail pulleys.

The respondent filed a timely appeal contesting the existence of the alleged significant and substantial violation of the safety standard and the amount of the penalty.

Stipulations

The parties stipulated as follows:

1. Kaiser Sand & Gravel is a large company and operates a moderate-sized facility. The company has close to a four million man hours' work per year as a company with about 23,000 man hours work per year at the facility.

2. Respondent has an average history having had four violations in the previous two years.

3. Imposition of the penalty will not affect the ability of respondent to continue in business.

4. The violations were abated in good faith.

Review of Evidence and Discussion

Mr. Cowley made the January 28, 1986 inspection of the Santa Margarita Quarry. He testified that he has been a mine inspector with MSHA the past 11 years and altogether has had 32 years mining experience. In the course of his inspection of the quarry he observed the tail pulley for the 36 inch wide primary conveyor belt. In his opinion the tail pulley was not guarded.

The tail pulley was located at ground level not more than a foot or two high. When the mine inspector first walked up to the tail pulley he observed a rectangular piece of plywood that obscured his view of the pulley. The plywood was leaning against the rectangular opening in the thick concrete structure that enclosed the tail pulley. He pushed the piece of plywood that obscured his view of the pulley and it fell over. He testified that he pushed it to see if it was secured and to get it out of the way so it no longer obscured his view of the pulley. He stated that the plywood was not secured in anyway and did not guard "anything".

On cross examination the mine inspector admitted that he does not know anything about the plant's operating or lock out procedures. However if someone were to service a tail pulley of this type while it was operating he could come in contact with the tail pulley and if this occurred it could result in a very serious injury.

The conveyor belt and pulley were operating at the time of this inspection. The mine inspector testified that he observed no one in the area of the tail pulley. The machinery is operated and serviced by one person, the operator, whose shack is located on a different level above the pulley and some 40 to 50 feet away. The operator services the machinery the first thing in the morning before he starts the conveyor belt.

The respondent presented evidence that the tail pulley and conveyor belt were enclosed in the heavy concrete structure that formed the base of the crusher, except for the rectangular opening which exposed the end of the pulley. To eliminate this exposure a section of plywood was inserted in the frame of the opening. The plant manager stated that after the conveyor operated for a while there was a buildup of material that secured the plywood in place.

It was respondent's position that the tail pulley was guarded by its concrete enclosure and the plywood until the inspector pushed or pulled the unsecured plywood from the frame of the opening in the concrete enclosure.

The plant manager testified that safety is one of the top priorities at the quarry and it is the practice at that facility to lock out machinery before any maintenance, servicing or repair work is performed. The person who performs the work uses his own lock and keeps the key. They have regular monthly safety meetings that take care of any safety problems that arise.

The operator presented evidence that the tail pulley had been guarded by the enclosing concrete structure and the plywood for the past eleven years. During that time they've had a number of inspections by various mine inspectors including Mr. Cowley and no one had complained before as to the manner in which the tail pulley was guarded, Mr. Cowley admitted that in his prior inspection of the plant he had not cited this primary conveyor tail pulley for not having a guard or for having an inadequate guard.

Respondent near the end of the hearing stated for the record that he was not contesting the existence of the violation but vigorously denied that the violation was a significant and substantial violation.

I'm satisfied from the testimony of the mine inspector that at the time he observed the tail pulley in operation the piece of plywood (which normally was in place in the frame of the opening of the concrete enclosure) was on this occasion just leaning up against the concrete enclosure. I am persuaded that there was a violation of the guarding requirement but I do not find from the evidence presented in this case that the violation was significant and substantial.

The Review Commission has previously held that a violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission pointed out that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834 at 1836 (August 1984).

In this case the Secretary has established each of the four elements in the Mathies formula except No. 3. While it is possible that the hazard contributed to will result in an event in which there is an injury this possibility is relatively remote and under the facts of this case it is found not to be a reasonable likelihood.

This finding is consistent with the fact that the tail pulley was guarded for 11 years by its concrete enclosure and a piece of plywood placed in the frame of the opening and there is no evidence that during this long period of time there was any problems or injury of any kind. The condition was never cited. Presumably some of the MSHA inspectors who inspected this operation over the past eleven years checked to see how the tail pulley of the primary conveyor was guarded and saw no citable hazard. While this observation has no weight or value as to the existence of the violation it is certainly consistent with the finding that the violation was not a significant and substantial violation.

It was the Secretary's position that the negligence was ordinary negligence and on the basis of the evidence presented I concur and so find. The gravity of the violation is high with respect to the seriousness of the injury which could result if one became caught in the pinch point of the conveyor belt and pulley but is evaluated as low with respect to the likelihood of such an accident. I accept the stipulations of the parties with respect to the remaining statutory criteria set forth in Section 110(i) of the Mine Act.

Based upon my consideration of the six statutory penalty criteria in Section 110(i) of the Mine Act I conclude that the appropriate penalty for this violation is $70.00.

Conclusions of Law

Based upon the entire record and the findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. The respondent violated safety standard 30 C.F.R. § 56.14001.

3. The violation was not significant and substantial and said allegation is stricken from the citation.

4. The citation as amended is affirmed and a civil penalty of $70.00 assessed.

ORDER

Accordingly, the citation, as amended, is affirmed and Kaiser Sand and Gravel Company is ordered to pay a civil penalty of $70.00 within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 22 1987

ARNOLD SHARP, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 86-149-D
v.	:	
	:	BARB CD 86-49
BIG ELK CREEK COAL CO., INC., Respondent	:	No. 1 Surface Mine

DECISION

Appearances: Arnold Sharp, Bulan, KY, Pro Se;
Stephen C. Cawood, Esq., Pineville, KY,
Respondent.

Before: Judge Fauver

Complainant brought this proceeding under § 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., contending that he was discharged because of safety complaints made to his supervisors. Respondent contends that he was discharged for reckless driving.

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

FINDINGS OF FACT

1. Respondent operates a surface coal mine, known as No. 1 Surface Mine, in Leslie County, Kentucky, which produces coal for sale in or affecting interstate commerce.

2. Complainant had been employed by Respondent's predecessor, Bledsoe Coal Company, at the same coal mine for about one and one-half years when the mine was taken over by Respondent, in April, 1985. Complainant began working for Respondent then, and worked as a rock truck driver and at times as an auger helper or operator until he was discharged on May 28, 1986.

3. From April, 1985, until February, 1986, Complainant's immediate supervisor was M.C. Couch. From February, 1986, until his discharge in May, 1986, his immediate supervisor was M. Cornett.

4. Around September, 1985, Respondent purchased an auger and assigned Complainant to be a helper on it. Complainant made many safety complaints to Couch and later to Cornett about the auger, including excessive oil leakage, accumulations of loose coal and a broken or damaged platform. Many times he asked Respondent to have the auger repaired and made safe, but Respondent did not have it repaired and continued assigning Complainant to work on the auger. Complainant also complained to his supervisors about inoperable front horns and inoperable backup alarms on trucks.

5. For a period, Respondent shut down the auger. Complainant drove a rock truck when the auger was shut down.

6. In February, 1986, M.C. Cornett became Complainant's immediate supervisor, and Couch became a mine supervisor above Cornett.

7. Around March, 1986, Respondent started operating the auger again, and Cornett ordered Complainant to work on the auger. Complainant complained about the auger, telling Cornett that he would not work on the auger until it was repaired and made safe to operate. However, Cornett ordered Complainant to work on the auger and Complainant did so. On one occasion, Cornett instructed Complainant to come in on Sunday, April 27, 1986, to work on the auger. When Complainant told him he did not want to work on the auger until it was repaired, Cornett told Complainant to work on the auger as instructed or he would be fired. Again, Complainant worked on the auger.

8. On May 28, 1986, Complainant was driving rock truck No. 437 and Willard Miller was driving rock truck No. 438. Miller had just dumped a load of rocks, and was leaving the dumping area. Complainant's truck was loaded, and he drove up to a "switchback" area where loaded trucks would stop and then back up to the dumping site. As Miller was driving downhill from the dumping area and as Complainant was backing uphill onto the dumping area road, the trucks collided. Neither truck had an operable front horn or operable back-up alarm. The accident probably could have been prevented if the trucks had these safety devices. Complainant looked in both of his side view mirrors before he backed up, but did

not see Miller's truck in either of them because of the angle at which the trucks were approaching each other. If Miller had been able to blow his front horn, it is likely that the accident would have been prevented.

9. Supervisor Cornett arrived on the scene after the accident, on May 28, 1986. Supervisor Couch arrived later. They summarily blamed Complainant for the accident, and discharged him on that date.

10. On June 17, 1986, after evaluating the representations made by Respondent and the Complainant, the Kentucky Division of Unemployment Insurance rejected Respondent's contention that Complainant had been discharged for cause. It found that: "There is a lack of evidence to show that the accident was intentional or that misconduct was involved. Therefore, the separation is non-disqualifying." (Exh. C-34.)

11. On August 26, 1986, the Mine Safety and Health Administration, United States Department of Labor, informed Complainant that its investigation of his complaint of a discriminatory discharge did not indicate a violation of § 105(c) of the Act. Complainant then filed the subject proceeding before this independent Commission, for a de novo hearing and adjudication of his claim of discrimination.

DISCUSSION WITH FURTHER FINDINGS

A miner may establish a prima facie case of discrimination under § 105(c) of the Act 1/ by proving that (1) he was engaged in a protected activity and (2) the adverse action complained of was motivated in any part by that activity. 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 the protected activity. Smith v. Reco, Inc., 9 FMSHRC 992 (June 30, 1987).

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

If the operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that (1) it also was motivated by the miner's unprotected activity, and (2) it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir 1984); Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983). 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 (1983).

Complainant proved that he was engaged in protected activity, i.e., making safety complaints about the condition of the auger and the trucks. He complained to Couch a number of times, and he complained to Cornett when Cornett replaced Couch as his immediate supervisor. His safety complaints included excessive oil on the auger, accumulations of coal on the auger, a broken or damaged platform on the auger and inoperable front horns and inoperable backup alarms on trucks. He also voiced safety complaints to fellow workers.

Respondent contends that Complainant had a number of prior accidents at the mine and that the accident on May 28, 1986, was the final cause for discharging him, because of reckless driving, and that this was the sole cause for his discharge. It denies any motivation to discharge him because of his safety complaints.

The evidence is in conflict as to prior accidents involving Complainant. Complainant called the former superintendent of Bledsoe Coal Company, Vernon Muncy, as a witness. Muncy testified that he saw Complainant practically every day on the job and that his work record was good while employed at Bledsoe.

Respondent's supervisor Couch testified that Complainant had several prior accidents at the mine, as follows:

(1) In the first month Complainant worked for Couch, Complainant backed a truck partly over a berm on the edge of the dumping area. One set of the rear wheels went over the berm, and that side of the truck rolled backward partly down the slope. Couch testified that backing over the berm was dangerous, because the truck could have turned over.

(2) In a later incident, Complainant backed into a high wall, damaging a railing and side mirror on his truck.

(3) In February, 1986, the last day that he worked directly under Couch, Complainant, at the end of the work day, jammed his truck into a narrow opening in an effort to get to the parking lot quickly and get away from the mine.

Respondent's foreman Cornett testified that he had worked for Bledsoe Coal Company as a supervisor and that Complainant had worked for him there for about a year and a half, and beginning in February, 1986, Cornett was his supervisor at Respondent's mine until Complainant's discharge on May 28, 1986.

Cornett testified that Complainant had a number of prior accidents at the Bledsoe Company: Once, nearly backing into a sweeping machine, and "various accidents backing into dozers" (Tr. 85). Cornett also described the accident at Respondent's mine that Couch described, contending that Complainant backed a truck partly over a berm in the dumping area.

William Bolling testified, as Respondent's witness, that he was a blaster and an equipment operator, first for Bledsoe Coal Company and then for Respondent. He first met Complainant when Complainant started working for Bledsoe Coal Company in December, 1983, or early 1984. They worked together for Respondent until Complainant was discharged. He described two accidents that occurred when they had worked for Bledsoe Coal Company: (1) Complainant backed a rock truck into a bulldozer Bolling was operating, causing some damage to the rock truck (cutting the tire and bending the rim of the truck) and (2) Complainant's truck bumped into a bulldozer Bolling was operating, without causing any damage. Bolling also testified that he saw Complainant back up too close to a bulldozer and the buldozer operator had to drive out of his way to avoid being hit.

Couch, Cornett, and Bolling testified that Complainant had a reputation at the mine of being an unsafe driver.

Complainant testified that the accident with Bolling involving the cut truck tire was at night and was caused by Bolling not having his lights on. He denied the other accidents mentioned by Bolling. He testified that the "berm" accident was due to Respondent's failure to build adequate berms. I credit Complainant's testimony on the subject of prior accidents and the accident on May 28, 1986.

The kinds of prior accidents attributed to Complainant by Respondent's witnesses were not unusual for this operator's employees. Respondent's trucks often operated without operable horns and back-up alarms and at times

equipment operated without adequate brakes or safety lights; rock blasting at times was too close to personnel or equipment; at times personnel were permitted too near, or approached too near, a high wall that was dangerous and could fall and fatally injure employees; the auger was often kept in an unsafe condition. Various employees were involved in accidents for which they were not disciplined by Respondent or by its predecessor. Nor did Respondent or its predecessor discipline Complainant for any accidents before May 28, 1986. On that date, Respondent decided to fire Complainant without conducting a reasonable investigation of the accident. When Cornett came upon the scene, he briefly talked to Miller and Complainant, looked at the damage to Miller's truck and hastily determined that Complainant was at fault. Soon after that, Couch arrived, and Couch and Cornett had a brief discussion and decided that Complainant should be dismissed. If they had viewed the accident without an animus toward Complainant, they would have considered the effect of the safety defects on the trucks as a major contributing cause of the accident, i.e., the failure to provide an operable front horn on Miller's truck and an operable back-up alarm on Complainant's truck. The same truck operated by Miller had been turned over and substantially damaged in an accident on May 9, 1986, involving a different driver, but there is no evidence that disciplinary action was taken against that driver, nor is there an explanation of that accident in relation to driver fault or safety equipment.

Earlier, Couch had threatened to fire Complainant if he continued to complain to other employees about his objections concerning the condition of the auger. Cornett was also upset with Complainant because of Complainant's safety complaints about the auger (as late as April 27, 1986) and his resistance to working on the auger when ordered to do so.

Couch and Cornett had not heeded Complainant's safety complaints about safety defects on the trucks. Had they checked the horns and backup alarms on the trucks involved in the accident on May 28, 1986, they would have found them to be inoperable. With such a finding, they could not reasonably attribute fault to either driver, but to their own failure to have the safety standard for horns and backup alarms complied with. Their summary action in blaming Complainant for the accident without checking the safety equipment on the trucks indicates a discriminatory motive toward Complaint.

For all of the above reasons, I find that Couch and Cornett were motivated at least in part by Complainant's safety complaints in their decision to fire him. The

evidence presented by Respondent does not preponderate to show that in the absence of Complainant's safety complaints Respondent would have discharged Complainant for the accident on May 28, 1986. Complainant is therefore entitled to relief under § 105(c) of the Act.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondent violated § 105(c)(1) of the Act by its discriminatory discharge of Complainant on May 28, 1986.

3. Complainant is entitled to an order requiring Respondent: (1) to reinstate him in Respondent's employment in the same position, and with the same pay rate, status and all other benefits, as he would have attained therein had he not been discharged on May 28, 1986, (2) to pay him back pay and interest for all compensation he would have earned in Respondent's employment had he not been discharged on May 28, 1986, and (3) to reimburse him for costs and expenses reasonably incurred by him in connection with the institution and prosecution of this proceeding, including a reasonable attorney's fee if an attorney is engaged for the remainder of this proceeding including a procedure for proposing a relief order and any review or appeal processes.

ORDER

WHEREFORE IT IS ORDERED that:

1. The parties shall confer, within 15 days of this Decision, in an effort to stipulate the amount of Complainant's back pay and interest, costs and expenses, and the position, pay rate, status and employee benefits to which Complainant is entitled to be reinstated in Respondent's employment. Interest shall be computed in accordance with the Commission's decision in Arkansas Carbona, 5 FMSHRC 2042 (1984) (copy to be distributed to each party).

2. Within five days after their conference, the parties shall file a report with the Judge, submitting either a joint proposed order for relief or a statement of the issues between the parties respecting the relief to be granted. Respondent's stipulation of the terms of a relief order will not prejudice its rights to seek review of this Decision.

3. This Decision shall not be made final until a Supplemental Decision on Relief is entered herein.

William Fauver
Administrative Law Judge

Distribution:

Mr. Arnold Sharp, General Delivery, Bulan, KY 41722 (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

July 23, 1987

RUSHTON MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 85-253-R
v.	:	Order No. 2403926; 6/11/85
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Rushton Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 86-1
	:	A. C. No. 36-00856-03548
v.	:	Rushton Mine
RUSHTON MINING COMPANY, Respondent	:	

DECISION ON REMAND

Before: Judge Broderick

STATEMENT OF THE PROCEEDING

By order issued March 30, 1987, the Commission remanded this case to me to rule on an issue raised by Rushton Mining Company (Rushton) in a Petition for Discretionary Review, which issue had not been presented to me before my decision which was issued February 20, 1987. The issue is whether Rushton is entitled to reimbursement from the Secretary for costs and attorney fees incurred in connection with the proceeding involving Order No. 2403926. The parties have stated in response to my order issued April 15, 1987, that they do not wish to submit further evidence on the issue presented. Each party has filed a legal brief addressing the issue.

FACTUAL BACKGROUND

Rushton filed a notice of contest on July 3, 1985, contesting Order 2403926 issued under section 104(d)(1) of the Act. The order alleged a violation of 30 C.F.R. § 75.326. At the request of contestant, the proceeding was continued by order issued December 23, 1985, pending the filing of the

related civil penalty case. On November 21, 1985, the Secretary filed a Petition for the Assessment of Civil Penalties seeking penalties for 5 alleged safety violations including the violation charged in Order 2403926. A penalty of $1,100 was sought for that violation. The penalty case was assigned to me on June 27, 1986. I consolidated the cases (and other contest cases) by order issued July 10, 1986, and issued a prehearing order the same day. The Secretary responded on August 13, 1986, and Rushton on November 6, 1986. Rushton's response included copies of a settlement motion and order and a vacated citation in other cases involving alleged violations of 30 C.F.R. § 75.326.

Pursuant to notice issued August 21, 1986, the proceeding was called for hearing in Pittsburgh, Pennsylvania, on November 6, 1986, at 9:00 a.m. The hearing was concluded the same day at 4:25 p.m. At the commencement of the hearing, one of the contested violations was settled, and the related contest proceeding was dismissed. Testimony was taken on the 4 remaining violations. With respect to the violation charged in Order 2403926, Inspector Klemick testified for the Secretary (Tr. pages 126-167). Raymond Roeder testified for Rushton (Tr. pages 169-197). I directed that posthearing briefs limited to the issue of whether statements made by MSHA personnel at MSHA Manager's Conference should have been admitted. The briefs were to be filed on or before December 29, 1986. I later extended the briefing time to January 16, 1987. Rushton's brief was submitted January 29, 1987. On February 5, 1987, the Secretary filed a motion to withdraw the petition for a civil penalty based on Order 2403926, "which should be vacated." Respondent did not object to the Secretary's motion.

On February 20, 1987, I issued my decision, including my ruling granting the motion to withdraw the petition insofar as it was based on Order 2403926, vacating the order and dismissing the contest proceeding. Rushton filed a Petition for Discretionary Review with the Commission limited to the issues whether it is entitled to reimbursement of costs and fees under Rule 11, and whether the facts of this case support such reimbursement. The Commission remanded the case to me.

ISSUES

1. Whether a mine operator is entitled to reimbursement from the Secretary for costs and attorney's fees under Rule 11 of the Federal rules of Civil Procedure (FRCP).

2. If so, whether the facts in this case support such reimbursement.

CONCLUSIONS OF LAW

I. DOES RULE 11 APPLY

The Commission's Procedural Rules provide in 29 C.F.R. § 2700.1(b):

> On any procedural question not regulated by the Act, these procedural rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission or any Judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate.

The Mine Act does not deal with reimbursement of costs and attorney's fees in connection with contest or civil penalty proceedings. The Administrative Procedure Act (APA) refers to litigation costs and attorney's fees only in connection with proceedings under the Freedom of Information Act (5 U.S.C. § 552(a)(4)(E)), the Privacy Act (5 U.S.C. § 552a(g)(1)(3)(B), and the Government In the Sunshine Act (5 U.S.C. § 552b(i). There are no references to costs and attorney's fees in sections 554, 555, 556, 557, or 558 of the APA.

Commission Procedural Rule 6 (29 C.F.R. § 2700.6) states:

> When a person who appears in a representative capacity signs a document, his signature shall constitute his certificate
> (a) that. . .he is authorized and qualified. . .to represent the particular party in the matter;
> (b) that he has read the document; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay.

Commission Procedural Rule 80 (29 C.F.R. § 2700.80) deals with standards of conduct required of individuals practicing before the Commission (they "shall conform to the standards of ethical conduct required of practitioners in the courts of the United States"), and sanctions for unethical or unprofessional conduct (disciplinary proceedings and "an appropriate disciplinary order, which may include reprimand, suspension or disbarment from practice before the Commission"). The sanctions do not include an order assessing costs or attorney's fees.

Rule 11 of the FRCP requires that pleadings and other paper of a party represented by counsel be signed by counsel. It further provides:

> The signature of an attorney or party constitutes a certificate by him that he has read the. . . paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The rule provides that the court shall impose "an appropriate sanction" upon the person who signed a document in violation of the rule or the represented party or both, which sanction may include an order to pay the other party's expenses incurred because of the filing.

Commission Rule 6 was obviously modeled after Rule 11 of the FRCP except that it does not provide for a sanction when the rule is disregarded. A sanction is provided, however, in Rule 80. Therefore, I conclude that the "procedural question" raised here (sanctions for filing a document which to the best of the knowledge, information or belief of the signer does not have good grounds to support it) is "regulated" by the Commission Procedural Rules: Rule 6 and Rule 80. The fact that the sanctions provided do not include the sanction sought here (whether because the Commission had questions about its authority to impose costs and attorney's fees or because it decided as a matter of policy not to impose such sanctions), it is clear that the regulations deal with the question. Therefore, under Commission Rule 1, it is unnecessary to look to the Federal Rules of Civil Procedure for guidance.

II. RULE 11

Assuming the applicability of Rule 11 FRCP as a guide, do the facts of this case justify the imposition of costs and attorney's fees against the Secretary?

Rule 11, as I stated earlier, provides that a court may impose sanctions, including costs and attorney's fees, on a person who signs a pleading or other paper unless to the best of his knowledge and belief it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing

law. After the rule was amended in 1983, it became unnecessary to find subjective bad faith to impose sanctions under the Rule. Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194 (7th Cir. 1985); Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985); Weisman v. Rivlin, 598 F. Supp. 724 (D.D.C. 1984). Nevertheless, like all rules which permit or mandate the assessment of costs for abuse of process, the rationale "is punitive rather than promotional or enabling. [Its] purpose is to punish and deter certain specific and, as a rule, narrowly defined forms of procedural abuse." I DERFNER & WOLF, COURT AWARDED ATTORNEY FEES, § 5.03[11].

Rushton's brief assumes that it is self-evident, or at least evident from the record made in this case, that the Secretary's Answer in the contest case and his Petition in the penalty case did not meet the requirements of Rule 11 that the papers filed were to the best of the knowledge, information and belief of the attorneys filing them well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. But there was no adjudication on the merits of the issues raised. Indeed, there were no legal briefs filed addressed to the propriety of the order involved here. So far as I am aware, there is no Commission or Administrative Law Judge decision on the merits of the issue raised concerning this order. Therefore the record before me is limited to the testimony and exhibits addressed to the order and its propriety, and the fact that after hearing, the Secretary moved to withdraw the penalty petition as related to the order and to vacate the order. Rushton did not object to the motion and it was granted. It would be presumptuous in the extreme on the basis of such a record to conclude that the documents in question were filed by officers of the court without the belief that they were well grounded in fact and warranted by law. I don't know and the record does not show what inquiry was made prior to the filing of the documents and, absent an adjudication on the merits, there is no way I could determine whether they were well grounded in fact and warranted by law. Therefore, even if Rule 11 applied to Commission proceedings, I would conclude that this record does not show that it was violated.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that Rushton's request for an award of

litigation expenses as a sanction under Rule 11, Federal Rules of Civil Procedure, IS DENIED.

James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 23 1987

LOCAL UNION 2274, DISTRICT 28, UNITED MINE WORKERS OF AMERICA (UMWA)	:	COMPENSATION PROCEEDING
Complainant	:	Docket No. VA 83-55-C
v.	:	McClure No. 1 Mine
CLINCHFIELD COAL COMPANY, Respondent	:	

DECISION

Before: Judge Gary Melick

This case is before me on remand from the Commission to determine whether certain allegations of violations cited in a section 104(d)(1) citation and three section 104(d)(1) withdrawal orders provide the required nexus between the section 107(a) imminent danger withdrawal order at bar and an underlying violation of a mandatory standard.1/ The Commission further directed that if such a relationship is found to exist then appropriate action should be taken to identify affected miners and determine the amount of compensation due each miner.

1/Statutory references herein are to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act". The remand order was based upon the Commission's decision in Local Union 1889, District 17, UMWA v. Westmoreland Coal Company, 8 FMSHRC 1317 (1986), that a section 107(a) order, whether as issued or subsequently modified, need not itself allege a violation of a mandatory standard in order to trigger entitlement to the one-week compensation provisions under Section 111 of the Act. The Commission also concluded therein that allegations of violations subsequently cited may supply the required nexus under section 111 between the section 107(a) imminent danger order and an underlying violation of a mandatory standard.

In this case the UMWA seeks one-week compensation pursuant to section 111 of the Act for certain miners employed by the Clinchfield Coal Company (Clinchfield) as of June 23, 1983.[2]/ In conjunction with the motion for summary decision now before me the parties stipulated that "a causal nexus existed between the 107(a) order issued to Clinchfield's McClure No. 1 Mine on June 23, 1983, and a violation of a mandatory standard in the McClure No. 1 Mine." The parties also stipulated to a list of miners on whose behalf the UMWA was seeking compensation, their rates of pay as of June 23, 1983, and the amount of compensation sought on behalf of each of those miners.

As stated in the UMWA motion, the compensation claim at bar arose following an underground explosion at the McClure No. 1 Mine on June 21, 1983. Subsequently at 4:00 a.m. on June 22, 1983, the Federal Mine Safety and Health Administration (MSHA) issued a Section 107(a) "imminent danger" withdrawal order covering the entire mine. The motion further states that on March 26, 1984, MSHA issued one section 104(d)(1) citation and four section 104(d)(1) withdrawal orders, of which three alleged that the cited violations had resulted in a methane ignition which caused the explosion. Clinchfield did not contest the citations or orders and paid the civil penalties assessed by MHSA. On September 30, 1983, the UMWA filed this claim for one-week compensation under section 111 of the Act.

In its opposition to the motion for summary decision Clinchfield argues that the prerequisites for awarding the one-week compensation under section 111 of the Act have not been met. Clinchfield argues that the miners were not "idled by" an order issued "for a failure for the operator to comply with any mandatory health or safety standards" as that section requires. Clinchfield observes that this argument has been rejected by the Commission in the September 26, 1986, decision (8 FMSHRC 1310) remanding this case for the instant proceedings but submits the argument to preserve its appeal rights.

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[2]/Section 111 provides, as relevant hereto, as follows:

If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

Indeed it is clear that Clinchfield's argument has been rejected by the Commission and within the framework of the stipulations presented herein it is established that the miners at issue were in fact "idled by" an order issued "for a failure of the operator to comply with any mandatory health or safety standard" as required by section 111. The UMWA Motion for Summary Decision is therefore granted. Commission Rule 64, 29 C.F.R. § 2700.64. The miners are accordingly entitled to one-week compensation under that section 111 of the Act.

The UMWA is also seeking interest on the compensation awarded in these proceedings dating from July 13, 1983. The award of interest is indeed consistent with the decisions of this Commission and the purposes of section 111 of the Act. It is accordingly awarded in this case. Mine Workers, Local 5869 v. Youngstown Mine Corporation, 1 FMSHRC 990 (1979): Peabody Coal Company v. Mine Workers, 1 FMSHRC 1785 (1979). Such interest shall be calculated in accordance with the formula set forth by the Commission in Bailey v. Arkansas-Carbona Company and Walker, 5 FMSHRC 2042 (1983). While the UMWA points out that the National Labor Relations Board has recently adopted a revised procedure for computing interest on back pay awards in light of the Tax Reform Act of 1986 (see New Horizons for the Retarded, Inc., 283 NLRB No. 181, (May 28, 1987) this Commission has not adopted the revised formula. The UMWA request for costs and attorneys fees is denied. Aleyeska Pieline Service Co. v. The Wilderness Society et al., 421 U.S. 240 (1975).

ORDER

Clinchfield Coal Company is hereby directed to pay the following miners the noted compensation plus interest from July 13, 1983, in accordance with the formula set forth in Secretary v. Arkansas-Carbona Company and Walker, 5 FMSHRC 2042 (1983):

(8:00 a.m. - 4:00 p.m. Shift)

Miner	Compensation
Virgil Lee Fuller	$505.70
Garneth Duty	505.70
Jerry Martin	536.60
Homer Gouge	536.60
Darrel J. McCowan	496.80
Jerry A. Hibbitts	505.70
Billy J. Coffey	491.60
Millard Harris	505.70
Danny McConnell	491.60

Edward M. Miller	536.60
Roger D. Austin	536.60
Kenneth Stacy	536.60
Sherman Matney	499.90
Sammy M. Smith	505.70
Randy Beverly	491.60
James R. Stevens	536.60
Edgar B. Moore	493.90
Bobby Murphy	536.60
Ollie Stanley	536.60
Junior Rainwater	506.60
Richard H. Baker	506.60
Joseph A. Counts	536.60
Robert L. Seitz	505.70
David R. Fuller	493.90
Jimmy L. Honaker	536.60
Harold B. Honaker	493.90
Nancy E. Mullins	505.70
H.D. Vencil	491.60
Dewey E. Stanley	499.45
Carrol Rasnick	499.90
James W. Mullins	493.90
Jerry W. Owens	536.60
Ronald M. Mann	493.90
Kemper Hill, Jr.	493.90
Garnice Hill	536.60
George P. Willis	536.60
Gaye N. Little	499.90
Demus A. Stanley	517.70
Roger L. Bentley	499.90
Kenneth L. Fleming	499.90
Ronald L. Welch	505.70
Randall L. Campell	493.90
C.E. Edwards	493.90
Fred Allen Mullins	505.70
Bobby A. Wampler	476.90
Billy B. Rose	496.80
Willis D. Rasnake	536.60
Larry G. Woods	536.60
Forgy Ray Pennell	493.90
Lowell Bise	536.80
Randy Smith	505.70
Billy G. Mullins	536.80
Marquis R. Neece	493.90
Michael W. Blackson	536.60
Jerry Deel	505.70
J.C. Vance	493.90
James C. Stanley	536.60
Michael D. Rose	505.70
John B. Yates	505.70

Danny Hughes	493.90
Clint J. Owens	493.90
Jim W. O'Quin	487.70
Trinkle L. O'Quin	505.70
Ron J. Baker	536.60
Raymond K. Breeding	536.60
Paul Owens	493.90
Gary Souleyrette	493.90
Wally V. Kennedy	536.60
Olaf D. Kennedy	536.60
Donald Duncan	536.60
Michael R. Kennedy	462.45
William C. Bolling	505.70
Michael J. Rasnick	493.90
Richard W. Hughes	536.60
Rodney A. Shortt	548.60
Steve L. Hale	496.80
Lee Vern O'Quinn	505.70
William Fletcher	505.70
Samuel J. Clay	321.66
Bobby L. Sykes	505.70
James D. Meade	505.70
Jack D. Yates	491.60
Randall C. Hamilton	491.60
Clifford D. Boyd	505.70
Don B. Hall	536.60
Paris Collins	536.60
Randy Wireman	536.60
Bascome H. Taylor	496.80
Claude Turner, Jr.	536.60
Earl B. Willis	493.90
Larry D. Boyd	536.60
George H. Owens	548.60
Mark Kennedy	516.25
Hobert Taylor, Jr.	552.90
John K. Brooks	493.90
Raymond E. Sykes	536.60
Barry M. Hall	536.60
George P. Thomas	477.15
Norman Lewis	542.60

Miner	Compensation
(4:00 p.m. Midnight Shift)	
Lois Bowman	$505.90
Joseph Brummett	505.90
Gregory Austin	548.60
Ardie E. Phillips	548.60
Teddy Tiller	548.60

Robert N. Phipps	517.70
Freddie J. Fultz	505.90
Lee O. Ratliff	548.60
Danny C. Edwards	505.90
Ricky L. Austin	517.70
Avery Boyd	505.90
Michael James	517.70
Joe Kiser	517.70
Danny R. Mullins	517.70
David S. Yates	517.70
Walter A. Deel	548.60
Paul V. Payne	548.60
Donald Williams	517.70
William C. Jackson	505.90
Henry Larry Phipps	548.60
David L. Stanley	548.60
Gary Lee Moore	548.60
Lonny F. Deel	548.60
Earnest E. McCoy	548.60
Darrell W. Thomas	478.80
Thelma Deel	517.70
Dennis Wagner	548.60
Lenville Mullins	517.70
Randy Breeding	548.60
John Mullins	548.60
Everette Miles	517.70
Kemper Damron	548.60
Earl Turner	548.60
James Stapleton	505.90
Gallie Greene, Jr.	505.90
Evelyn Delaney	517.70
James A. Stanley, Jr.	548.60
Michael Lane	548.60
James W. Hamilton	508.80
A. Paul Blevins	517.70
Urban Bartley	508.80
Ronnie Brown	505.90
Kellis C. Barton	548.60
Kile Spangler	548.60
Robert M. Dixon	548.60
Danny L. Chaffin	508.80
Sarah W. Rose	517.70
Curtis W. Franks	548.60
Jim R. Mullins	219.44
Tim Ruff	517.70
Jason E. McKinney	548.60
Jerry L. Jenkins	508.80
Steve J. Hamilton	517.70
Greg S. Fleming	517.70
Jim R. Hearl	548.60

Bob J. Martin	505.90
James E. Holbrook	548.60
James Wagner	548.60
Abraham P. Stevens	548.60
Victor Wallace	548.60
Randy D. Lane	548.60
Wade P. Mullins	548.60
Herbert Johnson	517.70
William R. Johnson	505.90

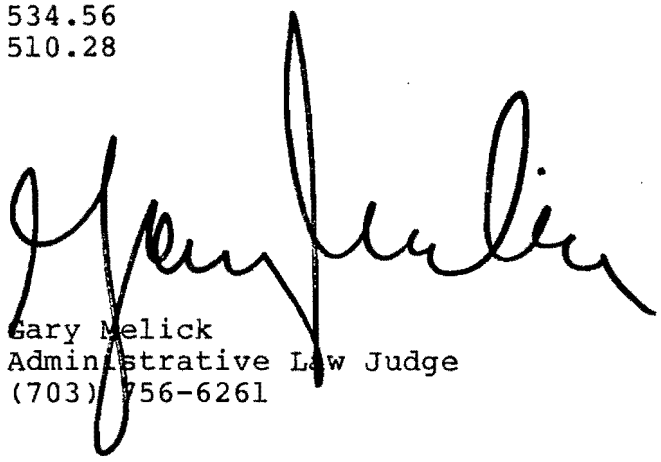
Miner	Compensation

(Midnight - 8:00 a.m. shift)

Fred A. Counts	552.60
William F. Hartsock	509.90
Larry L. Fields	509.90
Jerry L. Phillips	509.90
Timothy Jennings	527.60
Greg Phillips	509.90
Glen Meade	552.60
Don C. Bush	512.80
Joseph B. Stanley	552.60
Margaret J. Mullins	509.90
Charles Musick	552.60
Dan Honaker	552.60
Laurence Skidmore	509.90
Bill V. Brooks	552.60
Felix J. Boyd	509.90
Earl Castle, Jr.	249.21
Dan R. Musick	509.90
Carter Harrison	552.60
David Gilmer	552.60
Lisa Dingus	552.60
Charlene Ball	552.60
Sue Ellen Fleming	520.00
Oliver B. Rasnake	552.60
Harold D. Stevens	520.00
Marvin E. Counts	512.60
Gary L. Stallard	552.60
Gary N. Mullins	552.60
Leonard Taylor, Jr.	509.90
Steve Viers	520.00
Ron G. McReynolds	552.60
Ron D. Deel	552.60
Maynard F. Heaton	552.60
Walter L. Browning	552.60
James Gray Puckett	512.80
Thermon H. Powers	509.90
Jim D. Sexton	512.80

Ernie J. Meade	515.90
Robert E. O'Quinn	552.60
Robert C. Bailey	509.90
Clyde Harris	509.90
David L. Stanley	203.96
Bob D. Wolfe	509.90
H. Fayne Rasnick	552.60
Bill R. Robinson	552.60
James Turner	552.60
Jeff H. Greear	552.60
Ted R. Smith	512.80
Tony P. Owens	552.60
Joe F. Harrison	552.60
Jiles R. Branham	552.60
Lacy P. Couch	552.60
Jerry D. Childress	527.60
Irene J. Castle	509.90
Anthony Lynch	509.90
Darrell Perkins	521.60
Lawrence Carico	552.60
Charles R. Senter	509.90
Ramey Presley	506.70
Sam W. C. Hughes	516.32
Harold R. Hall	516.32
Gleason R. Austin	550.56
Bill R. Jessee	534.56
Bill G. Large	534.56
William W. Carty	524.80
Walter R. Owens	524.80
James S. Johnson	524.80
R.R. Trent, Jr.	524.80
Ron G. Arney	524.80
William A. Patton	524.80
Paul V. Kennedy	534.56
Dennis Steffey	550.56
Dennis King	536.80
Harless Mullins	534.56
George J. Hughes	536.80
Jim Edwards	536.80
Wiley R. Compton	536.80
Charles L. Ventro	536.80
Richard Neilson	550.56
John Hobson	536.80
Harry T. Mullins	536.80
G.C. Rasnick	536.80
Glen F. Gillenwater	536.80
Bobby Hawkins	536.80
Benny Vance	536.80
David W. Lee	550.56
Joe Tate	550.56

Ben Collins	550.56
Hermon Brooks	550.56
Jim Martin	550.56
Bill West	524.80
William E. Lester	510.00
Harold A. Vanover	534.56
Barbara A. Artrip	510.28



Gary Melick
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 24 1987

WILLIAM C. FANKHAUSER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 87-33-D
GEX HARDY, INC., Respondent	:	MORG CD 87-04

ORDER OF DISMISSAL

Before: Judge Melick

The Complainant William Fankhauser, requests to withdraw his Complaint in the captioned case after conferring with an attorney and "due to the fact that there were no incidents involving any safety or health violations". Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed and the hearing previously scheduled is cancelled.

Gary Melick
Administrative Law Judge

Distribution:

Mr. William C. Fankhauser, P. O. Box 6, Dundee, OH 44624 (Certified Mail)

GEX Hardy, Inc., Box 408, Flushing, OH 43977 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 28, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 87-2-M A. C. No. 29-00159-05516
v.	:	Tyrone Mine & Mill
PHELPS DODGE CORPORATION-TYRONE BRANCH, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This is a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977 (Act). 30 U.S.C. § 801 et seq. The Secretary of Labor, charged the operator, Phelps Dodge Corporation, with a violation of 30 C.F.R. § 56.16001. The violation was issued as a result of an accident in which one man was killed and another seriously injured.

On April 27, 1987, the parties submitted a motion to approve a settlement in the amount of $192 which was the originally assessed amount.

On May 6, 1987, I issued an order disapproving the recommended settlement, explaining why the recommendations of the parties could not be accepted. 9 FMSHRC 920 (May 1986).

On June 2, 1987, at the request of counsel, a telephone conference call was held. Counsel advised that they had attempted to address the concerns expressed in the disapproval of settlement and requested permission to submit a revised settlement motion. I granted the request.

On June 19, 1987, the parties submitted the revised motion seeking approval of a settlement in the amount of $3,840.

Thereafter, on June 25, 1987, pursuant to counsels' request, another telephone conference call was held to discuss the revised motion. I advised that most of the proposed findings and conclusions were acceptable, but stated that based upon MSHA's Accident Investigation Report, and other materials of record, a finding of "low negligence" was not acceptable. Counsel

requested permission to submit another settlement motion, which request was granted.

On July 7, 1987, a third motion was submitted which proposed a settlement of $5,000. After a review of this motion, I am satisfied that the recommended findings and conclusions set forth therein are in accordance with the record and that the settlement amount satisfies the requirements of the Act.

The subject Citation, No. 26620005, dated January 8, 1986 describes the condition as follows:

> Two employees of an independent contractor were seriously injured on November 25, 1985, and one died on December 19, 1985, when a bundle of three, 12 inch by 45 feet long pipe that were banded together slid from a stack and pinned the victims between pipe on the ground they were attempting to put a choker on, and the falling bundle. The pipe had been stacked about one week prior to the accident by an employee of the production-operator in a manner that contributed to a fall of material hazard in that the south stack of five bundles of pipe had three pipe in the bottom bundle, three pipe in the next bundle and four pipe in the top three bundles, resulting in a total height of approximately 5-1/2 feet. The top bundle of four pipe in the south stack apparently slid to the north and pushed the three pipe off the north pile onto the victims.

The mandatory standard, 30 C.F.R. § 56.16001, requires that:

> Supplies shall not be stacked or stored in a manner which creates tripping or fall-of-material hazards.

The MSHA Accident Investigation Report sets forth these facts: Phelps Dodge Corporation contracted with Hamilton Western Construction Company, Inc., to install a 6,000-foot-long 12-inch dewatering pipeline. This arrangement required that Hamilton Western lay the pipeline in accordance with a provided design while Phelps Dodge was to provide, among other items, the plastic pipe specified. Phelps Dodge purchased the required pipe which was delivered to the mine-site by common carrier. As in previous deliveries, the pipe was received by Phelps Dodge warehousing personnel who unloaded the pipe with a Phelps Dodge forklift. The pipe was unloaded and stacked at a predetermined location ahead of the approaching pipeline construction. The pipe in question was delivered and unloaded on November 12, 1985, thirteen days before the accident. A total of 49 pipes was de-

livered packaged in seven 3-pipe and seven 4-pipe bundles. The pile nearest the pipeline contained three 4-pipe bundles overlain by two 3-pipe bundles (north stack). Abutting this pile on the south was a 22-pipe pile consisting of two 3-pipe bundles on top of which were stacked four 4-pipe bundles (south stack). This pile was inherently unstable since the base bundles were 12 3/4 inches narrower than the width of 16 pipe lengths it supported. During preceding pipe-laying activity, pipe bundles were reportedly stacked only 2 or 3 units high (approximately 43.5 inches). On this occasion, however, the bundles were stacked 6-high (87 inches). The crew, therefore, was faced with a significantly different set of physical conditions. The pipeline construction crew consisted of a crane operator and two laborers. They had previously received their work assignment and proceeded to the jobsite without their supervisor's presence. The crane operator moved a cherry picker into hoisting position as the first laborer readied the fusion equipment. The crane operator began cutting the steel-securing bands of the top 3-pipe bundle of the south stack nearest the crane. He cut 5 of the 6 bands and, positioning himself in the clear, cut the last band. This allowed the 3-pipes to fall to the ground on the south side of the steel service pipeline. He then obtained hoisting slings while the second laborer positioned a dozer to drag fused lengths of pipe away from the fusion machine. As the crane operator was attaching the hoisting sling to the first pipe on the ground, the remaining 3-pipe bundle of the north stack slid to the ground landing on top of him and pinning the second laborer's right leg against the steel service pipeline. Apparently at the same time the top 4-pipe bundle of the south stack also slid off to the north and across the pipe bundle lying atop the crane operator. Twenty-four days later the crane operator died of his injuries. The second laborer suffered a broken leg.

The Accident Investigation Report described the cause of the accident in this manner:

> The direct cause of this accident was the failure to recognize the instability of the irregularly stacked pipe bundles.
>
> Possibly contributing to this accident was the fact that the crew members were not accustomed to working with pipe piled higher than 2 or 3 bundles. In this accident the bundles were stacked 6-high. The light rainfall of the past night may have created even greater pile instability; wet plastic pipe presents a very slippery surface.

The most recent settlement motion analyzes the cause of the accident as follows:

> Both the citation and the investigation report identify as a cause of the accident the manner in which the pipes were stacked. While these statements were made, the only apparent problem with the stacking of the pipe was that the south stack of pipes consisted of two 3-pipe bundles on top of which were stacked four 4-pipe bundles. The apparent problem was mitigated by the established and usual procedure of Hamilton in removing the top bundle of pipe from the stacks first. By removing the highest bundle first any problem with undercutting the support of bundles at a higher elevation would be eliminated. Hamilton's employees failed to follow this procedure when they removed the fifth bundle from the north stack before they removed the sixth bundle from the south stack. Had Hamilton's employees followed this procedure the hazardous condition would have been minimized and in all likelihood eliminated. The apparent problem with the stacking of the pipe was further mitigated by the fact that there was no shifting of the pipe between the second row (3-pipe bundle) and the third row (4-pipe bundle) of the south stack. Rather the movement of pipe occurred between the fifth and sixth stacked bundles and then the fourth and fifth stacked bundles of the south stack. The apparent problem with the stacking of the pipe was effected by considerable mitigating circumstances.

During the first conference call I inquired about the liability, if any, of the independent contractor. The settlement motion advises in this respect:

> Hamilton, the independent contractor, was not issued a citation even though the accident would not have occurred had its employees removed the top or sixth bundle from the south stack before removing the fifth bundle from the north stack in accordance with the usual procedure. However, the Mine Safety and Health Administration was unable to determine that the contractor Hamilton violated any mandatory standard applicable to the conditions.

The fact that the independent contractor was not cited does not, of course, increase the operator's liability with respect to the acts for which it is responsible. Nor does it affect

a determination as to what constitutes an appropriate penalty in this proceeding. However, in light of the inability to cite the independent contractor in this case, the Secretary may wish to re-examine the relevant mandatory standards.

I find that the accident had multiple causes, one of which was the way the operator stacked the pipes. Another was, as the parties represent, the way in which the independent contractor removed the pipes. Based upon the record and in light of the representations of the parties, I conclude that the occurrence was extremely serious and the operator was negligent. In addition, the operator's size is large; its history of violations is small; imposition of the recommended penalty will not affect ability to continue in business; and there was good faith abatement.

In light of the foregoing, the recommended settlement is APPROVED and the operator is, if it has not done so already, ORDERED TO PAY $5,000 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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Mr. Richard E. Rhoades, Manager, Phelps Dodge Corporation-Tyrone Branch, P. O. Drawer B, Tyrone, NM 88065 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 29 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 86-119
	:	A. C. No. 41-00356-03538
v.	:	
	:	Sandow Mine
TEXAS UTILITIES GENERATING COMPANY, Respondent	:	

DECISION

Appearance: Thomas F. Lillard, Esq., Christopher R. Miltenberger, Esq., Worsham, Forsythe, Sampels, and Wooldridge, Dallas, Texas, for the Respondent;
Max A. Wernick, Esq., Jill D. Klamm, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for the Secretary.

Before: Judge Weisberger

Statement of the Case

On August 11, 1986, the Secretary (Petitioner) filed a Petition for Assessment of Civil Penalty for alleged violations by the Respondent of 30 C.F.R. § 77.501 and 30 C.F.R. § 77.509. Respondent filed its Answer on September 2, 1986. Pursuant to notice, the case was heard in Austin, Texas on December 23, 1986. William J. Ciesielka testified for the Petitioner, and Garren Stroud, Thomas Nelson, and Robert Freyensee testified for the Respondent. After taking testimony from the above persons, the hearing was adjourned to allow the Parties to brief the issue as to whether Respondent would be allowed to cross-examine Inspector Ciesielka with regard to prior inconsistent statements and actions indicating bias. The Parties submitted Briefs and Reply Briefs. On February 4, 1987, an Order was issued allowing Respondent to further cross-examine Inspector Ciesielka. On February 19, 1987, the Petitioner filed a Motion for Continuance which was not opposed by the Respondent. The motion was granted, and the case was scheduled for April 7, 1987, in Austin, Texas. On March 16, 1987, Petitioner filed a Motion for Indefinite Stay. This motion was denied in an Order of March 19, 1987. On

April 1, 1987, Petitioner filed with the Commission a Petition for Interlocutory Review of the Orders dated February 4, 1987 and March 19, 1987, and also made a Motion to Suspend the hearing scheduled for April 7, 1987. The Commission, in an Order dated April 6, 1987, denied the Secretary's Petition for Interrogatory Review and also denied to stay the hearing scheduled for April 7, 1987. At the hearing, William J. Ciesielka testified for the Petitioner, and Paul Teinert, III, Garren Stroud, Robert Freyensee, Gary Lane, Sam Philip Jordan, and Jim Roach testified for the Respondent.

Petitioner filed its Brief and proposed Findings of Fact on June 18, 1987, and Respondent filed its Brief and proposed Findings of Fact on June 19, 1987. Reply Briefs were filed by Petitioner and Respondent on June 28 and June 29, 1987, respectively.

Stipulations

The Parties have stipulated as follows:

a. The undersigned has jurisdiction over the Parties and subject matter in this proceeding.

b. The Sandow Mine No. 1, Mine I.D. No. 41-00356-03538, had an annual tonnage in 1985 of 6,252,848. At the time of the December 23, 1986 hearing, the projected tonnage of 1986 was 5.5 million.

c. The Respondent had 39 inspection days in 1983; 36 in 1984; 44 in 1985; and 18 in 1986; and 77 over the previous 24 months.

d. Respondent had 5 assessed violations in 1983; 29 in 1984; 60 in 1985; and 82 assessed violations over the previous 24 months.

e. The fine proposed by Petitioner will not adversely affect the Respondent's ability to continue in business.

f. William Ciesielka, the Mine Safety and Health Administration ("MSHA") Inspector, who issued the contested citations, was a duly authorized representative of the Secretary.

g. On February 26, 1986, an inspection was conducted by an authorized representative, William Ciesielka, which resulted in the issuance of the two orders which are in issue.

h. The orders were issued with regard to two employees who were involved in the digging of a trench, in a substation area, that included a transformer that received 33,000 volts of power coming into the transformer.

i. The two employees involved, in digging the ditch, were pick and shovel men, and were not electrically qualified personnel within the meaning of the Act and the regulations.

j. The two employees, in the substation area, did not work on electrical switches. All work on the electrical circuits or switches had been done prior to the entry of the two employees into the substation area.

k. The switch coming out of the transformer had energized lines going into the top of the switch, and the switch was in the open position. The switch was not tagged at the time of the inspection.

l. The trench, being dug by the two employees, was 10 feet long, and located approximately 2 to 4 feet from the bottom of the switch.

m. The switch or circuit breaker was capable of being locked.

n. The abatement of Order No. 2838513 occurred within 3 minutes of notification of the alleged violation. The operator removed the two employees from the area and undertook efforts to activate the disconnect which prevented the 33,000 volts from flowing into the transformer.

o. The abatement of Order No. 2838513 occurred within 10 minutes of issuance. The operator pulled the power, which prevented electricity from going into the transformer station, and the pole used to pull the circuit breaker was tagged.

p. The electrical work being performed was confined to the 480 volt circuit breaker switch.

Issues

The issues are whether the Respondent violated 30 C.F.R. § 77.501 and 30 C.F.R. § 77.509(c), and, if so, whether the violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and whether the alleged violations were the result of the Respondent's unwarrantable failure. If Sections 77.501, supra, and 77.509(c), supra, have been violated, it will be necessary to determine the appropriate civil penalty to assessed in accordance with Section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § et. seq., (the Act).

Regulations

30 C.F.R § 77.501, as pertinent, provides as follows:

> No electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons....

30 C.F.R. § 77.509(c) provides as follows:

X X X

> "(c) Transformer enclosures shall be kept locked against unauthorized entry."

Findings of Fact and Conclusions of Law

Order No. 2838513

Order No. 2838513 which was issued by MSHA Inspector William J. Ciesielka on February 26, 1986, provides as follows:

> The 33 KV 2480 Transformer located at the bucket repair shed was not kept locked against unauthorized entry in that two mechanics (not electrical qualified) were inside the enclosure digging a trench. A qualified electrician was not at the site to directly supervise the work. A maintenance supervisor was in the area where he could observe the situation. Therefore this is an unwarrantable violation.

The substation in question, located at Respondent's Sandow Mine, contained a transformer, disconnecting device, and other electrical equipment, and was enclosed by a chain-link fence. According to the uncontradicted testimony of Respondent's witnesses, on February 26, 1986, Respondent's Electrical Foreman Garren Stroud instructed Respondent's electrician, Royce Mundine,

to cutoff the power at the main breaker in this substation, remove the power cable from the bottom of the breaker, and remove the cable from the substation area so that a trench could be dug running from underneath the breaker box to the edge of the fence. After the electrical cables were disconnected, Stroud explained to Respondent's supervisor, Thomas Nelson, that a trench or ditch had to be dug in the substation, and Mundine "laid it out" (Tr. 143). According to the testimony of Stroud, Mundine instructed Robert Yurk and John Bland, the two mechanics who were to dig the ditch, about the hazards that could exist within the substation fence. In contrast, it was the testimony of MSHA Inspector Ciesielka that when he subsequently arrived on the scene, on the date in question, Yurk told him that "I don't know what I am doing in here. This is an electrical job, and I know nothing about electric." (Tr. 23). In resolving the conflict between these versions, I note that Stroud's testimony was corroborated to some extent by Nelson who testified that he was present when Yurk was told, prior to time the ditch was dug, what he was to avoid making contact with. Also, Stroud was actually with Mundine on the date in question, and thus is competent to testify as to what Mundine said. On the other hand, Ciesielka was not privy to any conversations between Mundine and Yurk. Thus, based on the credible testimony of Stroud and Nelson, I find that Mundine told Yurk and Bland, in general, the hazards to avoid in digging the ditch.

Further, according to the uncontradicted testimony of Nelson, Mundine was in the substation enclosure for about 15 minutes while the trench was being dug by Yurk and Bland. Nelson testified that he had been told by Mundine that, in digging the trench, "back up at all time so you won't back into the breaker box" (Tr. 142). Nelson further testified that he was in the substation while the men dug the ditch and he stood inside between the gate and the breaker. Specifically, Nelson testified that he was standing at the gate when Ciesielka and the Union Representative Paul Tinert arrived at the scene on the date in question. In this regard, Nelson's testimony was, in essence, corroborated by Robert Freyensee, Respondent's superintendent, who arrived at the substation, on the date in question, along with Ciesielka. On the other hand, Ciesielka testified that when he and Tinert approached the substation he observed two employees inside digging a trench, and that there was no other personnel inside. He also testified that when he arrived at the substation area, he observed Nelson coming up from the bucket shed area. In essence, Ciesielka's testimony was corroborated by Tinert. I carefully observed the demeanor of all the witnesses testifying on this issue, and find that Nelson and Freyensee were more credible.

Thus, inasmuch as the credible evidence establishes that Nelson, Yurk, and Bland were inside the substation, at the request of Stroud, and had been apprised by Mundine, in essence, to avoid contact with the electrical equipment, and inasmuch as Yurk and Bland were being supervised by Nelson who was present in the substation, I find that the substation was unlocked to provide authorized entry. As such, I find that there has not been any violation by Respondent of 30 C.F.R § 77.509(c).

Order 02838514

Order 02838514 provides as follows:

> Electrical work was being perform on an electrical distribution circuit without the disconnecting devices being locked out and suitably tagged by the persons doing such work. The circuit going from the 7200T0480V transformer at the bucket repair shed was being relocated and a trench dug in the substation area inside the fence. A maintenance supervisor was near by in the area during observance of this condition and the qualified electrician was away, returning later with the mechanical/electrical supervisor. Therefore, this is an unwarrantable violation.

On the date in question, within the substation area in question, there was located a disconnecting device also referred to as switch box or circuit breaker. This item was located in a box that had a cover on it. It was stipulated that the box was not tagged, but that the door was closed. There was no evidence that the door was locked, but Ciesielka agreed that to open the box would necessitate undoing snaps. A lever controlling power from the box was located outside the box, and was in a down position which would not allow electricity to flow out of the box. The lever was not lock or tagged. Cables at the top of the box were energized, but they were insulated. The box itself was not energized. Because the power cable had been removed from the box, there was no power going from the box to buildings and there was also no power going to a number 6 cable coming out of a second transformer inside the fenced in area.

In actuality there is no dispute that a disconnecting device, on the date in question, was not locked out and tagged. In essence, it is Respondent's position, that Section 77.501, supra, was not violated, inasmuch as all electrical work, in the substation, had already been completed when the disconnecting device was observed by Ciesielka to be untagged and unlocked.

The second sentence of Section 77.501, supra, unequivocally prohibits having a disconnecting device that is not tagged or locked out. Although the first sentence of Section 77.501, supra, refers to persons performing "electrical work," there is no language in either of the two remaining sentences of Section 77.501, supra, to limit their application only to instances where electrical work is actually being performed. The manifest intent behind the requirement of having disconnecting devices locked out is to prevent the hazard of a injury being caused by a person coming in contact with an energized object which has been energized by a person inadvertently activating the disconnecting device. Such a hazard is more likely when electrical work is being performed, but also exists if authorized persons are in the area performing other work. Accordingly, I find that Section 77.501, supra, has been violated.

The failure to tag or lock the disconnecting device can only be considered to be significant and substantial if, as a result of this violation, there is a measure of danger to safety contributed to, with a reasonable likelihood that the hazard contributed to will result in a injury of a reasonably serious nature (See Mathies Coal Company, 6 FMSHRC 1 (January 1984). Petitioner's argument that the violation herein of Section 77.501, supra, is to be considered significant and substantial, appears to be predicated upon the testimony of Ciesielka, that, in essence, whenever a person is working in an area that has even low voltages there is a hazard of electrocution upon making contact with an energized part. However, the testimony of Ciesielka upon cross examination, and the uncontradicted testimony of Stroud, Respondent's supervisor of electricians, establishes that the circuit breaker (also referred to as disconnect box, switch box or disconnecting device), itself was not energized. Further, their testimony establishes that the only way that one could come in contact with a energized part of the circuit breaker is to open it or shove something up the entry hole at the bottom of the device where the wire comes out. Also, although cables or conduits located on top of the breaker box were energized they were 6 and 1/2 feet off the ground and wrapped with insulation. Another breaker (Item 8 Respondent's Exhibit 2), was 8 feet off the ground. Also, although Ciesielka testified that there was a cable leading out of the breaker box, I find based upon the credible testimony of Stroud that it was not energized. Therefore, based upon all of the above, I conclude that, although the breaker box in question was not locked or tagged, it has not been established by Petitioner that this violation would have resulted in the likelihood of an injury. I thus conclude that the violation of Section 77.501, supra, was not significant and substantial. (See Secretary v. Mathies Coal Company, supra.)

In its brief, Petitioner argues, in essence, that the fact that there was no lockout or tagging procedure on the disconnecting device constitutes "a serious lack of reasonable care." In this connection, Ciesielka testified that he considered the Respondent's negligence and rated it as "high" (Tr. 32). However, in discussing the Respondent's negligence, Ciesielka testified only to Respondent's alleged action in leaving unqualified people working without the direct supervision of a qualified person in an energized enclosure. He did not offer any analysis of Respondent's negligence with regard to the violation of Section 77.501, supra. Thus, I find that the Petitioner has failed to proffer sufficient evidence to support a finding that the violation by Respondent of Section 77.501, supra, resulted from its unwarrantable failure.

I have considered all of the criteria in Section 110(i) of the Act. All criteria have been stipulated to except the Respondent's negligence and the gravity of the violation. I conclude that the gravity was extremely low due to the lack of likelihood of an injury as a consequence of the violation herein. Also, I find that Petitioner has failed to establish any degree of negligences on the Respondent's part. I therefore conclude that a fine of $20 is appropriate herein for the violation of Section 77.501, supra.

ORDER

It is ORDERED that Order No. 2838513 be DISMISSED. It is further ORDERED that Order No. 2838514 be modified to a Section 104(a) Citation. It is further ORDERED that Respondent pay the sum of $20, within 30 days of the date of this decision, as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

July 31, 1987

GREENWICH COLLIERIES, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 86-17-R Order No. 2549665; 9/16/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Greenwich No. 2 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-56 A.C. No. 36-02404-03610
v.	:	Greenwich No. 2 Mine
GREENWICH COLLIERIES, DIV/PA MINES CORP., Respondent	:	

DECISION

Appearances: Joseph T. Kosek, Jr., Esq., Greenwich Collieries, Ebensburg, Pennsylvania; Joseph Yuhas, Esq., Greenwich Collieries, Ebensburg, Pennsylvania; B. Anne Gwynn, Esq., Office of the Solicitor, Arlington, Virginia

Before: Judge William Fauver

These consolidated cases were brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The Company seeks to vacate a withdrawal order charging a violation of a safety standard. The Secretary seeks to uphold the order and to have a civil penalty assessed for alleged violations.

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

FINDINGS OF FACT

1. Greenwich No. 2 Mine is an underground coal mine that produces coal for sale or use in or affecting interstate commerce.

2. Around 8:45 a.m., on September 16, 1985, in the P-7 section of the mine, Federal Inspector Samuel Brunatti observed certain deviations from Respondent's approved ventilation plan in that there was no check curtain across the last crosscut between entries R-1 and R-2 and the R-2 face canvas extended from the face to the inby corner of the belt entry in a manner that he believed closed off air to the faces of the belt and R-1 entries. He took an air reading at the face end of the canvas in R-2 entry and found no air movement.

3. There was no power on the section at the time, except for a roofbolting machine, and there was no mining going on.

4. When he began his inspection of this area Inspector Brunatti first went to the face in R-2 entry, where he found there was no air movement. He did this before he noticed any deviations from the ventilation plan. When he made the air test, he told a crew member, Ron Nagle, that they did not have enough air to mine coal. Someone told the section foreman, David Benamati, about the air problem and he came up to the face area. Inspector Brunatti told the foreman, "You don't have enough air in the mine, right here" pointing toward the R-2 face. The foreman told the inspector they had used the same ventilation system on Friday, September 13, and had adequate air then. The inspector doubted this statement, and told the foreman that, if he had had adequate air on Friday he should have no problem getting adequate air then, and gave the foreman some time to bring the ventilation up to the standard, i.e., 5,000 cfm at each face. The foreman checked the air, saw there was inadequate air, and then had his men tighten the air curtains. He testified that the curtains had been loosened or repositioned before the inspector arrived, because they were going to install a run-through curtain in the crosscut between R-1 and R-2 entries before mining coal. After the curtains were tightened, the foreman took another air reading at R-2 face, and found 3,800 cfm, still not enough air. The foreman then went to the return air entry, several crosscuts away, to try to find the cause of the air problem.

5. While the foreman was away trying to find the cause of the air problem, the inspector started investigating the problem near the R-2 face and crosscut between R-1 and R-2 entries. The inspector then discovered deviations from the approved

ventilation plan which he assumed were the cause of the air problem. He found that there was no check curtain in the crosscut between R-1 and R-2 entries and that the canvas from the face in R-2 entry extended to the inby corner of the belt entry. He believed that the canvas was too near the rib to allow adequate air to reach the faces and that this condition prevented adequate ventilation of the R-2 face.

6. Meanwhile, the foreman discovered a dislodged post blocking an air curtain in the belt entry which he believed to be the cause of the air problem. The foreman reset the post and rehung the curtain in the belt entry, and returned to the R-2 face area. He rechecked the air there and found over 5,420 cfm.

7. While the foreman had been over to the belt entry, the mine foreman, Paul Somagi, instructed miners to install the run-through curtain in a different place (from the place where the foreman was going to install it) and to reposition the curtains to comply with the ventilation plan.

8. The inspector assumed that the new, adequate air reading taken by the foreman was due to the ventilation curtain changes made by Somagi; he did not know about the foreman's discovery of a dislodged post blocking a curtain in the belt entry or his repair of that problem. The foreman assumed the improved air reading was due to his resetting of the dislodged post and rehanging of the curtain in the belt entry.

9. The inspector and the foreman never effectively communicated their views to each other with respect to the ventilation problem and how it was solved.

10. The inspector issued a § 104(d)(2) order (No. 2549665) charging a violation of the ventilation plan and therefore a violation of 75 C.F.R. § 75.316, based upon the following allegations of fact:

> The approved ventilation and methane and dust control plan was not being complied with at P-7, active working section, in that mining was being conducted in the R-2 entry. However, no check or other device was erected across the crosscut, R-1 to R-2, thus allowing the air to short circuit back to the return and not properly ventilate the R-2 face while coal was being mined. Also the canvas extended from the face of the R-2 entry outby to the inby corner of the belt entry, closing off all the entries to the faces of the belt and R-1, thus providing little or no ventilation to these faces. This condition occurred on the 4:00 p.m. to 12:00 p.m. shift on September 13, 1985, which was under the supervision of Dave Benamati.

11. The inspector had not been at the mine on September 13, 1985, and no witness for the Secretary had been in the P-7 section on that date. The only eye-witness (of September 13 conditions) who testified at the hearing was the foreman, who testified that there was no air problem in the P-7 section on September 13. He also testified that the check curtain between R-1 and R-2 entries was in place on September 13, and the canvas in R-2 entry was also in place, both as required by the ventilation plan.

DISCUSSION WITH FURTHER FINDINGS

The Secretary did not put the entire ventilation plan in evidence but presented a ventilation diagram from the plan and the testimony of the inspector, who testified that the plan required a minimum of 5,000 cfm at each working face while coal was being mined.

There was no mining in section P-7 at the time of the inspection on September 16, 1985. The foreman testified that some of the air curtains were out of place because he was preparing to do construction work, i.e., installing a plank in the roof and hanging a run-through curtain on the plank. Since there was no mining at the time, I find that the Secretary did not prove a violation of the ventilation plan on September 16. Apart from this conclusion, I find that Order No. 2549665 does not adequately charge a violation on September 16 and therefore cannot support a finding of a violation on that date. The order states that the deviations from the ventilation plan occurred during mining in R-2 entry and that "This condition occurred on ... September 13, 1985."

The Act provides that each charge of a violation of a safety or health standard "shall be in writing and shall describe with particularity the nature of the violation ..." (§ 104(a)). I conclude that Order No. 2549665 does not give sufficient notice of a violation on September 16, 1985, and therefore the Secretary's contention of a violation on that date is not cognizable in this proceeding.

The order sufficiently charges a violation on September 13, 1985, but the Secretary did not meet his burden of proof as to this charge. The only hearing witness who was an eye-witness to the conditions on September 13 was the foreman, and he testified that there was no ventilation problem on that date and there was sufficient air at the faces. The Secretary attempted to prove a violation by two elements of proof: (1) the foreman's statement to the inspector to the effect that he had used the same ventilation system on September 13 as he used on September 16 and

(2) the hearsay statement of of Ron Nagle to the inspector that they had "no air" on September 13.

The foreman's statement about the ventilation system used on September 13 was not clear. The foreman testified that he meant that the same ventilation system used on September 13 was going to be used on September 16 after the construction work and before mining was to begin on September 16. The inspector and the foreman did not communicate clearly on this point. Their misunderstanding is not a sufficient basis for finding a management admission or acknowledgement of a violation or a statement of undisputed facts that would support a determination of a violation.

The statement attributed to Ron Nagle is a hearsay opinion statement that does not purport to be based on actual air readings or an attempt to measure the velocity of air in the P-7 section on September 13. Without that specificity and without the opportunity of Respondent to cross-examine Nagle as to the basis of his opinion, I find that the hearsay opinion is not subtantial evidence and is not sufficient to substantiate the charge of a violation of the ventilation plan on September 13.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.

2. The Secretary did not meet his burden of proving a violation of 75 C.F.R. § 316 on September 13, 1985, as charged in Order No. 2549665.

3. The Secretary's contention that Respondent violated 75 C.F.R. § 316 on September 16, 1985, is not cognizable in this proceeding because such charge is not sufficiently alleged in Order No. 2549665. In addition, the Secretary failed to prove such a violation on the facts.

ORDER

WHEREFORE, IT IS ORDERED that:

1. Order No. 2549665 is VACATED.

2. The petition for a civil penalty is DENIED.

William Fauver
Administrative Law Judge

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