JULY 1991

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDER

JULY 1991

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

Asarco, Inc., v. Secretary of Labor, MSHA, Docket Nos. SE 88-82-RM, etc. (Judge Weisberger, Interlocutory Review of May 20, 1991 Order.) [Published in this issue]

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

Secretary of Labor, MSHA v. Midwest Minerals, Inc., and Richard R. Atkinson, Docket No. CENT 90-60-M, CENT 91-51-M. (Judge Koutras, Interlocutory Review of May 30, 1991 Order.)

Larry E. Burns v. Blattner & Sons, Inc., Docket No. WEST 90-166-DM. (Judge Lasher, June 21, 1991.)

Homestake Mining Company v. Secretary of Labor, MSHA, Docket No. CENT 90-108-RM. (Judge Lasher, June 21, 1991.)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 91-100
MUSTANG FUELS CORPORATION	:	

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988), (the "Mine Act"), Commission Chief Administrative Law Judge Paul Merlin issued an order of default on June 17, 1991, finding Mustang Fuels Corporation ("Mustang") in default for failure to respond to his April 23, 1991, order to show cause. The judge assessed a civil penalty of $450.00. For the reasons that follow, we vacate the default order and remand the case for further proceedings.

On June 25, 1991, the Commission received an undated letter from Mustang that contains a statement of the reasons why Mustang disagrees with the civil penalty proposed by the Secretary of Labor in this case. The judge's jurisdiction over the case terminated when his decision was issued on June 17, 1991. 29 C.F.R. § 2700.65(c). Under the circumstances presented, we deem Mustang's letter to be a timely petition for discretionary review of the judge's default order. E.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988). The petition is granted.

The record discloses that on June 19, 1990, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Mustang a citation pursuant to section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.807-1, and an imminent danger withdrawal order pursuant to section 107(a) of the Mine Act, alleging that sufficient clearance from a high-voltage cable was not provided in an area in which a dozer was being operated. Mustang filed a "Blue Card" request for a hearing before this Commission. When no answer to MSHA's Proposal for Assessment of Civil Penalty was filed, Judge Merlin issued an order directing Mustang to file an answer within 30 days or show good cause for its failure to do so. When no response was received, Judge Merlin issued an order finding Mustang in default for failure to answer the Secretary's civil penalty proposal and the show cause order, and assessing the $450 civil penalty proposed by the Secretary.

On June 25, 1991, the Commission received a letter from Donna Johnson, the secretary and treasurer of Mustang, in which Ms. Johnson alleges that John Kerr, the president of Delta Fuels Corporation ("Delta"), hired Mustang as the "underground miner" for the mine, and hired another company as its "surface mine contractor." Johnson explains that surface mining operations were being conducted by the other contractor when the subject citation and order were issued on June 19, 1990, but that Mustang "never ran any coal at any time" out of the mine, and had no control over the surface mine contractor. It appears that both the citation and the order of withdrawal were issued for conditions present on the surface. She further states that Mr. Kerr assured Mustang that the "citations would be taken care of," and that, subsequently, Kerr left the country.

Ms. Johnson also attached to her letter a separate undated letter addressed to MSHA from Mustang stating that the mine "has been and will be permanently aban[doned]. This was effective on August 1, 1990." The subject citation and order were issued at the mine on June 19, 1990, and terminated on July 5, 1990.

Mustang appears to be a small company proceeding without benefit of counsel. In conformance with the standards set forth in Fed. R. Civ. P. 60(b)(1), the Commission has previously afforded such a party relief from default upon a colorable showing of inadvertence, mistake, or excusable neglect. E.g., A.H. Stone Company, 11 FMSHRC 2146, 2147 (November 1989). Here Mustang asserts that it failed to respond to the judge's order because it relied upon Kerr's alleged representation that the citation "would be taken care of," and that it believed that it was not the party responsible for any violative conduct. On the basis of the present record, we are unable to evaluate the merits of Mustang's assertions, but, in the interest of justice, we will permit Mustang to present its position to the judge, who shall determine whether relief from the default order is warranted.

Accordingly, we grant Mustang's petition for discretionary review, vacate the judge's default order, and remand this matter for proceedings consistent with this order.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 1 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 91-13
	:	A. C. No. 34-01633-03520
v.	:	
	:	No. 1 Mine
OK & WV COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert A. Fitz, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for the Secretary of Labor (Secretary);
A. F. Robinson and R. V. Bell, Madison, West Virginia, for OK & WV Coal Company (OK & WV).

Before: Judge Broderick

STATEMENT OF THE CASE

In this proceeding, the Secretary seeks civil penalties for two alleged violations of mandatory health and safety standards cited following an investigation of a fatal electrical accident at the subject mine on January 12, 1990. Pursuant to notice, the case was called for hearing in Tulsa, Oklahoma, on May 21, 1991. Ronnie Wilburn, Paul Cash, James Vince Smedley and Harold Shaffer testified on behalf of the Secretary. OK & WV did not call any witnesses. At the close of the hearing, both parties waived their right to file post hearing briefs, and each made a closing argument on the record. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

1. OK & WV was the operator of an underground coal mine in Okmulgee County, Oklahoma, from August 1989 to August 1990, known as the No. 1 Mine. The mine is currently operated by another company.

2. The mine produced 31,834 tons of coal in 1989 and 32,098 tons in the first quarter of 1990. The operator decided "it was impossible to make money there and we decided to sever our contract and try to dissolve our business in Oklahoma" (Tr. 103). I find that OK & WV was a small mine operator.

3. From the time the mine opened and until January 12, 1990, OK & WV was cited for 36 violations, none of which involved 30 C.F.R. § 75.509 or § 75.511. In view of the fact that the mine operated for such a short period of time, I find that this history is not such that penalties otherwise appropriate should be increased because of it.

4. Dover Varney was employed at the subject mine in January 1990, as an electrician. He was an experienced and certified electrician, one of four employed at the mine. He had 13 years mining experience, and had worked 4 months at the subject mine. Mr. Ronnie Wilburn, the chief electrician and Mr. Varney's supervisor, believed that Varney was the ablest electrician at the mine including Wilburn.

5. The crew on the day shift at OK & WV on January 12, 1990, was having trouble with the continuous mining machine beginning about 12:30 p.m. When they attempted to operate the machine, the circuit breaker knocked out the power. The first shift electrician Paul Cash was working on it.

6. The chief electrician Wilburn and second shift electrician Dover Varney went underground at about 2:00 p.m., on January 12, prior to the beginning of the second shift. Cash and Varney deenergized the miner and took off the control panel. They disconnected the pump motor and planned to tram the miner from the area. However, when they energized the miner and replaced the panel, they were unable to start the miner.

7. Leaving the miner energized, they again removed the control panel. Varney looked in the compartment and saw that the circuit breaker was "kicked." He checked the No. 1 circuit with his voltmeter which showed no voltage. Wilburn, who stated that he "wasn't that familiar with the machine," told Varney that he thought there was still power on the machine (Tr. 40). Cash, who was crawling away toward his tool box, and whose cap lamp had dimmed, said "Dover, one breaker doesn't kill all the power in that box" (Tr. 50).

8. Varney replied, as he reached in the panel, "if it has power on it, it's the first one I've ever. . ." At that moment he received the electric shock from the 450 volt circuit. This occurred about 5:00 p.m.

9. The trailing cable was deenergized. CPR was administered and Varney was taken to the surface and transported to the hospital by ambulance. He was pronounced dead on arrival at 5:22 p.m.

10. Varney was not wearing gloves at the time of the fatal accident. The electricity apparently entered his body through his forearm just below the elbow. He was kneeling on the wet floor at the time.

11. Chief electrician Wilburn was standing about 5 feet from Varney when the accident occurred. He was facing Varney and talking to him as found in 7. and 8. above. Cash, as I found above, was crawling away from the machine.

12. The cover to the control panel on the miner contained a printed instruction that the trailing cable must be deenergized before working in the compartment. Wilburn, however, was not aware of this instruction prior to the fatal accident.

13. On January 15, 1990, Federal Coal Mine Inspector Harold Shaffer investigated the accident. He issued a 103(k) Order, a 104(d)(2) Order charging a violation of 30 C.F.R. § 75.512, and a 104(a) Citation charging a violation of 30 C.F.R. § 75.1720(c).

14. On January 16, 1990, Inspector Shaffer issued a modification of the 104(d)(2) Order to show the correct section of 30 C.F.R. as 75.511.

15. The order was terminated on January 16, 1990, after a training course on locking out and tagging procedures was presented to the mine's electricians by the mine manager and an MSHA-qualified instructor.

16. When the case was called for hearing, the Secretary moved to amend the Proposal for Penalties and the 104(d)(2) Order to charge a violation of 30 C.F.R. § 75.509 rather than 30 C.F.R. § 75.511. OK & WV did not object and the motion was granted.

REGULATIONS

30 C.F.R. § 75.511 provides:

> No electrical work shall be performed on low-, medium-, or high-voltage 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. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

30 C.F.R. § 75.509 provides:

> All power circuits and electric equipment shall be deenergized before work is done or such circuits and equipment, except when necessary for trouble shooting or testing.

30 C.F.R. § 75.1720 provides in part:

> . . . each miner regularly employed in the active workings of an underground coal mine shall be required to wear the following protective clothing and devices:
>
> * * *
>
> (c) Protective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.

ISSUES

1. Whether the evidence establishes that OK & WV failed to deenergize electric equipment before working on such equipment?

2. If so, was it necessary to have the equipment energized for trouble shooting or testing?

3. Whether the requirement that protective gloves be worn applies to the facts shown in this proceeding?

4. If the two violations charged occurred, what are the proper penalties therefor?

CONCLUSIONS OF LAW

1. OK & WV was subject to the provisions of the Mine Act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

2. On January 12, 1990, OK & WV in the person of electrician Dover Varney performed work on electric equipment, namely the electric panel of a continuous mining machine without deenergizing the machine.

3. It was not necessary to have the machine energized while performing the work for trouble shooting or testing.

4. Therefore, a violation of 30 C.F.R. § 75.509 is established by the evidence in this proceeding.

5. The protective clothing standard requires gloves to be worn when performing work which might course injury to the hands. The Secretary's Program Policy Manual July 1, 1988, interpreting Section 75.1720(c) requires that "miners wear gloves whenever they troubleshoot or test energized electric power circuits or electric equipment." (Gx 11).

6. Therefore the failure of Varney to wear gloves when testing the energized electric circuit of the continuous miner was a violation of 30 C.F.R. § 75.1720(c).

7. The fatal electrical accident resulted from the violation of 30 C.F.R. § 75.509 referred to in conclusion 4. Therefore, the violation was extremely serious.

8. OK & WV in the person of its chief electrician was aware of the violation and observed its occurrence. On the other hand, the chief electrician warned the victim of the danger. Further, the victim was a highly qualified and certified electrician who should have known not to reach in an energized circuit compartment. These factor mitigate OK & WV's negligence.

9. Considering the facts established on this record in the light of the criteria in Section 110(i) of the Act, I conclude that a civil penalty of $2500 is appropriate for the violation of 75.509.

10. The evidence does not establish that the violation of 30 C.F.R. § 75.1720(c) was related to the fatal accident. The electric current entered the victim's body on his forearm below the elbow which would not have been covered by a glove. He was kneeling on the wet floor. OK & WV made gloves available, but apparently did not require the miners to wear them. The violation was of moderate gravity and resulted from ordinary negligence.

11. Considering the facts established on this record in the light of the criteria in Section 110(i) of the Act, I conclude that a civil penalty of $100 is appropriate for the violation of Section 75.1720(c).

ORDER

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

1. Order No. 2929848 issued January 15, 1990, as amended is **AFFIRMED.**

2. Citation No. 2929857 issued January 16, 1990, is **AFFIRMED.**

3. OK & WV shall within 30 days of the date of this order pay to the Secretary of Labor the following civil penalties:

CITATION/ORDER	30 C.F.R.	AMOUNT
2929848	75.509	$2500
2929857	75.1720(c)	$ 100
	TOTAL	$2600

James A. Broderick
Administrative Law Judge

Distribution:

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 1 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 90-428
	:	A.C. No. 15-16104-03533
v.	:	No. 5 Mine
RAMBLIN COAL COMPANY, INC., Respondent	:	Docket No. KENT 90-429
	:	A.C. No. 15-16685-03510
	:	Docket No. KENT 90-430
	:	A.C. No. 15-16685-03511
	:	No. 8 Mine

ORDER

These consolidated cases came on for hearing at Prestonsburg, Kentucky, on June 18, 1991. Various motions were made and ruled upon from the bench. This Order confirms the bench rulings.

WHEREFORE IT IS ORDERED that:

1. The motion for approval of settlement in Docket No. KENT 90-428 is GRANTED. Respondent shall pay the approved civil penalty of $105 within 30 days of this Order and upon such payment Docket No. KENT 90-428 is DISMISSED.

2. In Docket No. KENT 90-430, the Secretary's motion to vacate Citation No. 3367869 is GRANTED.

3. In Docket No. KENT 90-429, the motion to approve settlement of the following citations, in the civil penalty amounts shown, is GRANTED.

Citation	Civil Penalty
3367128	$91
3510164	$20
3510419	$112

Respondent shall pay the approved civil penalties of $223 within 30 days of this Order.

4. STAY ORDER: as to all remaining citations in Docket No. KENT 90-430 and as to Citation No. 3509948 in Docket No. KENT 90-429, further proceedings are STAYED pending the Commission's decision in Hobert Mining, Inc., Docket No. WEVA 91-65.

5. A decision on the merits of the remaining citations in Docket No. KENT 90-429 shall be rendered after consideration of the parties' briefs.

William Fauver

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 2 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 90-49 A.C. No. 36-07783-03516
v.	:	Slope No. 1 Mine
HICKORY COAL COMPANY, Respondent	:	

DECISION

Appearances: Anthony O'Malley, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for the Secretary of Labor;
Mr. William Kutsey, Owner, Hickory coal company, Pine Grove, PA, pro se.

Before: Judge Fauver

The Secretary of Labor seeks civil a penalty for an alleged violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence, oral arguments, and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. At all relevant time, William Kutsey, doing business as Hickory Coal Company, operated an underground coal mine known as Slope No. 1 Mine in or near Ravine, Schuylkill County, Pennsylvania, where he produced coal for sales in or affecting interstate commerce.

2. On September 19, 1989, Federal Mine Inspectors arrived at Respondent's Slope No. 1 Mine for the purpose of providing technical assistance and to conduct a § 101(c) petition for modification investigation. When Mr. Kutsey was informed that the underground investigation would also include enforcement

action (i.e. citations or orders issued under the Act) for any outstanding or unabated violations, he shut down the hoist engine and informed the inspectors that no further underground work would occur that day, and that the inspectors would not have access to the underground mine.

3. The action taken by Respondent on September 19, 1989, prevented the inspectors from performing their official inspection and investigative duties under the Act. Because of such action by Respondent, Inspector Charles C. Klinger issued Citation No. 2676993, on September 19, 1989, charging a violation of § 103(a) of the Act.

4. On September 21, 1989, the inspectors returned to the mine and Mr. Kutsey continued to deny the inspectors entry to the mine. Because of this conduct, Inspector Klinger issued a withdrawal order (No. 2676995), on September 21, 1989, forbidding any persons to enter the mine until entry by inspectors was permitted by Respondent.

5. Because of Respondent's denial of entry to the mine, inter alia, the Secretary brought a civil action in the United States District Court for the Eastern District of Pennsylvania, Secretary of Labor v. William Kutsey, t/a Hickory Coal Company (Civil Action No. 89-7874). On February 1, 1990, after an evidentiary hearing, the Court found that, on September 19, 1989, and September 21, 1989, defendant had refused entry to the mine and was continuing to operate a front-end loader in violation of a prior withdrawal order. The Court issued a preliminary injunction, enjoining defendant from denying authorized representatives of the Secretary entry to the mine and from interfering with, hindering, or delaying the Secretary of Labor or her authorized representatives in carrying out the provisions of the Act. The Court also enjoined defendant from permitting any person, except persons referred to in § 104(c) of the Act, from entering the mine until the Secretary terminated, modified or withdrew Order No. 2676995.

6. Respondent, acting through William Kutsey, had denied Federal Mine Inspectors access to the subject mine before September 19, 1989, and had direct knowledge of the requirements of § 103(a) of the Act before such date.

DISCUSSION WITH FURTHER FINDINGS

William Kutsey has had a longstanding dispute with MSHA over the requirements for adequate roof-control at the subject mine. He has not agreed to certain provisions that MSHA would require for approval of a roof-control plan at his mine. Also, Mr. Kutsey appears to have a personal conflict with one of the MSHA inspectors. These conflicts apparently gave Mr. Kutsey the misguided belief that he could obtain a resolution of his differences with MSHA by denying the inspectors entry to the mine until his disputes were settled. This, of course, is an

inappropriate reaction and one that is unlawful under this statute. Section 103(a) of the Act provides:

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

The allegations of Citation No. 2676993 and Order No. 2676995 are sustained by a preponderance of the reliable evidence.

In arriving at a civil penalty, I will consider Respondent's financial condition, the size of the operation, and the other criteria for civil penalties in § 110(i) of the Act. I note that Government Exhibit 4, the print-out of Respondent's prior violation charges and civil penalties from March 1, 1986, to November 26, 1990, shows total assessments of $7,842.00 in back penalties with zero payment of penalties. The payment or non-payment of final civil penalties (i.e., those that are not pending litigation) is part of the operator's history of compliance in § 110(i) of the Act. In light of Respondent's total delinquent history as to Government Exhibit 4, I will give Respondent an opportunity to propose to the Secretary a settlement and schedule of payments of the back penalties before assessing a penalty for the violation found in this case. If a suitable agreement is not reached by the parties for the payment of back penalties, I will consider Respondent's delinquent status as an adverse factor in assessing a penalty in this case.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent violated § 103(a) of the Act as alleged in Citation No. 2676993 and Order No. 2676995.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 2676993 and Order No. 2676995 are AFFIRMED.

2. Pending assessment of a civil penalty for the violation found herein, Respondent shall have 15 days from this Decision and Order to propose a settlement and schedule of payments to the Secretary of Labor, regarding the arrearage of $7,842.00 in back penalties. The parties shall file a report of the results of any negotiations concerning such matter, not later than July 22, 1991.

William Fauver

William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 2, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-105 A. C. No. 46-01438-03872
v.	:	Ireland Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Before: Judge Merlin

Statement of the Case

This case is a petition for the assessment of a civil penalty filed under sections 105(d) and 110(i) of the Federal Mine Safety and Health Act, 30 U.S.C. § 815(d) and § 820(i), (hereafter referred to as the "Act"), by the Secretary of Labor against Consolidation Coal Company for a violation of 30 C.F.R. § 70.100(a) which is a restatement of section 202(b)(2) of the Act, 30 U.S.C. § 842(b)(2).

30 C.F.R. § 70.100(a) provides as follows:

> (a) Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations).

Citation No. 3327204 dated October 29, 1990, charges a violation of 30 C.F.R. § 70.100(a) for the following condition or practice.

> Computer message 0321-002, advisory No. 0203, dated October 22, 1990, shows the average concentration of respirable dust in the working environment of the 044, longwall operator (tailgate side), for MMU 005-0, was 2.1 milligrams which

exceeds the applicable standard of 2.0 mgm/^{3} (sic). First the mine operator shall take corrective measures to lower the respirable dust, then sample the 044 occupation the following production shifts until five (5) valid samples are submitted to MSHA, St. Clairville, Ohio 43950 (Mailing Labels Included).

Stipulations

Each of the parties has submitted the case for decision on the basis of stipulations which are in agreement except for a few matters. The stipulations are adopted to the extent they are in agreement as follows:

(1) The Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission has jurisdiction to hear and decide this civil penalty proceeding pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977;

(2) The operator has an average history of prior violations for a mine operator of its size. There were at least six (6) violations of 30 C.F.R. § 70.100(a) at the Ireland Mine prior to October 29, 1990;

(3) Citation No. 3327204, the current violation, was issued on October 29, 1990, for a violation of 30 C.F.R. § 70.100(a). The respirable dust average of 2.1 milligrams is correct and is based on an average of five respirable dust test results of 1.1, 0.8, 3.1, 2.7, and 3.0;

(4) The only issue to be determined is whether the violation constituted a significant and substantial violation as defined by the Act;

(5) Inspector Ted Zitko was acting in his duly authorized and official capacity as a Mine Safety and Health Administration Inspector when Citation No. 3327204 was issued on October 29, 1990;

(6) Citation No. 3131217 was issued on March 13, 1990, for a previous violation of 30 C.F.R. § 70.100(a) based on the average of five (5) respirable dust tests that were performed in February 1990;

(7) Citation No. 3131217 was issued for a violation that occurred on the 044 longwall MMU-005-0 section, which is the same section as the current alleged violation. The average respirable dust level in Citation No. 3131217 was 2.7 milligrams;

(8) The information contained in Citation No. 3131217 that was issued for the previous violation of March 13, 1990, is accurate and is a final Commission decision. The Court may take judicial notice of the contents of the file of that case which were attached and identified by the Secretary as Document A.

(9) The operator is considered a large mine operator for purposes of 30 U.S.C. § 820(i);

(10) The operator has demonstrated good faith in achieving compliance after notice of the violation in both Citation Nos. 3327204 and 3131217;

(11) If a hazard existed, at least two (2) miners were exposed;

(12) Ireland Mine had no fatal injuries in 1989 or in 1990. As of January 1991, the disabling injury frequency rate for the Ireland Mine is 3.45 and the disabling injury frequency rate for the coal industry is 10.87;

(13) The maximum penalty which could be assessed for this violation pursuant to 30 U.S.C. § 820(a) will not affect the ability of the operator to remain in business.

Statement of the Issue

As set forth in the stipulations, the violation is admitted. The issue presented for determination is whether the violation was "significant and substantial" within the purview of Commission and judicial precedents.

Precedents

In Consolidation Coal Company, 8 FMSHRC 890 (June 1986), the Commission decided that a respirable dust concentration of 4.1 mg/m^3 constituted a significant and substantial violation. In so holding the Commission adopted principles which appropriately serve as a guide for resolution of the present matter. Similarly, the Court of Appeals which affirmed the Commission in Consolidation Coal Company v. Federal Mine Safety and Health Review Commission, 824 F.2d 1071 (D. C. Cir. 1987), further elucidated the precepts which govern this inquiry.

In Consolidation Coal Company, the Commission recognized the unambiguous legislative purpose to prevent disability from pneumoconiosis or any other occupation-related disease. The Commission stated that Congress intended the 2.0 mg/m^3 standard to be the maximum permissible exposure level in order to achieve its goal of preventing disabling respiratory disease. 8 FMSHRC at 897. The respirable dust violation was then analyzed to

determine whether it was significant and substantial in accordance with the four step test enunciated by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981) and Mathies Coal Company, 6 FMSHRC 1 (1984). The respirable dust violation was admitted (first step) and the Commission held that any exposure above the 2.0 mg/m^3 level established a measure of danger to health (second step). 8 FMSHRC at 898. In finding a reasonable likelihood that the hazard would result in illness (third step), the Commission stated that although a single incident of overexposure would not in and of itself establish a reasonable likelihood, the development of respiratory disease was due to cumulative overexposure with precise prediction of whether and when respiratory disease would develop being impossible. 4 FMSHRC at 898. Accordingly, the Commission held that if the Secretary proves an overexposure in violation of § 70.100(a) a presumption arises that there has been established a reasonable likelihood that the health hazard will result in illness. 8 FMSHRC at 899. Finally, the Commission found there was no serious dispute that the illness in question would be of a reasonably serious nature (fourth step). 8 FMSHRC at 899. Because the four elements of the significant and substantial test would be satisfied in any case where there was a violation of § 70.100(a), the Commission held that when the Secretary finds a violation of § 70.100(a), a presumption that the violation is significant and substantial is appropriate. The presumption may be rebutted by proof of non-exposure. 8 FMSHRC at 899.

Upon review, the Court of Appeals affirmed the Commission and upheld its adoption of the presumption that all respirable dust violations of § 70.100(a) are significant and substantial. The Court stated in pertinent part as follows:

> * * * The determination of the likelihood of harm from a violation of an exposure-based health standard necessarily rests on generalized medical evidence concerning the effects of exposure to the harmful substance, rather than on evidence specific to a particular violation.
>
> * * * Once the Commission had determined on the basis of medical evidence that any violation of the respirable dust standard should be considered significant and substantial, it would be meaningless to require that the same findings be made in each individual case in which a violation occurs. * * *
>
> * * * * * * *
>
> The Commission's adoption of the presumption at issue here is consistent with congressional

> intent in enacting the Mine Act, and specifically with Congress's use of the "significant and substantial" language.

824 F.2d at 1084, 1085.

Analysis

I conclude that the foregoing decisions of the Commission and the Court of Appeals compel a finding that the violation in this case is significant and substantial. Admittedly, the average concentration in this case was 2.1 mg/m^3, whereas it was 4.1 mg/m^3 in Consolidation Coal Company. However, as set forth above, the Commission in Consolidation Coal Company adopted a presumption that all exposures above the 2.0 mg/m^3 limit specified in § 70.100(a) are significant and substantial. In this case the operator has offered no evidence, such as non-exposure through the wearing of protective equipment, to rebut the presumption which is therefore, determinative.

In arguing that the violation here is not significant and substantial the operator relies upon the Commission's reference in Consolidation Coal Company to statements in the legislative history of the 1969 Coal Act that in a dust environment below 2.2 mg/m^3 there would be virtually no probability of contracting pneumoconiosis even after 35 years of exposure at that level. 8 FMSHRC at 896-897. The operator's argument cannot be accepted. Although the Commission referred to the cited legislative history, it did not decide that overexposure violations of a certain magnitude could be considered non significant and substantial. On the contrary, as explained above, the Commission's analysis and holdings regarding the four elements necessary for an overexposure violation to be considered significant and substantial, are grounded solely upon the 2.0 mg/m^3 ceiling of § 70.100(a). So too, the Commission's creation of the presumption, that any overexposure violation is significant and substantial, is specifically cast in terms of all violations of § 70.100(a), i.e. 2.0 mg/m^3 as the maximum ceiling. It is well settled that absent a clearly expressed legislative intention to the contrary, the language of the statute itself must be regarded as conclusive. Burlington Northern Railroad Co. v. Oklahoma Tax Commission, 481 U.S. 454, 461 (1987); Consumer Product Safety Commission v. GTE Sylvania Inc., 447 U.S. 102, 108 (1980).

Moreover, the Court of Appeals in Consolidation Coal Company specifically rejected the operator's suggestion that the standard for designating an overexposure violation as significant and substantial must be higher than 2.0 mg/m^3 required for a violation. The Court said it could not say that Congress intended that some concentration of respirable dust higher than 2.0 mg/m^3 be found before the violation could be designated as significant and substantial. 824 F.2d at 1084-1085. Rather it held that the Commission's adoption of the presumption of significant and

substantial was consistent with the Congressional intent in enacting the Mine Act. 824 F.2d at 1085.

In addition, the Court decided that in the legislative history the statements regarding non-probability of pneumoconiosis at a 2.2 mg/m^3 level did not provide a basis to reject the Commission's adoption of the significant and substantial presumption. 824 F.2d at 1085-1086. The Court held that the operator's arguments failed to consider the cumulative effects of repeated overexposure and that its position could not be reconciled with the Congressional intent to prevent respirable disease. 824 F.2d at 1086. Finally, the Court pointed out that Congress did not merely require dust concentrations be maintained below 2.0 mg/m^3 "over the long term" as the operator suggested, but mandated instead that the concentration be "continuously" maintained below the specified level "during each shift". 824 F.2d at 1086. Therefore, the reference in the legislative history to a "dust environment" of 2.2 mg/m^3 or less, relied upon by the operator is something quite different from the exacting requirements Congress actually placed in the law.

The arguments the operator advances in this case are the very ones it made in Consolidation Coal Company. And just as the Commission and the Court of Appeals rejected them previously, so they must be rejected here. The Commission's presumption that any respirable dust violation is significant and substantial applies here and determines the result. For me to carve out some intermediate and indeterminate zone in which a non significant and substantial violation exists would not only be contrary to the terms of the Act and underlying Congressional purposes, but also would be precluded by the decisions of the Commission and the Court of Appeals.

It should be noted that the record in this case further demonstrates that the instant violation was significant and substantial. Although the subject citation was issued for an average concentration of 2.1 mg/m^3, a citation issued seven months previously was for an average dust level of 2.7 mg/m^3 (Stipulation No. 7). Accordingly, even if the language in the legislative history regarding a dust environment below 2.2 mg/m^3 could otherwise be of comfort to the operator, the record shows that on the subject longwall section the dust environment was not anywhere near, much less below the 2.2 mg/m^3 level "continuously" and "during each shift".

In light of the foregoing, I find the cited violation was significant and substantial.

The Solicitor's Stipulation No. 4 proposes that an issue to be determined is whether the violation was due to moderate

negligence. The operator's proposed stipulations are silent on negligence. Because there is no evidence on the matter, I find the operator was not negligent. Cf. 824 F.2d at 1076.

I conclude the violation was serious and accept the stipulations of the parties with respect to the other criteria of section 110(i). Therefore, I conclude an appropriate penalty is $300.

I take note of the decision in Cyprus Empire Corporation, 11 FMSHRC 1795 September (1989), but for the reasons set forth herein, I decline to follow it.

The briefs of the parties have been reviewed. To the extent they are inconsistent with this decision they are rejected.

ORDER

It is **ORDERED** that the finding of significant and substantial in Citation No. 3327204 be **AFFIRMED.**

It is further **ORDERED** that the operator **PAY** $300 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUL 8 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-184-M A.C. No. 42-01816-05507
v.	:	
CUSTOM CRUSHING INC., Respondent	:	Custom Crushing # 1

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Steve Zabriskie, President, Custom Crushing Inc., Taylorsville, Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") charges Respondent Custom Crushing, Inc., 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 was held in Salt Lake City, Utah, on April 30, 1991. The parties waived the filing of post-trial briefs.

STIPULATION

At the commencement of the hearing, the parties stipulated as follows:

1. Custom Crushing, Inc., is engaged in the mining of sand and gravel in the United States, and its mining operations affect interstate commerce.

2. Custom Crushing, Inc., is the owner and operator of the Custom Crushing #1 Portable Crusher, MSHA I.D. No. 42-01816-05507.

3. Custom Crushing, Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevance of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect Respondent's ability to continue in business.

8. The Operator demonstrated good faith in abating the violations.

9. Custom Crushing, Inc., is a small operator of a sand and gravel portable crusher with 7,952 control hours worked in 1989.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citations.

Citation No. 2652565

In this citation, MSHA charges respondent with violating 30 C.F.R. § 56.12002. [1]

The evidence is uncontroverted: On March 6, 1990, MSHA Inspector James Skinner, an electrical and hoisting specialist, inspected Respondent.

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[1] The cited regulation provides as follows:

§ 56.12002 Controls and switches.

Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed.

The Operator's electrical control panels were located in the control trailer. The electrical panels, opened by the Inspector, housed protective breakers for individual circuits of the electrical motors throughout the plant.

Each panel is six feet high and two to three feet wide. (Exs. P-2 and P-3 are photographs of the outer doors of the panels.)

After opening the door, the Inspector observed two rows of circuit breakers with holes where a circuit breaker had been removed and a hole had been cut (Tr. 17). After the panel doors to the energized panels were closed, the Operator objected to their being reopened. As a result, no inside measurements were made and no photographs of the interior were taken.

Exhibit P-4 is an illustration of a circuit breaker panel taken from the National Electrical Code book (NEC), 1990 Edition.

Due to the holes, Respondent's panel was unlike those illustrated in the NEC. (Tr. 19). The holes in the inner panel were about 3 to 4 inches. As a result of the described condition, a worker could come into contact with a three-phase 480 volt current. (Tr. 22). If a worker would touch one of the busses and be grounded, he would receive a 277-volt shock. Voltage as low as 48 can be fatal. (Tr. 23).

The design for electrical panels is approved by a national organization, the National Electrical Manufacturers Association (NEMA). The NEMA approves of bare busses but an inner covering panel or "dead front" is required. Respondent's inner panel had been altered. (Tr. 28).

In the Inspector's opinion, the violation occurred because the circuit breakers had been altered from the original design. The change was where a circuit breaker had been removed, leaving a hole, and at least one hole had been cut in the panel. (Tr. 33, 34). The alteration of the dead front panel left holes in it. (Tr. 35).

The violation was abated by posting signs on the outside panel stating that the doors should not be opened unless the generator was de-energized. (Tr. 36).

STEVE ZABRISKIE, President of Respondent, submitted photographs of the electrical panel. However, the witness did not rebut the testimony of Inspector Skinner concerning the holes in the inner electrical panel. He further confirmed that a worker could be shocked if he contacted the wires in the holes cut in the panel. (Tr. 65).

DISCUSSION

It is uncontroverted that the electrical panel in Respondent's control trailer had been altered. The focus of MSHA's regulation § 56.12002 is that the electrical controls were not of "approved design and construction."

Inspector Skinner testified the design for such panels is approved by NEMA. While Nema approves bare busses, they must be covered. The "dead front" inner panel is a NEMA feature. (Tr. 28).

The design of the internal cover of Respondent's panel board had been altered. (Tr. 33). Figure 384-3 of Exhibit P-4 shows a panelboard. The panelboard in the illustration is without openings such as those at Respondent's electrical panel.

Section 56.12002 must be construed in light of its underlying purpose--the protection of miners exposed to the equipment's use. That purpose was plainly set forth in the Secretary's statement of purpose and scope of the Part 56 standards, which provided: "The purpose of these standards is the protection of life, the promotion of health and safety, and the prevention of accidents." 30 U.S.C. § 56.1. Any overly narrow or restrictive reading of the scope of Section 56.12002 cannot be reconciled with that statement of purpose or with the fundamental protective ends of the Mine Act itself, as set forth in the Mine Act. See 30 U.S.C. § 801(a), (d), and (e). Compare Ideal Cement Company, 12 FMSHRC 2409 (1990). No doubt, the purpose of an inner panel without holes is to protect a miner from coming in contact with live busses and terminals.

On the record here, Citation No. 2652565 should be affirmed.

Citation No. 2652567

This citation alleges a violation of 30 C.F.R. § 56.15004. [2]

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[2] The cited regulation provides:

> § 56.15004 Eye protection.
>
> All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

The evidence is uncontroverted: On the following day, during the inspection, Mr. Skinner observed the crusher operator in the wooden booth near the primary jaw-crusher. The Operator was not wearing safety glasses nor did he have eye protection while his head was outside of the window opening. (Tr. 40, 42). His head was in this position for about five minutes. (Tr. 43). The jaw-crusher, which can throw rock splinters, was three to four feet below the employee. (Tr. 44; Exs. R-1 and R-2 show the booth and employee.) Upon being questioned, the employee said he had eye glasses but he was unable to produce them.

The violation was abated when the employee was provided with glasses. (Tr. 45).

Witness Zabriskie offered photographs (Exs. R-1, R-2) and basically confirmed Inspector Skinner's testimony. (Tr. 55-57).

DISCUSSION

The uncontroverted evidence establishes that the crusher operator was leaning outside of the booth. In this position, he was three to five feet above the jaw-crusher. The hazard of flying rock splinters was apparent.

The factual situation establishes a violation of 30 C.F.R. § 56.15005 and Citation No. 2652567 should be affirmed.

CIVIL PENALTIES

The statutory criteria to assess civil penalties is contained in Section 110(i) of the Act, 30 U.S.C. § 820(i).

The Operator's history is very favorable. In the two years ending March 5, 1990, the company received no citations. In the period before March 6, 1988, there were nine citations.

The parties have stipulated that Respondent is a small operator and the proposed penalties will not affect its ability to continue in business.

The Operator was negligent as to both citations since it should have known of the violations.

The gravity was moderate though remote. Severe injuries could occur if the circumstances were ideal.

Respondent promptly abated the violations.

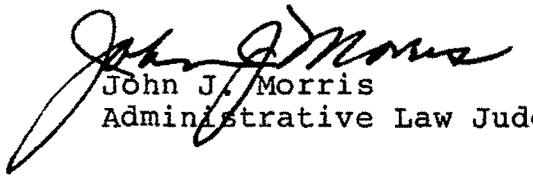
On balance, a civil penalty of $50 is appropriate for each violation.

Accordingly, I enter the following:

ORDER

1. Citation No. 2652565 is **AFFIRMED** and a civil penalty of $50 is **ASSESSED**.

2. Citation No. 2652567 is **AFFIRMED** and a civil penalty of $50 is **ASSESSED**.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 8 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 91-49 A. C. No. 46-01867-03866
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 91-50 A. C. No. 46-01867-03867 Docket No. WEVA 91-62 A. C. No. 46-01867-03869 Blacksville No. 1 Mine Docket No. WEVA 91-3 A. C. No. 46-01968-03881 Docket No. WEVA 91-51 A. C. No. 46-01968-03885 Blacksville No. 2 Mine

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary of Labor, (Secretary); Walter J. Scheller III, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company (Consol).

Before: Judge Broderick

STATEMENT OF THE CASE

Pursuant to notice, the above cases were called for hearing in Morgantown, West Virginia, on April 17, 1991. Counsel for the Secretary made an oral motion on the record to approve settlements of the violations charged in Docket Nos. PENN 91-3, 91-49, 91-51, and 91-62. He also moved to approve settlements in three of the four citations included in Docket No. PENN 91-50. The remaining 104(d)(2) Order in PENN 91-50 was heard on the merits. Dale R. Dinning and Raymond L. Ash testified on behalf of the Secretary. John M. Morrison and John M. Weber testified on behalf of Consol. Both parties filed post hearing briefs with respect to the contested order.

PROPOSED SETTLEMENTS

Docket No. WEVA 91-3 includes two 104(a) citations, one alleging a violation of 30 C.F.R. § 75.1725(a), the other a violation of 30 C.F.R. § 75.303(a). They were assessed at $292 and $227 respectively, and Consol agrees to pay the assessed amount. I have considered the motion in light of the criteria in Section 110(i) of the Act, and conclude that it should be approved.

Docket No. WEVA 91-49 includes four citations, two of which charge violations of 30 C.F.R. § 75.303(a). The Secretary moves to vacate one of these, Citation No. 3314125 on the ground that the area covered by the citation overlaps with that covered by Citation No. 3314130. With respect to remaining three citations, Consol agrees to pay the assessed amounts, $434 for Citation No. 3314124, $434 for Citation No. 3314129, and $276 for Citation No. 3314130. 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.

Docket No. WEVA 91-50. With respect to three of the four citations in the docket, the Secretary moves to approve settlements in which Consol will pay the assessed amounts, $355 for Citation No. 3314121, $355 for Citation No. 3314122 and $276 for Citation No. 3314123. I have considered the motion in light of the criteria in Section 110(i) of the Act, and conclude that it should be approved.

Docket No. WEVA 91-51. This docket contains a single violation of 30 C.F.R. § 75.1003(c) charged in a 104(a) citation. It was originally assessed at $292. The violation involved an unguarded trolley wire at a mantrip station. The motion proposes that the citation be modified to a nonsignificant and substantial one and the penalty be reduced to $176. The portal buses used at the mine have a covered top and are insulated with rubber. The only practical way in and out of the mantrip is from the wide side of the track away from the wire. I have considered that motion in the light of the criteria in Section 110(i) of the Act, and conclude that it should be approved.

WEVA 91-62. This docket contains a single violation of 30 C.F.R. § 75.303(a) alleged in a citation charging an inadequate preshift examination. The motion proposes that Consol will pay the assessed amount of $276. 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.

FINDINGS OF FACT with respect to Order No. 2708208.

1. Consol was at all pertinent times the owner and operator of an underground coal mine in Monongalia County, West Virginia, known as the Blacksville No. 1 Mine.

2. The imposition of civil penalties in this proceeding would not affect Consol's ability to continue in business.

3. Consol is a large operator.

4. Between July 31, 1988 and July 30, 1990, there were 686 paid violations of mandatory standards at the subject mine (this history, of course, extends beyond the date of the violation involved in this proceeding). Included in this number are 32 violations of 30 C.F.R. § 75.202 prior to the violation contested here. This history is average for a mine of this size. It is not such that a penalty should be increased because of it.

5. The violation involved in this proceeding was promptly abated in good faith.

6. The subject mine has a history of roof falls; it has the worst roof conditions of any mine in the Morgantown, West Virginia area.

7. The subject mine liberates approximately 3 million cubic feet of methane in a 24 hour period.

8. A roof fall occurred in the 4 South Left Return entry prior to March 1, 1990. The roof was 12 feet to 14 feet high and the fall caused a cavity 20 feet long, 14 feet wide, and about 6 feet high. The area was "dangered off" with a rope and a danger sign on both sides of the fall.

9. In early March 1990, the 4 South belt regulator was moved to the 4 South Left return aircourse. The air passed through the regulator and crossed an overcast to the return entry. Consol explained that it moved the regulator because of the large number of citations for float coal dust on the regulator at its former location.

10. The air velocity in the area of the roof fall was approximately 50,000 cubic feet per minute.

11. The entry was about 16 feet wide. The distance between the danger signs was between 70 and 80 feet.

12. There is no evidence that any miners travelled past the danger sign on either side of the roof fall. Consol's evidence establishes that it is highly unlikely that a Consol miner would travel into a dangered-off area.

13. The mine weekly examination record indicates that an examiner had been in the vicinity of the 4 South belt regulator on April 25, 1990. There is no evidence that the examiner traveled past the danger sign.

14. Methane is lighter than air and tends to migrate to the higher places in a mine, and specifically to roof fall cavities.

15. MSHA Program Policy Manual relating to 30 C.F.R. § 75.305, issued 7-1-88 (GX 3), requires weekly examinations of air courses. It provides that modification of this requirement where a roof fall has occurred, or where an area is unsafe for travel can be achieved only by a petition for modification under Section 101(c) of the Act. It does not specifically require that the air course be traveled in its entirety, contrary to MSHA's argument in this case.

16. Federal Mine Inspector Dinning issued a 104(d)(2) Order on April 30, 1990, charging a violation of 30 C.F.R. § 75.202(a). The order found that additional roof support was needed at the No. 16 crosscut where the 4 South belt regulator crosses over the equalizing overcast to the 4 South Left return. The roof fall exposed the roof bolts so that they were hanging 3 to 4 feet from the roof. The order found that the area could not be traveled safely.

17. The order originally found that the violation was significant and substantial and was reasonably likely to cause an injury. The MSHA conference officer modified the order deleting the significant and substantial finding and indicating that an injury was unlikely to result.

18. Because of the height of the roof fall cavity and its distance from the danger signs it was not possible to adequately examine the area in question for the presence of methane on April 25, 1990.

19. Because of the distance of the roof fall from the danger signs, and the necessity of examining the edges of the roof fall for further deterioration by a sound and vibration test, it was not possible to adequately examine the roof conditions of the area in question on April 25, 1990.

DISCUSSION

My findings of fact 18 and 19 are based largely on the testimony of Raymond Ash, supervisor coal mine health and safety inspector. The contrary testimony of Consol Safety Supervisor John Morrison and John Weber, I find less persuasive. Morrison admitted that he "could not see the entire top of this cavity . . ." (Tr. 58). I do not accept Weber's conclusion that a methane check of the cavity could be performed with a probe.

Despite the presence of cribs, further deterioration of the roof could occur and not be visible to an examiner standing at either of the danger signs. Whether such further deterioration took place could only be adequately determined by a sound and vibration test.

20. Should a further roof fall occur, it could damage an overcast and disrupt the mine ventilation.

21. The violation was abated and the order terminated on April 3, 1990, on the grounds that the 4 South belt regulator was removed from the No. 16 crosscut, and therefore the area of bad roof would not have to be traveled through by a mine examiner.

REGULATIONS

30 C.F.R. § 75.202(a) provides:

> (a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock burst.

30 C.F.R. § 75.305 provides:

> In addition to the preshift and daily examinations required by this Subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and insofar as safety considerations permit, abandoned areas. Such weekly examinations need not be made during any week in which the mine is idle for the entire week, except that such examination shall be made before any other miner returns to the mine. The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly. Any hazardous condition shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such condition to a safe area, except those persons referred to in section 104(d) of the Act, until such danger is abated. A record of these examinations, tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in

an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

ISSUES

1. Whether the area cited was one where persons work or travel?

2. If a violation of 30 C.F.R. § 75.202 is established, whether it resulted from Consol's unwarrantable failure to comply with the standard?

3. If a violation of 30 C.F.R. § 75.202 is established, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

1. Consol is subject to the provisions of the Mine Act in the operation of the Blacksville No. 1 Mine, and I have jurisdiction over parties and subject matter of this proceeding.

2. In the case of Cypress Empire, 12 FMSHRC 911 (1990), the Commission implied that the phrase in 75.202(a), "where persons work or travel" includes not only areas where persons actually work or travel, but also areas where persons are required to travel. 12 FMSHRC 917.

3. 30 C.F.R. § 75.305 provides that return aircourses must be examined in their entirely at least once each week. Findings of Fact 18 and 19 establish that such examinations in the subject maine would require the examiners to travel under unsupported roof to adequately examine the area for hazardous conditions.

4. Therefore, since persons are required to travel the cited area, a violation of 30 C.F.R. § 75.202(a) is shown, even though there is no evidence that in fact anyone did travel the area after the danger signs were in place.

5. Because there is no evidence that persons did travel the area, and because the evidence shows that it was highly unlikely that anyone would travel the area, the violation (of 75.202(a); the question whether 75.305 was violated is not before me) was unlikely to result in injury to miners. I conclude that it was not a serious violation.

6. In Emery Mining Corp., 9 FMSHRC 1997 (1987) the Commission held that unwarrantable failure means "aggravated conduct, constituting more than ordinary negligence in relation to a violation of the Act." I conclude that the evidence in this record shows that Consol in good faith believed that dangering

off the area of the roof fall constituted compliance with the standard. This was erroneous, but was not aggravated conduct. I conclude that the violation did not result from unwarrantable failure to comply with the standard.

7. Considering the evidence in the light of the criteria in Section 110(i) of the Act, I conclude that a penalty of $200 is appropriate for the violation.

ORDER

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

1. Citation Nos. 3314013 and 3314014 (Docket No. WEVA 91-3) are **AFFIRMED.**

2. Citation Nos. 3314124, 3314129, and 3314130 are **AFFIRMED.** Citation No. 3314125 is **VACATED** (Docket No. WEVA 91-49).

3. Citation Nos. 3314121, 3314122, and 3314123 are **AFFIRMED.** Order No. 2708208 is **MODIFIED** to a 104(a) Citation and, as modified is **AFFIRMED.** (Docket No. WEVA 91-50).

4. Citation No. 3314272 is **MODIFIED** to delete the significant and substantial finding and, as modified is **AFFIRMED.** (Docket No. WEVA 91-51).

5. Citation No. 3314138 is **AFFIRMED.** (Docket No. WEVA 91-62).

6. Consol shall within 30 days of the date of this Decision pay the following civil penalties:

CITATION/ORDER	30 C.F.R.	AMOUNT
3314013	75.1725(a)	$ 292
3314014	75.303(a)	227
3314124	75.1403-8(a)	434
3314129	75.202(a)	434
3314130	75.303(a)	276
3314121	75.1704	355
3314122	75.1704	355
2708208	75.202(a)	200

3314123	75.305	276
3314272	75.1003	176
3314138	75.303(a)	276
	TOTAL	$3301

/James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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Walter J. Scheller III, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 10 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 91-101
	:	A. C. No. 15-14074-03573
v.	:	
	:	Martwick Underground
PEABODY COAL COMPANY, Respondent	:	
	:	Docket No. KENT 91-131
	:	A.C. No. 15-02705-03701
	:	
	:	Camp No. 2 Mine

DECISION APPROVING SETTLEMENT

Appearances: W. F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
David R. Joest, Esq., Midwest Division Counsel, Peabody Coal Company, Henderson, Kentucky, for the Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings, Petitioner filed a motion to approve a settlement agreement and to dismiss these cases. A modification of Citation No. 3416556 to delete the "significant and substantial" findings and a reduction in penalty from $545 to $378 was proposed. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $378 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

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DENVER, CO 80204

JUL 12 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-215-M A.C. No. 05-04228-05504
v.	:	Red Arrow Mine
RED ARROW GOLD CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Cetti

This case is before me upon 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. Petitioner has filed a motion to approve a settlement agreement and to dismiss the case.

Petitioner states that based upon documentation submitted to Petitioner, Respondent's financial situation is such that the operator's ability to remain in business would be affected by the penalty amounts originally assessed by the Petitioner. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in § 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is **GRANTED** and Respondent shall pay to the Secretary of Labor, the approved penalty of $300 which will be payable in three (3) installments of $100 each with the first installment to be paid on or before August 12, 1991, the second on or before September 12, 1991, and the last on or before October 12, 1991.

August F. Cetti
Administrative Law Judge

Distribution:

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Robert Korn, Esq., Box 185, Telluride, CO 81435 (Certified Mail)

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FALLS CHURCH, VIRGINIA 22041

JUL 12 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 89-42 A.C. No. 18-00671-03537
v.	:	Mine: Mettiki General Prep Plant
METTIKI COAL COMPANY, Respondent	:	SOL No. 9146176

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

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

WHEREFORE, IT IS ORDERED that the motion for approval of settlement is GRANTED. Respondent shall pay the approved penalties of $800 within 30 days of this decision. Upon such payment this case is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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DENVER, CO 80204

JUL 15 1991

DONALD NORTHCUTT, GENE MYERS, AND TED EBERLE, Complainants	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 89-162-DM
v.	:	Ada Quarry & Plant
IDEAL BASIC INDUSTRIES, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Morris

HAVING CONSIDERED the Joint Motion to Withdraw Complaint and Dismiss Action with Prejudice submitted by Complainants Donald Northcutt, Gene Myers, and Ted Eberle, and

WHEREAS the Secretary of Labor, in Docket No. CENT 88-142-D, withdrew from prosecution of these Complainants' claim of discriminatory discharge, thereby allowing these Complainants to pursue this claim individually under 30 U.S.C. § 815(c), and

SEEING THAT, with respect to these three Complainants, this matter has been settled by the parties,

IT IS HEREBY ORDERED that Complainants Donald Northcuttt, Gene Myers, and Ted Eberle may withdraw their Complaint and their action is hereby **DISMISSED WITH PREJUDICE**, each party to bear his own attorneys' fees and costs.

John J. Morris
Administrative Law Judge

Distribution:

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JUL 15 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 91-39 A. C. No. 36-05018-03821
v.	:	
	:	Cumberland Mine
UNITED STATES STEEL MINING COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: H. P. Baker, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary; Billy M. Tennant, Esq., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor (Secretary) pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for an admitted violation of a mandatory standard. The remaining issues before me in this case are whether this violation was a "significant and substantial" one, the "negligence" to be attributed to the operator, and the assessment of an appropriate civil penalty in accordance with Section 110(i) of the Act.

The case was heard in Morgantown, West Virginia, on April 18, 1991. The parties have both filed proposed findings and conclusions which I have duly considered in making the following decision.

STIPULATIONS

The parties stipulated to the following, which I accepted (Tr. 6-9):

1. United States Steel Mining Company, Inc., hereinafter called Respondent, is a wholly owned subsidiary of USX Corporation.

2. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject citation was properly served by a duly authorized representative of the Secretary, William E. Wilson, upon an agent of the Respondent at the date, time, and place stated therein.

5. The Respondent demonstrated good faith in the abatement of the citation.

6. Payment of the proposed Civil Penalty of $445 will not affect Respondent's ability to continue in business.

7. The appropriateness of the Penalty, if any is affirmed, to the size of the coal operator's business, should be based on the fact that, (a) the Respondent company's annual production tonnage is 10,349,448 and, (b) the U. S. Steel Mining Company, Inc.'s, Cumberland Mine had an annual production tonnage of 2,530,694.

8. Respondent was assessed 796 violations over 879 inspection days during the 24 months preceding the issuance of the subject citation.

9. The parties stipulate to the authenticity of each other's exhibits, but not necessarily to the relevance or the matters asserted therein.

10. Citation No. 3089547 was issued at Respondent's Cumberland Mine on September 19, 1990, by Inspector William E. Wilson.

11. The citation alleges a violation of 30 C.F.R. § 75.1403. The citation is based on a valid safeguard, that is Safeguard Number 234407 issued April 27, 1978.

12. Respondent did violate 30 C.F.R. § 75.1403 as alleged in the citation. Respondent does dispute, however, the gravity and negligence finding set forth in Section 2, paragraphs 10 and 11 of the citation. Respondent specifically disputes the characterization of the violation as significant and substantial.

DISCUSSION AND FINDINGS

Citation No. 3089547 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.1403 and charges as follows:

> The 5 ton Greensburg personnel carrier being used to transport the 27 Butt crew to No 3 air shaft portal bottom was not provided with a lifting bar for the track jack. Mantrip 110. ML-116, Sr 3324."

Safeguard No. 234407 mandates that a lifting jack and bar be kept on all self-propelled personnel carriers. A lifting bar is used with a lifting jack to rerail a mantrip if there is a derailment.

The inspector found that the lifting bar in this case was missing from a mantrip that had just arrived at the bottom, transporting a crew from a section. The operator admits this fact and thus the violation of 30 C.F.R. § 75.1403.

The Secretary maintains that in the absence of the actual bar during a derailment/rerailment scenario, a miner would be sorely tempted to use a substitute bar. I concur with the inspector that using a substitute could be unsafe and increases the likelihood of injury because the substitute would not provide a good fit between itself and the jack. It is certainly a credible claim that the use of many imaginable substitute devices could result in serious injuries to a miner.

However, in our case there was no derailment. The missing lifting bar, in and of itself, does not create any safety hazard. Something more is required. That "something more" is that the miner in charge of the derailed mantrip will act improperly to rerail it. The inspector had to assume that the hypothetical miner involved would elect to use some improper substitute device because the required bar was not immediately available to him. I do not believe that assumption will carry the Secretary's burden of proof on the issue. One could perhaps make an equally likely assumption that the miner would obtain the correct bar before proceeding with the rerailment.

A violation is properly designated as 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." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory 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 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)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U. S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986).

With respect to the first Mathies element, a violation of 30 C.F.R. § 75.1403 has been established by stipulation, which I have previously accepted.

With respect to the second element, a discrete safety hazard contributed to by the violation, I find none. The violation here is simply the missing bar, and the missing bar, standing alone, does not create a safety hazard. There must additionally be a derailment, which is not unknown in this mine, but was not a part of this particular incident. Thirdly, even if there was a derailment or there might be one tomorrow, a safety hazard would be created only if the miner on the scene at the time acted improperly and attempted to rerail the mantrip by some unsafe methodology. There is no evidence in the record that this heretofore and still unknown miner would do so. And I don't believe you can assume all these necessary facts that are otherwise not in evidence.

Accordingly, finding that the Secretary has failed to prove that there was a discrete safety hazard contributed to by the violation, I find that the violation was not "significant and substantial."

Moderate negligence may reasonably be inferred from the circumstances. These mantrips are frequently inspected and management knew or at least should have known of the missing equipment before the mantrip was operated.

Considering the statutory criteria contained in Section 110(i) of the Act, I find that a civil penalty of $50 is warranted and appropriate for these circumstances.

ORDER

Citation No. 3089547 is AFFIRMED as a non-"significant and substantial" violation of 30 C.F.R. § 75.1403, and respondent is hereby **ORDERED** to pay a civil penalty of $50 within 30 days of the date of this Decision.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 15 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 90-120 A.C. No. 40-02368-03527
v.	:	Beechgrove Prep. Plant
BEECHGROVE PROCESSING CO., Respondent	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for the Petitioner;
Martin J. Cunningham, III, Esq., London, Kentucky, for the Respondent.

Before: Judge Fauver

The Secretary of Labor seeks civil penalties for alleged violations of safety standards, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

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 and further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent operates a coal preparation plant, known as Beechgrove Preparation Plant, where it processes coal for sale or use in interstate commerce. It employs about 17 employees and processes about 2,000 tons of coal per day.

Citation 3174032

2. On April 26, 1990, Federal Mine Inspector Don McDaniel, an electrical inspector, inspected the plant and observed accumulations of float coal dust in a two-storey building into which coal is dumped before it is conveyed to the cleaning plant. He observed float coal dust in the air, on electrical boxes, on

belt frames, and on the walls. The accumulations were as much as a quarter-inch thick.

Citation 3174033

3. On April 26, 1990, Inspector McDaniel inspected a building used to store materials and to grease equipment. He observed 50 to 75 bales of hay, an air compressor which operated a grease gun, and about 20 gallons of grease spillage on the floor and walls. He also observed an accumulation of about one gallon of grease on the air compressor equipment. He observed that, although the floor was wet, the float coal dust was dry.

Citation 317034

4. On April 26, 1990, Inspector McDaniel observed a fuel storage tank near the preparation plant. It held 150 to 200 gallons of kerosene, and was about half full. A fire extinguisher near the fuel tank had the safety pin pulled out and the discharge lever pushed in, indicating that the fire extinguisher had been discharged.

Citation 3174035

5. On April 26, 1990, Inspector McDaniel observed that the V-belt and pulleys on the No. 1 raw coal belt were not properly guarded. The guard provided was secure at the top, but two bolts were missing from the bottom, and the bottom of the guard had swung out three inches, exposing the moving parts.

DISCUSSION WITH FURTHER FINDINGS

Citation 3174032

The float coal dust accumulations found by the inspector were in a building in which there were various possible ignition sources, e.g., rollers on belt conveyors, bearings, electrical boxes, and energized electrical wires. Float coal dust presents a serious hazard of an explosion or propagation of fire. The cited condition presented a reasonable likelihood of resulting in serious injury, and therefore was a significant and substantial violation of 30 C.F.R. § 77.202.[1] See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991).

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[1] 30 C.F.R. § 77.202 provides:
"Dust Accumulations in surface installation. Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts."

The fact that the floor was wet did not remove the danger, because float coal dust will float on a wet or damp surface and still remain capable of propagating an explosion or fire. The condition was obvious and should have been detected and corrected before the inspection. The facts thus show moderate negligence.

Citation 3174033

The accumulations of grease presented a serious fire hazard. The flammability level of the grease was not high. Respondent states that it was not higher than hay, paper or wood. But it could propagate a fire and, with the presence of 50 to 75 bales of hay in the same enclosed area, could contribute to a major fire. The condition presented a reasonable likelihood of injury and was therefore a significant and substantial violation of 30 C.F.R. § 77.1104.[2] The condition was obvious and should have been detected and corrected before the inspection. The facts thus show moderate negligence.

Citation 3174034

The fire extinguisher near the kerosene fuel tank showed clear physical evidence of being discharged. The safety pin had been pulled and the discharge lever had been pushed in. This condition warranted a finding by the inspector that the fire extinguisher had been discharged. If the operator wanted to dispute this finding at the time the inspector issued the citation, it had the opportunity to demonstrate to the inspector that the fire extinguisher was operative. Failing such a demonstration by the operator, the facts sustain the inspector's finding that the extinguisher was in violation of 30 C.F.R. § 77.1110, which requires that "Firefighting equipment shall be continuously maintained in a usable and operative condition. * * *" Also, maintaining a fire extinguisher in a physical condition that indicates that it has been discharged would not comply with the standard. Such a condition could easily mislead a firefighter into going to a more distant fire extinguisher to fight a fire. Reasonable and substantial compliance with the safety standard requires that fire extinguishers be maintained in proper condition with the safety pin in place and the discharge lever in the non-discharged position.

The cited condition presented a reasonable likelihood of contributing to a serious injury, and therefore constituted a

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[2] 30 C.F.R. § 77.1104 provides:
"Accumulation of combustible materials. Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard."

significant and substantial violation.

The condition was obvious and should have been detected and corrected before the inspection. The facts thus show moderate negligence.

Citation 3174035

The guard for the V-belt and pulley on the belt head drive was missing bolts on the bottom and had swung out about three inches. The guard was about four feet from the walking surface, and on a walkway. This condition presented a serious hazard of someone coming into contact with moving machinery parts and sustaining a serious injury. If someone fell near the guard opening, he or she could accidently move a hand through the opening while trying to break the fall. The facts showed a significant and substantial violation of 30 C.F.R. § 77.400(a).[3]

The condition was obvious and should have been detected and corrected before the inspection. The facts show moderate negligence.

Considering all the criteria for civil penalties in § 110(i) of the Act, I find that the following civil penalties are appropriate:

Citation	Civil Penalty
3174032	$63
3174033	$63
3174034	$63
3174035	$63

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 77.202 as alleged in Citation 3174032.

3. Respondent violated 30 C.F.R. § 77.1104 as alleged in Citation 3174033.

---

[3] 30 C.F.R. § 77.400(a) provides:
"Mechanical equipment guards. (a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

4. Respondent violated 30 C.F.R. § 77.1110 as alleged in Citation 3174034.

5. Respondent violated 30 C.F.R. § 77.400 as alleged in Citation 3174035.

ORDER

WHEREFORE IT IS ORDERED that:

1. The above citations are AFFIRMED.

2. Respondent shall pay the above-assessed civil penalties of $252 within 30 days of the date of this decision.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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Martin Cunningham, Esq., 400 South Main Street, P. O. Drawer 5087, London, KY 40740 (Certified Mail)

/fas

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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DENVER, CO 80204

JUL 15 1991

FRANCIS A. MARIN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 91-161-DM
v.	:	
	:	WE MW 90-14
ASARCO, INCORPORATED, Respondent	:	Ray Unit

ORDER OF DISMISSAL

Before: Judge Morris

This case is a discrimination complaint arising under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

On June 3, 1991, Complainant moved to withdraw her complaint pursuant to Commission Rule 11, 29 C.F.R. § 2700.11.

In support of her motion, Complainant states that, while appearing pro se, she filed a complaint with FMSHRC. The gravamen of her complaint was that she had been terminated by Respondent because of her seniority, sex, and national origin. At that time, she also filed charges with the Equal Employment Opportunity Commission (EEOC) and the State of Arizona Civil Rights Division (ACRD) intending to pursue her remedies under State and Federal anti-discrimination laws.

Complainant further states her deposition was scheduled for May 29, 1991. On that date, she appeared and the motion was made to withdraw her complaint.

Complainant now believes that her complaint arising out of sexual harassment can be properly addressed under the State and Federal anti-discrimination laws. Accordingly, she desires to withdraw her complaint now pending herein.

Respondent opposes Complainant's motion and moves to impose sanctions and seeks an order dismissing the complaint herein with prejudice.

In support of its motion, Respondent states that on May 14, 1990, Complainant, appearing pro se, filed a discrimination report, which was followed by a discrimination complaint filed on May 30, 1990.

Complainant later withdrew her complaint for lack of a protected activity.

On September 4, 1990, Complainant filed an additional discrimination complaint stating she believed that her termination was for refusal to perform work which she deemed to be unsafe.

After conducting an investigation, MSHA concluded the facts disclosed during the investigation did not constitute a violation of Section 105(c) of the Mine Act.

On January 7, 1991, Complainant requested a hearing under the Mine Act.

On January 7, 1991, Chief Administrative Law Judge Paul Merlin ordered Complainant to forward her complaint to Respondent.

The complaint, when filed, was 10 days overdue.

On March 13, 1991, Respondent filed a motion to dismiss for failure to timely file her complaint.

On April 26, 1991, Mary Judge Ryan notified FMSHRC that she had been retained to represent Complainant.

Respondent's motion to dismiss was denied by the Presiding Judge on May 14, 1991.

Respondent's Counsel asserts he first became aware that Complainant was represented by Mary Judge Ryan through a distribution notation contained in a notice dated May 14, 1991.

A deposition was scheduled in Tucson, Arizona, for May 29, 1991. Counsel for both parties appeared but, on the instruction of her counsel, Complainant refused to be deposed on the grounds that Complainant would be moving to withdraw the Complaint before FMSHRC.

On May 31, 1991, Complainant formally moved to withdraw her complaint herein.

Respondent asserts Complainant's counsel has abused the discovery process and filed frivolous claims and documents which have amounted to harassment and needless increase in the cost of litigation.

Finally, Respondent asserts Complainant and Complainant's Counsel are in violation of Rules 11 and 37(b)(2) of the Federal Rules of Civil Procedure and merit sanctions, pursuant to Commission Rules 80(a) and 1(b), 29 C.F.R. § 2700.80(a), 1(b).

Accordingly, Respondent seeks an order dismissing the complaint wth prejudice and granting sanctions, including costs and attorneys' fees.

DISCUSSION

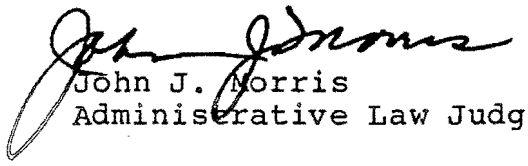
The Commission has previously ruled that it lacks jurisdiction to impose sanctions. Rushton Mining Company, 11 FMSHRC 759 (1989). See also Beaver Creek Coal Company, 10 FMSHRC 758 (1988) (Morris, J) and Rushton Mining Company, 9 FMSHRC 392 (1987) (Broderick, J).

Based on the rationale of the above cases, I enter the following:

ORDER

1. Respondent's motion to impose sanctions is **DENIED.**

2. Complainant's motion to dismiss this case is **GRANTED** and the case is **DISMISSED WITHOUT PREJUDICE.**



John J. Morris
Administrative Law Judge

Distribution:

Mary Judge Ryan, Esq., STOMPOLY & STROUD, P.C., 1600 Citibank Tower, One South Church Avenue, Tucson, AZ 86702-3017 (Certified Mail)

Henry Chajet, Esq., and Laura E. Beverage, Esq., JACKSON & KELLY, P.O. Box 553, Charleston, WV 25433 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 17 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 91-63-M A.C. No. 12-00004-05530-A
v.	:	
	:	Atkins Plant
DON FRAZE, Employed by LITER'S QUARRY OF INDIANA, INCORPORATED, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 91-73-M A.C. No. 12-00004-05529-A
v.	:	
	:	Atkins Plant
RANDEE LANHAM, Employed by LITER'S QUARRY OF INDIANA INCORPORATED, Respondent	:	

DECISION

Appearances: Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Robert Liter, Liter's Quarry, Inc., Louisville, Kentucky, on behalf of the Respondents.

Before: Judge Melick

These consolidated cases are before me upon the petitions for civil penalties filed by the Secretary, pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Don Fraze and Randee Lanham, as agents of a corporate mine operator, Liter's Quarry of Indiana, Inc., (Liter's Quarry) with knowingly authorizing, ordering, or carrying out a violation of the mandatory safety

standard at 30 C.F.R. § 56.11001 by the named mine operator. [1] A motion for settlement filed in these proceedings on June 5, 1991, was denied by order issued the same date and the cases proceeded to trial as scheduled on June 12, 1991.

At hearing, Robert Liter, the Respondents representative acknowledged that the alleged violative condition existed as charged. Moreover, it has never been denied that both Respondents were agents of the named mine operator, knew of the existence of the cited condition and knowingly authorized and ordered that condition. Liter argued only that the corporate operator had already paid a penalty of $800 for the violation and that it was an improper interference into the operator's management function to also subject its former employees to additional civil penalties. In essence, this argument is against the enacted statutory provisions of section 110(c) and, as such, can be redressed only through the legislative process. Regardless of the merits, vel non, of the argument, I am bound in this proceeding to follow the statutory provisions of section 110(c).

The violative condition is described in the underlying citation as follows:

> A safe means of access was not provided for travel around the primary crusher or travel to its booth. The floor covering for the V-belt drive & counter balance of the jaw crusher was not in place with the crusher in operation. Two employees were observed traveling from the crusher booth back to their pit haul units without the flooring in place. On the way back to the trucks they passed within about 2-1/2 foot of this opening on the counter balance side. Reportedly the crusher had been used two shifts without the flooring in place. The drop off by the crusher was about 12 ft. deep. Also the two steps leading from the outside to the booth area sloped toward these openings and were covered with spilled rock & dust.

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[1] Section 110(c) of the Act reads as follows:

"Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under section (a) or section 105(c), any director, officer, or agent of such corporate who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsection (a) and (d)."

According to the undisputed testimony of MSHA Inspector Jerry Spruce, the absence of floor boards and guard rails along the walkway over an opening in the crusher, created an "imminent danger" of fatal injuries to miners. In addition, it is undisputed that both Respondents had authorized and ordered that the cited floorboards and railings remain removed while miners proceeded along a narrow passageway adjacent to an opening into the crusher below ostensibly for easier observation and adjustment of newly replaced bearings in the crusher unit. No evidence has been presented that either Respondent has any history of violations under the Act or regarding their ability to pay civil penalties. Under the circumstances, and considering the seriousness of the violation and the egregious negligence involved, I find the Secretary's proposed penalties to be appropriate. The penalty against Lanham is greater inasmuch as he had supervisory authority, as general manager, over Fraze and directed Fraze to continue operations without the floorboards and guardrails.

ORDER

I find that Don Fraze and Randee Lanham acting as agents of the corporate mine operator, Liter's Quarry of Indiana, Incorporated, knowingly authorized, ordered, or carried out a violation of the mandatory safety standard at 30 C.F.R. § 56.11001 on March 26, 1990, and they are directed to pay civil penalties of $500 and $600, respectively, for the aforesaid violations within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, 4th Floor, Arlington, VA 22203 (Certified Mail)

Mr. Robert Liter, Liter's Quarry, Inc., 6610 Haunz Lane, Louisville, KY 40241 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 17 1991

THOMAS D. SHUMAKER,	:	DISCRIMINATION PROCEEDING
DISTRICT NO. 4, UNITED	:	
MINE WORKERS OF AMERICA	:	Docket No. PENN 90-202-D
On behalf of	:	MSHA Case No. PITT CD 90-20
MICHAEL KELECIC	:	MSHA Case No. PITT CD 90-21
EDWARD YANIGA	:	MSHA Case No. PITT CD 90-22
DONALD STEVENSON,	:	
Complainants	:	Dilworth Mine
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

ORDER LIFTING STAY AND DISMISSING PROCEEDING

Before: Judge Melick

Complainants request approval to withdraw their complaints in the captioned case. Under the circumstances herein, the request is granted. 29 C.F.R. § 2700.11. The Stay Order previously issued is accordingly now lifted and this case is therefore dismissed.

Gary Melick
Administrative Law Judge

Distribution:

Thomas D. Shumaker, District No. 4, UMWA, 32 South Main Street, Masontown, PA 15461 (Certified Mail)

Walter J. Scheller III, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Larry E. Swift, Chairman, UMWA, Local Union 1980, District No. 4, Health & Safety Committee, 206 S. Walnut Street, Masontown, PA 15461 (Certified Mail)

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THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JUL 17 1991

ENERGY WEST MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 91-406-R
v.	:	Order No. 3582410; 5/1/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Deer Creek Mine
	:	Mine I.D. 42-00121
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA) Intervenor	:	

DECISION AFTER EXPEDITED HEARING
ORDER MODIFYING CITATION
ORDER DISMISSING CONTEST PROCEEDING

Appearances: Thomas C. Means, Esq., Crowell & Moring, Washington, DC, for Contestants; Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent; Robert L. Jennings, Representative of United Mine Workers of America, Price, Utah.

Before Judge Cetti:

Pursuant to the request of Respondent, this matter came on for an expedited hearing before me at Grand Junction, Colorado, on May 23, 1991. Documents and testimony from numerous witnesses were introduced and the matter fully litigated by the parties. At the conclusion of the hearing, there was a ruling from the bench on some issues.

The proceeding was initiated by Contestant's filing a Notice of Contest pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) challenging the captioned citation issued by MSHA.

After the hearing and receipt of the transcript, the parties filed and requested approval of a proposed settlement agreement. The proposed agreement provides that the 104(d)(1) order be redesignated a section 104(a) citation, that it retain its

characterization of "significant and substantial" and that the negligence factor be characterized as "moderate" rather than "high". Contestant agrees to withdraw its contest to the enforcement document as amended, with the withdrawal to be effective upon approval of the settlement.

After due consideration of the evidence and arguments presented in support of the proposed settlement of the contest proceeding, I conclude and find that the settlement is reasonable and in the public interest. The motion is **GRANTED**, and the settlement is **APPROVED**.

ORDER

Order No. 3582410 is modified to a 104(a) citation with a significant and substantial designation and the characterization of its negligence factor is modified to "moderate". Contestant having agreed to withdraw its contest to the enforcement document as modified by this Order, this proceeding is **DISMISSED**.

August F. Cetti
Administrative Law Judge

Distribution:

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

Robert L. Jennings, UMWA Representative, Post Office Box 783, Price, UT 84501 (Certified Mail)

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FALLS CHURCH, VIRGINIA 22041

JUL 17 1991

RONNIE E. PRICE, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 90-308-D
CONSOLIDATION COAL COMPANY, Respondent	:	MORG CD 90-10
	:	Blacksville No. 1 Mine

DECISION

Appearances: James B. Zimarowski, Esq., Morgantown, West Virginia, for the Complainant; Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a complaint of discrimination filed by Ronnie E. Price (Complainant) on August 10, 1990, alleging that Consolidation Coal Company (Respondent) discriminated against him in violation of Section 105(c) of the Act. [1/] Pursuant to notice, the case was scheduled for hearing on January 15, 1991. Subsequently, in a telephone conference call between Counsel for both Parties, Counsel for Complainant indicated that Complainant saw him for the first time on January 11, 1991, and accordingly requested an adjournment to prepare for the hearing. The request was not opposed and was granted. The case was rescheduled for March 5, 1991. On February 25, 1991, in a telephone conference call with Counsel for both Parties, Counsel for Complainant requested a further adjournment in order to effectively prepare for hearing. This request was not objected to and the case was adjourned and rescheduled for April 30 and May 1, 1991. The case was heard at

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[1/] Pursuant to the agreement of the parties at the hearing, the Complaint which was submitted at the hearing, shall be deemed to have been filed on August 10, 1990.

that time in Morgantown, West Virginia. At the hearing, Ronnie Price, John Mason, Terry G. Collins, and Charles Edward Haun testified for Complainant. Francis Pethtel, Peter Yost Turner, Ronald Darrah, Paul J. Borchick, Jr., and J. Robert Levo testified for Respondent. Complainant filed proposed Findings of Fact and Conclusions of Law on June 17, 1991. Respondent filed a Posthearing Brief on July 1, 1991.

Findings of Fact and Discussion

Ronnie Price is a roof bolter employed by Respondent, and during the relevant times at issue, worked in the P-9 Section on the midnight shift. In the middle of March 1990, a new foreman Donald Darrah was assigned to the section. The first day that Darrah was on the section, Price, along with John Mason, Terry G. Collins, and Doug Harper, brought a complaint to Darrah that he did not sign the date board. Also on another occasion, Price informed Darrah and Paul J. Borchick, Jr., the shift foreman, that the former had not properly ventilated the belt area when it was moved. On another occasion, Price told Borchick that Darrah had wanted to tram a miner in order to get rid of gas. According to Price, at the end of the shift on April 17, he obtained a methane reading of one percent, whereas Darrah had reported a reading of .02 percent across the face. Price informed MSHA Inspector Dale Dinning of this problem. Price was asked on cross-examination if he told Darrah about it, and he said "yes, he was told about it" (Tr. 66). Darrah denied that Price made this complaint to him. However, Borchick indicated that Price informed him that Darrah had called the section safe in spite of the fact that one percent of methane was found at the heading. I conclude that Price, in voicing safety concerns to either Darrah or Borchick, was engaged in protected activities.

Essentially, in order to establish that he has been discriminated against in violation of Section 105(c) of the Act, Complainant herein has the burden of establishing a prima facie case by proving that he engaged in protected activities and that adverse action taken against him was motivated in any part by the protected activity. (Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803, 817-81 (April 1981). The prima facie case may be rebutted by the Operator by showing either that no protected activity occurred, or that the adverse action was not motivated in any part by the protected activity (See Robinette, supra, at 818 n.20; see also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)).

Essentially, it is Complainant's position that adverse action in the form of harassment was taken against him which was motivated in any part by his protected activities.

From the middle of March when Darrah became the foreman of the section, through April 18, Price had made various safety

complaints directly to Borchick, and to Darrah directly or indirectly through Borchick. According to Borchick and Darrah, the day after Price made a complaint about the methane gas readings, Darrah changed his location from bolting on the right to bolting on the left side. [2]/ According to Price, when Darrah made this switch he (Darrah) "had a very bad attitude" (Tr. 44). He was asked to describe this attitude and answered as follows:

> A. Well, just, you know, you're going to do it that way, you know. You're going to do as I said, I'm the foreman here which Mr. Levo told me the same thing. Darrah is the foreman on that section.
>
> Q. Okay. Did Mr. Darrah use the words that he's the foreman and you're going to do it his way?
>
> A. Well, yeah and a few others that I don't use.
>
> Q. All right. Now, is that just his way of conversing with his crew or does he single out you in particular to talk to you that way?
>
> A. Well, yeah, pretty well just not me, but me and two or three other ones. You know, some of the others he don't get along with (sic).
>
> Q. Which two or three others did he kind of act very combative to?
>
> A. Well, John Mason, Terry and his very best friend John Keener. I mean they don't even get along now.
>
> Q. And these individuals have also raised safety issues - - -
>
> A. Yeah. (Tr. 45).

Darrah testified essentially that bolting from either the right or the left side requires the use of identical controls although their order is reversed. He indicated further that although the section's two bolters usually work out between themselves the side they work on, he decided to switch Price in order to remove him from working close to the miner operator,

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[2]/ I find the testimony of Borchick and Darrah with regard to the specific dates involved more reliable as it was consistent with their contemporaneous notes.

located on the right side, inasmuch as Price is a "talker." (Tr. 228). According to Darrah he thought such a move would increase production.

Although the performance of the task of bolting appears to be the same whether performed from the right or left side, the bolter working on the left side in the P-9 Section would also have to tug and pull the ventilation tube located on that side. According to Price, bolters are usually rotated between the right and left sides, and he would not be able to work on the left side and pull and tug the tube all the time. Darrah indicated that although he had an extra man placed on the left side who does all the tugging and lugging, he agreed that a bolter working on the left side would be required to do a "little" more physical labor (Tr. 256). Accordingly, I find that, to some degree, the switching by Darrah of Price to the left side of the bolter constituted an adverse action. Further, inasmuch as this action was taken the day following Price's complaints about methane readings, and following Price's other complaints made within the preceding approximately 30 days, I conclude that this adverse action was motivated in part by Price's complaints.

Essentially, according to Complainant, Darrah not only took adverse action against him for voicing complaints, but also manifested animus towards Collins and Mason, who also had made safety complaints. Mason had complained to Darrah about the latter having required him to continue to load coal behind the miner to such an extent, that he (Mason) was concerned that there would be inadequate space for sufficient air to provide adequate ventilation. He also was concerned that there would be inadequate room for miners to escape in the event of an emergency. The following day, on April 18, Mason was transferred from the section to a position as a bolter. However, he received the same wages and did not suffer any loss of pay as a consequence of the transfer. Borchick said he removed Mason from the section because he felt that Mason had difficultly operating the satellite miner, and that another person was available who had more experience operating such a miner. According to Borchick, the switch was made to increase production.

Collins also had complained to Darrah about his methane checks. He also had raised concerns about the safety of certain cables, and the need for bolting. Collins was transferred off the section to another section, but was given the same job at the same rate of pay. Thus, the evidence is inadequate to establish that in general Respondent has responded to protected activities by taking adverse action.

When Darrah decided to shift Price to the left side to prevent him from talking to the miner operator, the latter had been in that position for only 1 day, and had replaced Mason a close friend of Price. According to Price, he had told Darrah at

the end of the prior shift that his (Price's) methane reading was two percent (Tr. 66, 68). However, neither Collins nor Mason who were with Price when he obtained the 2 percent methane reading, corroborated the testimony of Price that he directly informed Darrah of the reading. On cross-examination Collins indicated that when the methane was found, Darrah was at the belt heading, and that when the crew picked Darrah up at the mouth of the section, no one told him of the methane readings (Tr. 132). Based on my observation of his demeanor, I find the testimony of Darrah reliable, that he first found out about Price's methane reading when informed by Borchick at the end of the shift at approximately 8:30 a.m. According to Darrah it bothered him that the problem with the methane was not brought to his attention by Price, but was instead told to him by his supervisor. In this connection, I note that Darrah had been promoted from an hourly worker to a foreman only a few weeks before, and was younger and far less experienced in the mines than Price, Mason, and Collins. Accordingly, and taking into account the slight degree of adverse action in switching Price to the left side, I conclude that the action would have been taken in any event, based on Price's unprotected activities alone, i.e., having made the complaint to Darrah's supervisor rather than Darrah.

According to Price, he is required to take medication twice a day, 12 hours apart, a half hour before a meal, as "its the only way it would work in my system" (Tr. 30). He also testified that "it would make me sick if I take it and then didn't eat" (Tr. 41). Essentially it was Price's testimony that aside from Darrah, "all" of his foremen brought him his medication at three o'clock (Tr. 28). He also said that "most foremen would come up and say, hey, we're going to move this and we're going to do that and we'll do this. We'll have it done by such and such a time. You go take your medicine and be ready to eat at that time." (Tr. 55). This was confirmed by Collins who indicated that if a belt was down, the foreman would inform Price that they would be eating early and would bring him his medication. Otherwise, if the belt was not down, the crew would eat at 4:00 o'clock. Price also said that there were times when he had to work through lunch. He said he did not do so "willingly" and that "most" foremen advised him in advance that he would be working through lunch and eating later, so he was able to take his medication and then grab a sandwich or cup of coffee. (Tr. 55). He said that if a breakdown occurred at 3 o'clock and the crew was sent to eat, he did not take his medication, and did not eat. He said that he was able to take his medication when he was told that "we're going to be down for a half hour" (Tr. 57).

Francis Pethtel who, was Price's foreman from October 1989 through March 15, 1990, indicated that normally the crew would eat at 4:00 o'clock, but that there was no set time, and "quite often," the crew would not eat at 4:00 o'clock. (Tr. 187). He indicated that he did not inform Price daily that he would be

eating in a half hour. However, on cross-examination he indicated that if he knew in advance that the crew would not be eating at 4:00 o'clock, he would inform Price of this fact. He indicated that if the belt was down at 3:00 o'clock, Price then went to the dinner hole, took his medicine, and then ate on the way back to the working area. Price did not rebut this statement.

Price indicated that the first week that Darrah took over as foreman, the crew ate at 4:00 o'clock, unless there was a breakdown. If this occurred, he went to take his medicine at 3:30. Darrah essentially indicated that prior to April 18, the lunch time varied, but that if he did not specify the time, the crew ate at 4:00 o'clock, and he indicated that three out of five times the crew ate at 4:00 o'clock.

According to Price, on April 16 or 17, a miner had to be moved, and as a consequence he worked through lunch. He indicated that he spoke to Darrah, and told him that he would like to know what time he would eat so he could take his medicine. He indicated that all he needed was to be notified a half hour before lunch regardless of the time of lunch. According to Price, Darrah asked for a slip from his doctor, but subsequently did not want to accept the slip. Price indicated that he did not tell Darrah that he needed a designated time to eat lunch. He said that Darrah told him that lunch time is between 3 and 5, and that he is to eat when he is told to. He indicated that Darrah did not make any effort to communicate to him and inform him a half hour before eating time.

Subsequently, according to Price, he spoke with Jay Robert Levo the superintendent of the mine, and did not ask for a designated time to eat, but he repeated his request to be notified a half hour before lunch time. According to Price, Levo informed him that he will have 30 minutes before lunch to take his medicine, and that he did not need a medical slip. Price said that Levo told him that he could either continue with his past practice or he could submit the medical slip. Price said that Levo told him that if the company accepts the slip, he is no longer needed, as it is company policy not to have someone work with limitations. Charles Edward Haun, a miner who is a member of the Union Safety Committee, was with Price when he spoke with Levo, and confirmed Price's version of the conversation with Levo.

Collins testified that Price asked Darrah to inform him a half hour before the time to eat, and that this conversation occurred at the beginning of the shift, before any mining had taken place. He said that Price did not ask for a designated time, and that Darrah "snapped" at him and asked him to obtain a doctor's slip. (Tr. 122). According to Collins, the following day Price asked Darrah if he would let him know a half hour

before lunch time and Darrah indicated that he would eat between 3 and 5, and he said it "just like being a smart aleck" (Tr. 127).

Price indicated that he filed a grievance on April 26, and that subsequently the lunch time was changed, but that Darrah did not let him take his medicine and told him he could not take his medicine. He said at times he worked through lunch and accordingly, did not eat.

According to Darrah, on April 19, 1990, when he first came on the section, he informed Price that he was transferring him to the left side of the bolter. He then firebossed for 15 minutes and upon completion of that task, Price requested of him a "set," "designated" time for dinner (Tr. 218). According to Darrah, Price told him he wanted to eat at the same time every day. Darrah stated that Price did not request a half hour notice prior to eating and that nothing preceded the request by Price. He indicated that the tenor of the discussion with Price was "conversational," rather than "confrontational" (Tr. 271), and that he (Darrah) said that the only way he could accommodate Price was if the latter would bring a doctor's note indicating that he was required to eat at a set time daily.

According to Borchick, on April 19, 1990, Price asked for a "designated" eating time. (Tr. 30, 51). Borchick stated that Price used that term "numerous times." (Tr. 51). Borchick stated that when Price told him that Darrah indicated that he could not give him a designated eating time with out a doctor's slip, he told him that such a slip is not necessary, but that he would check with Levo. Levo and Borchick both testified, in essence, that Levo told Price that a note is not necessary. Levo further told Price that if he submits a note that indicates that a set time for lunch is needed, the note may be considered documentation of restricted duty which is not allowed by the company.

Despite the conflict in the testimony between the witnesses for Complainant and Respondent as to what was requested by Price, it is clear that there is no evidence that Respondent treated Price differently than other miners. There is no evidence that any miner had a set time to eat lunch. Nor is there any evidence that any other miners were given advance notice by their foreman of the time that a lunch break would be given. In essence, both Collins and Price indicated that prior to Price's request of Darrah, the crew had lunch at 4:00 o'clock, unless work had stopped before that time due to a breakdown of equipment. According to Price, after he brought in a note from his doctor, the time for lunch was changed, Darrah told him he could not take his medicine, and Darrah did not let him take the medicine. I do not place much weight on this testimony. Price did not provide any specifics regarding any details as to exactly what occurred

when Darrah did not let him take his medicine. He did not provide any specifics regarding the circumstances of this action, nor did he indicate when it occurred. Neither did he describe the context and content of any specific statement Darrah made in telling him that he could not take his medicine. Also, having observed the demeanor of Darrah, I find his testimony credible that, prior to April 19, there was no set time for lunch, and that although three out of five times, lunch was at 4:00 o'clock, the time did vary. This is consistent with the testimony of his predecessor Pethtel, whose testimony I found credible. In this connection, Collins indicated that the day after Price made his initial request, he again asked Darrah if he would let him know what time he would eat. According to Collins, Darrah told him "you eat between 3 and 5." (Tr. 125). Collins was asked to describe the manner in which Darrah responded, and he indicated that he was "just like being a smart aleck." (Tr. 127). However, on cross-examination, he indicated that Darrah did not change the routine as to lunch.

According to Price, Darrah requested him to bring in a note from his doctor. Even if this request is interpreted as an act of harassment, the evidence fails to establish a causal nexus between it and Price's safety complaints. I accept the testimony of Darrah, as it was corroborated by Collins, that the conversation regarding a medical slip occurred at the beginning of the shift. Although the evidence is in conflict with regard to the exact request made by Price of Darrah, the testimony is consistent in establishing that Darrah's remarks about the need for a medical note came <u>after</u> and <u>in response</u> to Price's request. I find that it was Price, not Darrah, who initiated any change in status quo with regard to lunch time. Darrah's comments with regard to the submission of documentation from Price's doctor were made the day following Price's complaints about methane readings. However, since these comments were made <u>solely</u> in response to a request made by Price, I conclude that there is no nexus between these comments and Price's complaints the previous evening.

Taking all the above into account, I conclude that the evidence establishes that any adverse action taken by Respondent against Price would have been taken in either event, based on unprotected activities alone. Hence, Complainant has failed to establish that he was discriminated against in violation of Section 105(c) of the Act. [3]/

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[3]/ In his Brief, Complainant alleges that "as a direct and proximate result" of Darrah's discriminatory and retaliatory action against him, Complainant "lost three (3) days work." The only testimony on this point is Price's statement that he was off from April 20 to April 23 "with my heart due to harassment" (Tr. 37) (<u>sic</u>). Complainant also offered as evidence a note from his

ORDER

It is **ORDERED** that the Complaint herein be **DISMISSED.**

Avram Weisberger
Administrative Law Judge

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Walter J. Scheller, III, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

dcp/fb

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footnote 3 (continued)
physician, John Manchin II, D.O. which states that he was absent from work on these dates "... due to anxiety and nervousness caused by a situation at work in which he was not permitted to take his medication." I find this evidence insufficient to establish a good faith reasonable belief that continued work involves a hazardous condition. Further, there is no evidence of any communication made by Price to management concerning any refusal to work on the dates in question. As such, it has not been established that Price had a right not to work on the dates in question, and that Respondent is responsible for his wages on those dates (See, Secretary on behalf of Keene v. S & M Coal Company, Inc., 10 FMSHRC 1145, 1150 (1988)).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 17 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 91-92
	:	A.C. No. 46-01433-03953
v.	:	
	:	Loveridge No. 22 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	
	:	Docket No. WEVA 91-102
	:	A.C. No. 46-01318-03975
	:	
	:	Robinson Run No. 95 Mine

DECISION APPROVING SETTLEMENT

Appearances: Charles Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings, petitioner filed a motion to approve a settlement agreement which was supplemented post-hearing. A modification of Citation Nos. 3308698 and 3309261 to delete the "significant and substantial" findings and a reduction in penalties from $1,722 to $1,400 has been proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $1,400 within 30 days of this order.

Gary Melick
Administration Law Judge

Distribution:

Charles Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Walter J. Scheller III, Esq., Consolidation Coal Company, Legal Department 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 17 1991

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-181 A. C. No. 46-01452-03770
v.	:	
	:	Arkwright No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Charles M. Jackson, Esq., U. S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner;
Walter J. Scheller III, Esq., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At the hearing, the parties jointly moved to settle this case. A reduction in penalty from $953 to $783 was proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that respondent pay a penalty of $783 within 30 days of this order. Upon payment in full, this case is **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 19 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 90-87 A.C. No. 33-01314-03519
v.	:	Island Creek # 43 Strip Mine
ANTHONY MINING COMPANY, Respondent	:	

DECISION

Appearances: Kenneth Walton, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the Petitioner;
Gerald P. Duff, Esq., HANLON DUFF & PALEUDIS CO., LPA, St. Clairsville, Ohio, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for three alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. The respondent filed an answer contesting the alleged violations, and a hearing was held in Steubenville, Ohio. The parties did not file posthearing briefs, but I have considered their oral arguments in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the standards as alleged in the proposal for assessment of civil penalties, (2) whether the violations were "significant and substantial," and (3) the appropriate civil penalties that should be assessed based on the civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. 30 C.F.R. § 77.1605(b) and § 77.1606(c).

4. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

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

2. The Anthony Mining Company is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. § 802(d).

3. The Anthony Mining Company is a small operator.

4. The Island Creek #43 Strip Mine of the Anthony Mining Company is a mine as defined in § 3(h) of the Mine Act, 30 U.S.C. § 802(h).

Discussion

The alleged violations in this case all concern one piece of equipment; a Willys jeep with a water pump mounted on the cargo bed behind the driver's cab. Two of the three section 104(a) "S&S" citations issued on February 15, 1990, were issued for violations of mandatory safety standard § 77.1605(b), because the service brakes and parking brake were not maintained in good operating condition in that the service brakes would not stop the jeep and the parking brake could not be applied. The third citation was issued for a violation of mandatory safety standard § 77.1606(c), because the windshield wiper arms and blades were missing and the wiper motors were inoperative. The inspector noted that it was raining at the time the violative conditions were observed and cited.

Petitioner's Testimony and Evidence

MSHA Inspector B. Ray Marker testified that he inspected the jeep in question on February 15, 1990, in the course of his inspection of the respondent's strip mine. He stated that the jeep was located in the pit area where coal was being loaded. A water pump used to pump water from the pit was mounted on the jeep, and he was informed that the pump had a defective seal

(Tr. 9-13). He observed an employee walking towards the jeep, and when he asked him what he was going to do, the employee advised him that he was going to move it out of the way because another pump was being brought to the pit. Mr. Marker then decided to inspect the jeep, and when he asked the employee to try the brakes, "the brake pedal went to the floor and there was no indication of any service brake whatsoever" (Tr. 14). He then asked the employee to apply the parking or emergency brake and "for some reason the park brake could not be applied". Mr. Marker then looked at the windshield and observed that the wiper blades and arms were missing from the motor and that the wiper motors would not work. He then issued a section 107(a) closure order to prevent anyone from moving the vehicle (Tr. 14, Exhibit P-1).

Mr. Marker stated that the jeep key was in the ignition and that the jeep could be driven and it was available for use. He spoke with pit foreman John Sperlaza who acknowledged that he was aware of the brake problems. Mr. Marker confirmed that another pump was brought to the pit, and the cited jeep was towed away (Tr. 14-15). Mr. Marker confirmed that he issued the citations in question because of the conditions which he observed (Tr. 16, 20, 23; Exhibits P-2 through P-4).

On cross-examination, Mr. Marker stated that he has never observed the jeep in operation anywhere at the mine site, and he confirmed that the pump was attached to the jeep and that "the purpose of the piece of equipment was for the water pump" (Tr. 26). He identified the employee that he spoke with as Denver Ray, and he confirmed that Mr. Ray did not start the vehicle until he (Marker) approached it. He stated that he has no evidence to contradict the fact that the jeep may have been towed to the pit, rather than being driven, and he confirmed that he never observed the jeep in any accident at the mine (Tr. 28).

Mr. Marker stated that the violations in question would be "significant and substantial" only if the jeep were operated out of the pit area and on the haul road leading in and out of the pit. There was no probability of any accident occurring in the pit area where the pump would normally be located (Tr. 28). He stated that the jeep had three forward and one reverse gears, that it would not be driven at much of a speed, and if driven in low gear it would be operated in a relatively slow powered gear. Under normal conditions, the jeep could be reasonably driven slowly by using the clutch and low gear (Tr. 29). Mr. Marker had no reason to believe that the jeep was driven on the day of his inspection (Tr. 30). Mr. Ray and one other individual were the only people in the pit. There would be no need for windshield wipers if the vehicle was not going to be operated, and he did not personally test the brakes, and simply visually observed them (Tr. 31).

In response to further questions, Mr. Marker stated that he assumed that the jeep would be driven out of the pit because the key was in the ignition and Mr. Ray started it as he (Marker) walked toward the jeep. Mr. Ray told him that the pump was going to be moved out of the pit, but he did not say that the jeep was going to be driven out (Tr. 32-33). Mr. Marker stated that the pump occupied most of the jeep cargo space, and with the exception of some additional water hose, he did not believe that the jeep could be used for hauling supplies. He confirmed that the jeep would be a "fixed object" in the pit while the pump was being operated and until it was relocated to another area. He did not know how long the brake conditions had existed and he checked no records or inspection reports (Tr. 35-37).

Mr. Marker believed that Mr. Ray moved the jeep forward a few feet when he asked him to test the brakes, and "it came to a coasting stop on its own". Mr. Marker also stated that "the brake went clear to the floor and that was enough for me" (Tr. 38). He confirmed that other than moving the jeep from one pit area to another over the haul road, the jeep would not normally be operated on the haul road (Tr. 39). If the jeep were parked with a workable pump, he would have only inspected the pump engine guarding. However, since the pump could not be used, he was concerned that the jeep would be used for transporting that pump (Tr. 40).

Mr. Marker confirmed that the jeep had a tow bar attached to the front bumper, and he indicated that Mr. Ray and another individual (Brown) told him that they did drive the jeep. He (Marker) also confirmed that the pit terrain was reasonably level with a grade 300 to 400 feet long coming out of the pit. The only occasion for using the parking brake would be for an emergency, and the jeep was towed from the premises and dismantled (Tr. 42,44). Mr. Marker also confirmed that he had no reason to believe that the jeep was used routinely for anything other than pumping water (Tr. 43). When he initially spoke with Mr. Ray, he saw no other vehicle present which would have been used to tow the jeep, but after speaking with Mr. Sperlaza a vehicle was brought in to tow the jeep (Tr.46).

Respondent's Testimony and Evidence

Pit foreman and heavy equipment operator Denver O. Ray, Jr., testified that his job on February 15, 1990, was to take care of the water pump mounted on the jeep and to insure that it was pumping water. He stated that the jeep was initially towed to the pit area by mine foreman J. C. Schiappa with his pickup and parked at the location where it was observed by the inspector. He confirmed that the jeep was equipped with a tow bar, and he denied that he ever drove or intended to drive the jeep that day. He explained that prior to the inspector's arrival, the back hoe operator informed him that the pump seal was defective and that

the pump was not operating. He then made preparations to bring in another pump and arranged for Mr. Schiappa to bring in his pickup so that the jeep could be towed out of the pit and the pump taken to the machine shop to be repaired (Tr. 52-54).

Mr. Ray denied that he intended to drive the jeep out of the pit, and he stated that he told Inspector Marker that the jeep was going to be towed out. He further stated that he started the jeep after the inspector told him to start it, and that he did so because he believed the inspector wanted to inspect it (Tr. 55). He stated that the jeep was not used to transport men or material that day and that it was towed out with a tow bar with Mr. Schiappa's pickup. The jeep had been parked in the pit for a week or two pumping water so that the main coal seam could be tapped and loaded out (Tr. 56).

On cross-examination, Mr. Ray admitted that he had previously driven the jeep approximately two weeks prior to the inspection by Mr. Marker. He stated that he had brakes when he drove it and that the brake pedal went about "halfway down". He was the only person to drive the jeep and he has never hit anything while driving it. He stated that the jeep only served as a stand for the pump because the jeep wouldn't start and Mr. Schiappa had to push it into position with his truck (Tr. 59). He asserted that he only started it after the inspector told him to get in and start it (Tr. 59). He confirmed that the brake pedal "went to the floor" and the parking brake and windshield wipers did not work (Tr. 60).

In response to further questions, Mr. Ray stated that he usually drove the jeep in first gear no more than five miles an hour and that he drove it from where it is usually parked "at the top of the hill" to the pit. The jeep was only used in the pit area to pump water and it was never used to transport men or materials. The jeep is usually blocked by placing rocks under the wheels when it is parked (Tr. 61-63).

Foreman John C. Schiappa testified that he was informed sometime between 9:00 a.m., and 9:30 a.m., on February 15, 1990, that the pump in question had quit pumping. He issued instructions to have another pump taken to the pit, and he assigned employee Bill Weaver to drive his pickup truck to the pit to tow out the jeep with the defective pump. The pump had been pumping water for 10 to 12 days before the inspection and it had not been moved from its location in the pit. The jeep was equipped with a tow bar and it was customarily towed in and out of the pit at times (Tr. 65-67).

On cross-examination, Mr. Schiappa stated that the jeep was originally driven to the pit, and that "at times" the jeep was driven and towed to the pit area. He stated that in the winter season the jeep wouldn't start, and that when it was driven to

the pit prior to the inspection, "the brakes were in good shape", and there were "no problems as far as stopping". However, he acknowledged that he did not know how far the brake pedal went down because he did not drive the jeep, and he had no personal knowledge of the condition of the brakes. He confirmed that there were no windshield wipers on the jeep (Tr. 68-69).

In response to further questions, Mr. Schiappa stated that when the jeep was driven it was only driven for a distance of one-tenth to two-tenths of a mile, and then towed into the pit. The pump would only leave the pit area when it was in need of repair and it was always towed to the repair shop. He considered the jeep to be a stand for the pump rather than a piece of mobile equipment. The pump was bolted to the bed of the jeep and it could be unbolted and removed from the jeep. If this were done, the jeep would be used as a standby for another pump (Tr. 70-73).

Findings and Conclusions

Fact of Violation - Citation Nos. 3130674 and 3130675

The respondent is charged with two violations of mandatory safety standard 30 C.F.R. § 77.1605(b), because of its failure to maintain the jeep service brakes and parking brake in good operating condition. Section 77.1605(b), provides as follows:

> Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes.

During the course of the hearing, respondent's counsel advanced an argument that the cited jeep was not a vehicle which was normally operated in the pit, that it was not being used as a mobile piece of equipment, and that it simply served as a stand for the water pump (Tr. 50-51). Notwithstanding his statement that "obviously a Willys jeep is mobile", counsel argued that section 77.1605(b), "talks basically about trucks, front-end loaders, and rock trucks out on the haulageway" (Tr. 80). Since the jeep traveled at most a tenth of a mile to two-tenths of a mile, and was generally towed into and out of the pit, counsel characterized the jeep as "a glorified platform stand with the pump", and he concluded that within the express language of the regulation, or the spirit of the regulation, the jeep was not used as a piece of mobile equipment (Tr. 80).

The term "mobile equipment" is not defined in Part 77 of the regulations. However, it is defined in the Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968, at page 719, as follows:

> Applied to all equipment which is self-propelled or which can be towed on its own wheels, tracks, or skids.

The respondent's suggestion that the cited jeep was not a piece of mobile equipment subject to the requirements of section 77.1605(b) is rejected. Apart from the modification made to the jeep to accommodate the water pump in the cargo area behind the driver, there is no evidence that the jeep was other than a self propelled vehicle which was sometimes driven and sometimes towed to and from the pit area. Although it may have been driven a relatively short distance from the area where it was normally parked to the pit area, it did travel over the regular haulage road used by other vehicles. Further, although the jeep may have been parked at the pit site for as much as ten days while the pump was pumping water, there is no evidence that the jeep was a permanent fixture at any one location in the pit. Indeed, the evidence shows that the jeep was moved in and around the pit area as needed so that the pump could pump water, and when it was moved from place to place it usually traveled over portions of the haul road.

Contrary to the respondent's assertion in its answer of July 3, 1990, that the jeep was never driven, both Mr. Ray and Mr. Schiappa admitted that the jeep was sometimes driven, and sometimes towed, to and from the pit area. Further, if the pump were unbolted and removed from the rear of the jeep, the jeep could be used as a "standby" vehicle for another pump, and I find nothing to suggest that it could not be used for other purposes. Under all of these circumstances, I conclude and find that the cited jeep was a piece of "mobile equipment" within the scope and intent of section 77.1605(b), and that the brake requirements found in this regulation applied to the jeep.

The uncontroverted and credible testimony of Inspector Marker establishes that at the time of his inspection of the jeep, and after requesting Mr. Ray to depress the service brake, the brake pedal went all the way to the floor and the inspector found no indication that the brakes were operational. The inspector's belief that Mr. Ray may have moved the jeep forward a few feet while testing the service brake and that the jeep "came to a coasting stop on its own" is unrebutted. In fact, Mr. Ray testified that "after he made me start it up and take off with it, the pedal went to the floor" (Tr. 60). This corroborates the inspector's testimony that after Mr. Ray started the jeep, he moved and depressed the brake pedal, and that the pedal went to the floor and the jeep coasted to a stop.

Although Mr. Ray testified that the jeep "had brakes" when he drove it approximately two weeks prior to the inspection, and that the brake pedal went "halfway down", the fact remains that at the time the inspector observed the brakes with Mr. Ray behind the wheel, the brake pedal went to the floor and would not stop the vehicle when Mr. Ray moved it forward. Further, although Mr. Schiappa testified that the jeep brakes were in "good shape" and that there were "no problems as far as stopping" when the

jeep was originally driven to the pit prior to the inspection, he conceded that he did not drive the jeep, did not know how far the pedal went to the floor, and that he had no personal knowledge of the condition of the brakes.

The evidence in this case establishes that the jeep was equipped with a parking brake, but for some unexplained reason the brake could not be activated. Although section 77.1605(b), only requires mobile equipment to be equipped with a parking brake, and has no specific requirement that the brake be adequate or serviceable, I conclude and find that the intent of the standard is to insure the margin of safety intended by the installation of the parking brake on the equipment, and that any reasonable application of the standard requires that a parking brake be maintained in serviceable and functional condition. See: Thompson Coal & Construction, 8 FMSHRC 1748 (November 1986); Turner Brothers, Inc., 6 FMSHRC 1219, 1253 (May 1984). Further, in Wilmot Mining company, 9 FMSHRC 684 (April 1987), in affirming a judge's finding of a violation of section 77.1605(b), the Commission stated as follows at 9 FMSHRC 688:

> To prove a violation of this standard, however, the Secretary is not required to elaborate a complete mechanical explanation of the inadequacy of the brakes. A demonstrated inadequacy itself may be sufficient. * * * Whatever the precise cause of the braking defect, the evidence amply supports the judge's finding that the Terex was not "equipped with adequate brakes, " in violation of the cited standard (emphasis added).

In view of the foregoing, and based on a preponderance of all of the testimony and evidence adduced in this case, I conclude and find that the petitioner has established that the cited jeep service brakes and parking brake conditions constituted violations of the cited mandatory safety section 77.1605(b). Accordingly, the citations issued by Inspector Marker ARE AFFIRMED.

Fact of Violation - Citation No. 3130676

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. § 77.1606(c), because of the missing jeep windshield wipers and inoperative wiper motors. Section 77.1606(c), states that "Equipment defects affecting safety shall be corrected before the equipment is used".

The respondent has not rebutted the uncontroverted evidence that the jeep windshield wiper arms and blades were missing and that the wiper motors were inoperative. However, during the course of the hearing the respondent's counsel argued that there is no evidence that the jeep was going to be driven in the rain

on the day of the inspection (Tr. 79). Petitioner's counsel argued that the jeep was available for use because the keys were in the ignition and that it was in fact started. Counsel further asserted that it was obvious that Mr. Ray was going to move the jeep because he was inside it for the purpose of moving it in order to make room for another pump. Under these circumstances, counsel concluded that that there is an inference that the jeep was driven (Tr. 78-79; 81).

Although the jeep was "used" in the sense that it was parked and blocked at the location where the pump was pumping water until it stopped pumping and Mr. Ray and Mr. Schiappa were preparing to tow it away, there is no evidence that the jeep was ever driven with the missing windshield wipers and inoperative wiper motors. I conclude and find that the missing windshield wipers and inoperative motor "defects" would only "affect safety" while the jeep was being driven with reduced visibility in inclement weather or during a rain, rather than while it was parked and blocked for any length of time while the pump was operating. I further conclude and find that in order to establish a violation there must be some credible evidence to establish, or at least to support a reasonable inference, that the jeep was driven with defective equipment which affected safety, and that the respondent failed to correct the defective conditions before allowing the jeep to be driven. On the facts and evidence presented in this case, I conclude and find that there is insufficient evidence to establish that this was the case.

There is no evidence as to how long the windshield wiper condition had existed prior to the inspection, and Mr. Marker confirmed that he did not check any maintenance or other records, and he apparently did not pursue this issue further. He stated that if the jeep were not driven there would be no need for windshield wipers. Mr. Marker confirmed that Mr. Sperlaza acknowledged that he was aware of the brake problem, but there is nothing to indicate that Mr. Sperlaza was aware of the windshield condition.

Although the evidence establishes that the jeep was driven approximately two weeks days prior to the inspection, there is no evidence that the windshield wipers were defective when it was driven. The inspector's assumption that the jeep was going to be driven out of the pit was based on the fact that the keys were in the ignition. However, the respondent's witnesses testified credibly that the jeep was going to be towed and not driven out of the pit area. The inspector conceded that Mr. Ray never told him that he was going to drive the jeep out, and he also confirmed that the jeep had a tow bar attached to the front bumper and that it was in fact towed away.

The petitioner's conclusion that Mr. Ray was going to move the jeep to make room for another pump is based on counsel's assertion that Mr. Ray was inside the jeep. Counsel's conclusion that this supports an inference that the jeep was driven is also based on this asserted fact (Tr. 78-79; 81). However, after reviewing the testimony in this case, I cannot conclude that it clearly establishes that Mr. Ray was inside the jeep preparing to drive it out of the pit area at the time the inspector first observed the vehicle.

Inspector Marker testified that he was sitting in his car watching the mining operation when he first observed Mr. Ray walking towards the jeep, and that when he (Ray) "went to get in", Mr. Marker asked him what he was going to do, and Mr. Ray told him that he was going to move the jeep out of the way because another pump was being brought to the pit (Tr. 13). At that point, Mr. Marker advised Mr. Ray that he wanted to inspect the jeep, and Mr. Marker conducted his inspection of the brakes while "the employee was in the jeep" (Tr. 13). Mr. Marker later testified that the jeep was not started until he approached it (Tr. 27; 31). Viewed in this light, I cannot conclude that Mr. Marker's testimony establishes that Mr. Ray in fact drove the jeep, or that it supports any reasonable inference that the jeep was driven. Even if one could conclude that Mr. Ray intended to drive the jeep, there is absolutely no credible evidence that he did, and the inspector conceded this fact.

In view of the foregoing findings and conclusions, I cannot conclude that the petitioner has established a violation of section 77. 1606(c). Accordingly, the citation issued by Inspector Marker IS VACATED.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a small mine operator and I find nothing to suggest that the payment of the civil penalty assessments for the violations which have been affirmed will adversely affect the respondent's ability to continue in business.

History of Prior Violations

The petitioner submitted a computer summary of assessed and paid violations for the period February 15, 1988, through February 14, 1990, and prior to February 15, 1988. The information reflects that the respondent paid civil penalty assessments in the amount of $1,634, for 24 violations issued during the 2-year period in question, and that prior to February 15, 1988, the respondent paid $989 for 20 violations. There is no evidence that the respondent has been cited for prior violations of the same standards cited in this case. Based on

the information provided, I cannot conclude that the respondent's compliance history is such as to warrant any additional increases in the civil penalties which I have assessed for the violations which have been affirmed.

Good Faith Compliance

The evidence establishes that the cited jeep was immediately removed from the mine site and scrapped. I conclude and find that the respondent rapidly abated the violations in good faith.

Negligence

Citation No. 3130674 (service brakes)

Inspector Marker confirmed that he based his "high negligence" finding on the fact that pit foreman Sperlaza admitted that he was aware of the brake problem (Tr. 20). I take note of the fact that in its answer of July 3, 1990, the respondent admitted that the pit foreman was aware of the brake problem, but took the position that the vehicle was always towed to the pit and never driven. However, the evidence shows that the jeep was at times driven as well as towed, and Mr. Schiappa admitted that it was driven to the pit before the inspection. Under the circumstances, I agree with the inspector's high negligence finding, and it IS AFFIRMED.

Citation No. 3130675 (parking brake)

Inspector Marker testified that he based his "moderate negligence" finding on the fact that pit foreman Sperlaza had no knowledge that the jeep parking brake could not be engaged. However, he believed that the respondent, as the mine operator, was responsible for having the equipment checked by a competent person, and that all defects found are required to be reported so that they may be corrected (Tr. 22). I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care. I agree with the inspector's negligence finding, and IT IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard", 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In order to establish that a violation is significant and substantial, the petitioner must prove the following: (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. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984); United States Steel Mining Company, 7 FMSHRC 1125, 1129 (August 1985), and the cases cited therein. The operative time frame for determining whether a reasonable likelihood of injury existed "must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations". Halfway, Incorporated, 8 FMSHRC 8, 12 (January 1986).

The respondent's counsel argued that the brake violations were not significant and substantial because there was a minimal mobile use of the jeep, it was unlikely that the parking brake condition would result in an accident, the jeep was driven no more than five miles an hour, at most for a distance of tenth of a mile, and only two people were working in the pit area. Counsel further pointed out that the evidence establishes that the jeep was not going to be driven, that it was towed, and that the chances of anything happening "were certainly more than remote" (Tr. 81). The petitioner's counsel took the position that the inspector's "S&S" findings were appropriate (Tr. 82).

Citation No. 3130674 (service brakes)

Inspector Marker believed that a "permanently disabling" injury was "highly likely" because he observed several large "off road" haulage and dump trucks in operation at the time of his inspection and if the jeep were taken out of the pit "with all of this activity going on" it was highly likely that there would be an accident due to the defective brake problems and lack of control in stopping the jeep (Tr. 18). The defective brake condition would contribute to "the severity of the event" because the vehicle could not be stopped, and if an accident were to occur, it was reasonably likely that it would result in a permanent disabling injury. For these reasons, he believed that the violation was "significant and substantial" (Tr. 19).

Citation No. 3130675 (parking brake)

Inspector Marker believed that the inability to activate the parking brake would "reasonably likely" result in an accident and injury because of the inability to control or stop the vehicle. However, he believed that the lack of a parking brake would only involve the cited jeep rather than other vehicles because the jeep could be stopped by running it into a berm provided on the haul road or in the spoil area (Tr. 21). He did not believe that

this violation was as serious as the service brake violation because the vehicle backing into a berm or spoil pile without a parking brake would probably or possibly only result in a "lost work day or restricted duty" injury (Tr. 22). He believed the violation was "significant and substantial" because "we have a control problem which increases the possibility of something happening" (Tr. 22).

The credible testimony of the respondent's witnesses establishes that the jeep in question was used to transport the water pump to and from the pit, and that while the jeep was parked the wheels were blocked with rocks. Although the jeep could have been used to transport men and materials, I find that this could only happen if the pump were unbolted and removed from the cargo area. However, there is no evidence that the jeep was ever used for anything other than transporting the pump, and the inspector had never observed the jeep being driven, and he had no reason to believe that the jeep was used routinely for anything other than pumping water.

The inspector confirmed that there was no probability of any accident occurring in the pit area where the jeep and pump would normally be located. He believed that the violations would be significant and substantial only if the jeep were operated out of the pit area and driven over the haul road. He confirmed that the jeep would not normally be operated on the haul road, and it would only be on the haul road when it was moved from one pit area to another. However, the evidence establishes that the jeep was equipped with a tow bar on the front bumper, and I am persuaded that the evidence supports a reasonable conclusion that although the jeep was driven to the pit area approximately two weeks before the inspection, it was not routinely or regularly driven on the haul road.

The respondent's credible and unrebutted testimony, which is supported in part by the inspector, establishes that if the truck were driven, it was only driven a very short distance and at a very slow rate of speed utilizing the low gear and clutch. Further, when the jeep was parked, it was blocked with rocks, and Mr. Schiappa's testimony that the jeep was always towed from the pit to the shop if the pump were in need of repairs is unrebutted. Mr. Ray's testimony that he had brakes when he last drove the jeep two weeks before the inspection is also unrebutted.

Although the inspector observed other vehicular traffic on the haul road at the time of the inspection, he had no reason to believe that the jeep was driven on the haul road that day, and there is no evidence that the jeep was exposed to any traffic hazards that day. Based on the evidence presented, I can only conclude that when the jeep was last driven, it was driven no more than a tenth of mile at a speed of approximately five miles

an hour. There is no evidence as to what the road or traffic conditions may have been at that time, and given the fact that water must obviously be pumped from the pit before the coal can be extracted and hauled away, I believe one can reasonably conclude that if the jeep is driven to the pit area this is done early in the morning before full mining operations begin, and before there is any other traffic on the road. I also believe that it is reasonable to conclude that once the jeep reaches the pit area, it remains in place for a relatively long period of time while the pump is pumping water.

In view of the foregoing, and after careful review and consideration of all of evidence and testimony adduced in this case, I cannot conclude that the petitioner has established by a preponderance of the evidence that in the normal course of mining operations it was reasonably likely that the cited brake conditions would reasonably likely result in an accident or injury of a reasonably serious nature. Under the circumstances, the inspector"s "S&S" findings with respect to these violations ARE VACATED.

Gravity

Although I have concluded that the violations were not significant and substantial, since the jeep was a piece of mobile equipment which was sometimes driven, and readily available to be driven, I believe that the respondent had an obligation to maintain the service brakes in an operable condition to preclude any potential accident in the event the jeep were driven. Under the circumstances, I conclude and find that the service brake violation was serious.

With respect to the parking brake violation, the inspector conceded that the parking brake condition was not as serious as the service brakes problem and he indicated that the terrain in the pit area was level. I find no evidence that the jeep was ever parked on an incline or that an emergency could develop over the short distance that the jeep may have on occasion been driven. Further, the evidence establishes that the jeep wheels were blocked with rocks when it was parked. Under all of these circumstances, I conclude and find that the parking brake violation was non-serious.

Civil Penalty Assessments

The petitioner's "special" civil penalty assessments are based on certain "narrative findings" made by MSHA's assessments office, including findings which stated that the cited jeep was a "water truck being used along the haul roads of the pit area" and "around the strip area"; that the violations "contributed to an imminent danger of a serious haulage-equipment accident" because "the truck was being used during rainy weather"; and that the

defective parking brake "increases the likelihood of a runaway of mobile-equipment accident". However, it is clear that I am not bound by MSHA's proposed assessments, nor am I persuaded by proposed assessment "findings" which have no evidentiary support.

On the basis of the evidence adduced at the hearing in this case, my findings and conclusions based on that evidence, and taking into account the six satutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
3130674	2/15/90	77.1605(b)	$150
3130675	2/15/90	77.1605(b)	$75

ORDER

1. Citation No. 3130676, February 15, 1990, citing an alleged violation of 30 C.F.R. § 77.1606(c) IS VACATED.

2. The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above for the two citations which have been affirmed. Payment is to be made to MSHA within thirty (30) days of the date of this decison and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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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 19 1991

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 91-650-R Citation No. 3329922; 6/11/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 91-664-R Citation No. 3329504; 7/16/91
	:	Meigs No. 2
	:	Mine ID 33-01173

DECISION

Appearances: David M. Cohen, Esq., Electric Power Service Corporation, Lancaster, Ohio for Contestant; Maureen M. Cafferkey, Esq., U.S. Department of of Labor, Office of the Solicitor, Cleveland, Ohio for Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

On July 3, 1991, the Operator (Contestant), filed a Notice of Contest contesting the issuance of Citation No. 3329922 which alleges a violation of 30 C.F.R. § 75.1704-2(a). Also on July 3, 1991, Contestant filed a Motion to Expedite.

On July 3, 1991, in a telephone conference call initiated by the undersigned with counsel with both parties, it was agreed that a hearing in this matter shall be held on July 11, 1991, in Columbus, Ohio.

At the hearing on July 11, 1991, Charles Jones and Edwin P. Brady testified for Respondent, and Nelson Kidder testified for Contestant. Both parties waived their right to submit a post hearing brief, but in lieu thereof each presented a closing argument.

On July 11, 1991, at the hearing, Contestant filed an Application for Temporary Relief, and the Secretary (Respondent) reserved its right to file a reply to this application. The

Secretary's Reply was filed July 16, 1991. On July 16, 1991, Contestant filed a Reply to Secretary's Response. Both parties waived their right to an additional hearing on the issues raised by the Application for Temporary Relief.

FINDINGS OF FACT AND DISCUSSION

In Contestant's Meigs No. 2 Mine, prior to April 25, 1991, the primary designated escapeway from the 3 South Longwall Section, ran a distance of 16,200 feet to the No. 1 intake air shaft, (air shaft No. 1) from which point miners exited underground and went to the surface. In May 1990, Contestant decided to install a new intake air shaft (air shaft No. 2), in order to better ventilate the working sections in the southwest area, and to ventilate the gob situated north of the southwest working sections. Air Shaft No. 2 was placed on a ventilation map in July of 1990, and was placed in operation on February 23. 1991. An escape capsule (hoist) was approved by MSHA on April 25, 1991. Hence on April 25, 1991, air shaft No. 2, became a mine opening suitable for the safe evacuation of miners.

Upon the approval of the escape capsule, Contestant designated a new primary escapeway to air shaft No. 2 to replace the 16,200 foot escapeway to air shaft No. 1. The new designated escapeway, on June 11, 1991, ran straight north from the face approximately 2,500 feet to the mouth (neck). From that point it ran approximately 2,000 feet east parallel and two entries south of the entry containing the trolley and belt lines. It then travelled 4 Entries North, and then turned west at the 4th entry and travelled approximately 2,000 feet to air shaft No. 2. The total distance the escapeway travelled from the mouth to the Air Shaft No. 2 was 4,800 feet. The total distance of the escapeway from the longwall face on June 11, 1991 to air shaft No. 2 was 7,700 feet.

On June 11, 1991, Charles Jones an MSHA Inspector walked the escapeway from the mouth of the 3-South longwall section to air shaft No. 2. He said that the escapeway was in good condition except for its distance. He estimated that it took 25 minutes to walk from the mouth to air shaft No. 2.

The mouth is approximately 200 to 300 feet south of air shaft No. 2. It is physically possible to traverse this distance from the mouth by taking a route which runs one crosscut through a track-door, then goes diagonally to the north east one crosscut, and continues west one crosscut through a man-door, then goes west one crosscut to air shaft No. 2 (See joint Exhibit 1). Another path from the mouth to air shaft No. 2 covering approximately the same distance and located in approximately the same area is illustrated in Joint Exhibit No. 2. These paths are in intake air. However, the air in these paths mixes with air from the belt entry that also contains trolley wires.

Jones issued Citation No. 3329922 alleging a violation of Section 75.1704-2(a) supra. This Citation as pertinent, provides as follows:

> The most direct practical route to the nearest mine opening was not provided from the 3rd South Longwall section in that miners were required to travel an additional 4,800 feet by traveling outby from the mouth of the section for 2,300 feet and traveling inby for about 2,500 feet. The emergency escape shaft is located at the mouth of the 3 south Longwall section (across the track and belt entry).

Section 75.1704-2(a) supra, provides as follows:

> In mines in working sections opened on and after January 1, 1974, all travelable passageways designated as escapeways in accordance with section 75.1704 shall be located to follow, as determined by an authorized representative of the Secretary, the safest direct practical route to the nearest mine opening suitable for safe evacuation of miners. Escapeways from working sections may be located through existing entries, rooms, or crosscuts (emphasis added).

Section 1704-2(a) supra, thus provides that a designated escapeway shall be located to follow the route determined by the Secretary's representative to be the "safest direct practical route". Hence, section 1704-2(a) is violated where the operator's designated escapeway is located along a route that has not been determined by the Secretary representative to be the safest direct practical route.

The cited escapeway, designated by Contestant in accordance with 30 C.F.R. § 1704, was determined by Jones, the Secretary's authorized representative to not have been the safest direct practical route. Hence, the utilization by Contestant of its designated escapeway is a violation of Section 75.1704, supra, if it is established that Jones' determination was proper i.e., that the designated route was not the safest direct practical route.

Inasmuch as the escapeway in question turns east for 31 crosscuts, then makes a 90 degree turn to go north for 4 crosscuts, then makes another 90 degree turn and goes east for 23 crosscuts, then makes another 90 degree turn to go south for 1 crosscut, then makes another 90 degree turn for 9 crosscut through air shaft No. 2, it clearly cannot be found to be a "direct" route. As was stated in Rusthon Mining Co. 10 FMSHRC 713, 716 (aff'd on other grounds) 11 FMSHRC 1432 (1989) "To find otherwise would violate the clear meaning of the word "direct" as defined in Webster New Collegiate Dictionary, (1979 Edition), as: 1a: proceeding from one point to another in time or space

without deviation or interruption: straight b: proceeding by the shortest way ..." Hence, the record establishes that Jones properly determined that the designated escapeway was not "direct".

Essentially, according to Jones he "suggested" to Respondent that an overcast be constructed in the "area" of the mouth, to allow miners to continue the escape from that point directly to the air shaft No. 2, utilizing a path that would be in intake air separated from the belt and track haulage entries. It appears to be Contestant's position that section 75.1704-2(a) supra, does not require an operator to engage in any construction in order to have an escapeway in conformity with its provisions. Contestant also argues that it is not "practical" for the overcast to be constructed, as miners engaged in the construction would be exposed to the hazards inherent in the construction and its attendant clean up. In addition, construction of the overcast requires excavation of a supported roof which could weaken the roof in other areas. Contestant also asserts that construction of the overcast requires interruption of cable, telephone, belt and trolley service inby. Contestant argues that, accordingly, construction of an overcast would curtail production at Meigs No. 2 Mine to a significant degree, as 50 percent of its production occurs in the southwest portion inby the overcast. All of these allegations of Respondent are borne out in the testimony of its witness Nelson Kidder an engineering superintendent for the Meigs division. However, the ultimate issue before me is not the property of a "suggested" abatement, but rather whether the record supports a determination that the cited escapeway was not the safest direct route.[1] I find that the record establishes that the escapeway was not "direct". Accordingly Jones' determination is supported by the record. Since Contestant designated an escapeway which was determined by Jones to not be direct, I conclude that Contestant herein did violate Section 75.1704-2(a). In light of this conclusion Contestant's

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[1]According to Jones' uncontradicted testimony, in discussing abatement he "suggested" that an overcast to constructed in the area between the mouth and air shaft No. 2. Neither Jones nor any other representative of the Secretary mandated a specific route that shall be designated on escapeway, in order to abate the violation cited herein. Nor has the Secretary expressly designated any route as the safest direct practical route from the mouth to air shaft No. 2. Accordingly, it is beyond the scope of these proceedings to resolve the issues raised by Contestant i.e., whether an escapeway route requiring the construction of an overcast is "practical".

Application for Temporary Relief must be denied.[2]

According to Jones and Edwin P. Brady an MSHA Chief of the Office of the Engineering Service, the violation herein is significant and substantial. According to Jones fire is always possible in a coal mine, and, given the added distance of the cited escapeway, and the fact that it parallels and surrounds a belt entry which also contains trolley wires, smoke could get into the escapeway. However, he agreed on cross examination that, essentially, there were no particular conditions in the area in question that would make it reasonably likely for the hazard of smoke to exist, but that there was a "general concern" about airtightness of stoppings.

In Rusthon Mining Co., 11 FMSHRC 1432 (1989), the Commission held that the length of a mine escapeway in and of itself is not dispositive of the existence of a discrete safety hazard." (Rusthon supra. at 1436). Here, as in Rusthon, I conclude that Contestant has failed to show that the length of the cited escapeway and its non direct route per se posed a threat involving a reasonable likelihood of a reasonably seriously injury in the event of a fire. Nor has the Respondent shown that the occurrence of a fire and smoke was reasonably likely to have occurred, as its witnesses have not indicated the existence of any specific conditions that would have been likely to have caused a fire, or leakage of smoke into the escapeway. For all these reasons I conclude that the violation herein has not been established to be significant and substantial. (See Mathies Coal Co., 6 FMSHRC 1 (1984).

ORDER

It is **ORDERED** that Docket No. LAKE 91-664-R be consolidated with Docket No. LAKE 91-650-R.

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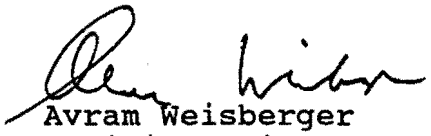
[2]On July 16, 1991, the Operator filed a Notice of Contest and Application of Temporary Relief seeking the vacation and dismissal of a Section 104(b) order issued on July 16, 1991, which alleges that since the last extension "little effort" has been made to abate Citation No. 3329922, which is the subject of the Contest Proceeding which was heard on July 11, 1991. (Docket No. LAKE 91-664-R) It is ordered that Docket No. LAKE 91-664-R be consolidated with Docket No. LAKE 91-650-R.

It appears that Contestant's basis for the Notice of Contest and the Application for Temporary Relief is its position, in essence, that the cited escapeway was not violative of Section 75.1704-2(a) supra. Inasmuch as it has been found infra that Citation No. 3329922 was properly issued, the Notice of Contest and Application for Temporary Relief filed July 16, 1991 are denied and ordered dismissed.

It is **ORDERED** that the Notice of Contests filed July 3 and July 16, be **DISMISSED,** and the Applications for Temporary Relief filed July 11 and July 16 be **DENIED**.

It is further **ORDERED** the Citation No. 3329922 be Amended to reflect the fact that the violation cited therein is not significant and substantial.



Avram Weisberger
Administrative Law Judge

David M. Cohen, Esq., Electric Power Service Corporation, Fuel Supply Department, P.O. Box 700, Lancaster, OH 43130-0700 (Certified Mail)

Maureen M. Cafferkey, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JUL 22 1991

KELLY L. DIEDE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 90-160-DM
v.	:	RM MD-90-09
SUMMIT INCORPORATED, Respondent	:	Anne Creek Mine

DECISION

Appearances: Kelly L. Diede, Pro Se
for Complainant;
Ronald W. Banks, Esq., Banks, Johnson, Johnson, Colbath & Huffman, P.C.
for Respondent.

Before: Judge Cetti

This case is before me upon the Complaint by Kelly L. Diede under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"), alleging discriminatory discharge on June 9, 1990, by Summit Incorporated ("Summit") in violation of Section 105(c)(1) of the Act. [1]

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[1] Section 105(c)(1) of the Act provides as follows:

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

I

Mr. Diede was hired by Summit on June 2, 1990, and was discharged eight days later, on June 9, 1990. At the time Summit was doing a small project for Wharf Resources at their Annie Creek Mine.

Mr. Diede, in pertinent part in his complaint, alleges as follows:

> I went to work for Summit Construction. I worked a week and one day. I had been putting down on my time card that the emergency brakes on my loader didn't work. I told Loyd they didn't work. He did nothing about it. They had to shut the loader down to fix the boom cylinder because it was leaking. I told Loyd I would like to get the brakes fix at that time. They did not get fixed. On my last sift (sic) Loyd told me that he would not be needing me on Monday. I asked why, he did not say anything, but that I was laid off
>
> I called later in Rapid City I asked him where he needed me Monday. He said he did not need me at all. I asked why he said there were problems with my work. I asked what was wrong he said he couldn't say just that he didn't need me. So I started looking for another job right away. So the Tuesday after my laioff (sic) I went to Summit Construction to find out a little more about what was going on. Tom Lester said he didn't have to give a reason for firing me, at that time a (sic) said I have a right to now

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cont'd fn. 1

> because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

> (sic) why I was let go. He said it was because I was unsafe in the loader. I said if I was so unsafe then why was the company running that loader without brakes. He asked me if I put that on my time card. I said Yes. I also told the sift (sic) boss nothing was done about the brakes.

At the hearing Mr. Diede admitted that he was told at the outset when he was interviewed for the job at Summit, that his "hire was going to be temporary." On the last day he worked for Summit, the Mine Superintendent, Mr. Nordstrom told him that the other loader operator was coming back to work and that they didn't need him (Diede) anymore. After telling him that he was "laid off," the Superintendent suggested he call the main office and see whether or not they could use him at "another place." (Tr. 13)

Mr. Diede testified that when he operated the loader for Summit he "noticed that the brakes weren't all that good." He started putting down on his time card that "the brakes needed to be looked at." After he was laid off, Mr. Diede called MSHA regarding the brakes on the loader.

After Mr. Diede's phone call (made after his discharge), MSHA in response to the call sent a Federal mine inspector to inspect the loader and specifically its brakes. The inspector found that no work had been done on the brakes but nevertheless found that the brakes of the loader were not in violation of any safety standard. The inspector filed a Notice of Negative Findings (Ex. R-1) which stated in relevant part: "Application of braking power was demonstrated to be sufficient... ." The "alleged hazard did not exist."

Mr. Diede stated that he asked Tom Lester (Summit's present Superintendent) why he "was let go." Diede testified that "basically he (Lester) really couldn't tell me." (Tr. 13).

Mr. Diede testified as follows (Tr. 14):

> He (Lester) had told me at one time after I kind of pinned him down he says, well, you were unsafe in the loader and we don't think that you've got any experience. At that time I asked him if he had called any of the people on the application and he said no, that it's not a practice at Summit Construction to do that.

Mr. Diede continued as follows (Tr. 15):

> I had asked Tom Lester why they took the man that was running the loader out of the loader and put me in it. Tom Lester said that he wasn't running the loader to production standards. At that time I asked him, I says, well, why didn't you let him go? Well, at that time he said well, we had another job for him and they put him in the roller. And I thought, well, that's fine and dandy. And then I asked him why I wasn't given the jobs that the other two guys that had just been hired, why I wasn't let to at least try those jobs. And at that time he told me that I was too inexperienced to do those jobs. Well, one the jobs is shoveling and stemming. Now I don't know how many people are dumb enough not to know how to run a shovel, but apparently I am. And one of the other people that was hired was put on the loading crew for loading the rounds. I asked him at that time why I wasn't at least given the chance to do that. He also said I was inexperienced. At that time I asked him if he did any follow-up on it, on my application, and he said no. And that's when I explained to him that I'd been mining for eight and a half years.
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> * * *
>
> I asked Tom Lester. I believe the safety man was in the office and so was Chuck Rounds at the time when I was talking to all of them. At that time I had given them basically a way out of this, and that was to put me back on in one of those jobs or that we were going to go to court because they tried to tell me that I was unsafe in the loader. Well, I don't doubt that. Anybody would have been unsafe in a loader without any brakes on it. After I was let go, I called MSHA.

On cross-examination, Mr. Diede again admitted that when he was hired, he was told that his "hire was going to be temporary" and admitted that he anticipated that he "wouldn't be there long." But that after he found out Summit had hired two other people after they terminated his employment "he kind of wondered what the reason was." He stated "most companies would hire back

whoever they had laid off before they are going to hire anybody else." Asked if that would be true "if they were not satisfied with your work performance," Diede replied "I guess the only question that I had on that was that I was wondering why they weren't satisfied." (Tr. 27).

Mr. Diede also stated "when I worked for Homestake there was a production standard, but it was never shoved down your throat like supposedly these people tried to do to me, saying that that was the reason I was let go was because I couldn't meet production standards."

II

Mr. Thomas Lester, General Superintendent for Summit, testified he observed Mr. Diede operating the loader in a "jerky erratic manner." He had heard reports of Mr. Diede's "bumping the trucks, dumping in a jerking motion into the trucks, which is hard on equipment, and hard on truck drivers also, and trucks."

Mr. Lester, who was present during Mr. Diede's exit interview, testified as to what occurred at the interview as follows (Tr. 72-73):

A. It got quite heated about mid-point. Kelly was using quite extreme language and our secretary was seated in the next room and taking all of this in. And John Ross told him several times to hold it down, knock off the profanities, and John even got up once and closed the window between the offices. And Kelly promptly rose and opened it back up in a forceful manner and continued his spiel of profanities, and said I'm going to sue you for everything you got!

Q. Did he say what he would use as a basis for the suit?

A. Discrimination, which I found to be unbelievable.

Q. Did he ever define what discrimination was? Did he have any definition in mind?

A. Yeah. I guess the way Kelly thinks he was discriminated against because he was not given a job that someone else--some other new hire had.

Q. Did he explain to you that it was the law that you had to take him back rather than to hire new hire?

A. Well, yes, but we don't interpret the law that way.

Q. But did he tell you that?

A. Yes.

Mr. Diede in cross-examining Mr. Lester asked him "Was there a reason given to me why I was discharged?" Mr. Lester replied, "I told you that we didn't find your performance adequate for our company." Mr. Diede then asked Mr. Lester why he was not "fired sooner" if management was "fearful that I was going to hurt myself or somebody else if I was supposedly a safety hazard?"

Mr. Lester replied as follows (Tr. 74):

A. I suppose at that time I was looking at things from a production standpoint. We were short on help, which is the reason that you were hired in the first place, the reason for several hires right then. Don't get me wrong, right then, in the first place, I knew that our loader operator would be back Monday. We figured that if you were watched close enough and talked to enough, we were hopeful that there wouldn't be an accident between Wednesday and Friday, Saturday.

Lloyd Nordstrom called by Summit stated he was Summit's Superintendent in charge of construction at the time Diede was employed by Summit. On the day he hired Diede, his main loader operator just left for a vacation. He put Diede on the loader more or less on a trial basis to see how he worked out. He observed that Diede had trouble keeping his loading area (pad) level enough so he could speed up his production. Diede started improving, "but he was awful wild with the loader, he was careless. He would jerk and jam and then when he'd dump his bucket he'd always try to catch the load instead of letting it try to drop into the truck. He would always stop the bucket. And I was on him, I think I told him about that every day, sometimes three times a day that that was hard on those load cylinders."

Mr. Nordstrom explained that when the operator stops the bucket abruptly from tilting, it builds up tremendous pressure in the hydraulic cylinder which causes the weakest point, the seals, to go out. The cylinders went out twice the week Diede operated the loader. Respondent had repacked one cylinder once and replaced that same cylinder later on in that week.

Mr. Nordstrom testified that he heard complaints from truck drivers that Diede in loading a truck was "awful rough on the truck." (Tr. 98) It got to the point that the three truck operators that hauled for Respondent didn't want to continue hauling because of the way Diede operated the loader while loading the trucks.

On cross-examination by Mr. Diede, Mr. Nordstrom stated: "I really wasn't happy with your performance. And talking it over with Tom, we decided to let you finish out the week, hoping that your performance would get better, which it didn't, and your attitude seemed to be getting worse." (Tr. 99)

Mr. Nordstrom concluded from what he considered Mr. Diede's inadequate performance in operating the loader that Mr. Diede had falsified his experience on his job application and for this reason alone he would not want to keep Mr. Diede on the job. He admitted, however, he had no proof of such falsification other than his observation of Mr. Diede's inadequate performance in operating the loader.

Two truck drivers, Charles White and Bill Shepperson, testified on behalf of Summit. Mr. White testified he observed Mr. Diede continue to load wet material even though he had been specifically instructed by Mr. Nordstrom not to do so.

Bill Shepperson testified that he observed Mr. Diede load his truck many times each day. Mr. Diede's operation of the loader was "jerky," he didn't keep his pad level and he ran into his truck frequently.

On cross-examination by Mr. Diede, Mr. Shepperson testified as follows (Tr. 136-137):

Shepperson: The pad wasn't level, you ran into my truck frequently, not with the loader, with the bucket, not only hooking the tooth on the tire but then when you'd pull into the truck you'd hit the truck. And you'd hit the truck with the bucket on the loader I would say at least once in the five dumps that was there, on the average. I don't mean just touch the truck, I mean hit the truck enough so it jarred it and shook the truck around.

Diede: As far as bumping into a piece of equipment down there when you had been operating that truck before, was there ever a time that the loader operator ever even came close to your truck at all?

Shepperson: It happens occasionally.

Diede: So it can happen. Not everybody is perfect is what I'm trying to get at, right?

Shepperson: In the ordinary course of a week of work maybe a loader operator will bump the bucket against the truck box once. And that's somewhere around 200 load. (Tr. 136-137)

FINDINGS AND CONCLUSION

It is undisputed that Mr. Diede was told at the time he was hired that he was a "temporary hire;" that the job would be a temporary one. It is also undisputed that Mr. Diede was laid off at the end of the eighth day he worked for Summit. The crucial question is whether Mr. Diede was let go on the eighth day he worked in retaliation for having engaged in protected activity or because Summit management believed that he lacked the skills and/or attitude needed to perform the work in a competent manner. There is no question that a miner's safety complaints, such as a reasonable good faith safety complaint of inadequate brakes on a loader, are a protected activity. The fact that there may have been no objective underlying safety problem would not invalidate a miner's good faith reasonable safety complaint.

If Mr. Diede had proved his employment was terminated in some part because he engaged in protected activity, a prima facie case for unlawful discharge in violation of 105(c) of the Act would have been established. If on the other hand, Summit discharged Mr. Diede because of management's belief that he lacked the skills needed to competently perform the work in a satisfactory manner, his discharge would not constitute a violation of 105(c) of the Act.

Mr. Diede has the burden of proof. Upon careful evaluation of all the evidence, I find that he failed to establish the necessary causal connection between his discharge and his safety complaints. I find no persuasive evidentiary support for Mr. Diede's contention that his termination was motivated in any part by the operators intention to retaliate against him for any safety complaints. I credit the testimony of Respondent's wit-

nesses and find that Mr. Diede was "let go" solely because management believed he did not have the skill to competently perform the job. I do not find that Mr. Diede was or was not a competent miner. That is not the question before me. Neither is the question of whether Summit was fair or accurate in its evaluation or its perception of Mr. Diede's skill or competence in performing the work. I find only on the basis of the evidence presented that it was management's honest belief that he did not have the ability to perform the work that was available in a competent manner and for this reason alone terminated his employment.

In sum, Mr. Diede failed to carry his burden of proof that his discharge was motivated in any part by his protected activity.

ORDER

Based on the foregoing findings and conclusions, and on the preponderance of the evidence adduced in this case, I conclude and find that the Complainant has failed to establish a violation of section 105(c) of the Act. He has not proven a discriminatory discharge within the meaning of section 105(c) of the Act. Accordingly, the complaint is **DISMISSED.**

August F. Cetti

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JUL 22 1991

ENERGY WEST MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 91-83-R
v.	:	Citation No. 3413924; 11/1/90
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Deer Creek Mine
	:	Mine I.D. 42-00121

DECISION

Before: Judge Lasher

This matter arose upon the filing of a Notice of Contest on November 13, 1990, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act") wherein Contestant seeks review of Citation No. 3413924 charging a violation of 30 C.F.R. § 50.20 which was issued by MSHA Inspector Robert L. Huggins at Contestant's Deer Creek Mine on November 1, 1990, and which in pertinent part alleges as follows:

> A [sic] accident occurred to Donald Hammond on 10-3-90 and a 7000-1 report form was not submitted to the MSHA Health and Safety Analysis Center in Denver, Colorado. Mr. Hammond was involved in an automobile accident that occurred on mine property and Mr. Hammond failed to report to his next shift of work. Mr. Hammond returned to work on 10-8-90.

By agreement, the parties have submitted this matter for decision on the basis of a stipulation of fact (with exhibits attached) and briefs.

Stipulated Facts

1. The Deer Creek Mine is owned by Contestant Energy West Mining Company ("Energy West").

2. The Deer Creek Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding Administrative Law Judge has jurisdiction over this proceeding pursuant to § 105 of the Act.

4. Citation No. 3413924 (Joint Ex. 1) was issued on November 1, 1990, by Inspector Robert L. Huggins, alleging that Energy West violated 30 C.F.R. § 50.20 by failing to report an injury sustained by employee Donald Hammond in an automobile accident on mine property on Wednesday, October 3, 1990.

5. The subject Citation and termination were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Energy West on the date, time, and place stated therein, and may be admitted into evidence for purposes of establishing their issuance without admitting the truthfulness or relevance of any statement therein.

6. At the time of the accident, Mr. Hammond was driving his own personal car on his way to work. He was injured when, after passing through the gate onto company property and driving uphill towards the parking lot, the engine of his car stalled and his brakes failed. The car rolled backwards down the road approximately 150 feet (see Joint Exs. 3, 4) and turned on its side into a drainage ditch on the side of the road (see Joint Exs. 5, 6).

7. The accident occurred at 7:30 a.m. as Mr. Hammond was on his way to report for his 8 a.m. shift at the time. Mr. Hammond sustained a strained neck.

8. After the accident, Mr. Hammond did not report to the 8 a.m. shift on Wednesday, October 3, 1990. He returned to work on Monday, October 8, 1990.

9. At the time of the accident and at all times relevant to the subject Citation, the road was paved, in good repair with guard rails on one side and a hillside on the other, and in substantially the same condition as the publicly maintained road leading to the entrance of the company property.

10. The accident occurred in daylight during good weather conditions and clear visibility.

11. The condition of the road was not the cause of the accident.

12. Inspector Huggins was present at the Deer Creek Mine on the day of the accident and visited the accident site. He asked Deer Creek Safety Engineer Kevin Tuttle whether Energy West planned to report the injury to the Mine Safety and Health Administration. In response, Mr. Tuttle stated his belief that the injury was not reportable, because it occurred while Mr. Hammond was on his way to work, not while he was on the job, and

involved Mr. Hammond's personally owned vehicle. Inspector Huggins informed Mr. Tuttle that he would check to see whether MSHA thought the injury was reportable.

13. Shortly thereafter, Inspector Huggins informed Mr. Tuttle that the injury was reportable. On November 1, 1990, Inspector Huggins issued the subject Citation when no accident report was forthcoming. To abate the alleged violation, Mr. Tuttle then completed MSHA Form 7000-1 (Joint Ex. 2) on November 1, 1990, and mailed it to the MSHA Health and Safety Analysis Center, and Inspector Huggins terminated the Citation.

Exhibits

As part of their stipulation, the parties submitted the following exhibits:

Exhibit	Description
1	Reproduced copy of Citation No. 3413924, issued 11-1-90
2	MSHA Form 7000-1, filed 11-1-90, completed by Kevin Tuttle, Chief Safety Engineer
3	Enlargement of Polaroid photograph (taken April 1991) looking downhill from approximate point at which car stalled and brakes failed; car rolled downhill and to the left around curve at conveyor facility shown in center of picture.
4	Enlargement of Poloraid photograph (taken April 1991) looking downhill and showing road further downhill and around curve from Joint Ex. 3; conveyor belt in center of Jt. Ex. 3 feeds into yellow loadout shown in Jt. Ex. 4.
5	Enlargement of Polaroid photograph (taken on day of accident, Oct. 3, 1990) looking uphill and showing where car came to rest below loadout pictured in Jt. Ex. 4.
6	Enlargement of Polaroid photograph (taken on day of accident, Oct. 3, 1990) looking across the road and showing car at rest behind berm.

Contentions of the Parties

Contestant contends that:

1. This case involves an operator's obligation to report "occupational" injuries pursuant to Section 103 of the Mine Act and Section 50.20-1 of the Secretary's regulations.

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1 30 C.F.R. § 50.20 pertaining to "Preparation and Submission of MSHA Report Form 7000-1--Mine Accident, Injury, and Illness Report," appears in Subpart C under the heading "Reporting of Accidents, Injuries, and Illnesses" and provides as follows:

> (a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. These may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7. If an occupational illness is diagnosed as being one of those listed in § 50.20-6(b)(7), the operator must report it under this part. The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed. When an accident specified in § 50.10 occurs, which does not involve an occupational injury, sections A, B, and items 5 through 11 of section C of Form 7000-1 shall be completed and mailed to MSHA in accordance with the instructions in § 50.20-1 and criteria contained in §§ 50.20-4 through 50.20-6.

2. Inspector Huggins "issued the instant citation ... charging Energy West with violating 30 C.F.R. § 50.20 by failing to report an "occupational injury."

3. The "sole issue in this proceeding is whether Section 50.20 requires Energy West to report a nonwork injury such as Mr. Hammond's, which occurred prior to the injured employee's shift and involved only the failure of the brakes on the employee's own private car as he drove to work."

Respondent MSHA contends that the injury to miner Hammond on mine property was required to be reported pursuant to 30 C.F.R. § 50.20 since it was an "occupational injury" within the meaning of the standard.

Discussion, Findings, and Conclusions

Preliminarily, it is useful to determine whether the Hammond injury is reportable as an "accident," whether or not such injury be considered as "occupational."

30 C.F.R. § 50.20 expressly requires a mine operator to report three categories of events: (1) accidents, (2) occupational injuries, and (3) occupational illnesses. It is significant that the word "occupational" does not precede or modify the word "accident" in view of the way "accident" is defined in the preceding regulation [Section 50.21(h)] which governs its usage in Section 50.20, to wit:

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cont'd fn. 1

> (b) Each operator shall report each occupational injury or occupational illness on one set of forms. If more than one miner is injured in the same accident or is affected simultaneously with the same occupational illness, an operator shall complete a separate set of forms for each miner affected. To the extent that the form is not self-explanatory, an operator shall complete the form in accordance with the instructions in § 50.20-1 and criteria contained in §§ 50.20-2 through 50.20-7.

(h) "Accident" means,

(1) A death of an individual at a mine;

(2) An injury to an individual at a mine which has a reasonable potential to cause death;

(3) An entrapment of an individual for more than thirty minutes;

(4) An unplanned inundation of a mine by a liquid or gas;

(5) An unplanned ignition or explosion of gas or dust;

(6) An unplanned mine fire not extinguished within 30 minutes of discovery;

(7) An unplanned ignition or explosion of a blasting agent or an explosive:

(8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;

(9) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour.

(10) An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank;

(11) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes; and

(12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

An accident is thus reportable, whether or not it can be said to be "occupational," if it is, in the language of § 50.2(h)(2), [2] (a) an injury to an individual (b) at a mine which (3) has a reasonable potential to cause death. [3] Here, the accident caused an injury to an individual at the mine and did cause a minor injury. But did it have "a reasonable potential to cause death?" I conclude that it did not. The accident occurred when the miner, Hammond, while driving to work on mine property, had the unusual event of his engine stalling and his brakes failing while he was traveling uphill. [4] His personal vehicle then rolled backwards downhill approximately 150 feet and turned on its side into a drainage ditch on the side of the road. Scrutiny of the primary piece of evidence bearing on the potential severity of any injury--the photograph of the overturned vehicle (Joint Ex. 5)--reveals that the vehicle was not demolished or, in the vernacular of the auto insurance industry, "totaled out." In other words, the damage to the vehicle does not warrant an inference that there was a reasonable potential to cause death. While the degree of the grade of the road was not stipulated, the vehicle rolled only 150 feet before coming to rest and from this I infer that the speed at which it was traveling when it impacted the ditch was not such to have severely damaged either the vehicle or its occupant. [5] Finally, the minor injury actually sustained by Hammond is some evidence of the magnitude of bodily harm one might reasonably expect of the accident. The injury in and of itself has no reasonable potential to ultimately result in death.

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2 The other 11 categories of "accident" are not applicable here.

3 Review of the other 11 categories of "accident" reveals that any such event covered by the definition carries with it the potential for severe injuries or fatalities. The focus of the specific categories appears to be on the high degree of seriousness of potential injuries to individuals endangered by the event at the mine rather than whether the event occurred in the context of a work-related activity by the endangered individual.

4 No other causal factors, including weather, road condition, or negligence on the part of the driver or the mine operator, were involved.

5 The test here, of course, is "reasonable potential to cause death," not "reasonable likelihood" to cause serious injury.

It is therefore concluded, that the event, as an "accident," was not required to be reported by the standard.

The question remains whether Hammond's neck strain (Stipulation; Joint Ex. 2) was reportable as an "occupational injury." Hammond was off work two workdays because of the injury. (Joint Ex. 2).

"Occupational injury" is defined in the pertinent regulation [30 C.F.R. § 50.2(e)] as follows:

> (e) "Occupationl injury" means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

The circumstances of Hammond's neck strain meet the definition of "occupational injury" set forth in 30 C.F.R. § 50.2(e). Each element thereof is established in this matter:

"Any injury": Hammond suffered a strained neck as a result of the accident. Part 50 explicitly includes sprains and strains as a type of injury which my be reportable. (See 30 C.F.R. § 50.20-3, which distinguishes first aid and medical treatment of various injuries.)

"To a miner": Hammond was a roof bolter at Energy West's Deer Creek mine. Since he works in a coal mine, his position clearly qualifies him as a "miner" under the definitions set out under the Act (30 U.S.C. § 802(g) (1988) and Part 50 (30 C.F.R. § 50.2(d) (1988).

"For which medical treatment is administered, or which results in ... inability to perform all job duties on any day after an injury ..." Hammond's accident occurred on October 3, 1990, and he didn't return to work until October 8. [6] The MSHA form (Jt. Ex. 2) shows that he missed two days of work, not counting inability to return to full duty right away.

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[6] See also Respondent's Brief, fn.1, pg. 2.

Contestant argues, however, that the Secretary's (MSHA's) interpretation of these reporting requirements for an injury not having a causal nexus to actual mining work at a mine is wrong since such is contrary to the Mine Act itself, the legislative history and "immediate predecessors" to the current reporting regulations. Contestant also maintains that requiring reporting for non-work related injuries would be burdensome. [7] Finally, Contestant does concede that there is Commission precedent (Freeman, infra) to the contrary of its position. [8]

The Commission has indeed resolved the issue in this matter previously in Secretary of Labor v. Freeman United Coal Mining Company, 6 FMSHRC 1577 (July 1984). That precedent governs.

In Freeman, a plant cleaner who was putting on his boots in the mine's wash house an hour before his shift commenced experienced back pain. At the hospital he was diagnosed as having back strain and he subsequently missed 13 days' work. The administrative law judge found a "failure to report" violation under Section 50.2(e) because (1) there was an injury to a miner; (2) it occurred at a mine; and (3) medical treatment was required and it caused disability. On appeal to the Commission, Freeman argued that Section 50.2(e) contemplated a "causal nexus" between the miner's work and the injury. The Commission rejected this contention, stating:

> ... sections 50.2(e) and 50.20(a), when read together, require the reporting of an injury if the injury--a hurt or damage to a miner--occurs at a mine and if it results in any of the specified serious consequences to the miner. These regulations do not require a showing of a causal nexus.

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[7] However, if there were so many accidents or injuries at a mine as to then the need of the regulating agency to have them reported - to enable investigation and exercise of judgment - would necessarily outweigh the mine operator's attendant paperwork problem. Further, as forms go, MSHA Form 7000-1 (Gov't Ex. 2) consists of one page and is not particularly elaborate whether completed for statistical purposes or for starting the process of notification, inspection, and enforcement action if called for.

[8] Contestant's Brief, p. 16. Contestant's Reply Brief makes no further mention of the Freeman precedent.

The Commission also determined (1) that the regulatory history of the occupational injury - reporting requirement does not show any intent to require such a specific causal connection and (2) that Section 50.20(a) is consistent with and reasonably related to the statutory provisions (Mine Act) under which it was promulgated.

Accordingly, despite the quality and thoroughness of Contestant's arguments, it is concluded that the position of Respondent MSHA (which is incorporated herein by reference) is meritorious and that the neck injury to Hammond was an occupational injury for reporting purposes in mine safety enforcement and was required to be reported pursuant to 30 C.F.R. § 50.20. Since it wasn't, the violation charged in Citation No. 3413924 is found to have occurred. [9]

ORDER

Contestant's Notice of Contest is **DENIED**; Citation No. 3413924 is **AFFIRMED**; this proceeding is **DISMISSED**.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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[9] I am unaware of any related penalty case and none has been mentioned by the parties in their stipulation or otherwise. (See Contestant's "Filing of Subsequent Modification and Motion for Leave to File Same Out of Time" dated June 21, 1991, ¶ 5, pg. 2).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 23 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 90-177
	:	A.c. No. 46-03875-03547-A
v.	:	
	:	No. 5 Mine
BILLY R. SIPPLE, Employed by SHILLELAGH MINING COMPANY, Respondent	:	

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Billy R. Sipple, Logan, West Virginia, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, seeking civil penalty assessments in the amount of $4,800, for eight (8) alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent is charged with "knowingly authorizing, ordering, or carrying out" the alleged violations.

The respondent filed an answer contesting the alleged violations and a hearing was convened in Charleston, West Virginia on June 5, 1991. The parties appeared and presented testimony and evidence in support of their respective positions. In the course of the hearing, the petitioner withdrew its proposals for assessment of civil penalties for two of the alleged violations (Citation/Order Nos. 2745972 and 2745973) and these alleged violations were dismissed from the bench. Subsequently, on June 19, 1991, petitioner's counsel advised me that the parties reached a settlement of the case, and the petitioner has now filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of the proposed settlement.

The alleged violations, initial assessments, and the proposed settlement amounts are as follows:

Order No.	Date	30 C.F.R. Section	Assessment	Settlement
2745972	5/30/89	75.1317(a)	$ 400	Withdrawn
2745973	6/1/89	75.1311(a)(1)	$ 400	Withdrawn
2745974	6/1/89	75.1311(b)(3)	$ 400	$ 200
3235730	6/1/89	75.202(b)	$1,200	$ 850
3235731	6/1/89	75.213(d)(1)	$1,200	$ 850
3235732	6/1/89	75.202(b)	$ 400	Withdrawn
3235733	6/1/89	75.202(b)	$ 400	Withdrawn
3235737	6/1/89	75.220	$ 400	$ 100
			$4,800	$2,000

The petitioner has withdrawn two additional alleged violations (Order Nos. 3235732 and 3235733) on the ground that insufficient evidence exists to establish that the respondent knowingly allowed the alleged violative conditions to exist. With regard to the four remaining alleged violations, the petitioner has submitted information pertaining to the civil penalty criteria found in section 110(i) of the Act and states that the reduced settlement amounts are based on the respondent's financial hardship as testified to at the hearing.

The parties have agreed that the settlement payment of $2,000, will be paid by the respondent in monthly installment due on the 10th of the month and in accordance with the following installment schedule:

$150 per month from July through December 1991
$300 per month for January, February, and March 1992
$200 final payment due April 1992

The parties also agreed that the payment checks or money orders shall be made payable to the "Mine Safety and Health Administration", shall include Docket No. WEVA 90-177 and Assessment No. 46-03875-03547-A, and shall be mailed to MSHA at P.O. Box 360250M, Pittsburgh, Pennsylvania 15251.

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 filed by the petitioner IS GRANTED, and the settlement IS APPROVED.

ORDER

The respondent IS ORDERED to pay the agreed-upon civil penalty assessments in the aforementioned amounts and in accordance with the aforementioned payment schedule agreed to by the parties. This decision will not become final until such time as full payment is made by the respondent to the petitioner, and I retain jurisdiction in this matter until payment of all installments are remitted and received by the petitioner.

In the event the respondent fails to make full payment, or otherwise fails to comply with the terms of the settlement, petitioner is free to file a motion seeking appropriate sanctions or further action against the respondent, including a reopening of the case.

George A. Koutras
Administrative Law Judge

Distribution:

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Mr. Billy R. Sipple, 49 Godby Street, Logan, WV 25601 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

July 25, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 91-59
	:	A.C. No. 11-00590-03815
v.	:	
	:	Mine 26
OLD BEN COAL COMPANY, Respondent	:	

ORDER APPROVING PARTIAL SETTLEMENT

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a partial settlement agreement. A reduction in penalty from $440 to $180 is proposed. On June 25, 1991, a hearing was held on this Motion.

I have considered the representatives and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of partial settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $180 within 30 days of this order.

Avram Weisberger
Administrative Law Judge

Distribution:

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Gregory S. Keltner, Esq., Old Ben Coal Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

July 25, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 91-44 A.C. No. 11-00590-03766
v.	:	
OLD BEN COAL COMPANY, Respondent	:	Docket No. LAKE 91-45 A.C. No. 11-00590-03767 Docket No. LAKE 91-69 A.C. No. 11-00589-03770 Docket No. LAKE 91-113 A.C. No. 11-00589-03774 Docket No. LAKE 91-121 A.C. No. 11-00589-03778 Docket No. LAKE 91-442 A.C. No. 11-00589-03782 Docket No. LAKE 91-486 A.C. No. 11-00589-03783 No. 24 Mine Docket No. LAKE 91-27 A.C. No. 11-02392-03818 Docket No. LAKE 91-131 A.C. No. 11-02392-03829 No. 25 Mine Docket No. LAKE 91-24 A.C. No. 11-00590-03805 Docket No. LAKE 91-28 A.C. No. 11-00590-03806 Docket No. LAKE 91-46 A.C. No. 11-00590-03810 Docket No. LAKE 91-47 A.C. No. 11-00590-03812

: Docket No. LAKE 91-68
: A.C. No. 11-00590-03813
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: Docket No. LAKE 91-71
: A.C. No. 11-00590-03817
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: Docket No. LAKE 91-78
: A.C. No. 11-00590-03818
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: Docket No. LAKE 91-79
: A.C. No. 11-00590-03819
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: Docket No. LAKE 91-100
: A.C. No. 11-00590-03820
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: Docket No. LAKE 91-108
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: Docket No. LAKE 91-110
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: A.C. No. 11-00590-03830
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: Docket No. LAKE 91-417
: A.C. No. 11-00590-03832
:
: Docket No. LAKE 91-427
: A.C. No. 11-00590-03833
:
: No. 26 Mine

DECISION APPROVING SETTLEMENT

Appearances: Rafael Alvarez, Esq., U. S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for the Secretary;
Gregory S. Keltner, Esq., Fairview Heights, Illinois, for the Respondent.

Before: Judge Weisberger

These cases were consolidated and set for hearing on June 25, 1991, in St. Louis, Missouri. At that time, Petitioner made a series of Motions to approve settlements that had been entered into between the Parties in these cases. Petitioner, had initially sought penalties totaling $11,656, and the Parties have proposed in their settlements, that the total penalties should be reduced to $6,079.

At the hearing, the Parties made extensive and thorough representations and proffered documentary evidence with regard to the facts relating to each of the Citations and Orders at issue in these cases, and the factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act). I have considered these representatives as well as the factors set forth in Section 110(i) of the Act, and I find that the settlements and the proposed penalties are appropriate, and I approve the settlements presented at the hearing.

It is **ORDERED** that the above docket numbers be severed from the docket numbers they were consolidated within an Order issued June 25, 1991, (Docket No. LAKE 91-15 et al).

It is further **ORDERED** that, within 30 days of this Decision, Respondent shall pay penalties totaling $6,079.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 25 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 91-40
	:	A. C. No. 36-00799-03533
v.	:	
	:	Docket No. PENN 91-41
ALOE COAL COMPANY, Respondent	:	A. C. No. 36-00799-03534
	:	
	:	Aloe Strip Mine

DECISION

Before: Judge Maurer

These consolidated proceedings concern five citations issued by an MSHA Inspector pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent, Aloe Coal Company, with various violations of the mandatory standards found in 30 C.F.R., Part 77.

The parties have agreed to submit the matter to me for summary disposition based on a stipulation of facts and supporting memoranda. I agree that the material facts necessary to decide these cases are not in dispute and have been stipulated by the parties to my satisfaction. Thus, the matter is a proper one for summary decision pursuant to 29 C.F.R. § 2700.64.

STIPULATION OF FACTS

Aloe Coal Company (Aloe) and the Secretary of Labor (Secretary) stipulated to the following facts with regard to the above-captioned matter:

1. These cases involve five citations issued against Aloe.

2. Aloe operates a bituminous coal strip mine in Allegheny and Washington Counties, Pennsylvania.

3. On July 10, 1989, Aloe's employees, who were represented by the United Mine Workers of America and its District 5 (UMWA) for purposes of collective bargaining, commenced a strike which is still in progress. Shortly after the strike began, Aloe resumed mining operations with 13 replacement workers and 6 striking employees who had crossed the picket line and returned to work.

4. On August 17, 1990, two of the UMWA strikers designated the UMWA as their miner's representative.

5. The citations in these cases resulted directly from an inspection conducted on August 21, 23, 24, 27, 31, 1990, and September 4 and 6, 1990, pursuant to Section 103(g) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 113(g).

6. When the inspector first appeared to conduct the Section 103(g) inspection, a dispute arose concerning the UMWA strikers' right to designate a walkaround representative.

7. In Aloe Coal Company v. Secretary of Labor and United Mine Workers of America, 12 FMSHRC 2113 (1990) (ALJ), the Honorable Avram Weisberger ruled that the UMWA strikers at the Aloe Mine were not miners as defined in the Act and had no right to designate a walkaround representative.

8. During the course of the hearing before Judge Weisberger, on September 28, 1990, Aloe learned that UMWA Representative Ken Horcicak was the individual who had requested the Section 103(g) inspection.

9. The conditions identified in the five subject citations in fact existed and the amounts of the proposed penalties set forth in the Secretary's petitions are reasonable.

DISCUSSION

Aloe's Arguments

The inspector who issued the citations at bar did so pursuant to a Section 103(g) complaint filed by an individual who it turns out was not a miner's representative, and therefore, had no right to request an inspection under Section 103(g) of the Act. The line of argument then goes on that if Mr. Horcicak (the UMWA representative who requested the inspection) had no right to request a Section 103(g) inspection, then the inspector had no right under Section 103(g) to conduct it. And since the inspection was not authorized by Section 103(g), it was an unreasonable one in violation of Aloe's Fourth Amendment rights and the evidence obtained during the inspection must be excluded as "fruit of the poisonous tree." Ultimately then the upshot of the whole evolution is that the citations are null and void and cannot form the basis for the assessment of a civil penalty.

FINDINGS

I agree with the Secretary that the Fourth Amendment's exclusionary rule does not extend to these civil proceedings. Along that same line, I also concur that mining is a type of

business that historically has been subject to extensive government regulation, and therefore, such a business has no reasonable expectation of privacy.

But the rationale for my decision to uphold the citations in these cases is simply the broad power granted by the Act generally to MSHA inspectors to inspect and/or investigate, and to issue citations and orders relating to violative conditions they should find existent at a mine.

Section 103(a) of the Act provides in pertinent part that: "Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in . . . mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards. . ."

Section 104(a) authorizes the Secretary, upon either inspection or investigation, to issue a citation if he believes the operator has violated a mandatory standard.

Section 103(g)(1) appears to me to be but a subset of the broader substantive provision of Section 103(a) that merely provides a procedure for the representative of miners to obtain an "immediate inspection" by giving notice to the Secretary of the occurrence of a violation or imminent danger. This section does not in any way limit the MSHA inspector's broader authority, granted under Section 103(a), to conduct an inspection or issue citations should any violative conditions be found, whether or not the technical requirements of Section 103(g) are met.

In the cases at bar, the operator concedes the violations found at its mine did in fact exist, and I find that the technical defect cited by the operator concerning the Section 103(g) complaint did not hinder Aloe's ability to defend itself in these proceedings.

I therefore conclude that given an MSHA inspector's broad authority to inspect mines and issue citations for violative conditions, when he observes a violation at a mine, regardless of the manner in which he was made aware of the same, the resulting citation he issues is valid.

Accordingly, the five citations at bar will be affirmed and the Secretary's proposed civil penalties assessed by me herein.

ORDER

Citation Nos. 3092488, 3092401, 3092493, 3099500, and 3092491 are **AFFIRMED**, and Aloe Coal Company is **DIRECTED TO PAY** a civil penalty of $625 within 30 days of the date of this Decision.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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THE FEDERAL BUILDING
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JUL 25 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-273-M A.C. No. 26-02153-05501
v.	:	Docket No. WEST 90-274-M A.C. No. 26-02153-05502
JET CONCRETE INCORPORATED, Respondent	:	Docket No. WEST 90-347-M A.C. No. 26-02153-05503
	:	Docket No. WEST 91-6-M A.C. No. 26-02153-05504
	:	Jet Concrete Inc.

DECISION APPROVING SETTLEMENT

Before: Judge Morris

These cases are civil penalty proceedings initiated by Petitioner against Respondent in accordance with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. The civil penalties sought here are for the violation of mandatory standards promulgated pursuant to the Act.

The parties reached an amicable settlement prior to a hearing.

In WEST 90-273-M, the parties seek to settle 20 citations with assessments of $1024 for the sum of $802.

In WEST 90-274-M, the parties seek to settle 7 citations for the assessments totaling $248.

In WEST 90-347-M, the parties seek to settle 10 citations with assessments of $3000 for the sum of $1740.

In WEST 91-6-M, the parties seek to settle 1 citation with an assessment of $400 for the sum of $247.

In connection with the motion, the parties have further submitted information relating to the statutory criteria for assessing civil penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement agreement is **APPROVED.**

2. The citations and penalties, as provided in the settlement agreement, are **AFFIRMED.**

3. Respondent is **ORDERED TO PAY** to the Secretary of Labor the sum of $3037 within 30 days of the date of this decision.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 29 1991

PYRO MINING COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 90-340-R Order No. 3421655; 6/9/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 90-341-R Order No. 3421656; 6/9/90
	:	Docket No. KENT 90-343-R Citation No. 3419883; 6/12/90
	:	Pyro No. 9 Slope, Wheatcroft Mine
	:	Mine ID 15-13920
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 91-66 A. C. No. 15-13920-03684
v.	:	Pyro No. 9 Wheatcroft
PYRO MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: W. F. Taylor, Esq., U. S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Secretary;
Robert I. Cusick, Esq., Louisville, Kentucky, for the Company.

Before: Judge Maurer

At the hearing, in Owensboro, Kentucky, on July 9, 1991, the parties jointly moved to settle these cases. They proposed to leave Order No. 3421655 (Docket No. KENT 90-340-R) as it is, and increase the assessed civil penalty from $2000 to $2500. The Secretary also moved, unopposed, to vacate Order No. 3421656 and Citation No. 3419883. I have considered the representations and

documentation submitted in these cases, and I conclude that the proffered settlement, including the proposed vacation of the aforementioned order and citation is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of their settlement is **GRANTED**, and it is **ORDERED** that the Pyro Mining Company pay a penalty of $2500 within 30 days of this Decision. Order No. 3421656 and Citation No. 3419883 are hereby **VACATED**. The above captioned contest proceedings have accordingly been rendered moot and are therefore **DISMISSED**. Upon payment of the civil penalty in full, the above captioned civil penalty proceeding is likewise **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

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JUL 30 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 90-338 A. C. No. 15-13362-03571
v.	:	Mine No. 3
R B COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, TN, for the Petitioner;
Susan C. Lawson, Esq., Harlan, KY, for the Respondent.

Before: Judge Fauver

The Secretary of Labor seeks a civil penalty for an alleged violation of a safety and health standard, under the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 801 et seq.

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 and further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent operates R B Coal Company No. 3 Mine, an underground coal mine, in Harlan County, Kentucky, where it produces coal for sale or use in or affecting interstate commerce.

2. On February 23, 1990, Federal Mine Inspector Robert Rhea issued § 104(d)(1) Citation No. 3392184 at the No. 3 Mine for a violation of 30 C.F.R. § 75.517, because the trailing cable for the Gallis roof bolting machine contained four temporary splices that were worn through and exposed live wires. These four worn and exposed places, located in well traveled areas, presented a serious danger, particularly to the roof bolter helper who regularly handled the cable. The inspector found that the cable's condition had existed for at least one to two weeks. Section Foreman Earl

Hensley told Inspector Rhea that Respondent had not repaired the cable because it was behind in roof-bolting.

3. Inspector Rhea found that this was an unwarrantable violation because Section Foreman Hensley and Mine Superintendent Phillips knew or should have known of the condition, the damage was located in a highly visible area, and the cable had been in a damaged condition for a substantial period.

4. The roof bolter helper, who frequently handled the cable, depended on a sound outer jacket of the cable for protection from electrical shock. Because of the frequency and manner in which the cable was moved by the roof bolter helper, Inspector Rhea found that the violation was reasonably likely to result in a fatal accident involving the helper. He found that the violation was significant and substantial. The operator abated the violation within 45 minutes.

5. No clean inspection of the mine was conducted between February 23, 1990, and March 20, 1990. [1]

6. Ventilation, methane and dust control plans for underground coal mines are required to provide for water application at the face, in order to control coal dust, float coal dust and respirable dust. The health risk in overexposure to respirable dust is the development of pneumoconiosis or black lung disease. There are also important safety reasons for using water to control dust, to dilute the dust at the face, and to prevent float coal dust from accumulating in the return airways and belt entry airways. Float coal dust creates a serious hazard of a mine explosion or fire. Coal dust is a serious fire hazard.

7. Water sprays on Respondent's continuous miners are on a spray bar or a spray block with as many as six to eight sprays on the block or bar. Water is conveyed to the spray block through a plumbing system of pipes and hoses.

8. On January 14, 1990, Inspector Calvin Riddle issued § 104(d)(1) Citation No. 2996545 to Tommy Phillips at No. 3 Mine for a violation of 30 C.F.R. § 75.316, for having only 20 water sprays on the continuous miner, and § 104(d)(1) Citation No. 2996546, for having zero psi water pressure on the miner. Respondent's ventilation, methane and dust control plan required that 75 psi of water be maintained on the sprayer system for the continuous miner when the machine was running, and that the continuous miner have 31 operational water sprays.

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[1] A clean inspection is one in which the entire mine or the sum of its parts has been inspected without a finding of an unwarrantable violation.

9. Inspector Riddle returned to the mine on February 2 and 7, 1990, to check on the abatement of citations issued in January. On February 2, the water pressure was 80 psi; the operator achieved this figure by increasing the pressure from the sump pump. Inspector Riddle noticed some leaks in the hoses when the operator increased the pressure. He did not stay to see how long the operator could maintain the increased water pressure.

10. On February 7 and 8, while conducting a respirable dust survey, Inspector Riddle again tested the continuous miner to see if the operator had sufficient water pressure. He found that the operator could not maintain any water pressure. The operator worked on the pumps and was not able to maintain water pressure sufficiently to make production, so Inspector Riddle discontinued the dust survey and left the mine.

11. Inspector Riddle returned to the mine on March 19, 1990, for a follow-up inspection prompted by citations issued for excessive dust violations. After laboratory analysis, Inspector Riddle's dust survey had shown that there was excessive respirable dust in the mine. The March 19 inspection was to check on controls the operator had installed to correct the excessive dust levels.

12. Mine No. 3 was operating on an adjusted (higher) respirable dust standard because of the quartz level in the coal. If airborne dust contains more than five per cent quartz, the regulations require that there be less respirable dust present in the mine environment to compensate for the presence of the quartz. Excessive quartz in the dust increases the danger of contracting pneumoconiosis.

13. Inspector Riddle arrived at the mine on March 19 at about 10:00 or 11:00 a.m. When he arrived on the surface, he sat in his vehicle for about 15 - 20 minutes and observed coal flowing from the mine on the surface belt, indicating that the continuous miner was producing coal. Mine management indicated to the inspector that they were having problems with the jeep used to transport miners underground and that they did not know if they would be able to transport the inspector underground that day. Inspector Riddle accepted this explanation and, since he had other appointments, left the mine at 12:30 p.m. that day. He observed a regular flow of coal on the surface belt while he was there.

14. On March 20, Inspector Riddle returned and saw coal coming out of the mine for a sufficient time to indicate that coal was being produced at that time. The operator stopped production between the time the Inspector left the office to go underground and the time he arrived at the face. When he arrived at the face, the continuous miner had been pulled back from the face waiting for him to make a water pressure check. Inspector Riddle found that the operator was producing coal on March 20 based on the continuous flow of coal on the surface beltline, the appearance of the coal,

and the time he observed the loaded belt running.

15. Inspector Riddle went underground with Tommy Phillips on March 20. When they arrived at the section, the continuous miner was 50 to 100 feet outby the face, which was the normal position to check the water pressure considering mine conditions. The miners were preparing the miner for the inspector to check the water pressure. He saw no indication that the men were working on repairs (of the water system or anything else). The inspector used a water gauge to check the water pressure. He found 50 psi when he took the first reading, but the continuous miner could not sustain this level for more than 15 minutes. Each time the operator attempted to raise the water pressure, the continuous miner's water supply system would blow a hose outby after 5-15 minutes. The hose was worn and had the appearance of being old. It appeared to the inspector that the hose had been in a deteriorated condition for more than a week and possibly more than a month. Based on his observations, the inspector believed that even if the satellite pump had been 100% operational, the hose would not have been able to maintain 75 psi. The hose had been stretched and pulled along the ribs and was worn showing a lot of age and wear and tear. During the inspector's test of the water pressure, the operator's representatives tried to maintain water pressure but would lose it. They checked both inby and outby the continuous miner motor. When the pressure got to 50 psi the system would blow a hose and they could not maintain water pressure even at 50 psi. The dust control plan required 75 psi of water pressure.

16. On March 20, 1990, Inspector Riddle issued § 104(d)(2) Order No. 2996559 for the failure to follow its ventilation, methane and dust control plan, which required 75 psi of water pressure when the continuous miner was running. He had been at the continuous miner for two hours before writing the order, and the operator could not maintain the system at or above 50 psi the entire time he was there. It was evident that the hose could not withstand a pressure of 75 psi. This condition had existed for some time, at least a week, and the general condition of the continuous miner was poor. On March 21, 1990, Inspector Riddle modified the order to be a § 104(d)(1) order, and to allege high negligence instead of moderate negligence.

17. To abate the condition cited, the operator replaced the hose to the miner and ran an independent water system to the block of water sprays and replaced 250 feet of main supply hose. The abatement involved the modification of the water line on the continuous miner. At the place where water came to the miner, the operator installed a "T" joint, which bypassed a major part of the system including a choke point where only a certain amount of water would pass through the orifice and go into the motor. The operator also adjusted the main pump down the line to increase the water pressure on the booster pump (piston pump) on the continuous miner.

18. At all relevant times, Tommy Phillips and Carson Shepherd were supervisors at Respondent's No. 3 Mine, Lick Branch No. 1 Mine and Lick Branch No. 2 Mine. Each man simultaneously held a supervisory position in each mine.

19. Before March 20, 1990, Respondent, through its supervisors, had direct and thorough knowledge of a number of violations of operating a continuous miner without adequate water pressure. Citations for this kind of violation were served on Tommy Phillips on March 28, 1989 (only 10 psi), January 24, 1990 (only 20 water sprays when 31 sprays were required), January 24, 1990 (zero psi); on Robert Stanley on October 11, 1988 (only 20 psi); and on Carson Shepherd on February 6, 1990 (zero psi).

DISCUSSION WITH FURTHER FINDINGS

As amended, § 104(d)(1) Order No. 2996559 charges a violation of Respondent's ventilation, methane and dust control plan, for inadequate water pressure on the continuous miner as follows:

> The operator was not following his approved ventilation, methane and respirable dust control plan in that, the water pressure was measured at 50 psi at the sprays. The plan requires 75 psi.

Respondent contends that the order is invalid because it does not allege that the continuous miner was running or producing coal when the water pressure was only 50 psi. However, by charging a violation of Respondent's ventilation, methane, and dust control plan, the order implies, and reasonably puts Respondent on notice, that the continuous miner was running without required water pressure.

The order charges a violation of 30 C.F.R. § 75.316, which provides that a ventilation, methane, and dust control plan approved by the Secretary shall be adopted by the operator. The evidence establishes that on March 20, 1990, the continuous miner did not have 75 psi and in fact had much less than 50 psi on a sustained basis. The operator contends that the miner was not in operation on March 20 and that the order must therefore fail. The Secretary contends that coal was produced on March 19 and 20. I find that the reliable evidence shows that coal was being produced by the continuous miner when the inspector observed coal flowing out of the mine for more than 15 minutes on March 19 and 20, 1990. In addition, the reliable evidence demonstrates that the water system for the continuous miner was mechanically unable to sustain 75 psi for at least one week prior to March 19, and the evidence shows coal production during that week.

An inspector may use his judgment to find a violation based on circumstantial evidence. It is not necessary that the inspector be

present when the violation occurs to issue a citation or order under § 104(d). Florence Mining Co., 11 FMSHRC 747, 751 (1989); Emerald Mines Corp., 9 FMSHRC 1590 (1987), aff'd sub nom. Emerald Mines Corporation v. FMSHRC, 863 F.2d 51 (D.C. Cir. 1988). A mine inspector may make unwarrantable failure findings under § 104(d) of the Mine Act for violations that have been abated before the inspector arrives at the mine. Emerald, supra, 863 F.2d at 59.

Unwarrantable Failure to Comply

Section 104(d)(1) of the Act provides that:

> If, upon inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

The Commission has held that an "unwarrantable" failure to comply means "aggravated conduct constituting more than ordinary negligence." Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (1987). As defined in the legislative history, an "unwarrantable" failure is "the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of

reasonable care on the operator's part." Senate Committee on Labor and Public Welfare, 94th Con., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1512 (1975); see also id, at 1602; and see: Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 620 (1978). A continuing safety or health problem places on the mine operator the need for heightened scrutiny to assure compliance with the Act. Eastern Associated Coal Corp., 13 FMSHRC 178,187 (1991).

Prior to March 20, 1990, Respondent had continuing problems and violations concerning its water supply system to the continuous miner. Supervisors Shepherd and Phillips were served citations (to Respondent) for the same or similar violations at this mine and at other mines operated by the company in the year prior to this citation. The operator did not take adequate action to remedy the problem at Mine No. 3 when it received the citations, but took only such minimal action as was needed to abate the citations temporarily. It did not address the overall water system at the mine which demanded greater repair and attention.

Respondent's conduct in mining coal without regard for the deteriorated condition of its water system, despite numerous prior violations involving lack of water pressure, extensive respirable dust, and excessive float coal dust, shows a disregard for the requirements of the dust control plan and high negligence in operating the miner without the required water pressure. The violation found on March 20, 1990, was due to high negligence and an unwarrantable failure to comply with its methane, ventilation, and dust control plan.

A Significant and Substantial Violation

The Commission has held that a violation is "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U. S. Steel Mining Co., Inc., 7 FMSHRC 327, 328, (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U. S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (1984).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable

likelihood" in defining an S&S violation, states that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (§ 104(d)(1) of the Act; emphasis added). Also, under the statute, (1) an "imminent danger" is defined as "any condition or practice ... which could reasonably be expected to cause death or serious physical harm before [it] can be abated," [2] and (2) an S&S violation, is less than an imminent danger.[3] It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease is more probable than not.

Black lung disease is one of the most crippling occupational health hazards facing a coal miner. Health violations exposing miners to respirable dust, even though black lung may take years to develop, are significant and substantial violations of the Act. Consolidation Coal Co., 8 FMSHRC 890 (1986), aff'd sub nom. Consolidation Coal Co., v. FMSHRC 824 (F.2d) 1071 (D. C. Cir. 1987). In affirming the Commission's presumption that such violations are S&S, the Court stated:

> The legislative history of the [Act] suggests that Congress intended all except "technical violations" of mandatory standards to be considered significant and substantial. ***.[824 at 1085.]

The Court also recognized that "the determination of the likelihood of harm from a violation of an exposure-based health standard necessarily rests on generalized medical evidence concerning the effects of exposure to the harmful substance, rather than on evidence specific to a particular violation." Id., at 1084.

In addition, the dust in Respondent's mine contains an excessive amount of quartz, which is more likely to lead to development of the disease. Respondent's violation also involved a clear safety hazard from float coal dust accumulations in active workings. The mine has a history of excessive dust violations, including violations for excessive float coal dust. The presence of excessive dust presents a serious danger of a mine explosion or fire.

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[2] Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977; emphasis added.

[3] Section 104(d)(1) limits S&S violations to conditions that "do not cause imminent danger ...."

The evidence demonstrates that, assuming continued mining operations, the cited violation presented a substantial possibility of resulting in black lung disease as well as a mine explosion or fire.

The inspector's finding of a significant and substantial violation is sustained.

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

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 75.316 as alleged in Order No. 2996559.

ORDER

Respondent shall pay the above civil penalty of $1,000 within 30 days of the date of this decision.

William Fauver
William Fauver
Administrative Law Judge

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fas

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 90-200 A. C. No. 46-03875-03546 A
v.	:	
	:	No. 5 Mine
JAMES D. McMILLEN, EMPLOYED BY SHILLELAGH MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The parties now advise that they have agreed to settle this matter for $3,000. Upon review of the matter I determine that the settlement is entitled to approval under the provisions of the Act.

Accordingly, it is **ORDERED** that the settlement be **APPROVED.** It is further **ORDERED** that the operator, if it has not already done so, pay $3,000 within 30 days from the date of this decision and order.

Paul Merlin
Chief Administrative Law Judge

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/gl

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAY 20 1991

ASARCO, INCORPORATED, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. SE 88-82-RM Citation No. 3252969; 7/16/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. SE 88-83-RM Citation No. 3252970; 7/16/88
	:	Immel Mine
	:	Mine ID 40-00170
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 89-67-M A. C. No. 40-00170-05520
v.	:	Immel Mine
ASARCO, INCORPORATED, Respondent	:	

ORDER ON REMAND

Before: Judge Weisberger

I.

On December 26, 1990, the Commission vacated an Order I had issued dated September 22, 1989, in which it was held that various excised portions of six documents were not protected by a privilege as alleged by the Secretary of Labor (Secretary), but should be produced as requested in Discovery Motions filed by Asarco, Inc. (Asarco). (Secretary v. Asarco, Inc., 12 FMSHRC 2548 (Dec 1990)). In essence, the Commission remanded for further consideration, the issues of the applicability of informant's attorney-client, and work product privileges.

In a telephone conference call with Attorneys for both Parties, Counsel indicated that they would not seek an evidentiary hearing pursuant to the Commission's remand, but, instead, sought to file Briefs. Asarco filed its Brief on Remand on March 14, 1991. The Secretary had requested an extension of

time to file its Brief and the request, not opposed by Asarco, was granted. The Secretary filed a Reply Brief on Remand on April 24, 1991.[1]/

II.

Disposition of Issues

a. Informer's Privilege

1. Exhibit B

Exhibit B attributes a statement to an individual identified by his job category and the fact that he was not present at the time of the accident. In the Secretary on Behalf of George Roy Logan v. Bright Coal Company, Incorporated and Jack Collins, 6 FMSHRC 2520, at 2523 (1984), the Commission indicated as follows: "The burden of proving facts necessary to support the existence of the informers' privilege rests with the Secretary. Secretary of Labor v. Stephenson Enterprises, Incorporated, 2 BNA OSHC 1080, 1082 (1974), 1973-74 CCH OSHD par. 180277 at 22, 401, aff'd, 578 F.2d 1021 (5th Cir. 1978)." In meeting this burden the Secretary has not proffered any evidence, but has merely asserted, in its Brief before the Commission, that the identity of an informer can be provided by the content and context of the statement, and that this is especially so in the instant case ". . . where the universe of persons with knowledge about relevant events is relatively small."

The statement does not indicate whether the person who made it is a present or former employee of Respondent, or whether the individual is an independent contractor. Petitioner has not alleged, nor does the record contain any indication of the number of persons in the job category of the person who made the statement at issue. Nor is there any indication of the number of persons who performed the same task. Hence, I conclude that it has not been established that the informer's identity would be revealed by allowing discovery of the statement at issue. Hence, the Secretary shall divulge paragraph 1 on page 2 of Exhibit B.

---

[1]/Petitioner also filed a Motion to Strike Proffered Evidence to strike the affidavits marked Exhibits 1 and 2 attached to its Brief, and "other matters cited or referenced in the Brief which are not part of this remand." None of this material was relied on by me in making any of my rulings, infra, and did not form the basis for any of my rulings. Accordingly, the Motion is **DENIED.**

2. Exhibit I

With respect to Exhibit I, on its face, an informer is clearly identified by name. The Commission, in its Decision, supra, at 2555, referred to Bright, supra, at 2526, wherein the Commission stated that ". . .important factors to be considered when evaluating whether the documents sought are essential include, whether the Secretary is in sole control of the requested material or whether the material which Respondent seeks is already within their control, and whether Respondents other avenues available from which to obtain the substantial equivalent of the requested material." (emphasis added). Expanding on this direction, the Commission in remanding this issue for further consideration, stated as follows: "One of the factors that the judge should consider in balancing the interests of the Parties, should be whether Asarco could obtain substantially similar information from other sources. The judge should determine whether the information excised by the Secretary is essential to a fair determination of the issues and he should clearly articulate the basis for his conclusion." (Asarco, 12 FMSHRC supra, at 2556).

In reconsidering Exhibit I, based upon the above directive from the Commission, I find that the excised statements describe the event, which apparently gave rise to the Citations at issue. As such, these statements are essential to a fair determination of the issues.

Respondent does not argue either that the Secretary is in sole control of the requested material, or that it does not have any other avenue available to obtain the requested material. Indeed, although it is reasonably likely that the informer could give relevant testimony, it would appear that there are no facts alleged to indicate that the class of persons having personal knowledge of the event that gave rise to the Citations at issue, is so large and unidentifiable as to preclude Respondent from taking statements from its own employees who witnessed the event at issue. Accordingly, inasmuch as there are no facts alleged to establish a hardship on Asarco's part in taking statements from those of its employees who had personal knowledge of the events at issue, in this context it is clear that the Secretary's interest in maintaining the secrecy of the informer outweighs Asarco's need to obtain this information from the Secretary. Accordingly, Respondent does not have a right to discover the fourth page of Exhibit I.

3. Exhibits E, F, and G

Exhibits E, F, and G contain detailed, extensive statements provided to MSHA personnel by miners employed by Respondent who are identified by name. As such, the statements are to be considered given by informers and as such, subject to a

qualified privilege. The Commission, in its Decision, Asarco, 12 FMSHRC supra, at 2556-2557, stated that on remand I ". . . should consider whether Asarco could obtain substantially similar information from other sources, and whether these documents are essential to a fair determination of the issues."

The Commission, in Bright, supra, elaborated on these factors as follows: "Some of the factors bearing upon the issue of need include whether the Secretary is in sole control of the requested material or whether the material which Respondents seek is already within their control, and whether the Respondents had other avenues available from which to obtain the substantial equivalent of the requested material." (Bright, supra, at 2526). (Emphasis added). Although the individuals whose statements are the subject of Exhibits E, F, and G, are employees of Asarco, and presumably under its control, and hence subject to questioning and the taking of depositions, the material consisting of a transcription of their detailed extensive statements, is unique, closely related in time to the instance at issue, and within the sole control of the Secretary. Although Asarco might, by way of a deposition, have access to information within the knowledge of these persons, it does not have another avenue available to obtain the transcripts of the detailed statements which is the material that is the subject matter of Exhibits E, F, and G. Hence, access to the transcription of these statements would enable Asarco to use the material to refresh the recollection of a witness or to attempt to impeach the credibility of a witness by way of a prior inconsistent statement.

In further evaluating whether these documents are essential to a fair determination of the issues, as required by the Commission's Remand, I considered the circumstances involved herein as well as the violation charged and possible defenses (See, Bright, supra, at 2526, quoted by the Commission in Asarco, 12 FMSHRC supra at 2553). One of the Citations in issue herein, Citation 3252969, alleges a violation of 30 C.F.R. § 57.12017. Section 57.12017, supra, in essence, provides that power circuits shall be deenergized before work is done on such circuits. It also requires that switches shall be locked out, or other measures taken to prevent power circuits from being energized without the knowledge of the individuals working on them. Specifically, the issued Citation alleges that an employee was electrocuted while cleaning insulators on a disconnect, and that the top terminals on the disconnect were not deenergized. In the narrative findings for a special assessment, appended to the petition for assessment of the civil penalty, it is alleged that the violation resulted from Asarco's negligence, in that the foreman had discussed the job with the victim before he started to work, and gave no safety instructions. It further is alleged

that "Evidence gathered during the investigation of the fatal accident indicated that similar work on energized equipment was the common practice at this mine."

Petitioner also issued a citation alleging a violation of 30 C.F.R. § 57.12019, which requires that suitable clearance is to be provided at stationary electrical equipment or switch gear. Specifically, the issued citation alleges that suitable clearance was not provided at the rear of the mine feeder transfer switch cabinet where the decedent had been working ". . . in that the bottom off the access panel was setting against the bottom of the transfer cabinet with the top leaning against the rib." (Sic.) The narrative findings allege that ". . . the safety director was present and saw the violation, but took no action." In its Answer, Asarco asserts that it provided suitable clearance and followed proper procedures, and "did not know and had no reason to believe that a trained and experience election, fully aware of the circumstances and hazards, would work on or contact the energized components of the equipment involved." Asarco also argues that any violation did not result from negligence on the part of Asarco.

Exhibit E contains statements with regard to instructions, if any, given the decedent. In addition, the statement discusses past work practices. As such, it has a significant bearing on the issues raised by the pleading. In the same fashion, Exhibit F contains statements as to what was stated on the morning of the accident by a supervisor, as well as statements made by the miner who had been electrocuted with regard to his knowledge of hot contacts. This exhibit also contains statements relating to the removal of the panel in question. Similarly, Exhibit G contains statements with regard to location of the panel and whether it should have been completely removed. Also, Exhibit G contains the opinion of the informer, as to how the job should be done safely and to the degree of supervision provided workers in similar situations.

Hence, Exhibits E, F, and G contain statements that have a crucial bearing on issues raised by the citations at issue and possible defenses. As such, it is concluded that Asarco has a high degree of need to discover these exhibits.

Thus, considering all of the above, I conclude that Asarco's need for Exhibits E, F, and G out weighs the Secretary's need to maintain the informer's privilege.

4. Exhibit K

The second and third paragraphs on page 4 of Exhibit K contain statements attributed to two persons, one of whom is identified by name, and the other by a description that could easily lead to his identification. The statements themselves

were not deleted from the documents served on Asarco by the Secretary. Considering the factors set forth in Bright, supra, I note that Asarco, in its Brief, does not allege that it has any need for the name of the declarant in each incident to prepare a possible defense, nor does it argue that the release to it of the declarant's name is essential to a fair determination of the issues. Accordingly, Asarco is not entitled to discovery of the excised names on pages 4 and 5 of Exhibit K.

The deleted material on page 8 of Exhibit K, subsequent to the words "1556 hrs telephoned" contains a discussion that the interviewer had with a miner, but the essence of the conversation did not involve discussion of any issues relating to the alleged violations herein or the negligence, if any, of Asarco in connection with these violations. Accordingly, applying the balancing test set forth in Bright, supra, I conclude that these statement do not relate to any possible defense, and as such Asarco need to obtain such information is outweighed by the informer's privilege, and hence Asarco does not have any right to discover this material.

Page 9 of Exhibit K contains information relating to attempts by a special investigator to contact various individuals. Asarco, in its Brief, has not alleged any need to obtain this information, or specifically how it would relate to the preparation of any possible defense. Thus, considering the factors set forth in Bright, supra, and applying the balancing test described therein, it is concluded that the release of these deletions is not required.

The first three lines in the second paragraph, page 9, following the words "at motel. Spoke," do set forth any statement made by either the interviewer or the two miners named therein, but indicate where they will be the following night. Such information would not appear to be helpful in any possible defense and would not be of assistance in resolving the issues herein. As such, applying the balancing in the test set forth in Bright, supra, it is concluded that these lines were properly deleted.

The first word on the next line is to be deleted, as it identifies an informer. However, the balance of that line and the next three lines contain a statement with regard to the reaction of miners to statements of MSHA officials, and there is no indication that this information is available to Asarco by other sources. Hence discovery is allowed.

Deleted material under the heading "10/26/88" on pages 9, 10, and 11 contain names of informers, as well as the arrangements the interviewer made to interview them and the interview procedure. This information alone is not necessary for possible defense, nor is it essential for a fair determination of

the issues. Accordingly, applying the principles annunciated Bright, supra, the Secretary's need to insure the informer's privilege outweighs Asarco's need for this information, and hence discovery is not allowed.

The deleted material under the heading 10/27/88 on page 10, is a notation of a contact the interviewer had with an individual, and that the interviewer decided not to met with this individual. Inasmuch as no information was solicited from this individual, it can not be seen how the deleted material would be of assistance to Asarco in any possible defense regarding the issues framed by the pleadings. Accordingly, utilizing the balancing test set forth in Bright, supra, discovery of this material is denied.

The first four lines that are deleted on page 12, refers to an inquiry by Mr. Chajet, as to whether the interviewer wanted talk to "X", and the interviewer's response. This excised statement lists the name of a possible informer, but does not indicate the substance of any conversation. As such, the only purpose of disclosure would be to compel the Secretary to reveal the name of a possible witness or informer. It has not been established that Asarco's need for this information outweighs the Secretary's interest in maintaining the privilege. Hence, this material was properly deleted.

On page 12, the deleted material after the words "2025 hrs telephoned," contains the name of an informer, but does not contain any information relevant to the issues framed by the pleadings. However, the first six words of the seventh line of that paragraph, as well as the quoted phrase at the end of this paragraph contain information that might lead to a possible defense, without identifying the source of this information. It is difficult to see how Asarco could obtain this information without discovery. Hence, applying the factors enunciated in Bright, supra, discovery of this deleted material, is to be allowed to the extent set forth above.

Material excised from the middle of page 23 contains a list of questions prepared for an informer. These relate to the event that gave rise to the issuance of one of the citations in issue. The deleted statements on page 24 and the first two lines on page 25 contain the informer's responses. In order for Asarco to be able to discover these specific statements, it would need not only the identity of the informer, but also the specific questions asked. Hence, the responses to these specific questions are only be in the custody of the Secretary, and not obtainable by Asarco without discovery. Further, inasmuch as the information relates to the circumstances surrounding the violative condition alleged in Citation 3252970, the information

would be relevant in resolving the issues and might lead to a possible defense. Accordingly, applying the criteria set forth in Bright, supra, this information is subject to discovery.

The deleted material on page 23, after the words "1915 hrs telephoned," and the last three lines of this page contain the name of an informer whom the interviewer attempted to contact. There was no contact made at the time and hence, this information is not relevant to any possible defense, and is not essential to any determination of the issues, and hence under the criteria set forth in Bright, supra, is not subject to discovery.

The deleted material at the bottom of pages 25, 26, and 27 identifies individuals who were interviewed by an investigator, but does not give any facts concerning either questions to them or their responses. Asarco has not alleged that it has any need for the names of the Secretary's informers. Divulging this material would only provide their names, and no other information which would be helpful in preparing a possible defense or in determining the issues presented herein. Accordingly, this material was properly deleted.

b. Work Product Rule

The deleted material on pages 3 and 4 of Exhibit K are notes that MSHA Special Inspector Robert Evert made while interviewing MSHA Supervisory Inspector Craig concerning the Asarco latter's conversations about this case with one of the Secretary's attorneys. The Commission, in its Decision, 12 FMSHRC supra, applied Fed. R. Civ. P. 26(b)(3), and held that the material in question is a document which was prepared by a Party or its representative, i.e., Evert. It further found as follows: "The record appears to us to reveal that the disputed portions of the special investigator's notes were prepared in anticipation of litigation." Asarco, 12 FMSHRC supra, at 2559. The Commission indicated that it would thus appear that the excised portions of Craig's statements met the immunity tests set forth in Rule 26, supra. In vacating the portion of my Order of September 22, 1989, that held that the excised portions were not within the scope of the work product rule, the Commission stated as follow: "However, the judge may have considered relevant factors or the nuances not fully reflected in his prior order." (Asarco, 12 FMSHRC supra, at 2559). The Commission remanded the issue for "further consideration consistent with this Decision." (12 FMSHRC, supra, at 2559.)

Upon further consideration, I concur in the findings of the Commission that the immunity tests set forth in Rule 26, supra, have been met. Any relevant factors or nuances that I considered in my original Order are, upon reconsideration, of a lesser significant than the Commission's rationale for its holding that the various criteria set forth in Rule 26(b)(3) have been met.

Accordingly, it is concluded that the excised portions in Exhibit K are within the work product rule, and not subject to discovery.

c. Attorney - Client Privilege

On remand of this issue and upon further consideration, I note that the solicitor related to Craig what another individual had told him, and the Solicitor also asked a question of Craig. Neither of these communications are mental impressions, conclusions, opinions, or legal theories. As such these communications are in confidence and protected. (See, Hickman v. Taylor 329 U.S. 495 (1947).

Inasmuch as the material excised from pages 3 and 4 consist of statements covered by the attorney-client privilege and passages protected by the work product rule, they were properly excised and not subject to discovery.

ORDER

It is **ORDERED** that, within 10 days of this Order, the Secretary shall serve the Operator with the following: (a) Paragraph 1 on page 2 of Exhibit B; (b) Exhibits E, F, and G; (c) the last four lines of the second paragraph of page 9, Exhibit K, with the exception of the first word in the fourth line of this paragraph which is to be deleted; (c) the list of questions deleted from page 23, the responses on page 24, and the first two lines on page 25; (d) the first six words of the seventh line of the third paragraph of page 12 Exhibit K and the phrase quoted at the end of that paragraph; and (e) the list of questions deleted from page 23, and the responses on page 24, and the first two lines on page 25.

Avram Weisberger
Administrative Law Judge
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