JULY 1996

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JULY 1996

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

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 93-146-B. (Interlocutory Review of Judge Melick's June 6, 1996 Order).

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No. SE 95-459. (Judge Fauver, June 24, 1996).

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

Secretary of Labor, MSHA v. Blue Bayou Sand and Gravel, Docket No. CENT 93-238-M. (Judge Weisberger, June 25, 1996).

Thomas Crowder v. Wharf Resources, Docket No. CENT 95-150-DM. (Judge Cetti, April 25, 1996).

Asarco, Incorporated v. Secretary of Labor, Docket No. CENT 95-8-RM, etc. (Judge Manning, March 4, 1996. Petition was denied as premature).

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 10, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEVA 93-394-D
ADMINISTRATION (MSHA),	:	WEVA 93-395-D
on behalf of CLETIS R. WAMSLEY,	:	WEVA 93-396-D
ROBERT A. LEWIS, JOHN B. TAYLOR,	:	WEVA 93-397-D
CLARK D. WILLIAMSON and	:	WEVA 93-398-D
SAMUEL COYLE	:	
	:	
v.	:	
	:	
MUTUAL MINING, INC.	:	

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C.§ 801 et seq. (1994) ("Mine Act" or "Act"). Following an evidentiary hearing, Administrative Law Judge Arthur J. Amchan concluded that Mutual Mining, Inc. ("Mutual") violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), when it terminated five miners. *Secretary of Labor ex rel. Wamsley v. Mutual Mining, Inc.*, 16 FMSHRC 1304, 1320 (June 1994) (ALJ). The judge assessed a civil penalty of $5,000 for the section 105(c) violation, awarded the miners back pay, and directed that any unemployment compensation that the miners received following their discharge be deducted from back pay. 16 FMSHRC 2371, 2372-73 & n.1 (November 1994) (ALJ). The Commission thereafter denied petitions for discretionary review filed by Mutual and the Secretary of Labor.

Subsequently, Mutual and the Secretary filed petitions for review in the U.S. Court of Appeals for the Fourth Circuit. On April 3, 1996, the court issued its decision affirming in part and reversing in part the decision of the Commission. *Secretary of Labor ex rel. Wamsley v. Mutual Mining, Inc.*, Nos. 95-1130 and 95-1212 (4th Cir.). The court affirmed the judge's determination that the five miners were discriminatorily discharged in violation of section 105(c) of the Mine Act. The court reversed the judge's deduction of unemployment compensation from

the back pay awards.[1]

On May 28, 1996, the court issued its Mandate, Opinion and Certified Judgment in this matter, returning the case to the Commission's jurisdiction.

[1] Chairman Jordan and Commissioner Marks note that in reversing the back pay determination, the court held that the Commission owed deference to the Secretary's view on the deductibility of unemployment compensation. *Wamsley*, slip op. at 6-9. The court disapproved *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616-18 (April 1993), in which the Commission announced a rule requiring the deduction of unemployment compensation from all back pay awards, and *Secretary of Labor ex rel. Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2216-20 (November 1994), which upheld *Meek*. *Wamsley*, slip op. at 8-9. The court determined the Secretary's interpretation to be a reasonable one that "effectuates the health and safety goals of the Act." *Id.* at 9-10.

Pursuant to the court's order, we remand this matter to the judge to recalculate the miners' back pay awards and we direct the judge not to deduct unemployment compensation received by the miners from their awards.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Distribution:

Jeffrey Scott, Esq.
311 W. Main Street
P.O. Box 608
Grayson, KY 41143

Susan E. Long, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge Arthur Amchan
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 30, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. SE 94-92-M
FLUOR DANIEL, INCORPORATED	:	

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raises the issue of whether Fluor Daniel, Inc. ("Fluor") violated 30 C.F.R. § 56.14101(a)(1) (1995).[1] Administrative Law Judge Jerold Feldman concluded that Fluor did not violate the section. 16 FMSHRC 2049, 2054 (October 1994) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review, which challenges the judge's vacation of the citation. For the following reasons, we reverse the judge's decision.

---

[1] 30 C.F.R. § 56.14101(a)(1), entitled "Brakes," states:

> Minimum requirements. Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.

I.

Factual and Procedural Background

On April 21, 1993, Steven Crapps, an employee of Fluor, was operating a Komatsu forklift truck at the Ridgeway Mine, an open pit gold mine located near Ridgeway, South Carolina. 16 FMSHRC at 2050-51. At the top of the highwall, Crapps put the forklift into neutral, set the parking brake, and shut off the engine. *Id.* at 2051. The forklift started to roll forward and Crapps applied the brake pedal; however, the brakes did not respond. *Id.* The forklift traveled approximately 15 feet down a 5 to 6 percent grade and pushed Johnny Ray, also an employee of Fluor, over a berm whereupon he fell to a bench 86 feet below. *Id.* Ray sustained fatal injuries. *Id.*

The Department of Labor's Mine Safety and Health Administration ("MSHA") began an accident investigation on the morning of April 22. *Id.* That same day, MSHA issued a citation to Fluor alleging a significant and substantial ("S&S")[2] violation of section 56.14101(a)(1)[3] for an alleged defect in the service brakes. *Id.*; *see* Ex. P-6, at 4. On April 24, the forklift was removed from the mine and taken to Greensboro, North Carolina for further inspection and testing. 16 FMSHRC at 2051-52.

The forklift truck was equipped with an accumulator designed to activate the service brake system with the engine off. *Id.* When functioning properly, the accumulator forces accumulated brake fluid into the service brake system, permitting effective operation of the brake fluid pump for approximately five to ten depressions of the brake pedal, which should stop and hold the forklift when the engine is not running. *Id.* MSHA examined the service braking system with the engine running and found that there was adequate hydraulic fluid and pressure. *Id.* However, with the engine off, a pressure gauge test of the accumulator indicated no pressure. *Id.* at 2052; Ex. P-6, at 2.

---

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."

[3] In connection with the accident, MSHA also issued an imminent danger order under 30 U.S.C. § 817(a) requiring immediate removal of the forklift. 16 FMSHRC at 2051, 2054. Two other citations were issued against Fluor alleging violations of 30 C.F.R. § 56.14101(a)(2), for a defective parking brake, and 30 C.F.R. § 56.14100(a), for inadequate inspection of the forklift. The judge affirmed the order and the two citations. *Id.* at 2051, 2054-60. They were not appealed and are not at issue before the Commission.

Fluor contested the violation and, after an evidentiary hearing, the judge vacated the citation. Construing section 56.14101(a)(1) in conjunction with 30 C.F.R. § 56.14101(b),[4] the judge stated that section (a)(1) "relates to the service brakes' effectiveness in stopping *moving* (in service) vehicles in that tests to support violations of this mandatory standard are conducted on *moving* vehicles." 16 FMSHRC at 2053-54 (emphasis added). The judge explained that the service brake system functioned adequately when the engine was running and thus the Secretary failed to establish a violation of section 56.14101(a)(1). *Id.* The judge noted that 30 C.F.R. § 56.14101(a)(3), requiring all braking systems to be maintained in functional condition, was applicable to the accumulator malfunction but the Secretary did not cite Fluor under that section. *Id.* at 2054.

II.

Disposition

The Secretary argues that section 56.14101(a)(1), by its plain terms, requires a service brake system to be capable of stopping and holding moving equipment, regardless of whether the equipment's engine is on or off. PDR at 8. Additionally, the Secretary asserts that the Commission must give weight to his interpretation of the regulations and that his interpretation of section 56.14101(a)(1) effectuates its purposes. *Id.* at 7-10.

Fluor counters that the judge correctly construed section 56.14101(a)(1) to apply only to the effectiveness of service brakes on moving vehicles with engines running. F. Br. at 4-5. It asserts that adequate brakes had been installed, that the standard provides the method and criteria for testing under subsection (b), and that, because it was stipulated that the brakes met the requirements of subsection (b), the brakes did not violate the standard. *Id.* at 7-8, 10-11. Fluor further contends that section 56.14101(a)(1) does not require that brakes once installed be maintained in functional condition and that the Secretary cited Fluor under the wrong provision of that standard. *Id.* at 7-8, 12.

"Where the language of a statutory or regulatory provision is clear, the terms of that provision must be enforced as they are written . . . ." *Utah Power & Light Co.*, 11 FMSHRC

---

[4] Section 56.14101(b), involving testing of brakes, provides in part:

> (1) Service brake tests shall be conducted when an MSHA inspector has reasonable cause to believe that the service brake system does not function as required, unless the mine operator removes the equipment from service for the appropriate repair;
>
> (2) The performance of the service brakes shall be evaluated according to Table M-1.

1926, 1930 (October 1989); *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Section 56.14101(a)(1) provides: "Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." That section does not limit the braking requirement to moving vehicles with engines running. Under its plain language, the service brakes must be capable of stopping and holding the equipment on the maximum grade it travels. The uncontroverted evidence established that the forklift's brakes failed to meet this requirement. 16 FMSHRC at 2051-52. Thus, the judge erred in vacating Citation No. 4094231 and we reverse his determination that the Secretary failed to establish a violation of section 56.14101(a)(1).

We reject Fluor's argument that section 56.14101(b) limits the scope of subsection (a) and requires a different result. Section 56.14101(b) relates only to the testing of service brakes when there is "reasonable cause to believe that the service brake system does not function, as required . . . ." Section 56.14101(a)(1) does not state that the tests contained in subsection (b) are the exclusive means of determining the effectiveness of service brakes. As the Notice accompanying the publication of this rule in the Federal Register stated, "Testing would only be utilized in those instances when there is disagreement about the performance capabilities of the service brakes." 53 Fed. Reg. 32,496, 32,505 (August 25, 1988). That the forklift's brakes failed at the time of the accident and in subsequent testing was not disputed. Therefore, MSHA properly cited a violation of section 56.14101(a)(1). Moreover, even if section 56.14101(b) were applicable here, it does not specify that the effectiveness of brakes can only be determined with the engine running. To the extent that the judge read into section 56.14101 any of these additional requirements, he erred.

In addition, even if the forklift's lack of braking capability could have been cited under section 56.14101(a)(3) or 30 C.F.R. § 56.14100(b),[5] as Fluor asserts (F. Br. 12), we conclude that the condition was properly cited under section 56.14101(a)(1). A hazardous condition may violate more than one standard and the fact that MSHA determines not to issue citations under all applicable sections does not render invalid the citations it does issue. *See Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993).

---

[5] Section 56.14100(b) provides:

> Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

III.

Conclusion

For the foregoing reasons, we reverse the judge's vacation of the citation alleging a violation of section 56.14101(a)(1). At the hearing, the parties stipulated that a violation involving the failure to have operational service brakes was properly characterized as S&S. 16 FMSHRC at 2052. We remand for reassessment of penalty, including consideration of the S&S nature of the violation.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

Marc L. Marks, Commissioner

James C. Riley, Commissioner

Distribution

Tana M. Adde, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 516
Arlington, VA 22203

Carl B. Carruth, Esq.
McNair & Sanford, P.A.
P.O. Box 11390
Columbia, SC 29211

Administrative Law Judge Jerold Feldman
Federal Mine Saftey & Health Review Commission
Two Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, VA 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 2 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JIMMY D. CARNES, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	DOCKET NO. KENT 96-276-D
	:	BARB CD 96-04
	:	No. 3 Mine
v.	:	Mine ID 15-17350
DYNASTY RESOURCES, INC., Respondent	:	

ORDER DISMISSING TEMPORARY REINSTATEMENT PROCEEDING

The Secretary has moved to withdraw his application for temporary reinstatement on the grounds that the Complainant has obtained other employment. The motion to withdraw is approved and these proceedings are dismissed. Commission Rule 11, 29 C.F.R. § 2700.11.

Gary Melick
Administrative Law Judge

Distribution:

MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215

Mr. Saul Akers, Agent for Service, Dynasty Resources, Inc., State Rt. 1056, P.O. Box 126, McCarr, KY 41544

Mr. Jimmy D. Carnes, H.C. 69, Box 255, Arjay, KY 40902

Tony Oppegard, Esq., Mine Safety Project/ARDF of Kentucky, Inc., 630 Maxwelton Court, Lexington, KY 40508

/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 15 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 95-568 A.C. No. 15-02263-03520
v.	:	
	:	Darby Fork No. 1 Mine
LONE MOUNTAIN PROCESSING, INC., Respondent	:	

DECISION

Appearances: Charles H. Grace, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Barbourville, Kentucky, for the Petitioner; Michael O. McKown, Esq., Robinson & McElwee, Charleston, West Virginia, for the Respondent.

Before: Judge Feldman

The above captioned proceeding is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (the Mine Act). This case was called for hearing on March 27, 1996, in Pineville, Kentucky.[1] The parties stipulated the respondent is a large operator subject to the jurisdiction of the Mine Act. (Joint Ex. 1).

[1] The March 27, 1996, hearing was initially scheduled for November 14, 1995. The hearing was continued until January 11, 1996, due to an interruption in government operations as a consequence of the budget impasse. The January 11, 1996, hearing date was once again continued because of the government shutdown.

At the hearing the parties moved to settle Citation Nos. 4485356 and 9987989. The settlement terms include deleting the significant and substantial (S&S) designation from Citation No. 4485356, and reducing the total proposed civil penalty for these two citations from $925.00 to $600.00. The terms of the parties' settlement proposal were approved on the record and are incorporated herein.

Remaining Citation No. 4465629, issued by Mine Safety and Health Administration Inspector (MSHA) Harold Scott on March 1, 1995, concerns an S&S violation of the mandatory safety standard in 30 C.F.R. § 75.370 for the respondent's alleged failure to follow its approved ventilation plan. The parties' post-hearing briefs with respect to this citation have been considered in my disposition of this proceeding.

Statement of the Case

The operative ventilation plan dated September 13, 1994, required the installation of numerous check curtains in entries outby the last open crosscut in order to ventilate the working faces. Inspector Scott testified there was no set way the curtains had to be installed as long as "you get ventilation to all [working] places." (Tr. 46-47). The issue to be decided is whether the Secretary has established, by a preponderance of the evidence, that one of the numerous required check curtains was not installed at 8:30 a.m. on March 1, 1995.

The Secretary contends Inspector Scott observed a missing check curtain in the No. 4 entry at the No. 2 crosscut (also referred to as the No. 2 "break"). Scott's citation was issued on the surface after Scott found excessive methane in a cavity caused by a bleeder crack.[2] However, there was no methane detected at the roof line inby or outby the bleeder cavity. Significantly, as discussed below, Scott did not specify which required check curtain was missing in Citation No. 4465629. (See Gov. Ex. 2).

---

[2] A bleeder is an area in a coal seam where methane is liberated causing a pocket of methane. (Tr. 100-01).

The respondent asserts that Scott's detection of this excessive methane from a bleeder crack in the roof cavity motivated Scott to speculate that there was a missing check curtain although all required curtains had been installed. The respondent argues the ventilation plan was followed. It maintains the bleeder crack in the roof cavity was a unique condition that could not be ventilated by routine adherence to the approved ventilation plan.

Preliminary Findings

The respondent's Darby Fork No. 1 Mine is an underground coal site located in Eastern Kentucky. Work at the facility is divided into three shifts -- 11:00 p.m. to 7:00 a.m. (owl shift), 7:00 a.m. to 3:00 p.m., and 3:00 p.m. to 11:00 p.m. The owl shift is the maintenance shift. The two other shifts produce coal. Bernie Johnson was the supervisor when the owl shift ended at 7:00 a.m. on March 1, 1995. Johnson's responsibilities included readying the section for coal production on the next shift. As part of his duties, Johnson conducted a preshift examination, including an inspection of the check curtains, at approximately 6:00 to 6:30 a.m., on March 1, 1995. Johnson testified that his preshift exam revealed a problem with the check curtain in the No. 4 entry in that the curtain had been torn "about halfway down." Johnson testified that he hung the curtain back up sometime prior to 6:30 a.m.

At about the same time Johnson was conducting his preshift exam at 6:30 a.m., Scott arrived at the Darby Fork facility to perform an inspection and to conduct respirable dust surveys. Scott testified he entered the mine at approximately 7:00 a.m. with John Richardson, the respondent's Foreman. Scott testified that as he and Richardson traversed the No. 2 crosscut proceeding towards the No. 5 entry, he observed a curtain down in the No. 4 entry. However, Scott did not advise Richardson of any violative condition at that time.

Scott testified he proceeded to turn inby the No. 5 entry off the No. 2 break. The No. 5 entry was approximately 56 inches from floor to roof requiring Scott and Richardson to bend as they traveled the entry. As they turned into the No. 5 entry, Scott observed a cavity between the No. 2 and No. 1 breaks. The cavity area, which was properly supported, was created by draw rock that

had fallen during the mining process. The cavity width was the full width of the entry and it was approximately 20 feet long. Scott estimated the highest part of the cavity was approximately 76 inches from the mine floor. The depth of the cavity above the normal roof line ranged from approximately 13 to 24 inches.

Scott placed his methanometer approximately 12 inches from the roof of the cavity and immediately obtained readings above two percent. Scott withdrew the methanometer to avoid causing damage to this sensitive instrument by this high reading. In view of the high methanometer reading, Scott, "remembering that the [No. 4 entry] curtain was down," ordered Richardson to "get that block curtain over there and make the air shift over here to number five." (Tr. 29).

Scott remained in the cavity and took air bottle samples and did not accompany Richardson to redirect the air flow. (Tr. 29, 109-10, 184). Scott took two bottle samples from locations approximately 12 inches from the top of the cavity which ultimately revealed high methane concentrations.[3] Methane readings were negative for methane inby and outby the cavity at the mine roof line. (Tr. 105-06). Scott testified that methane gas is lighter than air. (Tr. 101). Therefore, Scott conceded that a pocket of methane could remain in a cavity for an extended period of time although there continued to be negative methane readings at the roof line. Id.

Richardson testified he took immediate steps to ventilate the cavity. He went to the No. 4 entry but did not see any problem. Richardson, with the assistance of employees Jimmy Taylor and Roy Gibson, tore down the disputed curtain in the No. 4 entry and rehung it from corner to corner narrowing two curtains to one for better airflow. (Tr. 181). In order to better ventilate the cavity, Richardson also installed a line curtain from the No. 4 entry across the No. 2 break directing the intake air from the No. 4 entry into the cavity. (Tr. 183-89; See Ex. R-1). Scott did not inspect the check curtains Richardson had installed although they went through the curtains as Scott continued his inspection. (Tr. 189). Richardson

---

[3] Subsequent laboratory analysis revealed methane readings of 5.780 percent and 2.730 percent.

testified Scott never identified any specific curtain that was missing and that should have been installed. Id. Richardson stated he did not know Scott was going to cite the respondent for a missing curtain until they had exited the mine and arrived on the surface. (Tr. 190).

Further Findings and Conclusions

Mandatory safety standards are promulgated through the rulemaking process and apply to all similarly situated mine operators. 30 U.S.C. § 811. However, such universal applications of safety standards are ineffective in addressing conditions that are unique to particular mines. Consequently, Congress provided for MSHA to require mine operators to adopt comprehensive plans tailored to each mine that address specific areas of health and safety such as the adequacy of mine ventilation systems. 30 U.S.C. § 863. The plan adoption and approval process is flexible and bilateral, requiring discussions and negotiations between the operator and MSHA. The goal is approval of a ventilation plan that is mutually agreeable and that maximizes safety given the specific conditions that are known to exist at a particular mine. Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987). A ventilation plan is not intended to address future unanticipated conditions, such as cavities and bleeders, that occur during the mining process.

Once a ventilation plan is adopted, its provisions are enforceable as mandatory safety standards. Id. However, the Secretary bears the burden of proving that the provision allegedly violated is part of the approved plan, and, that the cited condition or practice violates the provision. Id. The Commission has stated that a violation cannot be established when "the disputed language of the plan provision is ambiguous" and the Secretary cannot "dispel the ambiguity." Id. at 906-07.

In this case, the closest operative provisions in the subject ventilation plan consist of a diagram on page 7 of the plan that depicts curtains outby the last open crosscut in all entries except the first and last entry. (Gov Ex. 4 at p. 7; Tr. 45). While the diagram is clear, for the reasons discussed

below, the Secretary's application of the diagram to the facts of this case is ambiguous and inconsistent.[4]

Section 104(a) of the Mine Act, 30 U.S.C. § 814(a), specifies "[e]ach citation shall be in writing and shall describe with particularity the nature of the violation . . ." However, Inspector Scott's citation, as well as his testimony, reflects his uncertainty about the precise nature of the alleged violation of the approved ventilation plan. For example, Citation No. 4465629 only contains the general conclusion that "[t]he approved ventilation plan was not being followed in the 002 section in that block curtains were not installed to direct a volume and velocity of air current thru (sic) the No. 5 working place in the 002 section, sufficient to dilute, render harmless and to carry away explosive gasses [confined to the cavity]." Thus, Citation No. 4465629 is lacking in specificity in that it fails to identify the missing curtain or curtains that caused the alleged violation.

Even if Scott had identified the missing curtain in Citation No. 4465629, Scott's testimony reflects the curtain requirements in the approved plan were vague and subject to different interpretations. In this regard, Scott stated:

> There's no set way that you could say this is exactly, it has to be done exactly like this because you can do it different ways and still get the same effect. But you still would have to use the same amount of check curtains in order to do it. You could -- I'm sure there's -- as sure as I sit here and tell you two ways, someone else can tell me three others. But the basic thing on the ventilation plan is so that you get ventilation to all the [working] places. (Emphasis added) (Tr. 46-47; See also Tr. 102).

---

[4] Of necessity, I have considered page 7 of the approved plan as the operative provisions for the purpose of clarity. I note, however, the Secretary has not even shown that page seven constitutes the alleged violative provision. When asked "which portion of the plan, if any, was violated by the condition [Scott] observed," Scott replied, "the closest one to it is page seven." (Tr. 45).

Although Scott based his citation on inadequate ventilation, Scott testified that all working places were indeed being ventilated. He admitted there was no evidence of methane at the mine roof line immediately inby the cavity indicating the bleeding methane in the cavity was being effectively ventilated and carried away through the air course. (Tr. 105-06). Scott also believed there was no methane at the face, with or without the disputed curtain. (Tr. 102-03, 120).

These inconsistencies in the Secretary's case are reflected by Scott's testimony:

> Q. However, if you put aside the cavity for a moment, without the [No. 4] curtain, it was ventilating the entries. There was no methane in the entries . . . If it was ventilating the entries . . . would the assumption be that the ventilation plan was being complied with because the result was there was no methane?
>
> A. If the cavity hadn't been there, it would have been being complied with. But I'm sure there was movement of air through there somewhere, but not by eliminating a curtain.
>
> Q. But there was enough movement inby and outby the cavity because there was no methane at the normal roof height; is that correct?
>
> A. Right.
>
> Q. So in essence installing the curtain was -- solely the routine as far as you know was to clear the cavity?
>
> A. Yes, sir.
>
> Q. Given the fact that there was no methane inby the cavity, would that give you any reason to draw conclusions with regard to whether or not there was methane at the face before the curtain was installed?
>
> A. No, sir. I don't think there was any methane at the face.

Q. Before the curtain was installed?

A. Before or after, neither one. (Tr. 119-20).

Albert McFarland, an MSHA ventilation supervisor, also testified he did not know whether the respondent was violating the plan's minimum air velocity requirements in the last open crosscut and at the face, with or without the disputed curtain.[5] (Tr.149-50).

With respect to bleeders in cavities, Scott conceded that a ventilation plan "doesn't contemplate anything on bleeders unless we have a mine that specifically has a problem with bleeders."[6] (Tr. 108). However, the Secretary does not contend the respondent's mine has a bleeder problem. Thus, the respondent's approved ventilation plan was not intended to address future isolated pockets of methane caused by unanticipated bleeder problems. Nevertheless, Scott opined that he would not have cited the respondent for violating its ventilation plan if there was no methane in the cavity. (Tr. 93-94, 95, 116). This is the essence of Secretary's problem. The lynchpin of the Secretary's case, i.e., the methane confined to the cavity, is not a material factor in determining whether the respondent complied with its ventilation plan.

In summary, the record is unclear as to whether the No. 4 curtain was down when Scott commenced his inspection. Scott did not initially believe there was a violation. It was only after he discovered methane in the cavity that he "remembered" seeing the missing curtain. (Tr. 29). Moreover, Scott did not accompany Richardson to observe the curtain conditions before Richardson took remedial measures to redirect air into the cavity. Even if the disputed curtain was not in place, the effective ventilation of methane at the faces, in conjunction with Scott's testimony that there are many permissible

---

[5] The ventilation plan requires a minimum of 4,500 cubic feet per minute (CFM) at the working face and 15,000 CFM at the last open crosscut. (Tr. 147-48; Gov Ex. 4 at pp. 6-7).

[6] McFarland testified ventilation plans are "generic in nature" and specify minimum ventilation requirements at a particular mine. (Tr. 122, 146).

alternative methods of curtain placement under the plan, leads me to conclude that the Secretary has not established the alleged condition violated the plan's provisions.

In conclusion, an isolated pocket of methane, alone, is not evidence of a ventilation plan violation. When asked if Scott would have issued the citation absent the methane in the cavity, Scott replied, "I may have, and then I may not." (Tr. 116). Such indecision does not satisfy the Secretary's burden of proof.[7] Accordingly, Citation No. 4465629 citing a violation of section 75.370(a) for the respondent's alleged failure to follow its approved ventilation plan is vacated.

ORDER

In view of the above, **IT IS ORDERED** that Citation No. 4465629 **IS VACATED. IT IS FURTHER ORDERED** that the motion for approval of settlement with respect to Citation Nos. 4485356 and 9987989 **IS APPROVED.** Consistent with the settlement terms, the respondent shall pay a total civil penalty of $600.00 to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of payment, this case **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

---

[7] This decision should not be construed as a finding that excessive methane is a prerequisite to a ventilation plan violation. On the contrary, I agree with McFarland that a required missing curtain, absent methane concentrations, still constitutes a plan violation. (Tr. 150). Here, however, the Secretary failed to demonstrate the disputed curtain was missing, or, that it was required under the provisions of the plan.

Distribution:

Charles H. Grace, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, HC 66 Box 1762, Barbourville, KY 40906-9206 (Certified Mail)

Mary Beth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Michael O. McKown, Esq., Robinson & McElwee, P.O. Box 1791, Charleston, West Virginia 25326 (Certified Mail)

/mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

JUL 16 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DAVID HOPKINS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 95-122-DM
	:	Sweetwater Mine
	:	Mine I.D. 23-00458
v.	:	
ASARCO, INCORPORATED, Respondent	:	

SUPPLEMENTAL DECISION AND FINAL ORDER

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor and David Hopkins; Henry Chajet, Esq., and M. Shane Edgington, Esq., Patton and Boggs, Washington, D.C., and Denver, Colorado, for Asarco, Inc.

Before: Judge Manning

This proceeding was brought by the Secretary of Labor on behalf of David Hopkins against Asarco, Inc. ("Asarco") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). In a decision entered March 4, 1996, I found that Mr. Hopkins' discharge violated section 105(c) of the Mine Act. 18 FMSHRC 317 (March 1996). In the decision, I ordered the parties to confer for the purpose of reaching an agreement as to the appropriate amount of back pay and other reasonable, related economic losses. The parties were unable to agree on any of these matters. Each party submitted a written proposal setting forth its position on these issues. The proposals were somewhat ambiguous and, during a conference call, I asked the parties to file supplemental proposals on or before July 1, 1996. The Secretary filed a supplement but Asarco elected not to do so.

I. FINDINGS AND CONCLUSIONS

A. Back Pay

The Secretary states that Mr. Hopkins was unemployed for four months before he obtained another full time job. Asarco did not dispute this fact. His gross pay per week at Asarco was $568.00. This amount was often increased by a shift differential

and overtime. Including shift differentials and overtime, Hopkins' gross pay was $10,470 during the four months preceding his discharge, May through August 1994.[1] Accordingly, I find that he would have earned this amount during the four month period that he was unemployed. The total amount of gross back pay due Mr. Hopkins is **$10,470.00**. Asarco shall withhold appropriate, lawful payroll deductions for Social Security, federal income taxes, medicare taxes, and state income taxes.

B. Bonus Pay

The Secretary states that Mr. Hopkins is entitled to bonus pay of $1,750.00 because that is the amount the Secretary claims he received during the four months preceding his discharge. Asarco contends that he is not entitled to bonus pay, but states that he received an average bonus of $288.00 per month during the four months preceding his discharge for a total of $1,150.00. My examination of the payroll records reveals that Hopkins received $1,396.00 in gross bonus pay during the four months prior to his charge. Accordingly, I find that Mr. Hopkins is entitled to bonus pay of **$1,396.00**. Asarco shall withhold appropriate, lawful payroll deductions for Social Security, federal income taxes, medicare taxes, and state income taxes.

C. Vacation Pay

The Secretary states that Mr. Hopkins is entitled to four weeks of vacation pay, two weeks for 1994 and two weeks for 1995. The Secretary states that the total gross amount due is $2,615.50. Asarco states that Mr. Hopkins is not entitled to any vacation pay because he could not have earned a year's vacation pay in the four months that he was unemployed. I find that Mr. Hopkins is entitled to two weeks vacation pay. Section 105(c) of the Mine Act was designed, in part, "to put an employee into the financial position he would have been in but for the discrimination." Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982). Vacation pay may constitute a part of a back pay award. Northern Coal Co., 4 FMSHRC 126, 142-43 (February 1982). Accordingly, I find that he is entitled to two weeks vacation pay in the amount of **$1,136.00**. Asarco shall withhold appropriate, lawful payroll deductions for Social Security, federal income taxes, medicare taxes, and state income taxes.

---

[1] This figure is $8.00 higher than that calculated by the Secretary due to differences in rounding techniques. The Secretary submitted Mr. Hopkins' payroll records for this period. All of my calculations in this case are based on these records and Mr. Hopkins' 1994 federal tax return. All of my calculations are shown on a worksheet that I hereby make a part of the official record in this case. I am sending a copy of this worksheet to the parties but I am not attaching it to this decision.

I find that he is not entitled to two weeks of vacation pay for calendar year 1995, however. The Secretary argues that he lost 1995 vacation time because his new employer would not allow him to take a two-week vacation in 1995. Mr. Hopkins was discharged in September 1994. I believe that the Secretary's request for 1995 vacation pay is misplaced. He had not accrued such leave at the time of his discharge and Asarco cannot be held responsible for the vacation leave policies of Hopkins' new employer.

D. Miscellaneous Expenses

The Secretary contends that Mr. Hopkins is entitled to **$247.00** for miscellaneous expenses related to the prosecution of this proceeding and looking for a new job. Reimbursement of hearing expenses and other similar expenses "is an appropriate form of remedial relief." Northern Coal, 4 FMSHRC at 144. Accordingly, this request is granted.

The Secretary also requests that Mr. Hopkins be reimbursed for the pay he lost to attend his deposition and the hearing in this matter. Asarco contends that it should not be responsible for any compensation Mr. Hopkins may have lost as a result of attending his deposition or hearing. I disagree. I hold that he is entitled to **$973.00** for this item, which the Secretary represents is the pay he lost for attending his deposition and the hearing. Asarco did not dispute this amount.

E. Interim Earnings

Mr. Hopkins obtained temporary employment before he started working for his current employer. According to his 1994 federal tax return, his gross earnings were $2,510.00. This amount is to be subtracted from the back pay due.

F. Interest

Mr. Hopkins is entitled to interest on his back pay award. The Secretary asks for $2,011.06 in interest. The Secretary used gross back pay and gross bonus pay when making the interest calculation. In addition, the Secretary did not follow the formula for calculating interest that the Commission established in Arkansas-Carbona Co., 5 FMSHRC 2042, 2051-53 (December 1983) and modified in Clinchfield Coal Co., 10 FMSHRC 1493, 1504-06 (November 1988). I find that the interest calculation should be based on his net pay not his gross pay. It is not possible for me to determine exactly what his net pay will be since the parties were unable to agree on the amount of net back pay that Mr. Hopkins is due. Accordingly, I have calculated the interest based on Mr. Hopkins net pay during the four months preceding his termination based on my examination of the payroll records. Mr. Hopkins' net bonus pay is also included in the calculations. I calculated the

interest using the method established by the Commission in the cases set forth above. My calculations are set forth on the worksheet. The total interest owed through July 31, 1996 is **$1,040.00.**

G. Total Amount of Back Pay, Interest, and Expenses

1. Back pay = $10,470.00 minus payroll deductions.

2. Bonus pay = $1,396.00 minus payroll deductions.

3. Vacation pay = $1,136.00 minus payroll deductions.

4. Miscellaneous expenses = $1,220.

5. Interest through 7/31/96 = $1,040.00.

6. Interim earnings of $2,510.00 shall be subtracted from the amount due.

H. Reinstatement

At the hearing Mr. Hopkins was asked whether he would want to go back to work at the Sweetwater Mine if reinstatement was ordered. He replied: "I can't answer for sure. Quite possibly, I would go back." (Tr. 909). In my decision of March 4, 1996, I asked the parties to stipulate to the position and salary to which Mr. Hopkins should be reinstated, if he seeks reinstatement. 18 FMSHRC at 335. The parties did not reach an agreement. In the Secretary's submission, counsel for the Secretary states that "Mr. Hopkins seeks reinstatement to his former position with ASARCO, including any pay raises, seniority, or other benefits that he would have received had his employment continued." (Secretary's Response to ALJ's Order at 1).

The time has come for Mr. Hopkins to determine whether he wants to be reinstated. He cannot wait to see whether his prospects are better with his present employer or with Asarco. If Mr. Hopkins wishes to be reinstated, he must notify the appropriate officials at Asarco's Sweetwater Mine as soon as possible, but no later that **August 16, 1996.** If Mr. Hopkins fails to provide such notification on or before August 16, 1996, he waives all rights to reinstatement.

I. Civil Penalty

The Secretary seeks a civil penalty of $5,000.00. Asarco contends that the proposed penalty is excessive "in light of the good faith demonstrated by ASARCO here and the lack of a prior history of discrimination claims at the Sweetwater Mine." (Asarco's Reply at 3). Based on the record in this case and the penalty criteria at section 110(i) of the Mine Act I find that a

civil penalty of $800.00 is appropriate. The Sweetwater Mine has a history of 49 violations in the two years preceding Hopkins' discharge. It does not have a history of any violations of section 105(c) of the Mine Act. The mine produces about 1.3 millions tons a year and employs about 90 hourly workers and 9 salaried employees underground. (Tr. 774). Asarco is a large operator. The penalty is appropriate for the size of the business and will not affect its ability to stay in business.

In my decision on the merits, I made the following findings:

> Asarco was diligent in attempting to discover why Hopkins was concerned about the high scaler. I credit Asarco's evidence that the Sweetwater Mine encourages miners to raise safety complaints and that management attempts to address these safety concerns. Indeed, the mine has never had a discrimination claim under the Mine Act prior to this case. In the particular facts of this case, however, I find that [mine management] did not address Hopkins' safety concerns "in a way that his fears reasonably should have been quelled."

18 FMSHRC at 326-27 (citation omitted). I find that Asarco's negligence was low and that the gravity of the violation was low. Based on the record, I also find that Asarco's discharge of Mr. Hopkins will not have a significant chilling effect on miners who wish to exercise their rights under the Mine Act at the Sweetwater Mine. See, Secretary on behalf of Johnson v. Jim Walter Resources, Inc., 18 FMSHRC 552, 557-59 (April 1996). Several other miners did not consider the high scaler to be unsafe and were willing to operate it. Under the facts of this case, it is unlikely that miners will be reluctant to refuse to work in the face of hazardous conditions or reluctant to raise safety issues because of Mr. Hopkins' termination.

The good faith criterion is difficult to apply in the context of this case. Section 110(i) defines the criterion as "the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation." A mine operator must abate a condition described in a citation or order issued under section 104 of the Mine Act whether or not he believes that the condition constitutes a violation. Thus, good faith is concerned with how quickly and seriously a mine operator tries to abate a condition after the citation is issued. In a discrimination case, there is no obligation on a mine operator to reinstate a discharged miner simply because the Secretary has brought an action under 105(c). In this case, the Secretary did not seek to have Mr. Hopkins temporarily reinstated. Thus, Asarco was not required to rapidly comply with the alleged

violation. Nothing in the record convinces me that Asarco's contest of the discrimination complaint was frivolous or was filed in bad faith. Rather, Asarco believed, in good faith, that its discharge of Mr. Hopkins did not violate section 105(c) of the Mine Act. As stated above, Asarco was diligent in attempting to discover why Hopkins was concerned about the high scaler. Accordingly, I find that Asarco demonstrated good faith.

II. ORDER

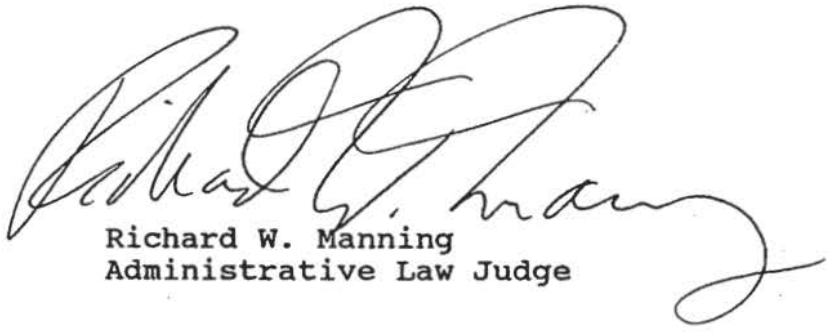
A. On or before August 16, 1996, Respondent shall pay David Hopkins back pay, interest, and miscellaneous expenses to be computed in accordance with this decision, as summarized in section I.G., above. Respondent shall also make payments to the appropriate federal and state tax agencies of the withholdings specified above.

B. On or before August 16, 1996, David Hopkins shall notify appropriate officials of the Sweetwater Mine whether he wants to be reinstated to his former position at the mine. If reinstatement is sought, Respondent shall reinstate David Hopkins to the same seniority, pay, status, benefits, and job conditions that would apply to his employment had he not been discharged.

C. Respondent shall expunge from David Hopkins' personnel records all references to its discharge of him as a result of the events of September 8, 1994.

D. Respondent is ordered to pay a civil penalty of $800.00 for the violation of section 105(c) of the Mine Act.

E. My decision of March 4, 1996, and this supplemental decision and order shall constitute my final disposition of this proceeding.



Richard W. Manning
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Henry Chajet, Esq., PATTON BOGGS, 2550 M Street, NW, Washington, DC 20037-1350 (Certified Mail)

M. Shane Edgington, Esq., PATTON BOGGS, 1660 Lincoln Street, Suite 1975, Denver, CO 80264 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

JUL 16 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	
LOTHAN DWAYNE SKELTON, employed by SKELTON, INC., Respondent	:	Docket No. WEST 93-644-M A.C. No. 05-03985-05540 A El-Jay Mine
PERRY LEE ROWE, employed by SKELTON, INC., Respondent	:	Docket No. WEST 93-645-M A.C. No. 05-03985-05541 A El-Jay Mine

DECISION

Appearances: Kristi L. Floyd, Esq., Dennis J. Tobin, and Barbara J. Renowden, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Ruth E. Gray, Lothan Dwayne Skelton and Perry L. Rowe, Pro Se, for Respondent.

Before: Judge Cetti

These consolidated cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Mine Act." Petitioner charges the named Respondents as agents of the corporate mine operator, Skelton, Inc., with knowingly authorizing, ordering or carrying out the violation of five mandatory standards set forth in Part 56 Title 30 Code of Federal Regulations.

Section 110(c) of the Mine Act subjects agents of corporate mine operators to civil penalties if the preponderance of evidence established that: (1) a corporate operator committed a violation of a mandatory health or safety standard or an order issued under the Act; (2) the individual was an officer, director, or agent of the corporate operator; and (3) the individual "knowingly authorized, ordered, or carried out" the violation.

In the proceeding against the agent, a violation by the corporate operator must be proved. Kenny Richardson, 3 FMSHRC 8, 10 (January, 1981), aff'd sub nom. Richardson v. Secretary of Labor, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). The Secretary also has the burden of proving that the person charged is an agent of the corporate operator. Section 3(e) of the Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine, or the supervision of miners in a coal or other mine."

The Secretary in order to establish liability of the agent under 110(c) of the Mine Act also has the burden of proving by a preponderance of the evidence that the agent "knowingly authorized, ordered or carried out" the violation. The Secretary, however, may sustain his burden of proof on this issue by proving the corporate agent "knew or had reason to know" of the violative condition. Secretary v. Roy Glenn, 6 FMSHRC 1583, 1586 (July 1984), citing Kenny Richardson, 3 FMSHRC 8, 16 (January 1981). In Kenny Richardson, the Commission stated:

> If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

Thus, to establish section 110(c) liability, the Secretary must prove only that the individuals knowingly acted, not that the individuals knowingly violated the law. Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August, 1992). In Roy Glenn, 6 FMSHRC 1583 (July, 1984), the Commission held, however, that something more than the possibility of an underlying violation must be shown to establish "reason to know". 6 FMSHRC at 1587-8. Moreover, a "knowing" violation requires proof of "aggravated conduct" and not merely ordinary negligence. Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August, 1994).

In this case it is clear from the undisputed evidence that Lothan Skelton is the owner, president and working manager of Skelton, Inc. and that Perry Lee Rowe is the mine foreman. The record shows beyond dispute that both Lothan Skelton and Perry Rowe are agents of the corporation, Skelton, Inc., within the meaning of section 3(e).

Citation No. 3904346 - Handrail for Elevated Walkway

MSHA charges Lothan D. Skelton and Perry L. Rowe with the knowing violation of 30 C.F.R. § 56.11002. This safety standard in relevant part requires elevated walkways to be of "substantial

construction, provided with handrails and maintained in good condition."

The citation reads as follows:

> A section of metal handrailing about 6 feet (approximately 1.8 meters) in length was found not in place on the top walkway around the Telesmith screen deck adjacent the "screen feed conveyor" ... . The walkway was approximately 15 feet (approximately 4.5 meters) above ground level and was used by employees to service the screen and head pulley of the screen feed conveyor. A person falling from this height could easily receive a very serious injury.
>
> Furthermore, adding to the gravity of the hazard, the existing handrailing at the west end of the deck was not being maintained in good condition. The railing was merely tied together at the two corners. One corner was tied with lightweight baling wire and the other with plastic rope, which allowed large openings to exist through which a person could fall.
>
> The crusher was in operation at the Norwood pit, and two employees were observed using the walkway for screen maintenance.
>
> Skelton, Incorporated, has received citations in the past for this same hazardous condition. Most recently was Citation No. 3904956 on 8-28-91. It is obvious that reasonable care was not being taken by the Operator to comply with the safety regulation. This finding results with a high degree of negligence on behalf of management, which constitutes an "unwarrantable failure" to comply.

Inspector Renowden who issued the citation observed Respondent Perry Rowe, the foreman and the crusher operator on the elevated walkway that "surrounds" the Telesmith screen deck. Renowden testified that this elevated screen deck was provided with an inadequate handrail along the perimeter of the walkway. There were missing sections of the handrail which left openings in the railing through which a person could fall. One corner of the handrailing was tied with baling wire and another corner with plastic rope. The handrails were not maintained in good condition.

The inspector designated the violation S&S because, if left uncorrected, he was of the opinion that there was a reasonable likelihood that a person could fall through the opening in the handrailing to the ground or the machinery below. A person falling from the screen deck would sustain serious injury.

On cross examination, Inspector Renowden, in response to Ms. Gray's assertion the walkway was about 10 feet above the ground, testified that he only estimated the height of the walkway to be 12 to 15 feet above the ground, he did not measure the height.

I credit the testimony of Inspector Renowden. The preponderance of the evidence establishes a knowing violation of the cited safety standard by both of the named Respondents. Both Skelton and the foreman Perry Rowe were aware of the obvious violative condition of the handrail for an extended period of time and failed to correct the violative condition of the handrails. Their conduct was aggravated and constituted more than ordinary negligence. This aggravated conduct subjected both Respondents to liability under section 110(c) of the Act.

Order No. 3904353 - Stacking Conveyor Tail Pulley Guard

This 104(d)(1) order charges an unwarrantable S&S violation of 30 C.F.R. § 56.14107(a) which requires guarding of tail pulleys. The citation was issued for the alleged failure to adequately guard the tail pulley of a stacking conveyor. The citation reads as follows:

> The metal guard provided on the tail pulley of the "white" stacking conveyor located on the upper mine bench was not acceptable. Sections of the existing guard along each side of the conveyor tail section were missing, thus exposing the dangerous rotating "fluted fins" of the self cleaning pulley and belt pinch points in that vicinity. The exposed moving machinery was located approximately 2 feet (.54 m) from ground level and was easily accessible to any of the three men working at the crusher. Contact with this hazard could result in at least a disabling injury, if not a fatality.
>
> This hazard and violation was very obvious and should not have been allowed to exist. It was obvious from visual observation that the missing section of guard had been removed with a "cutting torch." The guard when in place would have safely guarded/protected persons from contacting the moving machinery parts. A large adjustable wrench was

available hanging off the side of the conveyor which is used to work on the equipment. When discussing this condition with the Operator he stated that the guard was cut off so the belt could be adjusted. When asked why the guard was not put back in place after adjustment the comment was that it was just "a pain and waste of their time messing with them. A person is plain stupid if they stick a hand or arm in there, and they are not stupid!"

The Operator has not used reasonable care on several occasions when it comes to the application of guarding moving machinery. This violation was obvious and known to the Operator and is therefore evaluated as "high negligence" and an "unwarrantable failure" violation.

Inspector Renowden testified to all the material facts set forth in the above quoted citation. I credit his testimony.

I find that Skelton and Rowe were both in a position to know the existence of the inadequate guarding of the tail pulley. It was an obvious violation. The named Respondents knowingly failed to correct the condition. Under the facts and circumstances of this case, this was "aggravated" conduct involving more than merely ordinary negligence. This conduct subjected both named Respondents to liability under 110(c) of the Act.

Order No. 3904360 - Two in Cab of Front Loader

This citation in pertinent part states:

The crusher foreman and crusher operator were observed riding together in the operator's cab of the KOMATSU WA350 front-end loader. The two men were traveling in the loader from the crushing plant to the upper mine bench to pickup some parts. No provisions were provided in the operator cab to secure safe travel for the second rider. The rider could be injured in the cab or fall out of the cab while traveling which could be fatal.

Inspector Renowden testified that during his inspection he observed the crusher foreman Rowe get inside the cab of the front-end loader next to the driver of the loader and travel to the upper mine bench. The men were on the way to the upper mine bench to pick up some parts needed to abate a citation issued by

Renowden earlier in his inspection. Foreman Rowe stepped into the cab of the front-end loader in full view of the inspectors who were observing him as Rowe was not aware he was doing anything wrong or hazardous. The size of the cab was approximately 4 feet by 5 feet. It is enclosed with a door and windows just like a car. When you open the door there is a 2-foot by 5-foot step to stand on with a handrail all around the step. Respondents presented credible evidence that they were not aware they were doing anything wrong because on a prior inspection, they had observed an MSHA inspector get in the cab of the very same loader, next to the loader operator in the same manner as Rowe and travel back and forth, up and down for more than an hour. Clearly, there was violation of the cited standard and the operator, Respondent Lothan Dwayne Skelton in his corporate persona, Skelton, Inc., accepted by default the violation charged in this identical enforcement document No. 3630301 and accepted the assessed proposed penalty of $3,300.00 for this violation.

As stated earlier this was clearly a violation of the cited standard. However, the violation involved merely ordinary negligence. Unlike other safety standards for which Respondents were cited, Respondents never had any prior citations or discussions with MSHA personnel as to the requirement of the cited standard. Under the facts and circumstances of this case, I do not find that the conduct of Rowe or Skelton in this instance to be "aggravated conduct." Having seen an MSHA inspector during an earlier inspection of the plant travel in the same front-end loader in the same manner Rowe traveled during the instant inspection, Respondent had reason to believe this conduct was permissible safe non-hazardous conduct. Respondents were wrong in their belief but the Commission has held that to be liable under section 110(c), the corporate agent's conduct must be "aggravated;" it must involve more than ordinary negligence. Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994), BethEnergy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992).

Rowe and Skelton were not only unaware Rowe was violating the provisions of the cited subsection but had a reasonable belief that they were not doing anything that was not permitted in view of their prior observation of an MSHA inspector engaging in identical conduct during a prior inspection. Rowe's conduct involved ordinary negligence and was a violation of the cited standard but Rowe's conduct under the facts of this case was not, in this instance, "aggravated" and, therefore, his conduct was not subject to liability under section 110(c) of the Act.

Citation No. 3630301 - Berms

This order charges the owner-operator Skelton and his foreman Rowe with a knowing violation of 30 C.F.R. § 56.9300(a). Inspector Renowden testified that during his inspection of the mine he observed a lack of berms or guardrails in two areas of

the inclined roadway extending from the mine office area to the upper mine bench. Renowden observed a front-end loader with Rowe and the loader operator in the cab traveling on this roadway.

The cited standard § 56.9300(a) reads as follows:

> (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

Renowden testified that the elevated roadway had drop offs of sufficient depth and grade that could cause a vehicle to overturn and could result in serious or fatal injuries.

Petitioner presented evidence that in the past on two occasions, March of 1990 and again in October of 1990, the mine had received citations for inadequate berms on elevated roadways at the mine. (Gov't Exs. 11, 12). Respondent presented evidence that these violations were abated by constructing axle high berms on the elevated roadways. Over a period of time, however, the berms had deteriorated due to the weather so that only remnants of the berm remained in some areas. This was a violative condition that should have been corrected by Skelton or Rowe. They observed this violative condition over an extended period of time. Their failure to correct this violative condition was "aggravated" conduct and thus the violation subjects them to liability under section 110(c) of the Act.

Order No. 3904347 - Head Pulley Guard

This Order alleges a violation of 30 C.F.R. § 56.14107(a). The citation reads as follows:

> The self-cleaning (fluted) head pulley operating on the under cone crusher conveyor belt was not sufficiently guarded. This condition existed because the existing guard did not extend sufficient distance to cover the exposed pinch points and rotating machinery. The hazardous equipment was located approximately 2 feet from ground level and was accessible to contact by a person.
>
> This unsafe condition was easily noticed and was not taken care of by the Operator. The hazard was very obvious. This Operator has received many citations regarding guards and does not use reasonable care to ensure they are properly installed.

The cited safety standard 30 C.F.R. § 56.14107(a) provides:

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

Inspector Renowden testified that the self-cleaning pulley referred to in the citation as a head pulley was a reversible pulley. At the time of his inspection it was being used as a tail pulley. The pulley had a guard but the inspector issued the citation because he determined it was inadequate. The guard did not extend a sufficient distance to cover the exposed pinch points. The exposed moving parts were located approximately 2 feet from the ground and were accessible to human contact.

Perry L. Rowe, the foreman, testified that the guard observed by Inspector Renowden during the instant inspection is the identical guard that another MSHA Inspector had accepted for the abatement of an earlier citation, issued by Inspector Dennehy, for an inadequate guard on this pulley.

I accept Rowe's testimony that this is the same guard that was installed to abate an earlier violation and that it passed on abatement inspection. However, I do not give this fact much weight as a mitigation factor since I credit the testimony of Inspector Renowden who offered a reasonable explanation for this seeming discrepancy. Inspector Renowden explained:

> A. Another thing that can happen when you're at another pit is if the equipment is set up somewhat different by -- by location, in some instances if the tail or the head's located to where it's not easily accessible to people or it's covered partially by material buildup that never -- never exposes anything, that would be acceptable at that time. But once again, when the plant's relocated and moved and broken down, what might have been good at one place is not good at the other place because of the different layout of the equipment.

I am satisfied from the testimony of Inspector Renowden and the photograph, Government Exhibit 8B, that at the location and set up of the equipment during the instant inspection that the guard was not adequate to cover all exposed pinch points and was, therefore, in violation of the cited standard. The violation was a "knowing" violation within the meaning of section 110(c) because it was obvious and existed over an extended period of time without being corrected by either Skelton or Rowe. This failure to correct the violative condition was aggravated conduct that

involved more than merely ordinary negligence and subjects both of the named Respondents to liability under section 110(c) of the Act.

PENALTY

Section 110(c) of the Act provides as follows:

> (c) 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 subsection (a) or section 105(c), any director, officer, or agent of such corporation 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 subsections (a) and (d).

Section 110(i) of the Mine Act provides:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Mr. Skelton incorporated his small mining business in 1973. He testified that no employee has ever had a fatal or permanent disabling injury.

I am mindful the Respondent, Skelton, in his corporate persona, Skelton, Inc., defaulted on each of the five identical citations that are now charged against Skelton as an agent of his

incorporated self in this present proceeding and against his foreman Perry Rowe.

These penalties against Skelton, Inc. were incurred when Skelton in his per se representation of his corporate persona, through no ones fault but his own, defaulted on the citations against Skelton, Inc. As a result of that default substantial penalties were assessed for the same identical citations involved in this case.

I have no intention of piercing the corporate veil in this case but it does seem ironic that agents of a partnership of two or more corporations do not have 110(c) liability whereas the working owners of a very small mining operation consisting of one or two working owners who incorporate their small business are in addition to being subject to penalties in their corporate persona are again on the same identical citations subject to additional substantial penalties under section 110(c) as agents of their incorporated self.

In this case, the sole shareholders in the company are Skelton and his secretary, Ms. Gray. They are working owners and their only employees are their foreman, Rowe, and one other person.

Ms. Gray credibly testified that in addition to her secretarial duties, she has been operating the crusher since October 1994. Ms. Gray impressed me as an unfeigned, sincere witness. Ms. Gray testified in part as follows:

> [W]e did take some penalties to court in a situation such as this, where we felt we were absolutely right. Guards had been previously approved by Roy Trujillo. And Mr. Renowden and Mr. Dennehy came in, and they didn't like those guards. And so we had to change the guards and were cited again. And when we went to court, the Judge increased the penalty.
>
> And at that point we thought, you know, we wasted two days and to no avail. And when you pull Dwayne (Skelton) and Perry (Rowe) and I away from the business, you've got your three top people. And it's very difficult to run a business without -- as small as we are -- without the top management.
>
> As far as Dwayne's (Skelton) salary is concerned, he was making $2500 a month until December, at which time we bought a piece of equipment. And because Skelton, Incorpora-

ted, is -- is overloaded with debt, we put this in his name and gave him a salary increase to $3500 to make the monthly payment on that piece of equipment.

I, myself, have not been drawing a salary since -- an actual paycheck. I think the last one I got was July of '93. And the reason for this is because we got into a couple of situations, you might say, where we were working out of town and didn't get paid; in '89, and then came back here and worked in Ridgway and didn't get paid again in 1990. In each case it was a hundred thousand dollars, and it really set us back badly. So we still have debts outstanding from those time periods. And it's in order to try to alleviate that debt, I've been forgoing a salary. I felt -- I've been working, but I haven't got paid.

As far as the MSHA payments are concerned, we (Skelton, Inc.) were paying $750 a month total for the previous citations. These were from 1990 up to '92, I believe. Perry (Rowe) just paid off -- Perry's civil penalties have been paid off, and we're (Skelton, Inc.) still paying on Dwayne's (Skelton) civil penalties and the corporate civil penalties and my ex-husband's civil penalties. So the payments are $650 a month total.

MS. GRAY: The new citations that were issued in '92 totaled $28,000. We didn't fight them because of the previous situation. It's very difficult to try to know where you stand.

THE JUDGE: Those are the penalties on the citations that we're hearing about today?

MS. GRAY: That's correct. We (Skelton, Inc.) were fined $3300 for the two people riding in the loader, when you don't even know that's illegal; when the inspector has done that himself, and you assume it's all right.

We (Skelton, Inc.) were fined, I believe, $2200 for that guard, that was an existing guard that had been previously approved that had not been altered in any way since it was approved. The setup is the same.

I mean, as Perry (Rowe) said, that crusher, that under cone crusher -- or under cone conveyor is there. It's part of that plant, and it doesn't move. And they couldn't have made it so short because the dirt was there, because there's a lot of material coming through that cone and a lot of weight falling on that belt. And when it does, it can't function if it's not clean. A tail pulley has to be clean all the time.

I sent paperwork to the U.S. Attorney -- regarding payment on this $28,000. I haven't heard back from her. I don't know what the payments are going to be set up as.

I don't have any idea how we're going to pay this $15,000. Obviously, we can't put the penalty on Perry (Rowe) because, you know, that's not right. He's working for us. So Skelton, Incorporated, will be responsible. I don't know.

I -- as I said, I run the crusher now. I have for -- since October of '94. And I do my level best to make sure that the guards are in place, to make sure there's a berm on the roadway, to make sure that things are working as they're supposed to be. Just the same as Perry and Dwayne have done. They try to work with MSHA.

Roy's (MSHA Inspector Trujillo) been the one who's been inspecting us lately. And his attitude when he comes into the pit is totally different. He's there to help us. He's there to make sure our employees are safe. And I feel that is the responsibility of an inspector, to come in there and make sure that you're running a safe operation; not to make sure that you get a citation. I believe an inspector's position is to aid and assist.

* * *

But the point is that we have been trying to work with MSHA to the best of our ability. There's -- there are times when we do have to take guards off, but we try to put them back on. And it's just very difficult for an Operator to have someone come in and approve

something and then have someone from the same organization come in and say, "That's not right. That's not acceptable."

* * *

I can give you financial statements if you would like.

THE JUDGE: What will the financial statements show?

MS GRAY: The financial statements would show that this company is still carrying a debit in their unappropriated retained earnings, which means that it's a negative amount. We did make profit last year. The company is carrying a credit in their net equity, but the only reason they are is because Dwayne (Skelton) and I have put so much money into this business. We both mortgaged our houses and then subsequently sold those houses and wrote those notes back to the shareholders off into paid-in capital.

* * *

Q. Now, you also said that the company is currently paying Mr. Rowe's and Mr. Skelton's previous penalties?

A. Mr. Skelton's. Mr. Rowe's are paid.

Q. And those were paid by the company?

A. That's correct.

Q. With regard to these assessments, if penalties are assessed against Mr. Rowe and Mr. Skelton for these violations, would the company also pay those penalties?

A. Don't you think they're obligated to?

Q. I would think -- I'm asking you.

A. I'm sure that we would feel obligated to do so, yes.

Inspector Renowden testified that he was not angry when he wrote these unwarrantable failure citations but he was frustra-

ted. His frustration is easy to understand. Fortunately, it appears from Ms. Gray's testimony that Respondents now have a much better cooperative attitude with the MSHA inspector who currently is making the mine's mandatory inspections.

Upon consideration of the applicable statutory criteria I find on balance the following penalties are appropriate against the corporate agents of this very small corporation:

ORDER

Within 40 days of this Decision, Respondent Lothan Dwayne Skelton, in Docket No. WEST 93-644-M **SHALL PAY** to the Secretary of Labor the sum of $3,850.00 as and for the civil penalties shown below:

Citation or Order Number	Penalty
3904346	$1,000.00
3904347	1,000.00
3904353	1,000.00
3630301	850.00
3904360	0

Within 40 days of this Decision, Respondent Perry L. Rowe in Docket No. WEST 93-645-M **SHALL PAY** to the Secretary of Labor the sum of $1,500.00 as and for the civil penalties shown below:

Citation or Order Number	Penalty
3904346	$ 400.00
3904347	400.00
3904353	400.00
3630301	300.00
3904360	0

August F. Cetti
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Mr. Lothan Dwayne Skelton, SKELTON, INC., P.O. Box 125, Norwood, CO 81423 (Certified Mail)

Mr. Perry Lee Rowe, SKELTON, INC., P.O. Box 125, Norwood, CO 81423 (Certified Mail)

Ms. Ruth Gray, Corporate Secretary, SKELTON, INC., P.O. Box 125, Norwood, CO 81423 (Certified Mail)

/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

JUL 16 1996

DANIEL A. HERNANDEZ, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 95-398-DM
v.	:	
	:	American Girl Mine
AMERICAN GIRL JOINT VENTURE, Respondent	:	Mine ID No. 04-04816

ORDER OF DISMISSAL

Before: Judge Manning

On or about May 30, 1995, Daniel A. Hernandez filed a complaint with the Commission. The complaint was assigned the docket number set forth above and was assigned to me on July 12, 1995. In the complaint, Mr. Hernandez states that the complaint "is not a complaint of discrimination" but is a "complaint of how a mine can operate so unsafe and get away with it." It is evident from the complaint that Mr. Hernandez was terminated from his employment, but the reason is not clearly explained. Mr. Hernandez states: "I got fired because I spoke up for myself trying to get the lead miner position and then got a blasting license in order to do things right." (Complaint at 3).

Respondent contends that Mr. Hernandez failed to raise a claim that is protected by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). Respondent alleges that Mr. Hernandez performed a dangerous act, drilling near loaded blast holes, and that the company terminated him for that act.

This case was set for hearing on three occasions but in each instance the hearing was canceled. In telephone conversations, Mr. Hernandez stated that he was not sure that he would proceed with this case on his own and that he looked for an attorney to represent him but was not successful. On February 29, 1996, I ordered the parties to try again to settle this case. Counsel for Respondent advised me that he attempted to contact Hernandez but that Mr. Hernandez did not respond to his telephone calls or letters.

Because of the age of this case and the fact that Mr. Hernandez's complaint does not appear to allege a violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1988)(the "Mine Act"), I issued an order to show cause to Mr. Hernandez requiring him to explain why this case should not be dismissed. In the show cause order, dated May 3, 1996, I advised Mr. Hernandez that it is not clear that he was alleging that his termination from employment violated the anti-discrimination provisions of the Mine Act. I asked Mr. Hernandez to send me a letter by June 28, 1996, describing his termination and explaining whether he believes that he was fired for making a safety complaint or for refusing to do work that he considered to be unsafe. I also advised Mr. Hernandez that if he did not timely respond to the order to show cause, I would assume that he no longer wishes to proceed with this case and I would issue an order dismissing the case. Mr. Hernandez did not respond to the show cause order.

Section 105(c)(1) of the Mine Act protects miners from retaliation for exercising rights protected under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, tb Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a prima facie case by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by the protected activity. Secretary on Behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Haro v. Magma Copper Co., 1935, 1937 (November 1982).

Mr. Hernandez has not alleged that he engaged in activities protected by the Mine Act. Instead, his complaint states that he loaded four holes with explosives and was trying to unplug a steel bit for the jack-leg drill when his supervisor entered the area. The complaint states that this supervisor believed that

Mr. Hernandez was drilling another hole and that he told Hernandez that it was against the law to drill after explosives are loaded. His complaint alleges that his termination was unfair but does not allege that he engaged in protected activity. That is, Mr. Hernandez does not allege that he made safety complaints or refused a work order because he was concerned for his safety.

I dismiss Mr. Hernandez's complaint because he failed to respond to my order to show cause. 29 C.F.R. § 2700.66. In addition, even if Mr. Hernandez was treated unfairly, he failed to allege a violation of section 105(c) of the Mine Act. I do not have the authority to determine whether Mr. Hernandez's discharge was fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." Delisio v. Mathies Coal Co., 12 FMSHRC 2535, 2544 (December 1990) (citations omitted).

Accordingly, for the reasons set forth above, this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Daniel A. Hernandez, 1965 West Water Street, Tucson, AZ 85745 (Certified Mail)

Daniel A. Hernandez, 2121 W. Ironwood Ridge, Tucson, AZ 85745 (Certified Mail)

David S. Allen, Esq., JACKSON, LEWIS, SCHNITZLER & KRUPMAN, 1888 Century Park East, Suite 1600, Los Angeles, CA 90067-1702 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 1996

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 96-218-D
on behalf of STEVE BAKER	:	DENV-CD-95-20
Complainant	:	
v.	:	Mine #3
	:	
CEDAR COAL COMPANY INC.,	:	
Respondent	:	

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant;
Phil A. Stalnaker, Esq., Pikeville, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), on behalf of Steve Baker, pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The application seeks reinstatement of Mr. Baker as an employee of the Respondent, Cedar Coal Company, Inc., pending a decision on a Complaint of Discrimination Mr. Baker has filed concerning the company. For the reasons set forth below, I grant the application and order Mr. Baker's temporary reinstatement.

A hearing was held on the application on July 2, 1996, in Pikeville, Kentucky. In addition, the parties filed post-hearing briefs in the matter.

SUMMARY OF THE EVIDENCE

On November 20, 1995, Baker filed a discrimination complaint with MSHA alleging that he "was discharged by Larry Phillips on November 9, 1995, because [he] refused to operate the loader in conditions [he] believed to be unsafe." Larry Phillips is president of Cedar Coal, an independent contractor providing coal hauling services for various mines.

Baker testified that he was hired by Cedar Coal as a truck driver in July 1995. He further testified that in September 1995 his job was changed to that of front-end loader operator, loading coal into Cedar Coal trucks at the Sheep Fork Energy No. 3 mine.

Baker related that November 9, 1995, was a cold, misty day, with a temperature, according to the radio, of 19 degrees Fahrenheit around 6:00 a.m. He stated that when he arrived at work about that time, the windows on the front-end loader were frosted over.

Baker further testified that neither the heater nor the defroster worked on the loader and that he attempted to scrape the frost off of the front windshield with a cassette tape case. He stated that he loaded three or four trucks, but after hitting the last truck several times because of obstructed vision, he called the scale operator on the CB radio and told him to tell Daniel McCoy, the supervisor, that he was parking the loader and refused to run it because it didn't have a heater or defroster.

Baker claimed that he then went over to the Sheep Fork Energy No. 4 mine, where McCoy was working, and told McCoy that "I refused to run that loader without no heater or defroster like it was because it was unsafe." He stated that at McCoy's suggestion, he called Phillips at home to tell him why he would not operate the loader. Baker maintained that when he called Phillips, Phillips told him that he no longer needed him, that he was fired.

Daniel McCoy testified that he did not observe any frost when he arrived at work around 6:00 a.m. at the No. 4 mine. He further stated that Baker told him that he had a job offer of $12.00 per hour near his home and that he was going to quit if the heater was not fixed. He did not recall Baker claiming that

it was unsafe to operate the loader and he disagreed with Baker over the length of time that elapsed between Baker's call over the CB and his arrival at the No. 4 mine.

Curtis Thacker testified that he did not encounter any frost on arriving at work at the No. 4 mine. He stated that he replaced Baker as the loader operator about 9:00 a.m. He further testified that while there was fog on the inside of the windshield, which he was able to wipe off with a paper towel, there was no frost on the outside. He concurred with Baker that neither the heater nor the defroster worked and that it was cold in the cab of the loader.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission has provided for this procedure with Rule 45, 29 C.F.R. § 2700.45.

Rule 45(d), 29 C.F.R. §2700.45(d) states that "[t]he scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought." Thus, the issue at hand is not to determine whether or not Baker was discriminated against, but rather to determine whether his complaint appears to have merit. *Jim Walter Resources v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990). I conclude that it does.

If true, Baker's claims, that he refused to operate the front-end loader because it was unsafe and that Phillips fired him in response to that refusal, clearly set out a cause of action under section 105(c). *John A. Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989); *Simpson v. Kenta Energy, Inc.*, 8 FMSHRC 1034, 1039 (July 1986), *rev'd on other grounds sub nom. Simpson v. FMSHRC*, 842 F.2d 453, 459 (D.C. Cir. 1988); *Pratt v. River Hurricane Coal Co., Inc.*, 5 FMSHRC 1529, 1533-34 (September

1983); *Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982); *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd. Cir. 1981).

Baker's testimony was not inherently incredible. Nor was any evidence presented that indicated that he was unworthy of belief. The conflicts with his testimony presented by the testimony of McCoy and Thacker raise credibility issues which normally arise in any case. By itself, their testimony does not demonstrate that his claim is frivolous or without merit.

In a temporary reinstatement proceeding, Congress intended that the benefit of the doubt should be with the employee rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since he retains the services of the employee until a final decision on the merits is rendered. *Jim Walter Resources* at 748 n.11. Accordingly, I conclude that Baker's discrimination complaint has not been frivolously brought.

ORDER

Steve Baker's Application for Temporary Reinstatement is **GRANTED**. The Respondent is **ORDERED TO REINSTATE** Mr. Baker to the position of front-end loader operator which he held on November 9, 1995, or to a similar position, at the same rate of pay and benefits **IMMEDIATELY ON RECEIPT OF THIS DECISION.**

T. Todd Hodgdon
Administative Law Judge

Distribution:

Anne T. Knauff, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 80202-5716 (Certified Mail)

Phil A. Stalnaker, Esq., P.O. Box 1108, Pikeville, KY 41502-1108 (Certified Mail)

/mca

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 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 94-57 A.C. No. 46-01968-04121
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	Blacksville No. 2 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 94-366 A.C. No. 46-01968-04149 A
v.	:	
SAMUEL J. MCLAUGHLIN, employed by CONSOLIDATION COAL COMPANY, Respondent	:	Blacksville No. 2 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 94-368 A.C. No. 46-01968-04148 A
v.	:	
J.T. STRAFACE, employed by CONSOLIDATION COAL COMPANY, Respondent	:	Blacksville No. 2 Mine

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 94-384
	:	A.C. No. 46-01968-04150 A
v.	:	Blacksville No. 2 Mine
ROBERT WELCH, employed by CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Elizabeth S. Chamberlin, Esq., Consol Incorporated, Pittsburgh, Pennsylvania, for Consolidation Coal Company;
Stephen D. Williams, Esq., Steptoe & Johnson, Clarksburg, West Virginia, for Consolidation Coal Company.

Before: Judge Barbour

These are civil penalty proceedings brought by the Secretary of Labor (Secretary) pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. §§ 815(d) and 820(c)). In Docket No. WEVA 94-57 the Secretary alleges that Consolidation Coal Company (Consol) violated four mandatory safety standards for underground coal mines at its Blacksville No. 2 Mine, an underground bituminous coal mine located in Monongalia County, West Virginia. The Secretary further alleges that all of the violations were significant and substantial (S&S) contributions to mine safety hazards and were the result of Consol's unwarrantable failure to comply with the standards.

In Docket Nos. WEVA 94-366, WEVA 94-368 and WEVA 94-384, the Secretary alleges respectively that the mine's superintendent, J.T. Straface, its assistant superintendent, Samuel J. McLaughlin, and its foreman, Robert Welch, "knowingly" violated one of the mandatory safety standards alleged in

Docket No. WEVA 94-57 (30 U.S.C. § 75.1101-23(a)) and that each individual is liable personally for a civil penalty.

Consol and the individuals deny the alleged violations. In addition, the individuals assert that if the violation with which they are charged did occur, they did not knowingly violate it.

Pursuant to notice, a hearing was conducted in Fairmont, West Virginia, at which the parties presented testimony, documentary evidence and oral argument. During the course of the hearing Consol and the Secretary agreed to settle three of the alleged violations. Counsels explained the settlements on the record and I approved them (Tr. 1048-1053). I will confirm the approvals at the close of this decision.

GENERAL BACKGROUND AND ISSUES

On March 15, 1993, a fire occurred in the belt drive area of the 16-M longwall section of the mine. The Secretary contends that Consol violated §75.1101-23-(a) in that it did not withdraw persons affected by the fire outby affected areas as required by the mine's adopted and approved program of evacuation procedures.

The principal issues with regard to Consol are whether the alleged violation occurred, whether it was S&S, whether it was unwarrantable, and, if a violation is found, the amount of any civil penalty that must be assessed in light of the statutory civil penalty criteria set forth in section 110(i) of the Act (30 U.S.C. §820(i)).

The principal issues with regard to each individual are whether the alleged violation occurred, whether the individual knowingly authorized, ordered, or carried it out, and, if so, the amount of any civil penalty that must be assessed taking into account the applicable statutory civil penalty criteria.

STIPULATIONS

The parties stipulated as follows:

1. The Blacksville [No. 2] Mine extracts

minerals and has products which enter and/or affect commerce, [and] is thereby under the jurisdiction of the [Mine Act].

2. [Consol] is a mine operator, as defined under Section 3(h) of the Mine Act, [and] is a[n] ... operator of the Blacksville [No. 2] Mine.

3. [T]he Administrative Law Judge has jurisdiction ... under Section 105 of Mine Act.

4. [T]he assessment of the [c]ivil penalties in this proceeding will not affect the operator's ability to continue in business and the individual agents have the ability to pay their respective assessed penalties.

5. [Consol] is a large mine operator. At its [m]ine it employs approximately 440 underground miners and approximately 76 surface miners on three production shifts (Tr. 11-12).

THE SECRETARY'S POSITION AT TRIAL

Counsel for the Secretary contended the evidence would show that on March 15, 1993, Consol violated its approved and adopted program of evacuation procedures in that it did not withdraw miners off the 16-M longwall section when a fire occurred at the section's belt drive area. Further, the named individuals knew about the fire, but did nothing to insure that the affected miners were evacuated. (Tr. 15-16)

CONSOL'S POSITION AT TRIAL

Counsel for Consol maintained that the fire was discovered by the belt transfer man. He reported it to the tipple operator, who reported it to the dispatcher. The dispatcher immediately began notifying the affected crews and other mine personnel. The fire lasted for only a few minutes. By the time the 16-M section crew was ready to evacuate the section, the fire was out.

The charged individuals did nothing wrong. The mine foreman, Welch, told the crew not to evacuate because the fire was out (Tr. 17-18). The assistant superintendent, McLaughlin,

did not even reach the belt drive until after the fire was extinguished. The superintendent, Straface, immediately implemented the mine evacuation plan upon learning of the fire. Only after the fire was out was implementation of the plan stopped (Tr. 18-19).

There was no violation of section 75.1101-23(a)(1), there was no unwarrantable failure on Consol's part, and none of the individuals knowingly ordered, authorized, or carried out a violation (Tr. 20).

THE TESTIMONY
RAYMOND STRAHIN

Raymond Strahin, a federal coal mine inspector for the last 19 years, is a mine ventilation specialist. As such, he reviews operators' ventilation plans and fire fighting and fires evacuation programs and recommends to the MSHA district manager that the programs be approve or disapprove (Tr. 23).

Strahin described the ventilation system of the 16-M longwall section as consisting of four entries, two of which carried intake air and two of which carried return air. The belt entry was the closest entry to the longwall face (Tr. 31-32). It carried return air from the face. The air flowed outby and turned into a crosscut. The belt did not turn at the crosscut, but continued straight down the belt entry to the belt drive and the transfer point. At the transfer point, the belt dumped onto the mother belt. From the transfer point and belt drive to the crosscut leading to the regulator, the belt entry carried intake air. At the crosscut, the return air from the longwall face mixed with the intake air from the transfer point and belt drive and the mingled air passed through a regulator and into the main return. (Tr. 71-72)

In Strahin's opinion, if the fire at the belt drive had spread, it would have moved toward the face until it got to the point where the air from the transfer point mixed with the air coming down the belt entry. From there, the fire and smoke would have moved toward the regulator (Tr. 71-72,74,97-98). However, if enough time passed and the fire developed unchecked, the fire and smoke could have intensified and traveled toward the face. Strahin observed that the course of a fire cannot be predicted

always (Tr. 107). The first ten minutes are crucial to its control. After that, it can burn out of control (Tr. 75).

Strahin estimated that on March 15, 1993, the velocity of the air in the belt entry ranged from 100 feet per minute to 300 feet per minute, the larger figure being the velocity closer to the regulator and the lower figure being the velocity at the transfer point (Tr. 37-38). However, Strahin agreed that the velocity of the air traveling from the transfer point over the belt drive and to the regulator could have been as low as 75 feet per minute (Tr. 78).

Strahin also agreed that air pressure in the belt entry was lower than in the track entry. For this reason if air leaked between the belt and track entries, the leaked air would travel from the track entry into the belt entry (Tr. 94). Therefore, smoke in the belt entry most likely would stay in the belt entry and travel out the return (Tr. 94).

There was a box check in a portion of the belt entry that was ventilated by intake air. (Tr. 36) The box check was constructed of cinder blocks. There was an opening in the center of the blocks for the belt. In addition, there was a door on the side to provide access to the belt (Tr. 75-76). The box check restricted and slowed the velocity of the air that flowed toward the face (Tr. 36-37, 75).

Strahin testified that on March 15, 1993, there were two types of fire detection systems in place on the 16-M section belt entry, a heat sensor system and a carbon monoxide (CO) detector system (Tr. 41). The heat sensors were suspended from the roof, a foot or two over the belt, and were installed every 125 feet along the belt entry, from the longwall tailgate outby (Tr. 65). There was an alarm box for the heat sensors near the face at the stage loader. The alarm was used to alert the longwall crew if the heat sensors were activated (Tr. 101).

On March 15, most of the CO detector system was installed and functioning. The CO sensors were hung about half way between the belt and the roof (Tr. 80). There was an alarm on the surface that sounded when the CO reaching a certain level (Tr. 42-43, 110, 111).

Although the CO detector system was almost completely in place, Consol was relying primarily on the heat sensor's system (Tr. 42). Consol could not rely officially on the CO sensor system until a petition for modification allowing its use was approved and took affect (Tr. 43). Consol had applied for the modification and Strahin investigated Consol's petition (Tr. 77).

Strahin identified the approved and adopted program of evacuation that was in effect on March 15, (Gov. Exh. 4). Strahin had reviewed the program and recommended to the MSHA district manager that the agency approve it (Tr. 82). It was approved as written by Consol (Tr. 83).

Part II.A.&B. of the program applied to the fire sensor system. Part II.A.&B. was "In effect until implementation of Petition for Modification, Docket No. M-90-155-C)" (Gov. Exh. 4 at 4). Part II.C. of the program applied to the CO monitor system. Part II.C. was "In effect after implementation of Petition for Modification, Docket No. M-90-155-C" (Gov. Exh. 4 at 5). Strahin did not believe that the petition for modification was implemented on March 15 (Tr. 84-85). Therefore, he believed that the portion of the program relating to fire alarm systems under which Consol was operating when the fire occurred "probably" was the part for the fire sensor system, and not the part for the CO monitor system. (Gov. Exh. 4 at 4-5; Tr.86).

As Strahin interpreted Part II.A.&B., when a fire sensor alarm went off, persons in the affected area were required to be "immediately withdrawn to a location outby the affected area" (Tr. 45; Gov. Exh. 4 II.A.2.at 4). Further, if a fire was confirmed but an alarm was not activated the plan still required affected miners to be evacuated (Tr. 106). Strahin stated that no matter how the fire was brought to Consol's attention, the plan had to be followed and affected miners had to be evacuated outby the fire (Tr. 71, 112-113, see also Tr. 46, 50).

Strahin also testified concerning a portion of the program which stated in the event of a fire, one of the duties of the longwall foreman was to notify all personnel on the section about the fire and to see that they were outby it and were accounted for (Gov. Exh. 4 VII B.1.a.-b. at 7-8; Tr. 47). Strahin agreed that notification was one of the most important things to be done in a fire situation. Normally, miners were notified by

telephone. They were alerted to come to the telephone by a visual or audible signal (Tr. 91-92). On the M-16 section, the signal was a flashing light. It was normally activated by the dispatcher (Tr. 92).

Finally, Strahin testified that he had investigated a fire that occurred at the belt drive in another mine. A 10 to 15 minute delay in notifying the crew after the fire was discovered contributed to some of the crew suffering smoke inhalation injuries (Tr. 51-52). In another fire at a different mine, the crew had become separated and miners had died as a result. In Strahin's view, that was why it was important the miners on a section be gathered together and be evacuated together (Tr. 87-88).

GARY KENNEDY

Gary Kennedy was the day shift headgate man on the 16-M section. With him were Harold Zupper, Harold McClure, Ron Griffin, Richard Talkie and Marvin Fischer.

Kennedy stated that on March 15, he was working at the headgate, about 5,000 feet from the belt transfer point (Tr. 120-121,205). Around 12:30 p.m., he received a telephone call from the tipple man. The tipple man told Kennedy that the belt drive was on fire. Although Kennedy did not know at the time, Danny Ammons, who was working at the belt transfer, had reported the fire to the tipple man (Tr. 138).

Kennedy had suspected a problem at the belt drive because the belt had quite running shortly before the tipple man called. There was a fire suppression system at the belt drive that, when activated, stopped the belt and sprayed it with water. Kennedy speculated that the fire suppression system had shut down the belt (Tr. 154, see also Tr.67).

While Kennedy was talking to the tipple man, the heat sensor system alarm at the tail piece started to beep and the red light on the alarm stated to flash (Tr. 121-122). Activation of the alarm confirmed there was a fire on the belt line (Tr. 122).

Kennedy testified that he had been trained to respond to an alarm by going to an intake air entry and moving to a point outby

the fire area (Tr. 136). Kennedy shut off the alarm, disconnected the power at the longwall face, and called the miners along the face on the face telephone system (Tr. 123, 125, 141).

There were two telephone systems at the headgate, one connected the longwall face with the belt transfer point and the tipple. The other connected the headgate with points along the face. In addition to these two systems, a telephone system connecting the longwall section to all parts of the mine was located in the track heading by the dinner hole (Tr. 148). To notify the crew of something, the mine dispatcher either called on the mine system or called the tipple operator, who, in turn, called the crew (Tr. 149).

Kennedy told the miners to assemble at the headgate because there was an emergency (Tr. 123). Tim Nester, the section foreman, was not in the face area. He previously had walked down the belt entry to conduct a preshift examination of the belt (Tr. 131-132). However, Zupper, McClure, and Griffin appeared at the headgate. Freeland, the longwall coordinator and a management employee, was missing. Kennedy asked where he was. Zupper said that Freeland had gone down the tailgate entry to check spad readings. Kennedy stated that he would go and find Freeland and that he and Freeland would walk outby the fire via the tailgate entry. Zupper stated that the other members of the crew would exit via the intake escapeway, on the tailgate side of the longwall (Tr. 125, 142).

Kennedy found Freeland at the tailgate end of the longwall. (Tr.126) He told Freeland that there was a fire at the belt drive transfer. Each man picked up a self rescue device and together they proceeded down the tailgate entry, through a door at the crib line and out the track entry (Tr. 127, 143). Kennedy believed that while he and Freeland was walking out of the section, the rest of the crew also was walking out via the intake escapeway (Tr. 128)

It took about 20 to 25 minutes for Kennedy and Freeland to reach the mouth of the 16-M section (Tr. 129, 143). Once there, Kennedy and Freeland walked to the site of the fire. Several jeeps were parked in the area. Tim Nester was there and someone told Nester to take Kennedy and Freeland back to the 16-M section

because the fire was out (Tr. 131-132).

Kennedy looked at the fire site. He saw McLaughlin "kind of like kneeling down" (Tr. 131). According to Kennedy, McLaughlin had "a little red hose like he was washing off the bottom belt" (Id., 157-158). In addition to Nester and McLaughlin, Kennedy saw Ammons in the area (Tr. 131).

Kennedy did not see any hot coals, steam, or smoke (Tr. 150). Ammons told Kennedy that when he opened the door to the belt drive, he saw the fire blazing and went to the telephone to report the fire. When he returned to the belt drive, the fire had been extinguished by the fire suppression system (Tr. 151-152).

Kennedy stated he noticed a charred smell and could see where the belt had "burned" (Tr. 132). The bottom belt was "blistered" and "melted" (Tr. 153-154). Kennedy agreed that given the ventilation system of the longwall, any smoke produced by a fire would have moved away from the face and the longwall section crew (Tr. 146).

Kennedy, Freeland and Nester took a jeep back to the longwall section. When they reached the section, they found the other crew members there. Kennedy was surprised because when he left the section the crew was getting ready to evacuate (Tr. 133-134).

Kennedy and the crew discussed the fire and Consol's response. As the crew was talking about what had happened, Zupper stated that it was Welch who told him the fire was out and that the crew should stay on the section.

Kennedy recalled someone saying the situation could have been similar to one at another mine where miners were told the fire was out and were sent back to their section only to perish subsequently because the fire was not out (Tr. 133).

RONALD GRIFFIN

Ronald Griffin, the shield man on the 16-M longwall section, testified that on March 15, he was working at the face pulling shields when he received a telephone call from Kennedy. Kennedy

told him there was a fire at the belt drive (Tr.160, 172). Zupper and McClure also were working at the face. The three miners left the face together (Tr. 172). They walked approximately 300 feet, past the headgate and into the track entry where Griffin saw the strobe light blinking by the mine telephone. He picked up the telephone and Welch told him to gather the crew and to stay there (Tr. 161-162, 174). At this time Zupper, McClure, and Talkie were in the vicinity (Tr. 178). Nester was "down the belt" (Tr. 175).

Griffin went back to the face area and told the rest of the crew what Welch had said Tr. 160-162, 173, 177). After Kennedy left to look for Freeland, Zupper went to the mine telephone to advise management that the rest of the crew was leaving the section by walking down the intake. Griffin stated that he did not know with whom Zupper spoke, but that the group was held up leaving while Zupper was on the phone. According to Griffin, after he hung up, Zupper advised the group that the fire was out, and the group remained on the section. (Tr. 163-164, 180).

Griffin stated that if miners were not assigned to fight a fire, they were trained to evacuate by walking down an intake entry and proceeding outby the fire. The group discussed this and talked about what they should have done (Tr. 167, 181). In Griffin's opinion, "[w]e should have just gone ahead and taken off. We shouldn't have even looked back, we shouldn't even have been on the phone. We should have just went ahead outby" (Tr. 181).

HAROLD ZUPPER, JR.

Harold Zupper, Jr., the day shift shear operator on the 16-M section, was working at the face with McClure on March 15. Shortly after noon, Kennedy called Zupper on the face telephone system and told him there was a fire at the belt drive (Tr. 185, 198). Zupper and McClure walked off the face and the two met Kennedy at the headgate (Tr. 199). The belt was not running (Tr. 209).

Zupper told Kennedy that Freeland and Nester were not at the face (Tr. 200). Zupper suggested to Kennedy that he try to find Freeland while the rest of the crew evacuated the section (Tr. 185).

Zupper, Talkie, and Griffin discussed the situation with the rest of the crew. Ultimately, the crew decided to take the track entry out, because the track entry was on fresh air and a vehicle was there that they could ride. The crew started down the entry. After a few minutes, McClure suggested they go back, telephone the dispatcher, and tell him the route that they were taking (Tr. 186, 191, 203).

Zupper and McClure went back to the mine telephone. On his way to the telephone, Zupper heard mine superintendent Straface paging mine foreman Welch over the telephone pager unit (Tr. 189-190, 204). Up to this time Zupper had not spoken to Welch, Straface, or McLaughlin, and he had no idea what they had been doing (Tr. 205).

Zupper got on the telephone and spoke with Welch, who told him that the fire was out (Tr. 186). Welch stated the crew should stay together on the section (Tr. 186-187). Zupper believed that Welch was at the dump, approximately five miles from the 16-M section (Tr. 188-189). After receiving Welch's instruction, the crew remained on the section (Tr. 189).

A short time later, Nester arrived. Zupper thought Nester was surprised that the crew was still on the section (Tr. 189, 212). However, Zupper did not know whether Nester was aware the crew had been informed that the fire was out (Tr. 212).

Zupper had worked with Welch for 25 years and trusted him. When Welch told Zupper the fire was out, Zupper did not doubt it. He did not feel that his safety was in any way endangered (Tr. 207-208). Nevertheless, the crew discussed the fire and Consol's response to it. They specifically talked about another mine where the crew had remained on the section and died because they mistakenly thought the fire was out (Tr. 194, 213, 216).

Zupper agreed that on March 15, the air that ventilated the belt was traveling away from the face. Therefore, any smoke along the beltline would not have moved toward the face (Tr. 211). Although Zupper thought the crew should have been evacuated outby the fire, he never complained to Welch or to Nester about the incident (Tr. 212, 214-215).

HAROLD McCLURE

Harold McClure, the day shift shearer operator's helper, was working at the face with Zupper on March 15 (Tr. 219). McClure's testimony regarding how he learned of the fire and the subsequent actions of the crew mirrored Zupper's (Tr. 220-222). McClure stated that he was unaware of to whom Zupper spoke on the telephone and that he did not know who told Zupper to have the crew stay on the section (Tr. 222).

McClure stated the miners were concerned about whether or not the fire really was out when they subsequently discussed the incident (Tr.225). As McClure understood the approved and adopted program, even if a fire was out, the crew was supposed to evacuate (Tr. 227).

RICHARD ALLEN TALKIE

Richard Allen Talkie, the day shift longwall mechanic on the 16-M section, was working at the longwall face on March 15 (Tr. 229-230). Talkie's testimony about how he learned of the fire and the subsequent actions of the crew essentially was the same as Zupper's and McClure's, except that Talkie did not believe the crew actually started down the intake entry (Tr. 220-222). Rather, according to Talkie, before the crew could begin to evacuate, they were told by Zupper to stay put, that the fire was under control (Tr. 231, 235).

With regard to damage caused by the fire, Talkie stated that he was told by a beltman, whose name he could not recall, that 30 feet of the belt was scorched and blistered. However, Talkie did not see the belt (Tr. 237).

KENNETH STEWART

Kenneth Stewart was the dispatcher at the mine. As the dispatcher, one of his duties was to coordinate communication with mine personnel in the event of a mine emergency (Tr. 239). If the emergency was a fire, he was supposed to get miners outby the fire as safely and quickly as possible (Tr. 240).

Stewart explained that in the dispatcher shanty where he worked there were three different telephone systems -- the mine

telephone, the trolley telephone and the city telephone (Tr. 252). To communicate with management personnel and miners, Stewart used the mine telephone system and the trolley system (Tr. 241).

Stewart testified that the March 15 fire was reported to him by the tipple man. Stewart tried to page the 16-M section by using the mine telephone system. As Stewart put it, he "hollered at the section a couple of times" (Tr. 243, 253). When he did not receive an answer, he turned on the flashing light located above the mine telephone. He also activated a similar light on the 17-M section (Tr. 254). In addition, Stewart called McLaughlin over the trolley telephone and told him about the fire. Stewart estimated that McLaughlin was about a mile and a half to two miles away from the 16-M section. McLaughlin got in a jeep and headed for the fire (Tr. 249-250).

Stewart then called Straface and told him there was a fire in the mine. (At this time, Straface was in either the superintendent's office or the mine foreman's office. Stewart was not sure which.) Straface got on the mine telephone and Stewart heard him "holler" at Welch, who was at the dumping point, near the bottom of the shaft. Stewart stated that he did not know if Straface realized Stewart was still on the line and was listening (Tr. 246).

According to Stewart, Straface asked Welch what was going on. Welch replied that Stewart was handling the situation. Straface told Welch to take over (Tr. 247). Stewart understood this to mean he was supposed "to get the hell off the phone" (Id.). Stewart was upset and would have "punched [Straface] in the mouth" if he could, because Straface "was taking over my job" (Tr. 264-265). Stewart did not know if the crew was ever evacuated outby the belt drive area (Tr. 250-251).

DANNY AMMONS

Danny Ammons was in charge of the belt transfer area of the 16-M section. His duties required him to check the belt tailpiece from time to time (Tr. 268). Early in the afternoon of March 15, Ammons received a telephone call from Kennedy, who asked Ammons to take the slack out of the belt at the tailpiece. To do this, Ammons had to go to the belt drive area (Tr.269). To

reach the tailpiece, Ammons walked along the belt entry, crossed an overcast and proceeded to a second overcast. At the overcast there was an airlock within a set of doors. Ammons went through the first door and entered the air lock. The belt ran through the airlock (Tr. 292). He noticed smoke and haze around the belt. The belt had quit running and Ammons speculated that it was slipping on its rollers and the resulting friction was producing the smoke or haze (Tr. 284-285). Ammons opened the second door and saw more smoke. Almost at the same time, there was a sudden flare of flames. According to Ammons, "[i]t exploded like gasoline would" (Tr. 272). Although the fire could have been in existence before Ammons opened the second door (Tr. 304), he speculated that when he opened it, a bust of oxygen caused the fire to intensify and flames to erupt (Tr. 295).

Ammons returned to the belt transfer area and called the tipple to report the fire. He was not sure with whom he spoke (Tr. 273). Ammons asked the person at the tipple to notify the dispatcher and "whoever else they needed to notify" (Tr. 274).

Returning to the fire, Ammons traveled up the track entry. He reached a door leading to the belt entry. Ammons opened the door and noticed smoke that extended from the roof half way to the floor. He also saw the legs of a person walking through the smoke. It was Nester (Tr. 275-276, 300).

Accompanied by Nestor, Ammons retraced his steps to the air lock doors. Ammons and Nester put on self rescue devices and entered the air lock (Tr. 278). One of the sprays of the fire suppression system was on and the fire was out (Tr. 279, 291, 304). Ammons estimated that only a few minutes had elapsed since he first saw the fire (Tr. 296).

Ammons and Nester did not go too close to the site of the fire because it was wet. While they waited, miners and management personnel arrived (Tr. 285). McLaughlin was among the management personnel (Tr. 285). Freeland and Kennedy also were present (Tr. 286). As Ammons recalled, McLaughlin took a hose and started spraying "some hot coals and stuff" (Tr. 286).

Ammons noticed some badly scorched brattice boards and about 40 feet of blistering on the bottom of the belt (Tr. 287, 297). Ammons believed that if the fire suppression system sprays had

not activated, the fire would have gotten out of control (Tr. 289).

Ammons stayed in the area for about an hour. He and other miners kept checking the coal under the belt to make sure that there was no heat and that the fire did not restart (Tr. 309).

Ammons stated that as part of the fire training he received at the mine, he knew that miners were supposed to evacuate to an area outby the fire (Tr. 289). Regarding the direction in which the smoke from the fire traveled, Ammons agreed that it went through the regulator and out the return (Tr. 301).

TIMOTHY NESTER

Timothy Nester, the foreman of the 16-M section, was conducting a preshift examination of the belt line on March 15 (Tr. 731). As he approached a point inby the regulator, he noticed the belt slowing, and then it stopped (Tr. 718-719). About the same time, Nester saw smoke coming through the box check and traveling toward the regulator. Nester prepared to leave the entry and was about to do so when he saw Ammons (Tr. 313-314, 720).

He and Ammons walked to a door that lead to the belt drive area. When they opened the door, Nester saw layered smoke and water spraying but no open flames (Tr. 315, 721, 723). They checked both sides of the belt to determine the extent of the problem (Tr. 316), but they did not examine the belt all of the way to the longwall face (Tr. 729). Nester estimated that five to fifteen minutes passed before other miners, including McLaughlin, arrived (Tr. 319). Nester called Straface (Tr. 319). Straface wanted to know what the situation was. Ammons told Straface that the fire was out and that "everything was okay" (Tr. 320, 725).

Nester had to leave the belt drive area to make the call, and when he returned he saw Kennedy and Freeland. Nester asked Kennedy where the other longwall miners were, and Kennedy stated that he did not know (Tr. 321). Nester assumed the other crew members had evacuated the section (Tr. 322).

Subsequently, Nester, Kennedy, and Freeland went back to the

longwall section where they found the other miners (Tr. 323). Nester stated that although he was surprised to see the crew, he would not have been "if I knew when and at what time they knew the fire was out" (Tr.322).

Nester stated that if he had been on the longwall section and had been notified of the fire, he would have immediately evacuated the crew. He was trained to follow this procedure (Tr. 323-324). He stated, "[i]f we know where the fire is located [our responsibility] is to get outby that point" (Tr. 324-325) However, if he was notified subsequently that the fire was out and if the crew was not yet outby, he would not have evacuated them (Tr. 324).

MICHAEL AYERS

Michael Ayers was the president of the union local and a member of the mine safety committee. He did not work at the mine on March 15. When he came to work on March 16, Zupper complained to him that there had been a fire on March 15, and that the longwall crew had been stopped from evacuating. Ayers testified that the crew was concerned because the fire fighting evacuation program required miners "to evacuate and go outby" the fire if they received a fire signal at the headgate (Tr. 327; see also Tr. 329). In addition, the crew was supposed to notify the dispatcher that they were leaving, advise the dispatcher how many miners were in the group, and state the route they were taking (Tr. 329).

According to Ayers, on March 15, the fire sensor system was the primary means of fire detection and the CO monitor system was secondary, but Consol's miners were trained to respond to either system (Tr. 329).

MARVIN FISCHER

Marvin Fischer did electrical and mechanical work on the day shift. As part of his job, Fischer worked on the CO monitor system (Tr. 347). Fischer stated that there was a CO sensor over the belt drive so that the air coming across the drive would "hit" the sensor (Tr. 351, 357, 359). The next sensor was located at the regulator, approximately 100 feet from the belt drive (Id.). Given the location of the sensors, Fischer believed

that if there was a fire at the belt drive, the CO monitor system would have detected it and triggered an audible alarm at the CO monitor system station, which was located in the main mine office building, adjacent to the offices of mine management officials (Tr. 351-353). In his opinion people in those offices would have heard the alarm (Tr. 354).

SPENCER SHRIVER

Spencer Shriver is an electrical engineer and an MSHA mine inspector. Shriver conducts electrical inspections, as well as evaluates petitions for modification of standards. Shriver learned of the March 15 fire on March 17, when he was told about it by miners' representatives. (Tr. 362-363).

Shriver went to the mine office to check the CO monitor system print-out. At the office Shriver encountered Elmer Brooks, the mine's maintenance supervisor, who told Shriver that he had heard the CO system alarm on March 15, had called the dispatcher, and had told the dispatcher there was a fire alarm on the 16-M belt drive (Tr. 364, 375-376). Brooks also told Shriver that the audible alarm was confirmed by the CO system computer print-out (Id.).

When Shriver looked at that print-out, it showed that a fire warning indeed had been given. (The system gives a warning when CO reaches a level between 10 and 15 parts per million.) The print-out showed a reading of 11 parts per million, which, in a few seconds, rose much higher (Tr. 365).)

Later that day, Shriver spoke with Danny Ammons. Ammons told Shriver how he discovered the fire. Shriver's description of what Ammons said essentially tracked Ammon's testimony.

Shriver also spoke with Kennedy about the fire. Shriver's description of what he was told by Kennedy followed Kennedy's testimony. Similarly, Shriver's description of what Zupper told him paralleled Zupper's testimony (Tr. 369, 451, 453, 497), except that Zupper did not want to identify to Shriver the person who directed the crew to stay on the section. He would not tell Shriver whether the person was from management or was a rank and file miner (Tr. 373).

Nevertheless, Shriver came to believe that Welch was the person who had directed the crew to stay. Shriver's belief was based on a conversation he overheard. On March 24, 1993, another MSHA inspector asks Welch if Welch knew who told the crew to stay on the section and Shriver heard Welch reply that he, Welch, did (Tr. 385).

Shriver described the conversation this way:

> We were in a small room where the inspectors put their gear on, and I had heard some mention that the person who had called the section and told them to stay there was Mr. Welch, but he was pretty highly regarded by the rank and file people and they didn't want to name him.
>
> * * * *
>
> I wondered how we could determine who did call the people and ... Welch was standing in the doorway. And [the other inspector] says, very easily. He says, hey, Bob who called the 16-M section during the fire the other day and told them not to leave. And ... Welch said, well, I did (Tr. 457).

Shriver also maintained that subsequent to this conversation Welch again specifically stated that he told the crew to stay on the section (Tr. 471-472). Shriver therefore was of the opinion that Welch knowingly ordered, authorized, or carried out a violation of the evacuation program (Tr. 502).

Shriver was asked his views about whether or not McLaughlin knowingly failed to withdraw the affected miners. Shriver acknowledged that he did not speak with McLaughlin regarding his response to the fire. Shriver did not know where McLaughlin was when the fire occurred, or if McLaughin had given any orders regarding the fire (Tr. 414-415). Nor did he know when McLaughlin first reached the site of the fire (Tr. 470-471, 490). When he was asked if he believed McLaughlin knowingly ordered, authorized, or carried out the violation alleged, he replied, "I really don't have any information that would indicate that he did" (Tr. 501).

With regard to Straface, Shriver stated that he did not know for sure where Straface was when the fire occurred, but he assumed that Straface was not underground. Shriver recalled Straface describing what the company did regarding the fire and stating that he was prepared to bring water cars to the scene (Tr. 415). This indicated to Shriver that Straface knew about the fire (Tr. 473).

In a later meeting with MSHA that involved Shriver and Straface, Shriver remembered Straface saying that the company had made a mistake. Shriver interpreted this to mean that Straface conceded Consol should have evacuated the miners from the section (Tr. 473-474,502). However, he also agreed that he did not ask Straface what he meant and that during the meeting Straface argued vehemently that the company had done nothing wrong (Tr. 491-492).

Shriver testified that after interviewing the miners regarding the incident, he saw MSHA Inspector McDorman, who told Shriver that MSHA had learned enough to justify citing Consol for a violation of section 75.1101-23 in an order issued pursuant to section 104(d)(2) of the Act. The violation consisted of "having a fire and failing to evacuate the crew" (Tr. 369-370). (McDorman issued the order, and Shriver reviewed its contents and countersigned it (Gov. Exh. 6; Tr. 370-371, 405).)

Shriver believed that Consol violated Part II.A.2. of the fire evacuation program, which stated if a fire sensor system alarm occurred, persons in the affected area would be notified and would be immediately withdrawn to a location outby the affected area (Gov. Exh. 4 at 4; Tr. 377). Based upon what Kennedy told him, Shriver concluded that the fire sensor system alarm had indeed gone off on the 16-M section (Tr. 377). Shriver was asked what he understood "the affected area" to be. He responded that it was the 16-M belt drive, since that was the area involved in the fire (Tr. 376).

With regard to Part II.C. of the program, the part relating to the CO monitor system, Shriver maintained that Consol was required to follow it (Tr. 472-473). Shriver stated:

> At the time I assumed that [Part II.C.] did apply, since ... as I recall, ... [The CO monitor system] ...

had been ... partially installed for ... at least a year ... the only thing they had left to ... install ... was the final sensor up at the section ... and a[n] ... out station. So in all intents and purposes, the system was installed (Tr. 447-448).

Shriver also stated that as he understood the program, once a foreman or any management person knew there was a fire on a section, the person's first responsibility was to insure the crew was evacuated outby the affected area (Tr. 481).

> [A]s I read the plan, on belts, whether it's a fire sensor alarm or CO monitor alarm ... the plans calls to immediately withdraw the people to a location outby the affected area.
>
> * * * *
>
> If [the fire is] of a sufficient magnitude to set off one of these alarms, then the way I read it, the crew should be withdrawn ... . [T]he potential hazard of a fire out of control and the rapidity with which fire can get out of control, I think that's what causes these plans to be so demanding in getting the people off the sections and then figuring out what's wrong (Tr. 499-500).

It did not matter whether the fire lasted five seconds or fifteen minutes, the crew had to be evacuated (Tr. 500-501).

Regarding Consol's negligence in allegedly violating the program, Shriver agreed with McDorman that it was "high." Management officials knew of the fire yet directed the crew to remain on the section (Tr. 373).

Shriver believed the alleged violation was caused by Consol's unwarrantable failure because "management ... told the people to stay on the section even after a clear fire alarm had been sounded" (Tr. 404). Later, Shriver was asked if during the investigation he learned whether any management person at the mine actually knew that the fire alarm system had activated. Shriver responded, "[n]ot the point sensor fire alarm, no" (Tr. 411).

Shriver described the alleged violation as "extremely serious and potentially disastrous" (Tr. 387). Consol had experienced past fires at its mines and one, at the Blacksville No. 1 Mine, had resulted in fatalities (Tr. 386-387). He stated that the decision not to evacuate because the fire was out was "fraught with great danger" (Tr. 387). He explained, "[w]hen that decision had been made, no one had really walked the belt to see if any burning material had been carried back into ... the belt entry and possibly started another fire" (Tr. 387).

RICHARD McDORMAN

Richard McDorman was the regular inspector for MSHA at the Blacksville No. 2 Mine. In that capacity, he inspected all areas of the mine. McDorman was not at the mine on March 15, but he went on March 17. Shriver was also at the mine that day. When Shriver told McDorman he had received a complaint about a fire at the belt drive, the two inspectors began an investigation (Tr. 505-506).

While he was still above ground, McDorman looked at the on-shift examination book for March 15. The book contained no reference to a fire (McDorman subsequently issued a citation for failing to report a "hazardous condition" in the book (Tr. 508).)

McDorman then went underground to the 16-M section to talk with the crew. Zupper told McDorman there had been a fire, and he described how he learned of the fire and the crew's response to the fire. McDorman's description of what Zupper told him essentially paralleled Zupper's testimony, except that Zupper would not tell McDorman the name of the foreman who told the crew to remain on the section (Tr. 509-510, 535-536).

McDorman stated that he and Shriver jointly issued the contested order to Consol for violating its fire fighting and evacuation program (Tr. 511; Gov. Exh. 6A). McDorman indicated in the body of the order that five persons were affected by the alleged violation because he believed that number was not evacuated (Tr. 513). Further, he found the alleged violation was S&S because he knew of other belt fires in mines and of the results of those fires (Tr. 517).

Regarding the gravity of the alleged violation, he thought

the miners were subjected to the hazards of entrapment, of smoke inhalation, and of CO poisoning. Fires at other mines had resulted in miners dying from these causes (Tr. 515). Failing to evacuate affected personnel was dangerous because if the fire had gotten out of control, and intensified, it could have disrupted normal ventilation and smoke could have reached the face (Tr. 582-583, 590). Finally, because of Zupper's statement that a foreman said not to evacuate, McDorman found that mine management was highly negligent in failing to get the crew outby the fire (Tr.516,525,571). Mine management was responsible for following its fire fighting and evacuation plan (Tr. 521-522).

Subsequent to issuing the contested order, McDorman and Shriver modified it in several respects. One of the modifications indicated that the alleged violation also included a failure to withdraw the crew on the 17-M section (Gov. Exh. 6A at 4). McDorman explained that the escape route for that section traveled outby the 16-M belt drive. Because the crew on the 17-M section was inby the fire, they should have left the section and moved outby the fire (Tr. 518). Another modification changed the number of persons affected by the alleged violation from five to ten -- the number of miners working on both sections (Gov. Exh. 6A at 4; Tr. 519-520).

McDorman believed that Consol violated Part II.A.2. of the program, the part concerning the steps Consol had to take when the fire sensor alarm system was activated (Gov. Exh. 4 II A.2. at 4). Under Part II.A.2., persons in the affected area were required to be notified and to be immediately withdrawn to a location outby the area (Tr. 522-523). However, McDorman stated that he would have charged Consol with a violation even if the fire sensor alarm had not been activated, provided management had known there was a fire (Tr. 537).

McDorman did not know if the petition for modification allowing reliance on the CO monitor system was implemented on or before March 15 (Tr. 555-556). Nonetheless, he believed Consol also violated the CO monitor system part of the program, because a CO alarm sounded, but the crew was not withdrawn (Gov. Exh. 4 Part II.C.; Tr. 523).

Finally, McDorman believed Consol violated the part of the program that concerned the duties of the longwall section

personnel (Gov. Exh. 4 VII.B. at 8). Specifically, McDorman referenced section VII B.1.b., which required management to "[s]ee that all [longwall section] personnel are on the outby side of the fire and [are] accounted for" (Gov't Exh. 4 at 8; Tr. 584). McDorman stated the requirement applied whether the fire was at the face or was outby the section (Id.). (However, later he appeared to agree that this part of the plan was more applicable when of a fire occurred in the face area (Tr. 554-555).)

With regard to McLaughlin's involvement with the fire, McDorman stated that he had no knowledge regarding whether McLaughlin knowingly ordered, authorized, or carried out the violation (Tr. 587). With regard to Welch's involvement, the only thing McDorman knew was that Welch told Griffin to get the crew together and stay together (Tr. 562). With regard to Straface's involvement, Stewart told McDorman that Straface was on the mine telephone and that he prevented Stewart from doing his job (Tr. 563). McDorman never discussed Stewart's comments with Straface (Tr. 566).

HARRY C. VERAKIS

Harry C. Verakis is an MSHA supervisory engineer. He also has worked for MSHA as a supervisory physical scientist (Tr. 595-597). Part of Verakis' work for MSHA has involved the study of conveyor belt fires. He has participated in both large and small scale studies to determine what happens during such fires (Tr. 594-595). Verakis is the author of "Reducing the Fire Hazard of Mine Conveyor Belts," a paper that he presented at a mine ventilation symposium in 1991 (Gov. Exh. 8; Tr. 598).

Verakis testified that the studies in which he participated revealed that an entry air velocity of 300 feet per minute is the optimum for flame propagation (Tr. 606). Verakis agreed that on the 16-M section there was a lower velocity of air at the belt transfer point. However, rather than reduce the hazard, Verakis believed the velocity gave the fire a better chance to intensify (Tr. 610). In Verakis' opinion, if the fire was "fairly intense" it could have moved from the belt drive, up the entry, and toward the face (Tr. 638).

An additional hazard from the fire was that smoke and toxic

gases could have leaked into the track entry and moved toward the face (Tr. 612-614). However, Verakis admitted that the pressure differential between the track heading and the belt heading could have affected whether the smoke and fumes reached the face and that he did not know what the pressure differential was (Tr. 634-635).

In Verakis opinion, many variables dictated a fire's development and because of a fire's inherent unpredictability, miners always should be evacuated outby a fire (Tr. 613).

Verakis estimated that the March 15 fire produced temperatures of "at least a couple of thousand degrees Fahrenheit," temperatures sufficient to cause the conveyor belt, brattice material, and boards to burn. He further noted that these materials give off toxic fumes as they burn (Tr. 621-622). Verakis later agreed, however, that the conveyor belt could have become blistered by the heat without catching fire, and that he did not know if the belt actually had burned (Tr. 641-642).

In explaining the sudden burst of flames that Ammons saw upon opening the door at the belt drive, Verakis testified that there could have been a flashover caused by the friction of the belt rubbing against the belt drive drum. The rubbing could have loosened rubber and fabric particles from the belt and these particles, when mixed with the coal dust that usually is present at the belt drive, could have ignited suddenly. (Tr. 1034-1035).

CRAIG YANAK

Craig Yanak, who testified on Consol's behalf, was the company's regional supervisor for dust and noise control. Part of his duties involved the gathering of information for fire fighting and evacuation programs. He was extensively involved in the development of the fire fighting and evacuation program that was in effect on March 15 (Tr. 676-677). With regard to the part of the program relating to the fire sensor system (Part II. A.&B.) Yanak agreed that it was supposed to remain in effect until the petition for modification was implemented. After implementation of the petition, the provisions relating to the CO system (Part II.C.) were supposed to take effect.

Yanak identified a letter from Consol to MSHA dated

September 15, 1994, which stated that Consol was implementing the petition for modification effective that date (Exh. R. 3; Tr. 678-679). This letter was acknowledged by the MSHA district manager on September 26, 1994 (Resp. Exh. 4; Tr. 681-682). Therefore, in Yanak's view, on March 15, 1993, Consol was not operating under Part II.C. of the plan (Tr. 679-681).

Yanak explained the structure of the approved and adopted program by stating that there were only two parts of the program whose effect was conditioned upon a timetable:

> [W]e have two system here that we're addressing [in the plan]. One of them is a ...[fire] sensor system. And one part is a CO monitoring system.
>
> * * * *
>
> Either one or the other is going to be in effect. One will be in effect prior to the implementation [of the petition for modification]. The other would be in effect after the implementation. But all other parts of the plan [are] in effect regardless of whether its implemented or not implemented (Tr. 684).

ROBERT CHURCH

Robert Church, who testified for Consol, was the company's regional safety inspector. Church investigated and reported on the March 15 fire. According to Church, he determined from speaking with the people who were present at the belt transfer area that the fire lasted from one and one-half to two minutes. It resulted in the blistering of the belt in one area and the charring of two brattice boards. Because of the damage, the belt had to be spliced. Also, the grooves on the drive rollers were slightly damaged (Tr. 692-693, 707).

Church testified that the CO sensor printout indicated CO rising from 11 parts per million to a much higher level in a matter of seconds (Tr. 693). In addition, the CO monitor system gave an audible warning. He determined that Elmer Brooks, the maintenance supervisor, heard the warning and Church believed that Straface heard it as well. Straface's office was located about 20 feet from the alarm (Tr. 705). Stewart was notified of

the CO monitor alarm, but he already knew about the fire (Tr. 693).

Church believed that Stewart was in the process of evacuating the mine and getting water cars to the area when the fire was extinguished (Tr. 694). Straface told Church that all of this occurred within three to five minutes (Id, 796).

Church accompanied Shriver during Shriver's March 17, investigation of the fire. Church did not recall what he told Shriver about the fire (Tr. 708).

In Church's opinion, the miner's were not evacuated because:

> [T]he fire was extinguished prior to everyone even being notified there was a fire. And once the fire was extinguished and we were assured there were no further problems, we [saw] no reason to continue with the evacuation (Tr. 711).

According to Church, the fact that miners were not withdrawn under these circumstances was consistent with the policy then in effect at the mine (Tr. 712).

JOHN SWEETER

John Sweeter, a day shift foreman, testified for Consol. On March 15, he was outby the face on the 17-M section when a member of the crew told him Stewart was on the telephone yelling "something about a fire" (Tr. 735). Sweeter and the miner ran to the telephone and Stewart called the dispatcher who advised Sweeter that there was a fire at the 16-M belt drive. Stewart told Sweeter he was notifying others in addition to Sweeter and that he had water cars coming to the scene (Tr. 736). Sweeter sent the miner back to the 17-M section crew with instructions to tell them of the fire, to get the crew together, and to have them go to the telephone and contact the dispatcher (Id.).

Sweeter got in a jeep and headed for the 16-M belt drive. On the way, he called Stewart on the trolley phone to tell him he was going to the scene of the fire, and Stewart told him the fire was out (Tr. 737, 751). (Sweeter estimated that perhaps two minutes elapsed between the time he first called the dispatcher

and the time he was told the fire was out (Tr. 738, 745).)

When Sweeter reached the belt drive he observed blistering on the belt, but Sweeter did not recall how much of the belt was affected (Tr. 746-747). He also noticed that some boards were charred (Tr. 746).

Sweeter confirmed that the 17-M section was inby the 16-M section in terms of ventilation. He stated that if there was a fire at the 16-M section, "and it's still in progress," it would have been prudent to withdraw the crew on the 17-M section outby the fire (Tr. 749, see also Tr. 748-749). He stated he did not know if the 17-M crew was withdrawn (Tr. 749-750).

CHARLES BANE

Charles Bane, the company's regional manager of safety, testified for Consol. He was in charge of safety at Consol's northern West Virginia mines. His duties included the development of safety plans and policies for the company and he oversaw the Company's compliance with federal and state rules and regulations (Tr. 753). Bane helped develop and submit to MSHA the mine's program of evacuation (Gov. Exh. 4; Tr. 756-757, 761).

Blane described Consol's policy respecting Part II.A.&B. of the program. He explained that when the cause of a fire sensor alarm was unknown, Consol treated the situation as though there was a fire (Tr. 767). He stated, "[i]f we have an alarm and we don't know the reason for it -- we assume that with the fire alarm we have a fire ... [W]e respond to those alarms" (Tr. 765, 774).

He further explained, in effect, that if an alarm was activated and Consol knew first-hand that there was no fire, (for example, Consol knew the alarm was a mistake); or, if an alarm was activated and Consol knew that although there had been a fire, it was extinguished, Consol would consider that information and not require miners to evacuate (Tr. 779-780). This was what he intended when he wrote the program (Tr. 780). According to Bane, the program contained an underlying and unstated assumption that for Consol to take action under the program there had to be an "ongoing" fire.

Counsel for the Secretary questioned Bane about this:

Q. [T]hroughout this plan there is one emphasis and that is when a fire is discovered and its location known, the responsible foreman and those that have the responsibility are to get their people outby the fire; is that not correct?

A. I don't think anybody would deny that. If we have an ongoing fire, yes, sir, we would get everybody outby as soon as possible

Q. It doesn't say anything in here about an ongoing fire, it's just a fire.

A. I don't think anybody would deny that. If we have an ongoing fire, yes, sir, we would get everybody outby as soon as possible.

* * * *

Q. Outby the fire?

A. If it continues to burn, yes, sir (Tr. 789-790)

Bane summarized why, in Consol's view, it did not violate the program: "[T]he fire was put out before the people ever got gathered. So [at] that point, there was no longer a fire, so then there's not an evacuation process" (Tr. 794).

Finally, as the author of the plan, Bane maintained that Part VII applied only if the fire occurred on the section (Tr. 786). That was why certain assignments were specified in Part VII for various miners of the section crew (Tr. 787).

ROBERT WELCH

Welch testified on behalf of and himself Consol. He stated that on March 15, he was working near the bottom of the portal shaft, at the dumping shanty. This is the area where miners entered and left the mine and where coal was lifted from the mine (Tr. 809). Welch's duties that day were to monitor and coordinate with the dispatcher, Stewart, the availability of mine

cars that shuttled coal from the longwall sections (Tr. 810). At the dumping shanty Welch communicated throughout the mine and to the surface by using the mine telephone. He also had access to the trolley radio telephone system (Tr. 811-812).

Shortly after noon, Welch heard a signal that sounded when the dispatcher set off emergency warning lights somewhere in the mine (Tr. 813-814). Welch immediately thought something major had gone wrong. He picked up the telephone and listened. He heard nothing. He paged the dispatcher and asked him what had happened. Steward responded that there was a fire at the 16-M belt drive. (Tr. 815)

Welch testified that he told Stewart to turn other emergency lights on and to send a water car to the area. Welch also advised Stewart that he would stay on the line and when miners responded to the lights he would tell them about the fire and let Stewart know which miners had responded (Tr. 815).

The first person with whom Welch spoke was either Griffin or Zupper; Welch could not recall which. He told the person that there was a fire at the belt drive and that the person should get everyone on the section together and call back (Tr. 817). It was important to gather the crew so that its members would not separate and go in different directions.

Not more than five minutes later, Griffin called Welch (Tr. 820, 841). Welch asked Griffin if everyone on the crew was together. Griffin responded, "no, not yet," and Welch again stated that everyone should be brought together and then he should be called back (Tr. 820). Welch was asked by counsel for the Secretary why he did not tell the crew to evacuate. He replied, "the least you put on to a person in a situation like this ... the better off you are" (Tr. 840).

In the meantime, Stewart activated emergency lights in other sections of the mine, and other crews began to come on the telephone line and ask what had happened. Welch testified that he and Stewart responded to the inquiries by telling the other miners to stand by, that there was a problem (Tr. 821).

Also, Straface called Welch. According to Welch, Straface asked what was being done with respect to the problem (Tr. 857-

858). Welch advised Straface that he and Stewart "had things under control". (Tr. 849). Welch maintained that at the time he spoke with Staface, he was taking the steps necessary to evacuate the 16-M crew, in that he had notified them of the situation and advised them to prepare to evacuate (Tr. 851).

Before Welch heard again from the miners on the 16-M section, the tipple operator stated over the telephone that the fire was out. Shortly thereafter, there was a second call over the line. It was either Nester or Ammons. Whomever it was confirmed that the fire was extinguished (Tr. 823).

Subsequently, Zupper called. He told Welch the crew was with him and that they were ready to leave the section. Welch replied, "[t]he fire is out ... just stay in fresh air and monitor the telephone" (Tr. 823, 841). Welch testified he was satisfied that the crew was no longer in danger. Welch stated the only reason he did not tell the crew to evacuate was because he believed the fire was out (Tr. 825-826). He also stated that, although he could have ordered the crew to evacuate outby the site of the fire, he was concerned about the miners' physical condition and the possibility that if they had to move at a fast pace one or more of them might have had a heart attack and that he would have caused it (Tr. 823-824, 843). At no point subsequent to the fire did any member of the crew complain that Welch had not ordered them to evacuate the section; nor did Stewart complain (Tr. 827-828).

Welch did not ask anyone about the extent of the fire or about its effect on the ventilation of the longwall section. If the fire had created a problem with the ventilation he was sure he would have been notified by Stewart or by someone on the section (Tr. 844-845).

From his position in the dumping shanty, Welch had no knowledge as to whether or not a heat sensor system alarm and/or a CO monitor system alarm was activated (Tr. 826).

Welch also testified that at the time of the fire McLaughlin was in another part of the mine, a good distance away from the 16-M belt drive. After Welch heard Stewart tell McLaughlin there was a fire on the belt drive, he heard McLaughlin respond that he wanted to go to the fires site (Tr. 829). While McLaughlin was

in route, Welch heard McLaughlin call Stewart and ask if the water cars were on their way (Tr. 830). A short time later Welch heard Stewart tell McLaughlin that the fire was out. McLaughlin replied that he still wanted to go to the area. The last thing Welch heard was McLaughlin stating he was at the belt drive (Tr. 831).

JOHN STRAFACE

Straface testified on behalf of himself and Consol. According to Straface, he first became aware of the fire on the 16-M section when Stewart notified him over the telephone (Tr. 860). Straface called Welch at the dumper shanty and asked if Welch knew anything about the situation. Welch replied that Steward had told him the same thing (Tr. 860-861).

Straface stated that he assumed the worst. As a result, he wanted the full mine evacuation plan to be implemented (Tr. 861). As Straface recalled, he was told either by Welch or Stewart, that the 16-M section and the 17-M section crews had been notified of the fire and Straface requested that the entire mine be notified (Tr. 861-862, 904). Further, Straface asked if water cars were on the way to the belt drive and was told that had been taken care of. Straface stated that he put Welch in charge of monitoring the situation and taking care of the evacuation (Tr. 863). Straface denied that he ever told Stewart to stay off the mine phone system (Tr. 864).

On cross-examination, Straface stated that he did not give specific instructions to Welch or anyone else concerning the 16-M section or any other section, rather, his instructions were simply "to initiate the evacuation" (Tr. 889).

According to Straface, McLaughlin called him on the trolley telephone, and wanted to know if water cars were on their way to the belt drive. Straface told McLaughlin that everything was taken care of and to go to the fire (tr. 891).

After that, Straface monitored the mine telephone system "on and off" (Tr. 888). At one point he overheard Welch tell someone from the 16-M crew to get the crew together and to call back. Straface did not disagree with this (Tr. 894-895). Straface did not talk to the crew; he did not interrupt to say that once the

crew got together they should go outby the fire. He just assumed it would happen (Tr. 865, 890).)

A short while later, he overheard Ammons tell someone that the fire was out. Straface believed that Ammons was talking to Stewart (Tr. 865, 888). Straface stated that he wanted to speak with Nester in order to verify the fire was extinguished. Nester called him and stated that the fire was out, that there was no longer a problem, and that everything had been taken care of (Tr. 865). Later, he also overheard a conversation in which Welch told someone from the crew that the fire was out and to stay by the phone (Tr. 866). Straface did not say anything. He believed that Welch had given the crew the right instructions (Tr. 867, 895-896).

Straface went underground about 30 to 45 minutes after learning that the fire was out (Tr. 868). When he arrived at the belt drive, Straface observed damage to the belt. Approximately 40 to 50 feet outby the belt drive, the belt was blistered and some of the rubber had "bubbled up" (Tr. 868-869). In addition, there was damage to some wooden boards used for guarding (Id.).

Subsequent to the fire, Stewart spoke with Straface. Stewart was upset that his duties had been taken away. Straface stated:

> He felt that ... he was not given the right to direct the underground communication and traveling. I told [Stewart] that I think that he did his job properly and that I did my job properly. That if there was a problem underground and I was available, that I was going to help him and monitor what he did and if I didn't think what he was doing was right, I would change it. If I felt what he was doing was proper, that would be fine. But I was in charge of the coal mine, I would be ultimately responsible for the results of the incident and if it was going to be done right or wrong, I wanted to ... [know] about it, I'd make the decision (Tr. 876).

Straface denied that he ever told Stewart to stay off the telephone (Tr. 876). He asserted that he asked Welch to monitor the situation because:

> There are other people working in the [mine] besides the people on the production section. And it's very difficult for one person to try to find 150 people. So it would seem proper to have more than one person trying to ... make sure that everybody was evacuated and that we didn't leave somebody on the belt line shoveling the belt somewhere .... I just wanted more than one person to monitor what was going on (Tr. 885-886).

During cross-examination Straface was asked why the affected miners were not evacuated outby the fire, and he replied:

> They didn't evacuate because the fire was out .... It was a timing situation that by the time they gathered, [and] they called and notified that they were gathered and leaving, the fire was out (Tr. 882).

Straface believed there was not a violation of the approved and adopted program of evacuation procedures because:

> [I]f there's a fire, we evacuate. If there's an unknown situation, if there's a fire alarm that's unknown, we evacuate. If the situation becomes known, you react to the known (Tr. 902).

Here, he had know that the fire was out.

SAMUEL McLAUGHLIN

McLaughlin testified that he became aware of the fire when he was on the other side of the mine. A miner said that Stewart was trying to reach him on the trolley telephone. McLaughlin went to his jeep to speak with Stewart and Stewart told him there was a fire on the 16-M belt drive. McLaughlin jumped in the jeep and asked Stewart for clearance to travel to the 16-M section (Tr. 907). McLaughlin estimated that he was approximately 15 to 25 minutes away from the section (Tr. 908).

At a main junction, McLaughlin left the jeep to throw a rail switch. A mine telephone was near the switch. McLaughlin picked up the telephone and "hollered" for the dispatcher. Straface, not Stewart, came on the telephone and McLaughlin asked if the

crews had been notified of the fire and if water cars were ready. Straface responded that these things had been taken care of (Tr. 909).

McLaughlin resumed his trip to the section. Before he reached the belt drive, Stewart came on the trolley telephone and told McLaughin to take his time, that the fire was out (Tr. 910).

Once at the belt drive, McLaughlin got out of the jeep near an overcast. Nester and several other mines were there. McLaughlin did not ask where the crew from the 16-M section was (Tr. 926-927). Nor did he ask if the belt had been patrolled for fire from the point of the fire inby to the longwall face (Tr. 927). McLaughlin entered the belt drive area. The sprinkler was off and there was no smoke. However, when he approached the belt drive he could smell charred wood (Tr. 916).

After his examination of the belt and the belt drive, McLaughlin went to the telephone by the belt transfer area. He called Straface and told him about the damage (Tr. 920).

McLaughlin was asked by counsel for the Secretary whether he agreed that the fire evacuation program required "people to be withdrawn ... out by that fire immediately" once a fire was known to exist. McLaughlin replied it did (Tr. 930).

JOHN LEVO

John Levo, the ventilation foreman at the mine, testified on behalf of Consol. Levo stated that on March 15, he was with McLaughlin, on the other side of the mine, when Stewart called and stated that he wanted to talk to McLaughlin because there was a fire on the 16-M section. Levo got McLaughlin and they left in a jeep for the section (Tr. 934). At the point where a switch had to be thrown, McLaughlin got out of the jeep and called someone on a telephone. Levo did not hear the conversation (Tr. 935).

Levo and McLaughlin resumed their travel. Along the way, Stewart called over the trolley telephone and stated that the fire was out, that there was no emergency, but that they should continue on to the section (Tr. 936).

It took approximately 20 to 25 minutes to reach the section. Once there, McLaughlin left the jeep and walked to the belt drive. Levo parked the jeep and he too walked to the belt drive. Levo did not observe anything that was flaming, or smouldering, or hot (Tr. 937). The area was wet from the fire suppression system (Tr. 955).

DONALD MITCHELL

Donald Mitchell, a self-employed mining consultant specializing in ventilation, mine fires, and mine explosions, testified on behalf of Consol (Tr. 956). Mitchell is a recognized authority on mine fires and at the time of the hearing, he was completing the third edition of a book entitled Mine Fires. Mitchell described the book as a "best seller" in the mining industry (Tr. 961). In addition, Mitchell was instrumental in introducing CO monitor systems to the United States. Mitchell was permitted to testify as an expert with respect to mine fires, mine ventilation, and CO monitor systems (Tr. 961-962).

Mitchell described the air pressure differential between the 16-M section track entry and the 16-M section belt entry (Tr. 967). He stated that at the overcast, the track entry pressure was six-tenths of an inch higher than the belt entry pressure. Along the rest of the belt entry, the track entry pressure also was higher. The difference measured between four-tenths of an inch to three-tenths of an inch. Mitchell believed the pressure differential dictated how smoke would travel.

According to Mitchell, it was virtually impossible for smoke to pass from the belt to the track entry and to the face. Because of the difference in the pressure, if air leaked between two entries it would flow from the track entry into the belt entry, not the other way around. Therefore, smoke would stay in the belt entry and would exhaust through the regulator and the return.

The only way smoke could travel to the face was if massive roof falls stopped ventilation in the belt entry. Then, the smoke would have no place to go but back into the track entry and up the entry to the face (Tr. 970, 973). However, in Mitchell's opinion, it would take a fire of significant intensity and of up to ten hours duration to cause such roof falls (Tr. 970, 1031).

Mitchell did not believe that on March 15, the crew on the 16-M longwall section was in any danger from smoke or CO (Tr.970).

In Mitchell's opinion the March 15 fire was of a low intensity (Tr. 985, 1016). He estimated that it produced temperatures of more than 200° F but of less than 380° F, the temperature at which conveyor belting ignites (Tr. 977). An intense fire would have left more evidence than bubbling on the belt and charring on the brattice boards (Tr. 1017).

Mitchell believed the fire was caused by friction at the belt drive when the belt slipped around the drum (Tr. 992, 993). This raised the temperature on part of the belt to above 280°, and the belt bubbled (Tr. 992). In his view, the only things that actually burned were the brattice boards. They were white pine, which, according to Mitchell, burns at the relatively low temperature of 200° (Tr. 992-993). The wood, being the most ignitable substance in the area, was smouldering and when Ammons opened the door, the increased air caused the boards to flare up (Tr. 993-995).

RESOLUTION OF THE ISSUES
DOCKET NO. WEVA 94-57
THE CONTESTED VIOLATION

ORDER NO.	DATE	30 C.F.R.
3118640	3/17/93	75.1101-23(a)

The order states, in pertinent part:

> The fire fighting plan and evacuation plan was not followed at 16M section on 3-15-93. A fire occurred at the 16M belt drive at approximately 13:15 hrs. Mine management did not assure that those persons ... in the affected area be immediately withdrawn outby ... the affected area. The ... workers did not leave the section .... This presents the hazard of entrapment due to fire, smoke inhalation, and/or carbon monoxide poisoning. Management is responsible for insuring that the provisions of this plan be complied with and in this case did not insure that 16M Section was evacuated. Gov. Exh. 6A at 1).

THE STANDARD

Section 75.1101-23(a) requires an operator of an underground coal mine to "adopt a program for the instruction of all miners in...proper evacuation procedures to be followed in the event of an emergency". The standard also requires the program to be approved by the MSHA district manager. In addition, section 75.1101-23(a)(1)(i) requires that the approved program include "a specific fire...evacuation plan designed to acquaint miners...with procedures for..[e]vacuation of all miners not required for fire fighting activities[.]"

The standard is one of several that require an operator to adopt and the Secretary to approve safety-related plans and programs (see e.g. 30 C.F.R. § 75.200 (mine roof control plans), 30 C.F.R. § 75.370 (ventilation plans), 30 C.F.R. §75.1702 (smoking prevention programs)).

It is an axiom of mine safety law that the provisions of such required plans and programs, once adopted and approved, are enforceable as though they are mandatory safety standards (see, Zeigler Coal Co. v. Kleppe, 536 F.2d 389 (D.C. Cir. 1976) (provisions of ventilation plan enforceable as mandatory standards); Zeigler Coal Company, 2 IBMA 216 (1973) (provisions of roof control plan enforceable as mandatory standards)). Thus, once an evacuation program has been adopted by an operator and approved by the district manager pursuant to section 75.1101-23(a), the operator is required to comply with its provisions and the provisions are enforceable as mandatory safety standards.

INTERPRETATION OF THE PROGRAM

The Commission has made it clear that when determining whether there has been compliance with an approved and adopted program, a judge must look at the words of the program as written. However, the judge may not read the words in isolation so as to render any part of the program meaningless or superfluous. Rather, the words of a particular provision must be interpreted consistent with the program as a whole and consistent with program's purpose. ("It is well established that the provisions of the same document must be read and interpreted consistently with each other and that effect must be given to each part of a document to avoid making any word meaningless or

superfluous" (Mettiki Coal Corporation, 13 FMSHRC 3, 7 (January 1991); see also Shamrock Coal Company, 5 FMSHRC 845, 848-849 (May 1983)).

Moreover, although the Secretary's approval is required for a program to take effect, the program is first and last the operator's. The operator drafts it and the operator implements it. The operator's duty of authorship carries with it a concomitant duty of precision. Therefore, as a general rule, the author-operator will not be heard to argue that imprecise wording or drafting permits a result inconsistent with the overall safety objectives of the program.

RELEVANT PARTS OF CONSOL'S PROGRAM

The subject program implemented the regulation by setting forth evacuation procedures miners and management were required to follow upon the activation of a fire sensor system alarm (Gov. Exh. 4 II.A.&B. at 4); upon activation of the CO monitor system (Id. II.C. at 5); and by setting forth fire fighting and evacuation procedures that were required to be followed by specified mine personnel in the event of a fire (Id. III - VII at 5-8). The efficacy of the provisions relating to the fire sensor system and the CO monitor system was conditioned upon implementation of the petition for modification that authorized reliance upon the CO monitor system. The fire sensor system provisions were to be in effect until implementation of the petition, and the CO monitor system provisions were to be in effect after implementation.

There was confusion among the Secretary's witnesses regarding whether Consol was required to follow the provisions relating to the CO monitor system on March 15. Inspector McDorman did not know if the petition for modification had been implemented on or before March 15, and therefore he could not say whether Consol was required to follow Part II.C. (Tr. 555-556). Inspector Strahin thought that Consol "probably" was not required to follow Part II.C. (Tr. 84-86). On the other hand, Inspector Shriver stated that for "all intents and purposes, the [CO monitor] system was installed" and Consol should have followed the requirements relating to that system (Tr. 446-448).

Similar confusion was not evidenced by Consol. Yanak stated

categorically that Consol was not required to follow Part II.C. because the petition for modification had not been implemented. Yanak pointed to a letter dated September 15, 1994, in which he advised the MSHA district manager, on behalf of Straface, that the CO monitoring system was "installed and in operation" in compliance with the petition. He also noted the district manager's September 26, 1994, acknowledgment of the letter (Resp. Exhs. 3 and 4).

Just as an operator cannot be heard to argue that imprecise or poorly drafted language permits a result at odds with the overall safety objectives of a required program, so MSHA, cannot be heard to argue that clear language it has approved does not mean what it says. The program specifically conditioned the effectiveness of its fire sensor system requirements and of its CO monitor system requirements upon the implementation of the petition for modification. Therefore, both parts cannot have been in effect simultaneously (see Tr. 684). Yanak's testimony that the MSHA district manager's response of September 26, 1994, was an acknowledgment by MSHA that Consol had implemented the petition for modification on September 15, 1994, was not refuted by the Secretary (Tr. 682). Given this, and given the fact that Yanak's interpretation of the letters was eminently reasonable, I find that in fact the petition for modification was implemented within the meaning of the program on September 15, 1994.

Therefore, I conclude that on March 15, 1993, Consol was required to comply with the provisions of the program relating to the fire sensor system and not with the provisions relating to the CO monitoring system. Further, since no other parts of the program were conditioned upon a subsequent event, I conclude all of the rest of the program was in effect on the date of the fire.

CONSOL'S GENERAL AND SPECIFIC DUTIES TO EVACUATE MINERS

Having considered the program then in effect, I conclude further that on March 15, Consol had both general and specific duties to withdraw affected miners to a safe location outby the fire immediately upon indication of the existence of a fire.

Several provisions in the program implied the general requirement. Part II.A.1. required the withdrawal of persons in affected areas, except those needed to fight the fire, when the

fire sensor system alarm was activated and upon the positive identification of a fire. Part II.B.2. required the withdrawal of affected miners to a safe area when the fire sensor system trouble alarm was activated, even before the existence of a fire was confirmed. Part III.A.1. and Part III.A.5. required the dispatcher or other responsible person to alert all personnel inby the fire to the fire's location and to proceed with their evacuation. Part VII.A.1. required continuous miner section foremen to see that all section personnel were on the outby side of a fire and Part VII.B.1.b. placed the same duty on the foremen of longwall sections. (Consol's argument that part VII applied only if a fire was located on a section, is based on a much too restrictive reading of the program. Under it, a section foreman would have no duty to remove his or her crew from harms way if a fire occurred immediately outby the section, a result that clearly is at odds with the safety purposes of the program.)

When these provisions are read together, it is clear to me that the overall intent of the program was to remove miners inby a fire, or inby a suspected fire, from the affected area to a safe location outby. This overall intent implied a duty to act in order to further the purpose of the program--the protection of miners from the various hazards that can attend entrapment by fire. Consol's general duty is consistent with this purpose.

In addition to the general duty to evacuate affected miners inby a fire, the program imposed upon Consol the specific duties referenced above, the most pertinent of which was the duty to "immediately withdraw to a location outby the affected area" all persons in the affected area upon activation of a fire sensor system alarm (Gov. Exh. 4 II.A.2. at 4).

THE FACT OF VIOLATION

The parties agree there was a fire at the 16-M belt drive on March 15, and I credit the testimony of Kennedy that he knew of the fire both from being advised orally by the tipple operator and by the activation of the fire sensor system alarm (Tr. 121-122). I note especially that Kennedy's testimony the alarm activated was consistent with what he told Shriver within days of the incident (Tr. 377, 410, 451). It is also clear that mine management--especially Straface, Welch, and Sweeter--found out about the fire within minutes of the tipple operator learning of

it.

I further credit the consistent testimony of Zupper and the other members of the crew that they gathered and were ready to exit outby the fire, as they had been trained to do (Tr.125, 126, 142, 144). I find that in so doing the crew was preparing to withdraw "outby the affected area" in conformance with the program.

Consol did not dispute Talkie's testimony that the crew's evacuation was halted by instructions from Zupper (Tr. 235). Nor did it dispute that Zupper's instructions came as a result of a directive from Welch that the crew should stay on the section because the fire was out (Tr. 186-187). I note, as well, that Zupper's version of events was essentially consistent with Welch's own testimony of what happened (Tr. 823, 841). I also believe Welch's testimony that prior to telling Zupper not to evacuate the crew, he twice spoke with Griffin over the telephone but that he did not instruct Griffin, or anyone else for that matter, to evacuate outby the affected area (Tr. 820).

Nor were the miners on the 16-M Section the only ones not withdrawn from an affected area. The facts establish that the crew of the 17-M section was not withdrawn as required. McDorman stated his belief that the 17-M section was inby the 16-M belt drive and therefore was an area affected by the fire (Tr. 518). He testified that he amended the order to include the 17-M section after talking to Ayers and determining that the 17-M section crew was not evacuated (Tr.518; Gov. Exh. 6A at 4). Consol did not challenge McDorman's belief. Moreover, Sweeter agreed that at the time the fire started, the 17-M section was inby the 16-M section in terms of ventilation (Tr 748-749).

The existence of the fire, the fact that crew members of 16-M and 17-M sections were in affected areas inby the fire, the fact that the fire sensor alarm sounded on the 16-M section, the fact that mine management knew there was a fire, and the fact that miners on both sections were not evacuated outby the affected areas, establish that Consol violated its general duty immediately to withdraw the affected miners of the 16-M and 17-M sections to a safe location outby upon indication of the existence of a fire and its specific duty under Part II.A.2. to withdraw the 16-M section miners outby when the fire sensor alarm

activated. Therefore, I conclude that Consol violated the standard as charged.

In finding the violation, I reject Consol's contention that extinguishing the fire negated its duty to evacuate the crews. The program could have but did not state that any member of mine management could halt or otherwise cancel an evacuation because a fire had been extinguished and, as I have observed, the program was first and last the operator's. (See Gov. Exh. 4 V.A. (by implication permitting mine superintendent not to evacuate entire mine if fire is controlled.))

Moreover, I am persuaded that denying such a defense to Consol best effectuates the overall purpose of the plan. The miners were aware of a fire at another mine that had rekindled and cost miners their lives (Tr. 133,194,213,216.) They were rightly concerned about being caught in a similar situation. As Shriver noted, the fact that the fire was extinguished did not mean that potential ignition sources, which could have started another fire, had not been carried inby the immediate area of the fire (Tr. 387). Prudence mandated that those in the affected areas be evacuated and that areas inby the fire be thoroughly examined before miners were permitted to return to their duties.

Finally, I recognize that Charles Bane testified he intended the withdrawal requirements of the program to apply only when there was an "active fire" (Tr. 789). I also recognize that he did not state as much in the program. If there were proposed provisions of a program in dispute, the Secretary had the duty to negotiate in good faith with the operator (Jim Walter Resources, Inc., 9 FMSHRC at 907). But, the Secretary could not have been expected to negotiate over things Consol intended but did not state. If Consol now wishes its program to include a provision allowing it to halt, or not to initiate, the evacuation of miners if a fire is extinguished, it should include such a provision in a revised program and submit it to MSHA for approval.

S&S AND GRAVITY

A S&S 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 S&S, "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 Mathies Coal Co, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "S&S" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor 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 be 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.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-105 (5th Cir. 1988) (approving Mathies criteria).

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573,1574-75 (July 1984).

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation

(Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987)). Further, any determination of the S&S nature of a violation must be made in the context of continued normal mining operations (National Gypsum, 3 FMSHRC 327, 329 (March 1981); Halfway, Incorporated, 8 FMSHRC 8 (January 1986).

The Secretary has established that there was a violation of the mandatory safety standard. Further, he has established that the violation contributed to a discrete safety hazard. There was a fire at the belt drive and the miners on the 16-M section and the 17-M section were not withdrawn outby the fire. McDorman accurately described the hazard contributed to by the failure to withdraw the miners. There was the danger that the fire would intensify and would block the miners escape, or that smoke or toxic fumes from the fire would be carried inby and suffocate the miners before they could remove themselves from danger (Tr. 515). In addition, there was an added hazard that after the fire was extinguished at the belt drive, no one fully examined the belt line to determine if ignition sources had been carried inby (Tr.387). Failing to evacuate the miners obviously contributed to the hazard they faced.

Thus, the Secretary proved three of the four elements necessary to establish the S&S nature of the violation. However, he failed to establish that there was a reasonable likelihood that the hazard contributed to would have resulted in an injury.

The fire either was out when the miners on the 16-M and 17-M were not withdrawn or was extinguished shortly thereafter. Because the fire was extinguished so quickly, it was not reasonably likely that the fire at the belt drive would have intensified had normal mining operations continued.

Further, even if the fire was rekindled up the belt, it was not reasonably likely that the fire would have resulted in injury because there were heat sensors and CO monitors along the belt that again would have detected the presence of another fire, and made its rapid extinguishment likely. Thus any fire was likely to be of short duration and not of major intensity.

Further, given the ventilation system, it was not reasonably likely that the smoke and fumes would have gone to the face of

either section. McDorman agreed that the ventilation system normally would have carried smoke and toxic fumes away from the section and out the return (Tr. 582-583, 590). Mitchell, who essentially concurred with McDorman, persuasively and more fully explained that the air pressure differential between the track entry and the belt entry made it very unlikely that smoke ever would have traveled from the belt entry to the faces, barring a fire of "major intensity" and of up to 10 hours duration (Tr. 970, 973, 1031). (Verakis' contrary opinion (Tr. 612, 613, 614), was undercut when he agreed the pressure differential between the track and belt entries could have affected the ability of smoke and fumes to move into the track entry and that he did not know what the pressure differential was (Tr. 634-635).) Therefore, I conclude that an examination of the particular facts surrounding the violation of section 75.1101-23(a) precludes finding that the violation was S&S in nature.

However, those same facts do not preclude finding the violation was very serious. It is not incongruous for a non-S&S violation to be serious in nature. I note Chief Administrative Law Judge Paul Merlin's admonition that the term "S&S" is not synonymous with the concept of gravity (Consolidation Coal Co., 10 FMSHRC 1702, 1704 (December 1988)) and Administrative Law Judge William Fauver's careful explanation of the difference between the two concepts (Harlan Cumberland Coal Co., 12 FMSHRC 134, 140-141 (January 1990). As Judge Fauver stated:

> [Some violations] are serious because the safety and health standard involved is an important protection for the miners. Important safety ... or health standards are such, if they are routinely violated or trivialized substantial harm would be likely at some time, even if the likelihood that a single violation will cause harm may be remote or even slight.... Other mine safety ... violations are serious because they may combine with other conditions to set the stage for a mine accident or disaster (12 FMSHRC at 141).

To state that the standard Consol violated involved an "important protection for the miners" is profoundly to understate the matter. The evacuation of the miners could have meant the difference between life and death. It was possible an ignition source could have been carried elsewhere in the mine, and in such

a situation, Consol's failure could have set the stage for a major disaster. Or, to put the matter another way, all possibility of a disaster could have been prevented if Consol had complied with its program's withdrawal requirements and thus with the standard. For these reason I conclude that Consol's failure in this regard was very serious.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a miner operator in relation to a violation of the Act" (Emery Mining Corporation, 9 FMSHRC 1997 (December 1987)); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care" (Emery 9 FMSHRC at, 2003-04). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized that a heightened standard of care is required of such individuals (See Youghiogheny 9 FMSHRC at 2010-11; Peabody Coal Co., 14 FMSHRC 1258, 1261 (August 1992)).

I have concluded that under its approved and adopted program, Consol had both general and specific duties immediately to withdraw affected miners upon indication of the existence of a fire, that is, once it knew or had reason to believe there was a fire. Consol only could "know" about the fire through its officials, and the evidence overwhelming establishes they knew about the fire, knew miners were affected, and in the face of their knowledge, deliberately failed to order the miners outby.

When evaluating Consol's knowledge, I do not attribute much importance to Shriver's statement that he did not learn during his investigation that management personnel were aware the fire system alarm had been activated. Nor do I find compelling Welch's testimony that he did not know whether or not a fire sensor system alarm activated (Tr. 414, 826). Whether or not management personnel, including Welch, actually knew that the alarm went off, they knew through other means of the existence of the fire.

For example, Welch knew of the fire because Steward told him as much (Tr. 815). Once he knew, the program required that he

give priority to the withdrawal the miners. Yet, Welch did not immediately insist the miners evacuated outby the fire. Rather, according to his own testimony, he told Stewart to turn on the alarm light and to send water cars to the area (Tr. 820). In substituting his priorities for those of the approved program, Welch, and through Welch, Consol, exhibited an intentional disregard of the requirements of the program as it applied to the miners on the 16-M section.

Further, before Welch was told the fire was extinguished, he twice spoke with Griffin. He did not advise Griffin that the miners on the 16-M section should move outby the fire (Tr. 535, 562, 817, 820). Instead, Welch concentrated his instructions to the crew on the need to gather together. Although all of the witness who were asked agreed it was important for the miners to exit as a group (see, e.g., Tr. 87-88, 209, 329), Welch also had a responsibility on behalf of Consol to instruct the crew to evacuate outby the affected area, and he did not meet that responsibility. His excuse, that "the least you put on a person in a situation like this ... the better off your are," is really no excuse (Tr. 840); and his professed concern about the crew's physical condition and putting too much strain on the hearts of the crew members by ordering an evacuation is simply not credible (Tr. 823-824; 843).

Like Welch, Straface also knew of the fire. Straface found out about it from Stewart and from the CO monitor system alarm. Straface assumed responsibility from Stewart for coordinating management's response to the fire, something one might well expect of a mine superintendent. Straface testified that he "assumed the worst" and that he wanted the entire mine notified and the full evacuation plan put into effect (Tr. 861). However, although he knew of the fire and took full responsible for the company's reaction to it, and although he knew that there were miners inby the fire, he never ordered the miners to evacuate the affected areas.

Straface's failure, like Welch's, was inexcusable. As highly placed supervisory personnel, both had a heightened standard of care with regard to miners who were inby the fire. By failing to order the miners to leave the affected area, they, and therefore Consol, exhibited a serious lack of reasonable care toward the miners and unwarrantably failed to comply with the

adopted and proved program.

Unwarrantable failure likewise was exhibited toward the miners on the 17-M section. Straface clearly knew that there were miners on the 17-M section, yet he did not inquire whether they were evacuated. Further, day shift foreman Sweeter, who was outby the face of the 17-M section knew of the fire, yet did not order, or even discuss, their evacuation (Tr. 736, 748-750). In view of the program's withdrawal requirements and the fundamental importance of the requirements to miners' safety, these lapses represented more than ordinary negligence.

Virtually all of the Consol personnel who testified, attempted to excuse their failure to comply by asserting there was a policy at the mine that required an ongoing fire for miners to evacuate, (Tr. 709-710, 711-712, 790). I have rejected this excuse, and given the fact that the program does not address this "policy" and given the program's many references to withdrawal when a fire is signaled or confirmed, I conclude that this is not a situation where Consol exhibited a reasonable, good faith belief it was in compliance with its program, and hence did not unwarrantably fail to comply (see Southern Ohio Coal Co., 13 FMSHRC 912, 919 (June 1991), citing Utah Power and Light Co., 12 FMSHRC 965, 972 (May 1990). In other words, Consol did not show that it believed leaving the crew in the affected area was the "safest method of comply[ing]" with the mandate that they be removed (Southern Ohio Coal Co.,13 FMSHRC at 919).

Finally, because unwarrantable failure is more than ordinary negligence, in unwarrantably failing to meet its obligations under section 75.1101-23(a), Consol acted negligently as well.

HISTORY OF PREVIOUS VIOLATIONS

A computer printout of the assessed violations at the Blacksville No. 2 Mine for the 24 months prior to the date of the subject violation indicates that a total of 907 violations were cited and that one was a violation of section 75.1101-23 (Gov. Exh. 1). While the total number of violations is large, the number of violations of the standard at issue is small. The Secretary did not argue that the history of previous violations was such as to increase any penalty otherwise assessed, and I conclude that it should not (Tr. 658-661). However, because the

overall number of previous violations is large, I also conclude that the history is not such as to decrease any penalty otherwise assessed.

SIZE

The parties stipulated that Consol is a large operator (Tr. 12). Accordingly, the penalty assessed should be commensurate with its size.

ABILITY TO CONTINUE IN BUSINESS

Consol did not argue that the amount of any penalty assessed would adversely effect its ability to continue in business, and I conclude that it will not.

GOOD FAITH ABATEMENT

The violation was abated when the provisions of the approved and adopted program were discussed with all of the foremen and miners (Gov. Exh 6a). In the context of the violation, the discussion constituted good faith abatement.

CIVIL PENALTY ASSESSMENT

The Secretary proposed a civil penalty of $5,000 for the alleged violation. Having considered the statutory civil penalty criteria, and in view of the fact that the violation was not S&S but was nonetheless very serious and was caused by Consol's unwarrantable failure to comply, I assess a civil penalty of $4,000.

INDIVIDUAL CIVIL PENALTIES
DOCKET NO. WEVA 94-366

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY
3118640	3/17/93	75.1101-23	$4,500

The Secretary alleged that McLaughlin, as assistant mine superintendent, was aware of the requirements of the program and that a fire occurred, yet failed to withdraw the affected miners. However, after considering the testimony offered at the hearing, the Secretary moved to dismiss the section 110(c) allegations

against McLaughlin. The Secretary stated:

> Although McLaughlin did not insure that miners were withdrawn from section 16-M outby the fire, the evidence adduced at trial is insubstantial to indicate that ... McLaughlin participated in or was in a position to know of ... Welch's order to the 16-M section crew to stay on the section after the fire had been identified. Thus, the evidence adduced at trial indicates that ... McLaughlin had little reason to know whether or not the MSHA approved mine an evacuation plan had been violated (Motion to Dismiss 2-3).

McLaughlin and Consol did not oppose the motion.

The case is the Secretary's to bring and the Secretary's to prosecute. I do not question the Secretary's judgement in this regard. Indeed, I note that two of the Secretary's key witnesses, inspectors Shriver and McDorman, testified they found no evidence that caused them to believe that McLaughlin knowingly violated section 75.1101-23(a) (Tr. 507, 587).

The motion is GRANTED.

DOCKET NO. WEVA 94-368

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY
3118640	3/17/93	75.1101-23	$5,000

The Secretary alleged that Straface, as mine superintendent, was aware of the requirements of the program and that the fire occurred, yet failed to withdraw the affected miners.

KNOWING VIOLATION

The Commission has stated the meaning of "knowingly" as used in section 110(c)of the Act as follows:

> "[K]nowingly" ... does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has

> reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

92 F. Supp. at 780. We believe this interpretation is consistent with both the statutory language and the remedial intent of the ... Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute (Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd, 689 F.2d 623 (6th Cir. 1982).) (quoting U.S. v. Sweet Briar, Inc., 92 F. Supp. 777 (W.D.S.C. 1950)).

In addition, the Commission has held that to violate section 110(c), the corporate agent's conduct must be "aggravated", i.e., it must involve more than ordinary negligence. Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994); Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992).

Welch's testimony establishes that before the fire was extinguished, Straface knew of the fire, called Welch and inquired what was being done about it.

> Judge: [P]lease tell me when the conversation with ... Straface occurred in the chronology of the telephone conversations that you've had around this [fire] incident?
>
> Welch: [T]he lights had already went off and I had called ... Stewart and talked to him. Stewart was lining up motors to move his water cars and everything getting into position. And sometime in that period,... Straface called and asked what was going on.
>
> Judge: He called you directly?
>
> Welch: Yes, sir. But he had already talked to the dispatcher.

Judge: And at any point during the conversation, did ... Straface ask you what the problem was on the section?

Welch: No, sir, he knew what the problem was ... .

Judge: He knew there was a fire?

Welch: Yes, sir. (Tr.857-858)

Welch's testimony was thoroughly persuasive, and indeed, Straface confirmed that he first heard of the fire from Stewart (Tr. 860).

Straface's position is that upon learning of the fire he requested that the entire mine be notified of the fire and that he wanted a full evacuation plan of the mine to be implemented (Tr. 861-863). He also asked whether or not water cars were being brought to the scene (Tr. 863, 890). I take Straface at his word. I also accept as fact that Straface did not specifically instruct anyone concerning the evacuation of any section (Tr. 889), that he overheard Welch tell the miners to get together and that he did not interrupt or try to speak with the crew to advise them that once they were together they should evacuate (Tr. 980). Straface simply assumed that they would leave the section (Tr. 980). I further accept as a fact that Welch told Straface that he and Stewart "had things under control", that they were "taking care of the problem", and that Straface assumed this was true (Tr. 849).

I find, however, that Straface's assumptions were not enough to relieve Straface of personal liability. Straface was the superintendent. As Straface recognized, he was responsible for all that went on in the mine. ("I was in charge of the coal mine. I would be ultimately responsible for the results of the incident and if it was going to be done right or wrong, I wanted to ... [know] about it, I'd make the decision" (Tr. 876).)

Despite his assertion that he wanted to know the facts so he could "make the decision", Straface did not take the initiative required. He failed to make the critical and necessary inquiries regarding whether or not the crews had left the sections.

Consequently, he did not intervene to make certain they did. As the superintendent, Straface had an especially high standard of care to the company for whom he worked and to the miners who worked for him. That standard meant he was responsible ultimately to make certain there was full compliance with the program. Straface totally failed to meet the standard. In view of the potential dangers presented by the situation -- dangers that fortunately were not realized -- Straface's lack of a proactive response to the fire and his passive monitoring of the responses of others represented aggravated conduct--or put more accurately, represented an aggravated lack of conduct--and lead to his knowing violation of the cited standard.

This is not to say that Straface intentionally disregarded the program. However, an intentional violation is not necessary to establish a "knowing" violation. It is enough that prior to being advised the fire was out, Straface knew that there was a fire, knew miners were inby the fire yet took no action to make certain the miners were withdrawn (Kenny Richardson, 3 FMSHRC at 16).)

In addition, after Straface was informed the fire was extinguished, he heard Welch instruct the crew to stay where they were. He did not correct Welch because he believed Welch gave the crew the right instruction (Tr. 867, 895-896). Straface was wrong, and his high duty of care extended to a correct understanding and implementation of the program. The requirements of the program were not murky, convoluted, or ambiguous with regard to withdrawal in the event of a fire. The program did not contain a provision that withdrawal need not be carried out if the fire was extinguished. By failing to make certain the program was complied with as written, Straface exhibited more than an ordinary disregard of the care he owned the company and the miners.

I therefore conclude that Straface knowingly violated section 75.1101-23(a) and is personally liable pursuant to section 110(c) of the Act.

CIVIL PENALTY ASSESSMENT

This was a very serious violation, and Straface exhibited more than ordinary negligence in failing to insure the affected

miners were withdrawn as required. However, the Secretary proposed that both Straface and Consol pay the same penalty for violating section 75.1101-23(a). I find the proposal totally incongruous. Straface is an individual, Consol is a large company. I have assessed Consol a penalty of $4,000. I conclude that Straface should pay a civil penalty of $500. In reaching this conclusion, I note there is no suggestion Straface has a history of knowing violations of the Act and regulations.

DOCKET NO.WEVA 94-384

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY
3118640	3/17/93	75.1101-23	$3,500

The Secretary alleged that Welch, as mine foreman, was aware of the requirements of the program and that a fire occurred, yet failed to withdraw the affected miners.

KNOWING VIOLATION

Welch knew of the fire, and of the fact that the affected miners were not evacuated outby the affected area. He twice instructed the miners to gather and to call him back once they were assembled (Tr. 817, 820), yet Welch said nothing to the miners about evacuating outby the affected area, because, as he stated, "the least you put on a person in a situation like this ... the better off you are" (Tr. 840).

I conclude that Welch knowingly violated the standard when in the face of certain knowledge of a fire he failed to insure that there was compliance with the general requirement of the program that all miners inby the fire be evacuated. Moreover, when Welch learned the fire was extinguished and he purposefully told the miners to stay on the section, he also knowingly violated the program. The program did not contain a provision allowing the withdrawal of miners to be halted or canceled if the fire was extinguished.

Welch, as mine foreman, had almost as high a duty of care to his employer and to those who worked for him as did Straface. Welch's failure to make certain the program was enforced was more than ordinary negligence. As I have found with regard to Straface, the wording of the program was not obscure, and it was

not for Welch to imply into the program preconditions to evacuation the program did not state. I cannot find that Welch had a reasonable belief that failing to make certain the miners left the affected area was permitted under the program.

Further, in the face of the potential danger to the miners, dangers that included the possibility that ignition sources could have been carried inby prior to the fire being extinguished, his excuses for failing to insure withdrawal -- his reluctance "to put too much" on the crew and his fears that evacuation would be a physical strain -- were patently unconvincing (Tr. 840, 823-824, 843).

I therefore conclude that Welch knowingly violated Section 75.1101-23(a) and is personally liable pursuant to section 110(c)of the Act.

CIVIL PENALTY ASSESSMENT

This was a very serious violation, and Welch exhibited more than ordinary negligence in failing to insure the affected miners were withdrawn outby the affected areas. The Secretary proposed that Welch pay a civil penalty of $3,500. As with the proposal for Straface, I find it incongruous that the Secretary proposed Consol pay a penalty of $5,000 and that the individual mine foreman pay a penalty of $3,500.

While Welch knowingly violated the standard, and while his duty of care was high, it was not quite as high as the superintendent's. Consequently, I conclude that Welch should pay a civil penalty of $400. In reaching this conclusion, I note that there is no suggestion that Welch has a history of knowing violations of the Act and regulations.

SETTLED VIOLATIONS
DOCKET NO. WEVA 94-57

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY	SETTLEMENT
3122444	4/22/93	75.400	$5,000	$4,000

(The parties agreed for the purposes of litigation efficiency to reduce the penalty by $1,000. The findings set forth in the order remain the same (Tr. 1053).)

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY	SETTLEMENT
3122447	4/26/93	75.370(a)(1)	$5,000	$2,000

(The Secretary agreed to modify the negligence finding from high to moderate and to modify the order to a citation issued pursuant to section 104(a) of the Act (Tr. 1050-1051).)

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY	SETTLEMENT
3122415	5/19/93	75.360(g)	$9,500	$0

(The Secretary stated that after taking deposition testimony and reviewing further information regarding the allegations, he concluded that there was insufficient evidence to establish the alleged violation. The Secretary moved to vacate the order and the motion was granted (Tr. 1051-1052).)

Each of the settlements was approved on the record. Because I continue to believe the settlements are reasonable and in the public interest, the approvals are CONFIRMED.

ORDER

DOCKET NO. WEVA 94-57

ORDER NO.	DATE	30 C.F.R.
3118640	3/17/93	75.1101-23(a)

The Secretary is **ORDERED** to delete the S&S finding and to modify the order accordingly. Consol is ORDERED to pay a civil penalty of $4,000 within 30 days of the date of this decision.

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY	SETTLEMENT
3122444	4/22/93	75.400	$5,000	$4,000

Consol is **ORDERED** to pay a civil penalty of $4,000 within 30 days of the date of this decision.

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY	SETTLEMENT
3122447	4/26/93	75.370(a)(1)	$5,000	$2,000

The Secretary is **ORDERED** to modify the negligence finding from high to moderate and to modify the order to a citation issued pursuant to section 104(a) of the Act. Consol is ORDERED

to pay a civil penalty of $2,000 within 30 days of the date of this decision.

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY
3122415	5/19/93	75.360(g)	$9,500

The Secretary is **ORDERED** to vacate the order.

DOCKET NO. WEVA 94-366

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY
3118640	3/17/93	75.1101-23	$4,500

Docket No. WEVA 94-366 is DISMISSED.

DOCKET NO.WEVA 94-368

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY	ASSESSED PENALTY
3118640	3/17/93	75.1101-23	$5,000	$500

Straface is **ORDERED** to pay a civil penalty of $500 within 30 days of the date of this decision.

DOCKET NO.WEVA 94-384

ORDER NO.	DATE	30 C.F.R.	PROPOSED PENALTY	ASSESSED PENALTY
3118640	3/17/93	75.1101-23	$3,500	$400

Welch is **ORDERED** to pay a civil penalty of $400 within 30 days of the date of this decision.

Upon receipt of payments and modification and vacation of the orders, Docket Nos. WEVA 94-57, WEVA 94-368, WEVA 94-384 are **DISMISSED**.

David F. Barbour
Administrative Law Judge

Distribution:

James B. Crawford, Esq., Office of the Solicitor, U.S. Dept. of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203 (Certified Mail)

Elizabeth S. Chamberlin, Esq., Consol Inc., 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Stephen D. Williams, Esq., Steptoe & Johnson, 6th Floor, P.O. Box 2190, Bank One Center, Clarksburg, WV 26302 (Certified Mail)

nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
July 26, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 96-41-M A. C. No. 03-00039-05512A
v.	:	West Fork Quarry & Plant
WILLIAM W. LONG, EMPLOYED BY APAC, ARKANSAS INCORPORATED, McCLINTON-ANCHOR DIVISION, Respondent	:	

ORDER ACCEPTING RESPONSE
DECISION APPROVING SETTLEMENT
ORDER OF DISMISSAL

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty under section 110(c) of the Federal Mine Safety and Health Act of 1977.

On April 30, 1996, I disapproved the $300 settlement motion submitted by the parties and ordered them to submit information to support their motion and directed the Solicitor to file the penalty petition along with all the required exhibits. On May 10, 1996, the Solicitor filed the penalty petition and exhibits, and on July 11, 1996, the parties submitted a second joint motion to approve settlement.

The civil penalty in this case was issued against the respondent, William Long, pursuant to section 110(c) of the Act, 30 U.S.C. § 820(c), based upon Citation No. 4322730 which alleged a violation of section 56.12016 of the mandatory standards. 30 C.F.R. § 56.12106. Citation No. 4322730 was issued against Mr. Long's employer, APAC, Arkansas Incorporated, McClinton-Anchor Division, because the oversize conveyor belt was not deenergized and locked out before employees removed a large rock and applied belt dressing to the head pulley. The violation resulted in an injury. Section 110(c) provides for the assessment of civil penalties against individual agents of an operator for knowing and wilful violations. The originally assessed penalty was $600 and the proposed settlement now is $600 which the respondent has already paid.

I accept the parties' representations and conclude that the settlement is appropriate under the six criteria set forth in section 110(i) of the Act.

In light of the foregoing, it is ORDERED that the settlement motion filed on July 11 is ACCEPTED as a response to the April 30 order.

It is further ORDERED that the recommended settlement for this case be APPROVED, and that the respondent having paid, this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Connie M. Ackermann, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin St., Suite 501, Dallas, TX 75202

G. Bert Clark, Jr., Esq., APAC-Arkansas Inc., 900 Ashwood Parkway, Suite 700, Atlanta, GA 30338-4780

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 26 1996

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
On behalf of	:	Docket No. LAKE 96-139-DM
RONALD A. MARKOVICH,	:	
Complainant	:	NC-MD 96-02
v.	:	
	:	Minntac Plant
MINNESOTA ORE OPERATIONS,	:	
USX CORPORATION,	:	
Respondent	:	

ORDER DENYING COMPLAINANT'S APPLICATION FOR TEMPORARY REINSTATEMENT

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, for Complainant;
Gary R. Kelly, Esq., U. S. Steel Law Department, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Amchan

Uncontroverted Facts

Complainant, Ronald Markovich, worked for Respondent's Minnesota Ore Operations from 1969 until September 26, 1995. At about 1:30 p.m. on September 26, 1995, Complainant was summoned to the office of Thomas Hakala, the Area Manager for the Concentrator where he worked. He was given a discipline notice informing him that he was being suspended for five days subject to discharge and was escorted off company property (Exh. R-17, Markovich affidavit filed with the National Labor Relations Board). The notice stated that he was being suspended for "Removal or destruction of Company property (including notices) (Exh. G-6)."

The next morning a hearing was conducted pursuant to section 12(b) of Respondent's Collective Bargaining Agreement with the United Steelworkers of America. On September 28, Respondent informed Complainant that it had decided to convert the suspension into a discharge (Exh. R-11, R-17).

A week prior to the suspension/discharge Respondent installed a surveillance camera in the Concentrator Step I passenger elevator in order to secretly monitor employee activity. Respondent contends that it did so to address complaints of violations of its no smoking rules, the prevalence of obscene personalized graffiti and harassment of some employees by other employees (Tr. 25).

In addition to installing the video camera, USX affixed No Smoking stickers on three walls of this elevator. These stickers were repeatedly removed or damaged by employees on the elevator and replaced by management. On Monday, September 18 and 19, the signs in the elevator were white stickers saying simply "No Smoking" (Exh. G-1). During the day on Tuesday, September 19, management began affixing a yellow sign which read as follows:

Removal or Destruction of any Company
Property (Including Notices) is a Violation
of USS General Rules & Regulations
NO SMOKING IN ELEVATOR

These signs were also repeatedly removed and damaged. On Thursday, September 21, management began affixing a red sticker with the same message (Tr. 30-33).

The camera recorded employees in the elevator continuously between the morning of Monday, September 18, 1995 and Monday, September 25, 1995. When the tapes from the camera were reviewed by USX management they identified seven employees out of the 250 who worked in the concentrator, as having removed or damaged No Smoking stickers placed in the elevator.

One of the seven employees was a supervisor named Kenneth Koski, who was discharged for destroying three No Smoking stickers (Tr. 75-76). With regard to the six bargaining unit (non-supervisory) employees, Respondent concluded as follows:

Complainant Ronald Markovich removed or tampered with 28 No Smoking stickers on 16 separate occasions;

William Barfknect removed or tampered with one sticker on one occasion;

Anthony Leoni removed 3 stickers on one occasion;

Roger Manninen removed or tampered with one sticker on one occasion;

Steven Lindborg removed or tampered with 3 stickers on 3 separate occasions;

Ronald Johnson removed or tampered with 2 stickers on 2 occasions.

(Tr. 90).

William Smith, Respondent's manager of Employee Relations, contends that in deciding whether to suspend or terminate these employees he made a distinction between those who only tampered or removed stickers once and those who did it more than once. Those who removed or damaged No Smoking stickers more than once were discharged. Those who were recorded doing so only once were suspended (Tr. 54-55).

Mr. Smith concedes that Respondent was not entirely consistent in making these distinctions. Thus, it decided to suspend rather than discharge Mr. Lindborg. Smith's rationale was that it was hard to distinguish Lindborg, who tampered with 3 stickers on 3 occasions, from Leoni, who tampered with 3 stickers on one occasion. Moreover, Smith believed that Lindborg should be given a break for telling the truth at the 12(b) hearing (Tr. 61-2, 65, 72, 91-93). Thus, the end result was that Markovich and Johnson were discharged while the other four miners received suspensions. Johnson apparently won his job back in arbitration. Thus, Complainant is the only rank-and-file miner who was discharged for removing and tampering with No Smoking stickers.

Complainant's Activities Protected Under the Federal Mine Safety and Health Act

Ronald Markovich had been a miners' representative under the Federal Mine Safety and Health Act for 19 years. At about 7:15 a.m. on the morning of September 26, 1995, another miner handed Markovich a written safety complaint (Exh. R-2, p. 93). Markovich took the complaint to safety director's office where

Timothy Kangas, an assistant to the director, was waiting for MSHA Inspector Allen Brandt. Brandt was already on site to inspect another area of Respondent's plant.

After Complainant presented the written safety complaint, he accompanied Inspector Brandt and Mr. Kangas to the Second floor of the concentrator, where Brandt investigated the complaint. Before the inspection started, Markovich told Brandt, apparently within earshot of Kangas, that if they saw any MSHA violations and Brandt didn't issue a citation, the union would "conference" these conditions (Exh R-17). This "conference" is essentially an appeal to Brandt's supervisors.

During the inspection Brandt issued Respondent 22 citations, 12 of which were "significant and substantial (S & S)" (Exh. R-2, p. 95). Kangas' reaction to the inspection was recounted by Complainant at his arbitration hearing and in an affidavit filed with the National Labor Relations Board. At page 2 of the affidavit he relates that:

> The inspection went for half a day until noon and I would guess that the MSHA inspector and myself both pointed out about the same number of violations. During the inspection Tim Kangas said that this really pisses him off. Although this is the only comment he made I think he was mad about the fact that we were pointing out such a large number of citations.

(Exhibit R-17, page 2 of Markovich affidavit).

At his arbitration hearing in December 1995, Markovich testified:

> Tim Kangas during the inspection said, "This really pisses me off." I said, "It pisses me off, too, Timmy." I says, "If we are talking about the same thing here that nothing is done and here we are on another inspection."...

(Exhibit R-2, p. 95).

Procedural History

Complainant filed a grievance concerning his suspension/discharge which was heard by an arbitrator in December, 1995 and denied in March, 1996 (Exhibit R-1 and R-2). In October, 1995, he filed a charge with the National Labor Relations Board (Exhibit R-15). The Board's Regional Director declined to issue a complaint on his behalf (Exhibit R-16).

On October 11, 1995, Markovich filed a discrimination complaint with MSHA. He asserted that he believed he was discharged because of "enthusiastic performance" of his duties as a Union Safety Representative. He also asserted that other employees committed the same and/or similar violations (of company rules) and were not discharged. This referred to the fact that Respondent fired only two of the six union members identified as tampering or destroying No Smoking stickers in the company's video.

On June 24, 1996, the Secretary of Labor filed an Application for the Temporary Reinstatement of Mr. Markovich with the Review Commission. An affidavit attached to that application alleges that Respondent's articulated reason for the discharge of Complainant (removing and tampering with No Smoking stickers) is pretextual. On July 3, 1996, Respondent requested a hearing on the application. Pursuant to an agreement with the parties the hearing was held in Duluth, Minnesota on July 18, 1996.

The Issue Presented

Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

> 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 because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding

> under or related to this Act ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a complainant establishes a prima facie case of discrimination by showing 1) that he engaged in protected activity and 2) that an adverse action was motivated in part by the protected activity.

The operator may rebut the prima facie case by showing either that no protected activity occurred, or that the adverse action was in no part motivated by the protected activity. If the operator cannot thus rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

In a temporary reinstatement proceeding, the Secretary need not establish that it will, or is even likely to, prevail in the discrimination proceeding. Pursuant to the procedural rules of the Commission, 29 C.F.R.§ 2700.45(d), the issue in a temporary reinstatement hearing is limited to whether the miner's complaint was frivolously brought. The Secretary of Labor has the burden of proving that the complaint was not frivolous.

The legislative history of the Act provides that the Secretary shall seek temporary reinstatement, "[u]pon determining that the complaint appears to have merit." The Eleventh Circuit, in Jim Walter Resources, Inc. v. FMSHRC, 920 F.2d 738, 747 (11th Cir. 1990), concluded that "not frivolously brought" is indistinguishable from the "reasonable cause to believe" standard under the whistleblower provisions of the Surface Transportation Assistance Act. Further, that court equates "reasonable cause to believe" with a criteria of "not insubstantial or frivolous" and "not clearly without merit" 920 F.2d 738, at 747 and n. 9.

The Secretary has not met his burden of proving that Mr. Markovich's complaint was "not frivolous" or that his decision to seek temporary reinstatement was "not frivolous".

It is uncontroverted that Complainant engaged in protected activity over a period of 19 years as miners' representative. It is also uncontroverted that he engaged in protected activity the morning of his suspension when he transmitted another miner's complaint to Respondent and accompanied the MSHA inspector and management representative. For purposes of this proceeding, I take it as given that he pointed out to the inspector many of the conditions for which citations were issued. Nevertheless, I conclude that the Secretary has not established a nexus between Complainant's protected activity and his discharge. Moreover, the Secretary has not established that it is reasonable or "not frivolous" to contend that such a nexus exists.

As the Commission and Federal Courts have repeatedly noted, it is rare that a link between an adverse action and protected activity will be supplied exclusively by direct evidence. Usually discrimination can be proven only by circumstantial evidence upon which the trier of fact draws an inference regarding the employer's motivation, Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508, 2510 (November 1981).

The most common circumstances upon which such an inference may be based are the employer's knowledge of the protected activity, hostility towards the protected activity (animus), coincidence in time between the protected activity and the discharge or other adverse action, and disparate treatment of the complainant and similarly situated employees, Ibid., at 2510.

With regard to these factors, I assume for purposes of this proceeding that Respondent was aware of Markovich's role in the September 26 MSHA inspection when it decided to discharge him[1].

---

[1]Respondent's employee relations manager, William Smith, testified that he was unaware of the inspection when he reviewed the video and decided to suspend Markovich and the other miners observed tampering with the stickers. However, the final decision to discharge Markovich, which is what is really at issue in this case, was made the next day and I assume Respondent's management was aware of his participation in the inspection by September 27.

While the timing of a discharge may be evidence of a nexus with the protected activity, or evidence of animus towards the protected activity, that is not always the case. Where, as in the instant case, an employer at the same time becomes aware of a legitimate unprotected reason to discharge an employee, an inference linking the protected activity and the adverse action may not necessarily be drawn.

The evidence in this record is overwhelming in indicating that Respondent's stated reason for the discharge, Markovich's removal and tampering with No Smoking signs, was not pretextual. It is clear that Respondent considered destruction of these notices to be a very serious matter. This is established to my satisfaction by the discharge of foreman Koski.

It is not unheard of for an employer to discharge other employees to cover up its motives for discharging a union or safety activist. However, I place very great weight on the fact that Respondent fired one of its foreman for the same reasons that it fired Markovich. It is not reasonable to contend that it would have done so simply to conceal its motives in discharging Complainant.

I also place very great weight of the lack of evidence regarding animus towards Complainant's protected activity. The only such evidence are the statements made by Mr. Kangas which are quoted earlier in this decision. I consider these statements to be very ambiguous. It is not at all clear whether Kangas was angry at Mr. Markovich or considered him to be responsible for the number of citations received. I also consider it important that Markovich was merely transmitting the complaint that gave rise to the inspection. There is virtually nothing to indicate that he caused Respondent to get citations it would otherwise have not received[2].

---

[2]The Secretary argues that retaliation was taken for Markovich's activities as miners' representative for the past 19 years. There is nothing in this record to support such a contention other than the assertions of Complainant and his wife. To conclude that the Application is "not frivolous" on such a theory would require the reinstatement of any miners' representative regardless of his or her unprotected conduct. Congress could not have intended such cavalier application of the temporary reinstatement feature of the Act.

It is possible that Respondent was irritated enough by the September 26 citations that it decided to fire Markovich rather than merely suspend him. However, I deem the evidence supporting this theory to be so speculative that it falls short of establishing that Markovich's complaint and the Secretary's decision to seek temporary reinstatement are "non-frivolous."

Complainant's claim of disparate treatment vis-a-vis other rank and file employees is simply without merit. Disparate treatment which allows for an inference of retaliatory discharge is different treatment of individuals **who are similarly situated,** see, Hayes v. Invesco, Inc., 907 F. 2d 853 (8th Cir. 1990). Mr. Markovich's offenses of Respondent's rules were of a totally different order than that of the other rank-and-file miners (including Mr. Johnson, who Respondent also tried to fire)[3]. The distinction Respondent drew between Complainant and other employees is a rational one.

The Secretary in cross-examining Mr. Smith raised legitimate questions as to whether Markovich actually removed or tampered with 28 signs on 16 occasions. However, it is absolutely clear that he tampered or tried to remove many signs on a number of occasions--far more than any other employee. While, it may also be possible that some of these signs were removed because they contained offensive graffiti (Markovich's excuse for his actions), it is clear that many of these signs had no graffiti on them.

One may question the justice of discharging an employee with 26 years of service for tampering with No Smoking signs in an elevator. The Secretary may also be correct in arguing that Respondent could have made its point with its employees without discharging Markovich. However, there is no reason on the record before me to conclude that Respondent did not discharge Mr. Markovich for reasons other than those it articulated. The Secretary's assertions to the contrary I consider to be nothing more than speculative and without any reasonable basis. I therefore conclude that he has not established the Application

---

[3]I reject the Secretary's argument that Respondent's reconsideration of its initial decision to fire Mr. Lindborg raises a non-frivolous issue of disparate treatment. Lindborg's transgressions were not comparable to those of Complainant.

for Temporary Reinstatement to be "not frivolous" and dismiss the application[4].

ORDER

The Secretary of Labor's application for the temporary reinstatement of Ronald Markovich is hereby **DISMISSED**.

Arthur J. Amchan
Administrative Law Judge

Distribution:

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

Gary R. Kelly, Esq., U. S. Steel, Law Department, 600 Grant Street, Suite 1580, Pittsburgh, PA 15219-2749(Certified Mail)

---

[4]Two other issues are raised by the Secretary. One is Respondent's refusal to hold a fact-finding meeting prior to the 12(b) hearing on September 27, 1995. I see no significance in this fact because none of the six employees had such a meeting and Markovich had an equivalent opportunity to present facts on his behalf at the 12(b) hearing.

A second issue is whether the company may have been wrong in concluding that Markovich fabricated evidence at the 12(b) hearing when he produced two red stickers with obscene graffiti. Even if some of the stickers he removed or tampered with had such graffiti many of them did not. If Respondent was wrong about the two stickers I fail to see how this evidence would be material.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 26 1996

LION MINING COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. PENN 94-71-R
v.	:	Citation No. 3711869;11/17/93
	:	
SECRETARY OF LABOR,	:	Grove No. 1 Mine
SAFETY AND HEALTH	:	Mine ID 36-02398
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Hodgdon

On May 23, 1996, the Commission vacated my determinations[1] that the violation in this case was not "significant and substantial" and did not result from the operator's "unwarrantable failure" to comply with the Regulations, and remanded the case for further analysis consistent with its decision. *Lion Mining Company*, 18 FMSHRC 695 (May 1996). The parties have filed briefs concerning the remand. For the reasons set forth below, I conclude that the violation was S&S and the result of Lion Mining's unwarrantable failure.

The facts, which are set out more fully in the previous decisions in this matter, can be briefly summarized. Lion Mining was cited for violating its roof control plan by failing to install roadway posts prior to mining a notch out of pillar block 37. Note 7 to Drawing A of the plan provided that: "Roadway posts shall be installed on either side to limit roadway to 16' in pillar splits. Roadway posts installed in roof bolted entries, rooms, and crosscuts shall be installed to limit roadway width to 18 feet."

[1] *Lion Mining Company*, 16 FMSHRC 641 (March 1994).

Significant and Substantial

In this case, it is undisputed that the first two *Mathies S&S* criteria[2] are present, *i.e.* that there was an underlying violation of a mandatory safety standard and that the violation contributed to a discrete safety hazard - a possible roof fall. In connection with the third criterion, a reasonable likelihood that the hazard contributed to would result in an injury, the Commission stated that "the judge erred in placing undue weight on the operator's compliance with applicable roof bolting, breaker, and radius post requirements" and "in failing to consider the history of roof falls in the section." *Id.* at 698-99.

The inspector testified as follows concerning his basis for concluding that this third criterion was met:

> Q. Okay. Now, in your opinion, did the company's failure to erect posts, roadway posts at the crosscut, significantly or [*sic*] substantially contribute to the hazard of a roof fall?
>
> A. Yes, it would.
>
> Q. Did you observe any particular conditions in this area on November 17th that would lead you to the conclusion that the company's failure to erect posts would significantly contribute to the danger of a roof fall?
>
> A. Yes, it would.
>
> Q. What particular conditions did you observe?
>
> A. The rib was rolling off on number 38 and 39, which indicates there's pressure above the strata coming off the pillar line.
>
> Q. Okay. Now, was this in the same area where Mr. Jones and Mr. Marines were standing?

---

[2] *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984).

A. Yes, it is.

Q. And is this the same area where the roadway posts were to be erected?

A. Yes, it is.

. . . .

Q. Did it indicate to you anything -- does the history of roof falls that you've read into the record and the roof fall that you observed on the day before, did that indicate to you anything about the likelihood of a roof fall on November 17th?

A. Yes, it did.

Q. What is that?

A. Well, with these conditions it's reasonably likely that a roof fall would occur and which could be a serious injury to someone.

(Tr. 38-39, 51-52.)

The Respondent argues in its brief that "given the roof support measures in place, the short period of time the condition existed and the roof support provided by the remainder of the pillar block, the absence of the roadway posts, even though they are a roof support device, did not create a hazard that was reasonably likely to result in a serious injury." (Resp. Br. at 6-7.) This is essentially the same argument that the Commission has already rejected. *Id.*

Additionally, the Respondent argues that the mine's history of roof falls should be accorded little weight because in the particular area where the notch was made the roof appeared to be good. The company further argues that the inspector based part of his finding that the violation was S&S on his belief that half of block 37 had already been extracted, when in fact it had not.

In another mine, the Respondent's arguments might be persuasive. However, this particular mine had had five roof

falls in the previous two years, one of which had occurred the day before in an area two pillar blocks away from block 37. In addition, the rib was already rolling between pillar blocks 38 and 39, the precise area where the roadway posts should have been installed, prior to the notch being cut. Finally, it has long been recognized that mine roofs "are inherently dangerous and even good roof can fall without warning." *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (January 1984).

Taking all of this into consideration, I conclude that the failure to install roadway posts prior to cutting the notch made a roof fall which would result in an injury reasonably likely to happen.[3] It follows that such an injury would be reasonably serious, thus meeting the fourth *Mathies* criterion.

The Commission has emphasized that in determining whether a violation is S&S the particular facts surrounding the violation and continued normal mining operations must be taken into consideration. 18 FMSHRC at 699; *Texasgulf, Inc.*, 10 FMSHRC 498, 500-01 (April 1988). Accordingly, taking into consideration the particular facts in this case and continued normal mining operations, I conclude that the violation in this case was "significant and substantial."

Unwarrantable Failure

With respect to whether the violation resulted from Lion Mining's "unwarrantable failure," the Commission found that Lion's "history of roof violations and roof falls should have placed [it] on notice that greater efforts were necessary for compliance." 18 FMSHRC at 700 (citations omitted). In addition, it directed the judge to reconsider the testimony of Superintendent Jones and Foreman Marines and to consider what effect the inspector's presence may have had on the installation of roadway posts. *Id.* at 701.

---

[3] In reaching this conclusion, I have considered the Respondent's argument that the inspector testified that he thought that one half of block 37 had already been removed. However, he also testified that even if the block were whole he still would have found the violation to be S&S. (Tr. 101.)

The inspector testified that he found this violation to result from an unwarrantable failure because of "the previous citations and orders that were issued on this four and a half section for pillaring on the roof control plan and the number of roof falls that have occurred." (Tr. 57.) He testified as follows concerning his presence while the violation was being committed:

> Q. And after you spoke with Mr. Bittner can you describe what happened?
>
> A. As I talked to him I looked over there and I seen the two management people [Jones and Marines] standing there looking towards the miner watching it load the shuttle car. And at that time Russ Lambert, the mine foreman, came up along number 44 block to where Mike and I were standing and Mike went to the side of Russ Lambert and whispered in his ear. And Russ --
>
> Q. Did you hear anything?
>
> A. I couldn't hear what he was saying. And Russ Lambert looked up towards this area in the crosscut, between 38 and 39, and he started to come towards me. And I asked him, I said, isn't it about time you get your roadway posts set? And by that time he kept on going, walking. And then he went up there and started measuring the height from the roof to the floor.
>
> . . . .
>
> Q. Okay. What happened after that?
>
> A. After that then Mike Bittner and I walked over to this crosscut between 38 and 39. And as I observed, the shuttle car got loaded and Art Jones there and Ted Marines, and I was talking to Mike Bittner, the safety director, and I said, this isn't going to look too good on the violation Mike. I said, Art Jones, the superintendent and Ted Marine's names on these violations -- the violation. And Mike just laughed and he, you know, gave a smile, you know, and he didn't make no comment.

(Tr. 35-36.)

Mr. Jones testified that he had 21 years experience in the mining industry and had been superintendent at the Grove Mine for eight months. He stated that while he was generally familiar with the roof control plan, he was not aware of all of its specifics and he was not aware of the requirements of Note 7. With regard to the mining of the notch, Mr. Jones testified as follows:

> Q. Okay. Now, neither you nor Mr. Marines at anytime instructed the operator of the continuous miner to cease extracting coal from pillar 37 during the time in question, is that correct?
>
> A. I did not. I didn't know that there was anything wrong.
>
> Q. Mr. Marines did not either, did he?
>
> A. Mr. Marines ordered posts and I told him to bring back posts.
>
> Q. My question is, did he ever instruct a miner to stop extracting coal from the 37 pillar before the posts were erected?
>
> A. No.

(Tr. 128.) Finally, he testified that usually it would make sense to erect roadway posts before the extraction of coal begins.

Mr. Marines testified that he was at the face while the miner operator was cleaning up "gob," that he left the area for about fifteen minutes to take care of another matter and then he returned to the face. He described his return as follows:

> Q. And what were they doing when you got to the face?
>
> A. He was finishing up a buggy and I told the shuttle car operator to bring timber up.
>
> Q. Why did you tell the shuttle car operator to bring timber up?

A. Because he had just started to notch out the 37 stump.

Q. Had any time elapsed between the time you became aware he was mining the stump and the time you ordered the timber?

A. No.

Q. Who did you tell or who did you ask to bring the timber into the area?

A. Tim Lambert.

Q. And what is his particular position?

A. Shuttle car operator.

Q. Did anyone indicate to you that you needed timber in the area?

A. No.

Q. Did Mr. Lambert or Mr. Bittner tell you that you needed timber in the area?

A. No.

Q. Did the inspector tell you that you needed timber in the area?

A. No.

. . . .

Q. Now, he was taking coal from the pillar when you arrived in this area?

A. Uh-uh (yes).

Q. He was extracting coal from the pillar; was he not?

A. Right.

Q. Did you tell him to cease extracting coal from the pillar at that time?

A. Not till he finished that shuttle car.

(Tr. 133-34, 137.)

I find Mr. Jones' testimony irrelevant to the issue of unwarrantable failure. At the time that the violation was being committed, he did not know what the roof control plan required. Consequently, whether or not the plan explicitly required the installation of roadway posts prior to extracting any coal had no bearing on his actions. Whether his failure to know what the plan required, in view of his position at the mine, amounted to negligence sufficient to support an unwarrantable failure finding is a question that need not be answered in this case because there were two other management officials present who did know the requirements of the roof control plan.

Clearly, Mr. Russ Lambert, mine foreman, and Mr. Marines, section foreman, were the management officials making decisions on the scene. Nowhere in his testimony did Mr. Marines claim that the roof control plan did not require installation of roadway posts prior to the mining of the notch. Nor, apparently, did Mr. Lambert, who did not testify, raise such an objection when confronted by Inspector Fetsko.

The logical conclusion to be drawn from this, is that they understood the plan to require that the posts be erected before any mining was performed. This is consistent with the admission of the violation by the Respondent throughout these proceedings.[4] Therefore, I conclude that the roof control plan, as understood by company management officials, required the installation of roadway posts before the notch was mined.

With regard to whether the inspector's presence served as an

---

[4] In view of the Respondent's interpretation of its own requirement, the Secretary's concession in its brief before the Commission that the plan did not explicitly require the installation of posts before commencement of pillar extraction, while correct, is not relevant.

impetus for ordering the posts, the entire testimony concerning the inspector's presence is set out above. Neither Mr. Lambert nor Mr. Bittner testified. Jones and Marines were not asked on direct or cross whether they knew that the inspector was present and, if so, whether it had any effect on their actions. Only the inspector testified concerning the actions of Lambert. The only mention made of Lambert by any of the Respondent's witnesses was Marines' denial that Lambert told him to get the posts.[5] Marines also denied that the inspector told him to get the posts.

On the other hand, it is hard to imagine that the presence of the inspector would not have had an effect. One would hope that the normal reaction of someone when in the presence of an enforcement official would be to insure that the rules are being followed. Consequently, based on the testimony of the inspector concerning his presence during the violation, the presence of both Jones and Marines, and the actions of Lambert in taking measurements after the inspector spoke to him, I infer that Marines' decision to install the posts was at least partially triggered by the inspector's presence.

I also find the following testimony of the miner operator significant on the unwarrantable failure issue:

> Q. Were you, in fact, beginning to mine the pillar block when that notch was taken out?
>
> A. I was finishing loading the gob and was loading the buggy, yes. I loaded some out of that block.
>
> . . . .
>
> Q. Now, you intended to continue extracting coal from the pillar 37 at the time in question, is that correct? Aside from the notch that was actually indicated here on Joint Exhibit One you intended to continue extracting coal --

---

[5] Two Lamberts worked for the company, the question to Marines did not specify which Lambert was being referred to. However, do to the nature of the question and the inspector's testimony, I am assuming it referred to Russ Lambert.

A. Yes.

Q. -- from pillar 37?

A. Uh-huh (yes).

(Tr. 106, 112.)

In sum, then, the miner operator mined a notch out of block 37 with no apparent intent of stopping after the notch was removed; no one told him to stop mining;[6] Jones, Marines and Lambert were all present while this occurred; at a minimum both Marines and Lambert knew what the roof control plan required, yet no action was taken to install the roadway posts until after the notch was mined, and the reason for installing them then was at least partially the result of the inspector being present. Further, as the Commission has already held, the company's previous roof control violations and roof falls should have put it on notice that greater efforts were necessary for compliance.

Taking all of this into consideration, I find that the failure to install the roadway posts prior to mining the notch resulted from "indifference" or a "serious lack of reasonable care" and, thus amounted to aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (December 1987). Accordingly, I conclude that Lion Mining's commission of this violation resulted from an unwarrantable failure to comply with the Regulations.

---

[6] According to his testimony, he only stopped because he always stopped between shuttle cars, he did not testify that anyone told him to stop, and Jones testified that neither he nor Marines told him to stop. Therefore, I conclude that he was not told to stop.

ORDER

Citation No. 3711869 is **AFFIRMED** as written.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Joseph A. Yuhas, Esq., P.O. Box 25, Barnesboro, PA 15704 (Certified Mail)

Richard T. Buchanan, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market St., Room 14480, Philadelphia, PA 19104 (Certified Mail)

/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 26 1996

CYPRUS CUMBERLAND RESOURCES, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. PENN 96-46-R
	:	Order No. 3668592; 11/15/95
v.	:	
	:	Docket No. PENN 96-47-R
SECRETARY OF LABOR,	:	Order No. 3668593; 11/15/95
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Cumberland Mine
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 96-144
Petitioner	:	A.C. No. 36-05018-04087
v.	:	
	:	Cumberland Mine
CYPRUS CUMBERLAND RESOURCES,	:	
Respondent	:	

DECISION

Appearances: Allison Anderson Acevedo, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Secretary of Labor; R. Henry Moore, Esq., Buchanan Ingersoll Professional Corp., Pittsburgh, Pennsylvania for Cyprus Cumberland Resources.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," to challenge two withdrawal orders issued by the Secretary of Labor to Cyprus Cumberland Resources (Cyprus) under Section 104(d)(2) of the Act and to challenge the civil penalties proposed for the violations charged therein.[1] The general issue before me is whether the

---

[1] Section 104(d)(2) of the Act provides as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such

orders at bar should be affirmed and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Order No. 3668592

This order, issued November 16, 1995, (in modification of Citation No. 3668592 issued November 15, 1995) alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

> The clean-up program was not being complied with in [that] dry, black in color loose coal, coal dust, and float coal dust was permitted to accumulate on the active shuttle car roadway for a distance of approximately 200 feet in length, 0 to 12 inches in depth in an entry, 16 feet to 16.5 feet in width. This condition was observed in the No. 2 entry and connecting crosscut No. 2 to No. 1 entry in the last open crosscut of the 36 Butt developing section.

Footnote 1 continued

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 violations has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

As grounds for modifying the initial citation to an order, the issuing inspector for the Mine Safety and Health Administration (MSHA), Charles Pogue, noted as follows:

> Additional information was provided during a conference held on 11-16-95, concerning conditions observed on the midnight shift on 11-15-95. Statements indicated that the section foreman (pre-shift examiner) had inspected and traveled through the area on Citation No. 3668592, dated 11-15-95 and failed to comply with the Cumberland Mine clean-up program.[2]

The cited standard, 30 C.F.R. § 75.400, provides that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

On November 15, 1995 experienced MSHA coal mine inspector Charles Pogue was continuing a six-month roof control evaluation at the Cumberland Mine. He had performed approximately 100 previous inspections at this mine. Pogue arrived at around 8:10 a.m. and, among other things, reviewed the pre-shift examination report. There were no notations for hazards in the 36 Butt section.

Accompanied by representative-of-miners Dave Chipps and company representative Michael Konosky, Pogue proceeded to the 36 Butt section. In the face area of the No. 4 entry, he performed methane and oxygen tests. He found no trace of methane and 20.9 percent oxygen. In the No. 2 entry Pogue found .4 percent methane and 20.8 to 20.9 percent oxygen and in the No. 3 entry he found .4 percent methane and 20.8 percent oxygen.

In the No. 2 entry Pogue observed a pile of coal left from the loading cycle along with large amounts of coal, loose coal and coal dust in the crosscut. He dug into the pile with his foot and measured it, finding it to be 12 inches deep. Upon measuring with a 50-foot tape, assisted by miners' representative Chipps, he found the accumulation to be 194 feet long, 16 feet to 16 ½ feet in width, and 12 inches deep. According to Pogue the accumulations extended from rib to rib and there was coal dust from the rib to the floor at an angle of repose. Pogue also testified that generally in the center of the entry the depth was from .9 of one foot to 12 inches and that the depth was generally uniform throughout the cited area. He also testified however

---

[2] It is undisputed that there had been no intervening clean inspection subsequent to precedential "Section 104(d)" Order No. 3664528, issued July 12, 1995.

that along the rib the coal dust was 16 inches deep lying at an angle of repose. Government Exhibit No. 5 purports to represent a typical cross section of the area of cited accumulations. Pogue also squeezed some of the cited accumulations in his hand and concluded that there was no moisture. The material was black in color and there was no rock dust in it. Based on his experience, Pogue opined that the accumulations had resulted from the loading cycle over the midnight shift.

Pogue testified that on November 16 he modified the citation to a "Section 104(d)(2)" order after interviewing foreman Bernard Steve. Steve performed the pre-shift examination on the section and had also later traveled into the crosscut between the Nos. 1 and 2 entries where the accumulations were found. Steve admitted to Pogue that at the time of his pre-shift exam at around 6:01 that morning he observed loose coal, coal dust and float coal dust in the cited area but did not consider it to be hazardous.

Although inconsistent regarding the precise dimensions of the alleged accumulations, I find Pogue's testimony generally credible and sufficient to establish the existence of significant violative accumulations. His expert testimony is also sufficient to establish its combustibility. Indeed, in significant respects, his testimony is also corroborated by that of Michael Konosky, the Cyprus representative accompanying him on his inspection. Konosky acknowledged at hearing that there was an excessive amount of material in the No. 2 entry and the crosscut. He further acknowledged that Inspector Pogue dug a hole in the coal to show him the depth (apparently where the depth was 12 inches) but paid no attention. Konosky further acknowledged that he did not perform any tests on the cited material and did not remember whether he had objected to any of Pogue's measurements of the cited material.

In reaching my conclusions herein I also note the testimony of Cyprus' area manager, Robert Kimutis, who acknowledged that the continuous miner had made a mess that night as it backed out of the No. 2 entry because the regular operator was not at the controls. I also note that section foreman John Perry also recognized that the crosscut between entries 2 to 1 "looked bad" although he attributed this to what he believed was the dragging of coal back through the crosscut and the fact that it had been "torn up" presumably by the continuous miner backing out of the crosscut.

Inspector Pogue also concluded that the violation was "significant and substantial". 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. *See also Austin Power Co.* v. *Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).
>
> 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 1473, 1574 (June 1984); *see also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

In this regard Pogue noted that a fire or explosion were likely since all the necessary factors were present.[3] He noted the presence of oxygen, of combustible coal and coal dust, and ignition sources from the energized electrical face equipment and power cables. He also noted that methane was being liberated from the face and that coal dust was being placed in suspension both during the mining cycle and from mine traffic. He further noted that methane was liberated from the cited section at the rate of 600,000 cubic feet per minute over 24 hours. Other ignition sources were also likely from drilling holes for roof bolts. Drill bits may become hot enough to cause ignition, or strike rock. Friction heat may also result from the roof bolt rubbing on a face plate. Pogue further noted that the continuous miner itself can cause an ignition. Six workers in the area during the mining cycle could be burned or inhale toxic smoke and gases as a result of an explosion or fire.

---

[3] The Respondent's contention in its brief that Pogue only testified that a fire or explosion "could" occur is incorrect. See, e.g., Tr.64.

Inspector Pogue's conclusion regarding the "significant and substantial" nature of the instant violation was fully corroborated by the expert testimony of Clete Stephan, a graduate engineer with a professional engineering license in mining engineering. Stephan is also the principal mining engineer at the MSHA Tech Support Center and an experienced fire and explosion investigator. Stephan confirmed that the cited accumulation presented a serious hazard. He noted that all the necessary ingredients were present for a fire or explosion. Stephans also noted that the coal at the Cumberland Mine is within the Pittsburgh Seam which contains coal at the higher end of the explosivity scale. In particular Stephans testified as follows with respect to the likelihood of an explosion on November 15 in the 36 Butt section:

> A. Well, it would by my opinion that based on the accumulation of such a considerable length of hazardous materials, that an explosion -- that a propagating explosion, not just an explosion that would stay in the face area, but one that would propagate even to other areas of the mine would result.
> Q. [By Ms. Acevedo] Can you explain why?
> A. Well, with even the ignition of a body of methane that had a slight amount of coal dust in it, there would be enough of a shock wave generated at that point to suspend the coal dust that would be throughout this length of accumulation.

In the context of this as well as the totality of his testimony, it is clear that Stephan fully supports the "significant and substantial" findings of the Secretary.

The Secretary also alleges that the violation was the result of the Respondent's "unwarrantable failure". Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "lack of reasonable care." *Id.* At 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 194-194 (February 1991). Relevant issues therefore include such factors as the extent of a violative condition, the length of time that it existed, whether an operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994).

The Secretary first argues in this regard that the cited condition was "obvious" because of the large amounts of loose coal, coal dust and float coal dust. Indeed Pogue found these to have been "the largest amount of accumulations that I have

observed of loose coal, coal dust and float coal dust at a distance of 194 feet." The credible evidence establishes that the violative accumulations were extensive. From this evidence alone it is also apparent that the accumulations had built up over a rather long period of time and that the operator's abatement efforts were inadequate.

The Secretary also notes in his brief that in the six months before this order was issued, MSHA had cited this mine ten times for violations of the same standard, including one issued only two weeks prior to the order at bar. When all of the above factors are considered it is clear that the violation herein was indeed the result of gross negligence and unwarrantable failure. The order is accordingly affirmed.

Order No. 3668593

This "Section 104(d)(2)" order alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.360(g) and charges as follows:

> An adequate pre-shift examination was not conducted in that dry, black in color loose coal, coal dust, and float coal dust was accumulated on the active shuttle car roadways. The loose coal, coal dust and float coal dust was measured to be approximately 200 feet in length and 0 - 12 inches in depth and not observed and noted as a hazardous condition in the pre-shifter's examination book located on the surface. This condition was observed in the No. 2 entry and No. 2 to 1 crosscut between No. 2 and No. 1 entries in the 36 Butt section.

The cited standard, 30 C.F.R. § 75.360(g), provides in relevant part that "a record of hazardous conditions and their locations found by the examiner during each examination . . . shall be made in a book provided for that purpose on the surface before any persons other than certified persons conducting examinations required by this subpart enter any underground area of the mine." It is undisputed in this case that no entry was made in the pre-shift examination books for the pre-shift examination performed for the day shift on November 15, 1996, i.e., during the three hours preceding the commencement of that shift, regarding the accumulations noted in the order at bar.

In order for there to be a violation as charged herein the Secretary must prove that the cited hazardous and violative conditions existed when foreman Bernie Steve's pre-shift examination was conducted around 6:01 on the morning of November 15. Inspector Pogue acknowledged that he was not present at that time and did not know what accumulations in fact then existed. Foreman Steve provided the only direct evidence on

this issue and he testified that at the time of his pre-shift exam that morning he did not see any hazardous accumulations of coal.

Given the absence of direct evidence of a violative accumulation at the time of the pre-shift exam the Secretary must resort to secondary or circumstantial evidence. In this regard the large amount of accumulations found in this case and the evidence there was little production after the 6:01 a.m. pre-shift exam certainly raises suspicions that hazardous conditions may have also existed at the time of the pre-shift exam, however suspicions are not enough. I find therefore that I cannot reasonably infer that the same hazardous conditions in fact also existed some five hours before they were discovered by Inspector Pogue. The use of circumstantial evidence in this regard is particularly difficult because the conditions at the time of the pre-shift exam, to be considered hazardous, must be evaluated in terms of whether a reasonably prudent person familiar with the purposes of the regulation would have recognized the conditions as hazardous. See *Utah Power and Light Company*, 12 FMSHRC 965, 968 (May 1990). Since Inspector Pogue acknowledged that he did not know the extent of the accumulations at the time of the pre-shift exam it is difficult for this evaluation to be based on anything but speculation.

ORDER

Order No. 3668592 is hereby affirmed and Cyprus Cumberland Resources Corporation is hereby directed to pay a civil penalty of $4,500 for the violation charged therein within 30 days of the date of this decision. Order No. 3668593 is hereby vacated.

Gary Melick
Administrative Law Judge

Distribution:

Allison Anderson Acevedo, Esq., Office of the Solicitor, U.S. Dept. of Labor, Gateway Bldg., Room 14480, 3535 Market Street, Philadelphia, PA 19104

R. Henry Moore, Esq., Buchanan Ingersoll Professional Corp., One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219

\jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

JUL 29 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 95-63 A.C. No. 29-00096-03570
v.	:	McKinley Mine
PITTSBURG & MIDWAY COAL MINING CO., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Cetti

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 filed a motion to approve a settlement agreement and to dismiss this case. A reduction in the penalty from $35,000.00 to $10,000.00 is proposed.

Citation No. 4060756 was issued for a significant and substantial violation of 30 C.F.R. § 77.404(c), which requires that repairs and maintenance not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments. The inspector assessed the negligence as "high," the probability of an occurrence of "occurred" and the gravity of injury as "fatal." A penalty of $35,000.00 was specially assessed for this violation.

The inspector's site inspection indicated that the Respondent had attempted to remove an adapter from a chuck on the Schroeder Brothers drill in the No. 2 pit using the power of the drill. A wrench that was affixed to the adapter flew off once machine power was engaged and struck a miner in the head. The miner later died. The inspector had predicated the unwarrantable failure on the fact that miners would step back whenever the procedure for removal of a drill adapter was performed using machine power and supervisory personnel knew that the miners would retreat to safe positions at such times. The inspector concluded that because the mine operator continued to use the procedure, the operator was indifferent to the safety of the miners.

The parties advise that investigation into this 104(d)(1) citation revealed that the evidence does not support the inspector's determination of "high negligence" or "unwarrantable

failure." Interview statements from the miners established that the procedure had been used for at least two years before the fatality. During that time, a wrench had never been thrown but rather would simply rotate against the drill mast and fall to the ground. None of the mine mechanics who had used the procedure had thought the procedure unsafe before the fatality.

Other evidence revealed that a representative of the drill manufacturer had shown the operator the procedure as an efficient way to unscrew the adapter and that Schroeder Brothers mechanics also had used that same procedure when they were at the mine performing maintenance and repairs. The drill's service manual was silent about how to remove the adapters, leaving the impression that the demonstration by the manufacturer's representative was as safe as any other means of removing the adapters.

The parties, after further investigation, agree that rather than establishing plain indifference or a reckless disregard of miner safety and the regulatory requirements, the evidence shows the operator's actions not to be in conformance with safe and prudent operating practices. The operator's actions were neither willful nor unwarrantable. More accurately, the operator acted with moderate negligence by not employing an alternative, safer method of accomplishing the task.

Under the proffered settlement, the citation is modified from a "high negligence" 104(d)(1) violation to a "moderate negligence" 104(a) violation and the penalty is reduced from $35,000.00 to $10,000.00.

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 Citation No. 4060756 be modified as agreed and indicated above and that the Respondent, Pittsburg and Midway Coal Mining Company, **PAY** a civil penalty of $10,000.00 to the Secretary of Labor within 30 days of the date of this decision and order. Upon receipt of payment, this case is dismissed.

The hearing previously set for July 30, 1996, in Albuquerque, New Mexico, is canceled.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

Connie M. Ackermann, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202

John W. Paul, Esq., PITTSBURG & MIDWAY COAL MINING CO., 6400 South Fiddler's Green Circle, Englewood, CO 80111-4991

/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 29 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 96-171
Petitioner	:	A. C. No. 15-17487-03525
v.	:	
	:	No. 3 Mine
BLACK STAR MINING COMPANY,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tenneesee, and James C. Hager, Conference and Litigation Representive, Mine Safety and Health Administration, Phelps, Kentucky, for the Petitioner;
Milford Compton, Owner, Black Star Mining Company, Inc., Phelps, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging violations by Black Star Mining Company, Inc., (Respondent) of various mandatory safety standards. Pursuant to notice, the case was heard in Paintsville, Kentucky on June 27, 1996.

Findings of Fact and Discussion

I. Citation No. 4234310.

At the hearing, a motion was made to approve the settlement that the parties had reached regarding this citation. Respondent has agreed to pay $50, the full amount of the proposed penalty. Based upon the documentation in the file, and the assertions of the Secretary, I conclude that the proposed settlement is appropriate considering the factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977 ("the Act"). Accordingly, the settlement is approved, and the motion is granted.

II. Citation No. 4506332.

At the hearing, a motion was made to approve a settlement that the parties had agreed to regarding this citation. Initially, the Secretary had sought a penalty of $690. The parties have agreed to settle this matter for $363. I have considered the representations made at the hearing in support of the motion, as well as the documentation in the file of this case. I conclude that the settlement is appropriate within the terms of the Act, and accordingly the motion is granted.

III. Citation No. 4006727.

A. Violation of 30 C.F.R. § 202(a)

On January 26, 1996, MSHA inspector Larry Little inspected the No. 5 entry at Respondent's No. 3 Mine. At a point approximately sixty-five feet inby survey spad No. 563, Little inserted a stratascope up into the roof of the mine through a one inch diameter test hole that had been bored up into the mine roof. Utilizing the mirrors of the stratascope, Little observed horizontal cracks, or separations, at three different levels. He indicated that a crack twelve inches above the bottom surface of the roof was a quarter inch wide. Another crack twenty-five inches above the bottom surface of the roof was between an eighth and a quarter inch wide. A crack seventy-two inches above the bottom surface of the roof was approximately one inch wide.

The only roof support in the area was a series of seventy-two inch resin bolts that were on four foot centers. Little opined that there was inadequate support to support the cracks that were located seventy-two inches above the bottom of the roof. He indicated that the separations that he saw have a tendency to cause the roof to fall. In this connection, he noted that on January 12, 1996 and on January 16, 1996, roof falls had occurred in two areas approximately 200 to 300 feet outby the area in question.

Little issued a citation alleging a violation of 30 C.F.R. § 75.211(c). At the hearing, Petitioner moved to amend the citation to allege a violation instead of 30 C.F.R. § 75.202(a). This motion was not objected to by Respondent, and accordingly was granted.

30 C.F.R. § 75.202(a) provides as follows: "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 bursts."

Little conceded that Respondent provided for more roof support in the area in question than called for in its roof control plan.[1] Specifically, Little indicated although the roof control plan allows the entries to be twenty feet wide in the area in question, Respondent narrowed the entries[2] which resulted in a larger area of coal pillars providing additional support. The same result was obtained by lengthening the distance between the centers of crosscuts to one-hundred feet. Also, Respondent

---

[1]The roof control plan would be the best evidence of its various provisions, but it was not offered in evidence.

[2]I accept the uncontradicted testimony of Milford Compton, Respondent's President, that the entries in the area in question were seventeen feet wide. Compton indicated, in support of this testimony, that he had measured these entries the day after the citation was issued.

had initially bolted the area with forty-two inch rods, but then provided additional support with the use of seventy-two inch resin bolts. In general, these bolts bond the levels of strata in the roof to form a beam which strengthens roof support. Also, the resin in the bolts seeps into any cracks in the roof to provide further binding of the strata.

Respondent did not impeach or contradict the testimony of Little regarding the presence of cracks at three different levels in the roof. Although the seventy-two inch bolts would likely bind the strata between the bottom of the roof up into the roof to a point seventy-two inches above the bottom of the roof, it would appear not to have any binding affect on roof strata more than seventy-two inches above the bottom of the roof. Little opined that there was inadequate support for the crack that was located at a point seventy-two inches above the bottom of the roof. This opinion was not specifically contradicted by Compton. Also, although there were no visible signs of problems with the roof in the cited area such as pressure on the plates of the bolts, ribs falling off, floor heaving, or the roof flaking, Respondent did not specifically impeach or contradict Little's testimony that the separations or cracks that he saw do have a tendency to cause the roof to fall. In this connection, I note that two weeks prior to the date at issue a roof fall had occurred, and another roof fall had occurred ten days prior to the date in question. Both of these roof falls were located approximately 250 to 300 feet from the cited area.

Based on all the above, I conclude that it has been established that the roof in question was not sufficiently controlled to protect persons from hazards related to falls of the roof. I find, based upon the uncontradicted testimony of Little, that persons work in the area cited. I thus find that it has been established that Respondent did violate Section 75.202(a), supra.

B. Significant and Substantial

According to Little, the violation at issue was significant and substantial. 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 Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In essence, as discussed above, the first two elements set forth in Mathies, supra, have been met. Petitioner must now establish the third element of Mathies, supra, i.e., the reasonable likelihood of an injury producing event.

Specifically, Petitioner must establish that a roof fall was reasonably likely to have occurred. Respondent had experienced two roof falls in a two week period prior to the date at issue, in areas approximately four crosscuts outby the cited area. However, the areas that experienced the two roof falls were supported by only forty-two inch rods, whereas the cited area was supported by seventy-two inch resin bolts. Also, the areas that experienced the roof falls were significantly closer to the weakest area of the roof, ie., the area under the thinnest portion of overburden or the center of a hollow. In contrast, the cited area was located under overburden that was approximately 300 feet thick. Petitioner did not introduce the testimony of any eyewitnesses who had observed the previous roof falls and resulting cavities in the roof. Nor did Petitioner introduce the testimony of any persons who investigated these falls. Instead, Petitioner relied upon the reports of these falls (Plaintiff's Exhibits No. 3 and No. 4), but did not proffer the testimony of the persons who prepared these reports. I thus assign very little probative weight to the factual statements in these reports concerning the "thickness" of the roof falls.

In further analyzing the likelihood of a roof fall, I note, as set forth above, the lack of visible signs of problems with the roof, the use of seventy-two inch resin bolts, the high ratio of solid roof to cracks, and the presence of additional support provided by increased areas of coal pillars resulting from narrower entries, and increased distance between crosscut centers. Within the context of this evidence, I find that it has not been established that an injury producing event, i.e., a roof fall was reasonably likely to have occurred. I thus conclude that the violation was not significant and substantial.

C. Civil Penalty

Accordingly to Little, Respondent's foreman had informed him on the date in issue that it had planned to install eight foot bolts on the third shift in the area cited. However, this person was not called by Petitioner to testify.

The cracks noted by Little could only have been observed with the use of a stratascope. There is no evidence that Respondent had knowledge of these cracks, or had seen them prior to the issuance of the citation. Since there were no visible

signs of problems with the roof, there is no evidence that Respondent reasonably should have known of the presence of such cracks or separations. I thus find that it has not been established that Respondent was negligent regarding the violative conditions. Although a roof fall is a serious condition, any penalty to be assessed should be mitigated by the lack of any negligence on the part of Respondent. Considering the remaining factors in Section 110(i) of the Act, as stipulated to by the parties, I find that a penalty of $50 is appropriate for this violation.

ORDER

It is ORDERED that, within 30 days of this decision, Respondent shall pay $463 as a total civil penalty.

Avram Weisberger
Administrative Law Judge

Distribution:

Thomas Grooms, Esq., U.S. Department of Labor, MSHA, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

James C. Hager, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 39789 State Highway 194E, Phelps, KY 41553 (Certified Mail)

Milford Compton, Black Star Mining Co., Inc., P.O. Box 443, Phelps, KY 41553 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 29 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KENNETH OLIVER, Complainant	:	DISCRIMINATION PROCEEDING Docket No. KENT 96-54-D BARB CD 95-22
v.	:	No. 1 Plant Mine ID 15-04442
CYPRUS MOUNTAIN COALS CORP., d/b/a BUCKHORN PROCESSING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

This is an action for relief from discrimination, concerning alleged incidents on June 21-22, 1995, and June 29, 1995.

The parties have moved for approval of a settlement agreement. I find that the settlement is consistent with the purposes of § 105(c) of the Act. Accordingly, the motion will be granted, along with the parties' request that the judge retain jurisdiction until compliance with the terms of the settlement agreement.

ORDER

WHEREFORE IT IS ORDERED that:

1. The motion to approve the settlement agreement is GRANTED.

2. The parties are directed to comply with all terms of the agreement.

3. Within 10 days of compliance with all terms of the agreement except paragraph 3 of the agreement, the parties shall file a joint Satisfaction of Agreement indicating such compliance.

4. Within 30 days from the filing of a Satisfaction of Agreement, Respondent shall pay a civil penalty of $5,000.00.

5. Within 10 days after payment of the civil penalty, the Secretary shall file an acknowledgement of payment with a motion to dismiss this case with prejudice.

6. The judge retains jurisdiction until a final order is entered.

William Fauver
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Dept. Of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Tony Oppegard, Esq., Mine Safety Project of the ARDF of Kentucky, Inc., 630 Maxwelton Court, Lexington, KY 40508

R. Henry Moore, Esq., Buchanan Ingersoll, 301 Grant St., 20th Floor, Pittsburgh, PA 15219-1410

/nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 3 1 1996

STILLWATER MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEST 95-539-RM
	:	Citation No. 3908599; 9/5/95
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 95-540-RM
ADMINISTRATION (MSHA),	:	Citation No. 3908600; 8/24/95
Respondent	:	
	:	Stillwater Mine
	:	Mine I.D. 24-01490
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-131-M
Petitioner,	:	A.C. No. 24-01490-05577
v.	:	
	:	Docket NO. WEST 96-214-M
STILLWATER MINING COMPANY,	:	A.C. No. 24-01490-05579
Respondent	:	
	:	Stillwater Mine

DECISION

Appearances: Kristi Floyd, Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
James J. Gonzales, Esq., Holland and Hart, Denver, Colorado, for Respondent.

Before: Judge Amchan

This case involves two citations and proposed civil penalties resulting from MSHA's investigation of a fatal accident at the Stillwater underground platinum mine near Nye, Montana.

On August 21, 1995, Kenneth Goode, a 38-year old experienced miner was buried under tons of ore when the assembly securing the gate of ore chute 5620 East failed.

Citation 3908599 was issued on September 5, 1995, and originally alleged that Respondent had violated 30 C. F. R. § 57.3360 because the mounting design for the 5620 ore chute did not provide support for loads imposed during mining operations. In February 1996, the citation was amended to allege a violation of section 57.14205 in that "the chute gate assembly... was being used beyond its intended (design) capacity in that the strength of the fasteners (bolts) used to attach the chute gate to the support structure were (sic) inadequate for the anticipated loads...[1]" In April 1996, MSHA proposed a $5,000 civil penalty for this citation[2].

Citation 3908600 alleges a violation of section 57.9309 in that the 5620 chute was not designed to provide a safe location for persons pulling (emptying) this chute. A $309 civil penalty was proposed. The issues pertaining to this citation involve the location of the valve used to control the gate to chute 5620. The parties agree that Mr. Goode's death is unrelated to this alleged violation. For the reasons stated below, I affirm citation 3908599 and assess a $1,500 civil penalty. I vacate citation 3908600 and the corresponding penalty proposal.

The Accident of August 21, 1995

On August 21, 1995, Stillwater foreman Randy Johnson assigned miners Kenneth Goode and Duane Hudson to the task of emptying or "pulling" the 5620 East ore chute (Tr. 527). This chute is 210 feet long and 6 feet in diameter. It descends from 5200 feet above sea level to 5000 feet above sea level in a South-North direction. The chute drops at an angle of 80 degrees to horizontal until it reaches a location about 10 feet above the

---

[1]Section 57.14205 states that "Machinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer, where such use may create a hazard to persons."

[2]The Petition for Assessment of a Civil Penalty does not reflect the amendment alleging a violation of section 57.14205.

bottom of the chute. At this point the chute changes direction to an angle of 83 degrees from the horizontal in a southerly direction. At the bottom of the chute is a metal plate angled at 45 degrees. This plate directs the falling ore out of the chute to the East. Thus, ore falling from the top of the chute changes direction twice (Tr. 127-29, 619-27, Exhs. R-8, R-10, G-20).

The 5620 East chute had been filled with approximately 280 tons of ore about 4 days prior to August 21, 1995. It is common for a chute at Respondent's mine to be full for such a period (Tr. 526-27. 546). There was water flowing into the chute at a rate between 0.7 to 2.0 gallons per minute (Tr. 412, 503-06, 545-46). A small amount of water was flowing out the chute, which is also a normal occurrence (Tr. 574). It has not been established that a substantial amount of water was trapped in the chute or had been absorbed by the ore inside it.

To unload the chute the miners positioned four ore cars, each with a ten-ton capacity on the railroad track under the chute (Exh. R-9, p. 21). Mr. Hudson operated the locomotive that moved the cars and Goode operated the valve controlling the gate that regulated the flow of ore from the chute (Tr. 575, Exh. G-3, p. 1).

Prior to starting their work, Hudson and Goode examined the condition of the chute. Hudson checked the bolts holding the chute gate assembly to the wall with a 12-inch crescent wrench. There appeared to be nothing wrong with the bolts or any other part of the chute (Tr. 571-72, 608)

When Goode opened the chute gate, the ore moved very slowly. After filling the first 1/4 of a rail car, the ore appeared to Hudson to be a sticky cement-like mixture. It came out of the chute a little bit at a time (Tr. 577, Exh. G-3, p. 1).

Hudson and Goode then employed several customary measures to unload a jammed chute. Goode slammed the chute gate open and shut a few times, hoping to loosen the ore with vibration. They also opened the chute gate a little and sprayed the ore with water several times (Tr. 577-78).

Having little luck in freeing the ore, the two miners placed a half stick of explosive approximately 8-10 feet up the chute

with a long pole. This is also a common and widely accepted means of unjamming an ore chute. Hudson and Goode used explosives 4 to 5 times and were able to fill three of the four railroad cars. Then the chute jammed again (Exh. G-3, p. 1).

Goode signaled Hudson to get off the locomotive and walk back to his location at the chute gate valve control. The two miners then walked North towards the chute while trying to decide whether to use another explosive charge (Tr. 583, Exh. G-3, p. 7). They walked only a few feet when the chute gate and the assembly holding it to the chute suddenly gave way. Hudson turned and ran to the South. He was struck in the back of the legs and knocked down by the falling rock at a location near the valve control. These controls were about 16-20 feet South of the mouth of the chute (Exh. R-9, p. 60). When Hudson got up he could not find Goode (Tr. 584-87).

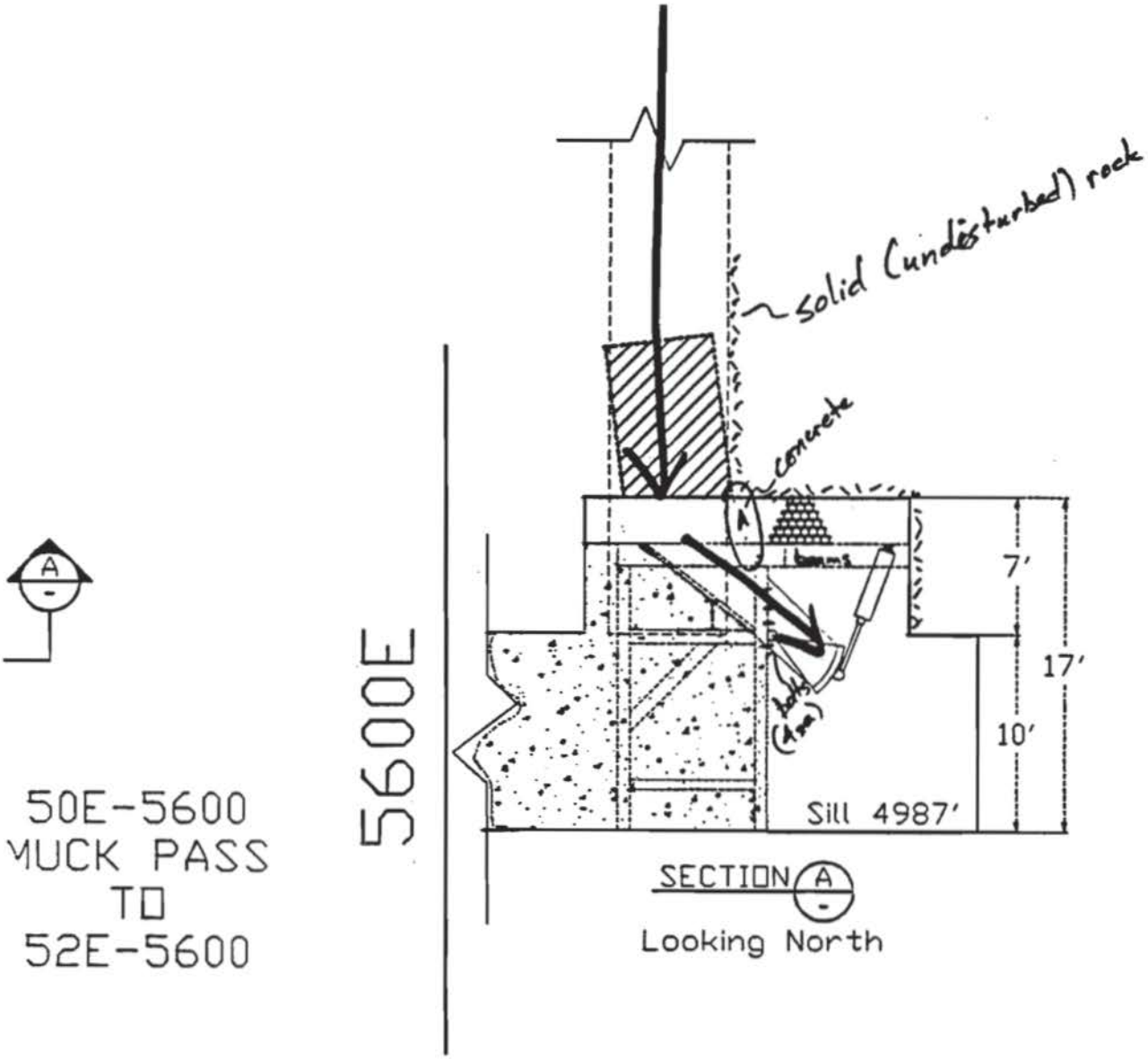
Goode was buried under the ore, a few feet closer to the mouth of the chute than Hudson[3]. Approximately 50 tons of ore came out of the chute when the gate assembly gave way. It stopped flowing when the mouth of the chute was choked off (Tr. 5-6, Stip. No. 8, Tr. 526, 531, Exh. R-9, 23-24). The pile of ore extended approximately 20 feet from the chute at an angle of approximately 45 degrees. It covered the rail car under the chute (No. 4 in Exhibit G-2) and was knee - waist deep at the site of the gate control valve (Tr. 671-73).

Citation 3908599: Equipment used beyond the design capacity intended by the manufacturer

The parties agree that the immediate cause of the August 21, 1995 accident was the failure of the bolts that held the chute gate assembly to the 5620 chute (Tr. 300, 348, 674-76). The assembly was affixed by eight 1-inch diameter grade 8 bolts, four on each side of the chute. The location of these bolts was clearly indicated by Respondent's mine manager Alan Buell on Government Exhibit 20, which is reproduced below.

---

[3]Hudson indicated Goode's location the last time he saw him on Exhibit G-2 (Tr. 587).



50E-5600
MUCK PASS
TO
52E-5600

EXHIBIT
6-20

a=29.5 sq ft

1297

MDI -1100

FS

One issue before me is whether these bolts are "equipment" or part of "equipment" within the meaning of section 57.14205. I conclude that the bolts are "equipment" because the word is broad enough to encompass any physical asset used in mining operations. Moreover, the term should be interpreted in a manner that effectuates the purposes of the Act, Allied Chemical Corp., 6 FMSHRC 1854 (August 1984).

My inquiry focuses on the bolts, not only because both parties agree they failed, but also because they are the only component of the chute and gate assembly for which there is any evidence regarding the design capacity intended by the manufacturer. There is no such evidence pertaining to the chute or chute gate assembly as a whole.

The 5620 East chute and the chute gate assembly were installed by Respondent in approximately 1990. Prior to the accident approximately 205,000 tons of ore had been dropped through this chute without incident (Exh. R-9, pp. 18-22). The 5620 chute design had been used in constructing other chutes by Chevron Resources, which operated this mine before Stillwater (Tr. 772, Exh. R-16, p. 17). Thus, the manufacturer of the chute and chute gate assembly in this instance is Stillwater Mining Company, and there is no evidence indicating the intended design capacity of the chute or chute gate assembly.

Similarly, there is no evidence as to who manufactured the eight grade 8 bolts that held the gate assembly to the chute. However, I credit the testimony of Complainant's expert Carl Schmuck and find that the manufacturer's design capacity for these bolts is that specified for all manufacturers by the American Institute of Steel Construction in its "Specification for Structural Joints Using ASTM A325 and A490 Bolts[4]" (Tr. 308-09, Exh. G-8, pp. 8-11, Appendix E, page E6). The design

[4]A Grade 8 bolt is called an A490 bolt by the American Society for Testing and Materials (ASTM) (Tr. 309).

capacity of eight grade 8, one-inch diameter bolts is 408,408 lbs (Tr. 309-312)[5]. The bolts used to affix the chute gate assembly for the 5620 East chute at the time of the accident were manufactured to these specifications (Tr. 247-249).

The fatal accident of August 21, 1995, establishes to my satisfaction that the design capacity of the eight bolts holding the chute gate assembly was exceeded by the forces applied to those bolts before they failed. Had only loads not in excess of the design capacity been applied to these bolts, the chute gate assembly would not have failed.

There simply is no credible alternative explanation for the failure of the 5620 chute gate assembly. While there is some evidence that at least one of the bolts was deformed prior to the accident, it has not been established that the bolts did not meet the design capacity of 408,408 pounds prior to the accident (See Tr. 675). Moreover, while it is impossible to calculate the force applied to the bolts prior to the accident, I conclude that it exceeded this design capacity.

Much of the evidence in this case concerned Mr. Schmuck's calculations of the potential forces applied to the bolts prior to the accident. Respondent has demonstrated that calculating the force applied to these bolts is a very complicated undertaking. The force applied to the bolts cannot be derived simply by taking a given amount of ore and the distance it drops. Such a calculation leads to absurb results. For example, if 6 tons fell 10 feet and all the force was transmitted to the bolts, they would break (Tr. 317-22).

The force applied to the bolts was dissipated by many factors. These are frictional forces, the affect of the change of direction 10 feet above the bottom of the chute and the 45 degree change of direction right at the chute gate. All these things are, however, irrelevant to the outcome of the case. Whatever load was applied to the bolts on August 21, 1995, had to

---

[5]Respondent's mine manager, Alan Buell, agreed with Mr. Schmuck's calculation of the tensile strength of the bolts and his dividing the static load capacity by two to account for the force of a dynamic load (Tr. 665-66).

have exceeded the design capacity of the bolts; otherwise the chute would not have failed and Mr. Goode might not be dead. Therefore, I conclude that the Secretary has established a violation of section 57.14205[6].

Assessment of a Civil Penalty[7]

The Commission assesses civil penalties de novo after considering the six penalty criteria in section 110(i) of the Act. It is not bound by MSHA regulations or determinations with regard to proposed penalties, United States Steel Mining Co., 6 FMSHRC 1148 (May 1984).

The parties have stipulated that the proposed penalties will not affect Respondent's ability to stay in business. As to prior history, they have also stipulated that Stillwater has not previously been cited for violations of the standards at issue in these proceedings. Exhibit G-1, an MSHA assessed violation report, provides no reason to either raise or lower a penalty based on the remaining criteria.

Respondent is a relatively large operator, employing 448 people at this mine, 271 of whom work underground (Exh. G-5, p. 1, Tr. 59-60). In 1993 the mine had 711,691 hours of production,

---

[6]I believe an extended discussion of the "significant and substantial (S & S)" issue is not necessary in this case. If there was a violation, it satisfied the "S & S" criteria set forth in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984).

[7]Respondent argues that I have no jurisdiction over the penalty for this citation on the grounds that the Secretary has never petitioned for a penalty for an alleged violation of section 57.14205. However, the Secretary proposed a civil penalty for citation 3908599; therefore, I hereby sua sponte amend the pleadings to conform to the evidence at hearing pursuant to Rule 15(b) of the Federal Rules of Civil Procedure. See my decision in Higman Sand and Gravel, Inc., _____ FMSHRC _____ (ALJ June 19, 1996, slip opinion at pp. 8-9). The penalty petition is deemed to seek a penalty for a violation of § 57.14205.

18 FMSHRC 34 at 41 (ALJ January 1996). Other things being equal, I would assess a somewhat higher penalty than for a smaller operator.

Stillwater deserves maximum credit for exhibiting good faith in rapidly abating the citation. It installed two large steel pipes which extend from the chute assembly to the opposite rock wall. This provides additional lateral support for the chute gate assembly. Additionally, Respondent has installed a 3/4-inch wire rope around and under the gate so that the assembly will not separate from the wall if there is another failure of its fasteners (Tr. 676-77).

For new chutes, Stillwater has changed designs and has purchased a very differently configured chute gate assembly which is manufactured in Sweden (Tr. 676-78). This assembly apparently has some different problems from the one formerly used by Respondent. The chute gate is secured by chains, through which pieces of ore can fall(Tr. 658-61, 678).

The two most critical factors of the six penalty criteria are the gravity of the violation and Respondent's negligence, if any. The instant violation is a very grave one. It resulted in the death of one miner, Kenneth Goode, and could easily have killed Mr. Hudson as well. It is important to note that the accident herein was not the result of any misconduct by Goode and Hudson. As far as this record indicates they were doing what they were supposed to be doing in the manner in which they had been instructed. Mr. Hudson, checked the condition of the chute assembly, including to the best of his ability, the condition of the bolts (Tr. 528, 591-2, Exh. G-3, pp. 3-4).

I also find that Respondent was to some extent negligent. It is axomatic that after a tragic accident occurs everyone becomes much smarter than they were before. However, I find that there were indications prior to the accident that the chute gate assembly might not be adequate to support the forces that at some point would be imposed upon it.

Respondent essentially inherited the design of its chutes and chute gates from Chevron. However, it made modifications to reduce the forces imposed by ore falling against the gate assembly. For example, in 1988 or 1989, John Thompson, then

general mine foreman, requested that the chutes be designed so that the ore would change direction before it impacted the gate assembly at the bottom (Exh. R-9, pp. 14-15). The 5620 East chute was installed with such a change.

More importantly, Stillwater experienced some twisting and bending of the steel beams supporting the gate assemblies, which gave it an indication that the original design of these assemblies was inadequate (Tr. 647-48). The beams were then embedded in concrete and gussetts were added to the beams to provide additional support. I conclude that once Respondent recognized that the original design of the chute gate assembly suppport system was inadequate, prudence would have mandated revisiting the engineering calculations with regard to the entire system. There is sufficient evidence from which I infer that this was not done (Exh. R-9, pp. 50-55).

In this regard I again credit the testimony of Mr. Schmuck that installation of the gussetts, which was done on the 5620 East chute sometime after its initial installation (Tr. 425-27, 647-48), had the affect of redistributing force to the bolts (Tr. 288-89). There is no evidence that Respondent then performed a thorough engineering analysis of the capacity of the bolts and the loads to which they might be subjected. In the absence of such an analysis it cannot be said that Respondent was totally without fault with regard to the instant violation of § 57.14205.

In finding Respondent negligent, I do not give any consideration to the incident where a miner named Dewey was almost drowned by a gush of water from a chute. There is nothing in the evidence regarding that incident that relates to the structural adequacy of chute gate assemblies (Tr. 690-92, Exh. G-3, pp. 3-4). I also do not rely on an incident involving miner Brigham Garrett in approximately 1992 at the 5150 chute (Tr. 179-80, 192-97). In the Garrett incident, the gate failed but the gate assembly remained intact (Tr. 197). Moreover, there insufficient evidence that Respondent's management was aware of the incident (Tr. 535, 693).

However, I do think that instances in which the gate assemblies of much larger chutes were damaged should also have alerted Respondent to the need for a reexamination of its

engineering assumptions with regard to the adequacy of the assemblies on all its chutes (Tr. 641-644). Prior to August 1995, there were instances in which water and muck had fallen several hundred feet in some chutes much larger than 5620 and had caused extensive damage to the chute gate, its assembly and the supporting steel beams (Tr. 641-42). Although much larger, these chutes were of the same design type as the 5620 chute.

Mine manager Alan Buell observed that:

> [If] we have about 15 feet of broken rock at the bottom of the raise [another term for the chute] there's not a problem. But if there's nothing there, if it's just empty air all the way to the gate, then this big plug of ore can come down and cause a lot of destruction on that chute gate package...

Tr. 643.

Buell testified further that Stillwater generally doesn't have this sort of problem in chutes 200 feet in length (Tr. 644). Nevertheless, for the sake of its employees, Stillwater had an obligation to make sure that all its chute gates were capable of withstanding any load that could impact upon them. Its experience with the larger chutes was an indication that this was not so.

The Secretary has not established that the 5620 East chute was not designed to provide a safe location for persons pulling chutes.

Section 57.9309 requires that "Chute loading installations shall be designed to provide a safe location for persons pulling chutes." The cited standard does not give any indication as to what constitutes a "safe location". Thus, the issue is whether a reasonably prudent mine operator familiar with the protective purposes of the standard would have recognized that the location of the control valve in this case violated its requirements, Ideal Cement Company, Inc., 12 FMSHRC 2409 (November 1990). I conclude that this has not been established.

When the chute gate assembly failed in August 1995, ore reached a depth of at least a miner's knees at the location of the gate controls (Tr. 672). This fact is irrelevant to whether the cited standard was violated. There is no indication that "safe location" means a location at which one would be protected from the result of a catastrophic chute failure, such as occurred in this case. Regardless of where the chute controls are located, miners will often have to get closer to the chute, particularly when the chute jams. The way to prevent death or injury due to catastrophic chute failure is assure the integrity of the chute, rather than to position the gate controls 10 feet farther away from the mouth of the chute.

Miners cannot be too far away from the gate when emptying it. It is necessary that a miner operating the gate controls be able to see the mouth of the chute (Tr. 726). Otherwise, he or she will not be able to fill the ore cars properly.

At the time of the citation the controls for the chute gate were approximately 14 - 20 feet from the mouth of the chute (Exh. R-9, pp. 33, 60). Nothing in this record indicates that a reasonably prudent person would conclude that this was unsafe because it was too close to the mouth of the chute (See Tr. 190, 552, 576-77).

There was a 42-inch clearance between the gate controls and the ore cars that were on the track next to them in August 1995 (Tr. 84-90, 111-13). MSHA apparently believes that this clearance is inadequate to protect employees from an ore car that derails. Nothing in the record indicates what MSHA considers to be a safe clearance. I note, however, that section 57.9330 requires a clearance of at least 30 inches at locations near moving railroad equipment. This to my mind establishes that a reasonably prudent person would not necessarily conclude that the 42-inch clearance at the controls at chute 5620 East made that location "unsafe" within the meaning of section 57.9309.

While the record indicates that ore cars derail on a regular basis, there is nothing that shows that a 42-inch clearance is inadequate to prevent injury from such mishaps. There is no

evidence that ore cars overturn or otherwise travel 42 inches laterally from the track. None of the miner witnesses in this proceeding believed that the clearance was inadequate (Tr. 190, 552, 576-77).

For the reasons stated above, I conclude the Secretary has not established a violation of section 57.9309 and I therefore vacate citation 3908600 and the penalty proposed for that alleged violation.

ORDER

Citation 3908599 is affirmed and a $1,500 civil penalty is assessed.

Citation 3908560 and the corresponding proposed penalty are vacated.

The assessed penalty shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

Distribution:

James J. Gonzales, Esq., Jeanne M. Bender, Esq., Holland & Hart, 555-17th St., Suite 2900, P.O. Box 8749, Denver, CO 80201-8749 (Certified Mail)

Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202 (Certified Mail)

dcp

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

July 10, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-434-M A.C. No. 26-00500-05542
v.	:	Docket No. WEST 95-467-M A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY, Respondent	:	South Area - Gold Quarry

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR PROTECTIVE ORDER

These cases involve two citations and two orders issued by the Secretary for alleged mercury contamination at Newmont's South Area Gold Quarry. The Secretary filed a motion for a protective order seeking to preclude Respondent from taking the depositions of **Andrea Hricko**, Deputy Assistant Secretary for the Department of Labor's Mine Safety and Health Administration ("MSHA"); **Fred Hansen**, MSHA Western District Manager; **Garry Day**, MSHA Western District Assistant Manager; and **Tom Koenning**, MSHA Toxic Materials Division Supervisor. The Secretary contends that he is entitled to a protective order because any information that could be gained from the proposed deponents could be more readily and directly obtained from other MSHA sources. He contends that the proposed deponents do not have any relevant, non-privileged information about the citations and orders that are the subject of these proceedings other than second-hand information obtained directly from other MSHA employees. Further, the Secretary argues that the high administrative position held by three of the individuals should be protected from the burden of unwarranted discovery. Finally, he maintains that the benefit to Respondent from taking these depositions is easily outweighed by the hardship and annoyance of allowing the depositions.

Respondent opposes the Secretary's motion. Respondent maintains that the Secretary, without notice to the mining community, adopted a "zero tolerance policy" under which MSHA inspectors are instructed to issue citations if they find even trace amounts of mercury in certain areas of a mine. Newmont states that it seeks information about this policy, including how MSHA applied this policy to the mine, whether it has been applied at other mines, and whether MSHA provided reasonable notice of this new policy.

It contends that the issuing MSHA inspector and other local MSHA officials will not be able to address these issues adequately. Newmont states that the deposition testimony of these witnesses on this issue is likely to be relevant to the question of whether the Secretary can establish that the alleged mercury contamination posed any health risk to miners.

Commission Procedural Rule 56(b) provides that parties "may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b). Rule 56(c) provides that "a Judge may, for good cause shown, limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense." The Commission's rule is similar to Rule 26(c) of the Federal Rules of Civil Procedure, which states, in pertinent part, that the judge may limit discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...."

I find that information concerning the alleged new "zero tolerance policy" is relevant to the issues in this proceeding. Newmont alleges that the MSHA inspectors alluded to a "zero tolerance policy" during their inspection of the South Area Gold Quarry. Accordingly, I hold that inquiry into this alleged new policy is an appropriate subject for discovery. 29 C.F.R. § 2700.56(b). Admissibility at the hearing is not a prerequisite. "[D]iscovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action." 8 Federal Practice and Procedure, § 2008 (1970). The fact that the Secretary denies the existence of the policy does not preclude Newmont from inquiring about it.

The Secretary's first reason in support of the protective order is that the four individuals do not have any direct information about the particular citations and orders at issue. This is, the Secretary states that since these individuals did not visit the mine or observe the cited conditions, the only information available to them was obtained from other MSHA employees. It is clear that Newmont is not seeking to depose these individuals to obtain information about site specific issues, but to inquire about the alleged "zero tolerance policy." In addition, some of these witnesses may have direct knowledge of the allegations set forth in the citations and orders. Thus, the Secretary's objection is not well taken.

Second, the Secretary alleges that a "significant amount" of the information sought from the proposed deponents is protected by the deliberative process privilege. (Sec. Br. at 3). I agree with Newmont that the fact that objections may be raised during a deposition does not provide a sufficient basis to bar the deposition altogether. In addition, it is not clear at this juncture that the deliberative process privilege will apply.

Third, the Secretary argues that protective orders are necessary because "courts do not engage in adjudicating hypothetical issues." *Id.* at 5. He states that questions about the alleged "zero tolerance policy" are hypothetical because the Secretary "will always look to determine whether the mercury present poses a hazard to the health of employees...." *Id.* at 6-7. The Secretary maintains that deposition questions about this issue constitute an impermissible intrusion into the Secretary's time and resources. *Id.* at 8. The Secretary's argument begs the question. Respondent contends that the citations and orders were issued because of this "zero tolerance policy" rather than because MSHA determined that the mercury found at the mine posed a health hazard. Thus, inquiry into the alleged policy is relevant to the subject matter of these cases. The fact that the Secretary disputes Newmont's contention is not a basis for prohibiting the depositions.

Fourth, the Secretary contends that the possible benefits of deposing the four MSHA officials are outweighed by the hardship and annoyance that the depositions would create. As discussed above, the alleged "zero tolerance policy" is relevant to the issues in these cases. The Secretary characterizes these depositions as "fishing expeditions" that, if regularly allowed, "would create a flood of similar requests." (Sec. Br. at 12). I disagree. Newmont is seeking very specific information about MSHA policies and practices that it believes have a significant bearing on these case. If, as counsel for the Secretary alleges, MSHA does not have a "zero tolerance policy" and these proposed deponents do not have any other information about the citations and orders issued to Newmont, then the depositions will be rather short and any burden on the Secretary will not be very great.

Finally, the Secretary maintains that Ms. Hricko and Messrs. Hansen and Day are high administrative officials who should be protected from unwarranted discovery. He maintains that Ms. Hricko's deposition should not be allowed because she is one of MSHA's two deputy Assistant Secretaries. He also maintains that the depositions of Messrs. Hansen and Day should be barred because they hold the top two positions of MSHA's Western District. The Secretary contends that these depositions should not be allowed absent a demonstration that they have direct personal factual information pertaining to material issues in these cases. Finally, he maintains that these depositions amount to harrassment. The Secretary states that other MSHA employees have a more comprehensive understanding of the "policies behind" these proceedings, have more direct knowledge of the facts involved, and that Newmont can obtain the same information from other sources. *Id.* at 10.

Top executive department officials should not, except in extraordinary circumstances, be called to testify regarding their reasons for taking official actions. Simplex Time Recorder Co.

v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985). The courts have not drawn a clear line between such high level officials and other government employees. High level officials are protected from compulsory testimony because such officials must be free to conduct their jobs without the constant interference of the discovery process. Church of Scientology of Boston v. I.R.S., 138 F.R.D. 9, 12 (D. Mass. 1990).

I find that Messrs. Hansen and Day are not the type of high level government officials that require such protection. The South Area Gold Quarry is within MSHA's Western Metal/Nonmetal District. Messrs. Hansen and Day, directly or indirectly, supervise the MSHA inspector who issued the subject citations and orders. They may be more directly aware of any "zero tolerance policy" than the issuing inspector since they are responsible for enforcement throughout MSHA's Western District. Although I find that Hansen and Day have important positions within MSHA, they are not of such a high level that they need the special protection from compulsory testimony that higher level officials require. As a result of their positions, they may have information about the issues in these cases that are not available from other MSHA employees.

The proposed deposition of Andrea Hricko presents a closer question. As stated above, at all pertinent times, she was one of two Deputy Assistant Secretaries. Newmont argues that she is not a high level official. It relies, in part, on an order of former Commission Judge Broderick allowing the deposition of MSHA's Administrator for Coal Mine Safety and Health. In re: Contests of Respirable Sample Alternation Citations, 14 FMSHRC 410 (February 1992). In that case, however, the judge allowed the deposition in large measure because the proposed deponent was retired and his deposition would not "disrupt the Government's functions in the least." *Id.* at 411. The deposition of Ms. Hricko will remove her from critical official tasks. I agree with the Secretary that she occupies a sufficiently high administrative position to grant her "limited immunity from being deposed in matters about which [she has] no personal knowledge." Warzon v. Drew, 115 F.R.D. 183, 185 (E.D. Wis. 1994). I apply a balancing test to determine whether the motion for a protective order should be granted.

The principles to consider may be summarized as follows:

> Before the involuntary depositions of high ranking government officials will be permitted, the party seeking the depositions must demonstrate that the particular official's testimony will likely lead to the discovery of admissible evidence and is essential to that party's case. In addition, the evidence

must not be available through an alternative source or via less burdensome means.

Id. (citation omitted). Although it is not entirely free from doubt, it is unlikely that Ms. Hricko has "direct personal factual information" about the citations and orders in these cases. Church of Scientology, 138 F.R.D. at 12. On the other hand, Newmont has established that Ms. Hricko may have information relating to MSHA's alleged "zero tolerance policy" and that her testimony on this issue may lead to the discovery of admissible evidence. It is likely, however, that this information is available from alternative sources or through a less burdensome means. For example, Messrs. Hansen and Day may well have the same information. Indeed, if such a "zero toleration policy" exists, they would have more direct information regarding its implementation at the South Area Gold Quarry. Information obtained through interrogatories may also shed light on this issue. I find that the burden placed upon Ms. Hricko and MSHA if a protective order is not granted is significantly greater than the burden placed on Newmont if a protective order is granted. It is important to remember that the issue in these cases is not the history of MSHA's enforcement policies with respect to mercury contamination, but whether the conditions described in the citations and orders existed and, if so, whether the conditions violated the cited standards.

For the reasons set forth above, the Secretary's motion for a protective order is **GRANTED** with respect to Ms. Andrea Hricko and is **DENIED** with respect to Messrs. Fred Hansen, Garry Day, and Tom Koenning. In addition, Newmont's request for sanctions is **DENIED**.

Richard W. Manning
Administrative Law Judge

Distribution: Via facsimile and U.S. Mail

Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105-2999

Henry Chajet, Esq., PATTON BOGGS, 2550 M Street, NW, Washington, DC 20037-1350

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 96-121
Petitioner	:	A.C. No. 11-02440-03750
v.	:	
	:	Marissa Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

ORDER DISAPPROVING SETTLEMENT AGREEMENT

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed a motion to approve a settlement agreement. A reduction in penalty from $2,392.00 to $993.00 is proposed.

Citation No. 4575758 alleges a violation of section 75.342(a)(4) of the Regulations, 30 C.F.R. § 75.342(a)(4), because the methane monitor on a continuous miner did not register when methane was present nor deenergize the miner when methane was present. The violation is alleged to be "significant and substantial" and of "moderate" negligence. The agreement proposes to delete the S&S designation and to reduce the proposed penalty from $506.00 to $50.00. No explanation is given for the removal of the S&S designation. As justification for the settlement, the agreement declares that:

> The penalty is reduced in recognition of Respondent's good faith efforts in abating the cited conditions within the time granted by the MSHA inspector. Further, the Respondent is strongly committed to enforcing compliance more strenuously in the future. The operator will make all necessary attempts to assure that the methane monitor stays repaired and calibrated in the future. Further, the miners will continue to carry hand-held methane detectors in accordance with mine procedure.

The agreement calls for a fifty percent reduction in proposed penalties for the three remaining citations, which involve two areas of coal dust accumulations in violation of section 75.400, 30 C.F.R. § 75.400, and a failure to follow the ventilation plan in violation of section 75.370(a)(1), 30 C.F.R. § 75.370(a)(1). The only justification provided for all three is the "Respondent's good faith efforts in abating the condition within the time allowed by the MSHA inspector and its strong commitment to enforcing compliance more strenuously in the future." The agreement then recites the Respondent's abatement efforts as set forth in section 17 (Action to Terminate) of the citation.

The Mine Act was passed with the intention that the Commission "assure that the public interest is adequately protected before approval of any reduction in penalties." S. Rep. No. 95-181, 95th Cong., 1st Sess. 45 (1977), *reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). In this connection, it is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in Section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481 (April 1996).

Consequently, Commission Rule 31(b)(3), 29 C.F.R. § 2700.31(b)(3), requires that a motion to approve a settlement include "[f]acts in support of the penalty agreed to by the parties" so that the judge can verify that the reduced penalty is appropriate. No such facts are provided with this agreement.

The agreement offers no reason for deleting the "significant and substantial" designation in Citation No. 4575758. The agreement should explain why the violation is not S&S and why the penalty is being reduced so drastically.

Furthermore, as has been previously pointed out, neither the Respondent's abatement efforts, which were presumably considered when the penalty was originally assessed,[1] nor a commitment to comply with the law in the future, which is the expected result of every citation or order, are a reason for reducing the penalty. *Coal Miners Inc.*, 18 FMSHRC 827, 828 (May 1996). Therefore, absent extraordinary circumstances, which do not appear to be present in this case, explaining what abatement efforts have taken place and stating that the Respondent is strongly committed to compliance in the future supply no facts in support of the agreement.

A settlement agreement should provide the reasons for reducing a penalty. Generally speaking, the greater the reduction in penalty, the more detailed should be the justification.

In this case, no facts in support of the modification or of the reduced penalties have been furnished. Therefore, having considered the representations and documentation submitted, I am unable to approve the proffered settlement.

ORDER

Accordingly, it is **ORDERED** that the motion for approval of settlement is **DENIED**. The parties have **15 days** from the date of this order to submit additional information to support the motion for settlement. Failure to submit additional information, or to resubmit a new agreement, within the time provided will result in the case being scheduled for hearing.

T. Todd Hodgdon
Administrative Law Judge

---

[1] Section 100.3(f), 30 C.F.R. § 100.3(f), provides for "a 30% reduction in the amount of the regular assessment where the operator abates the violation in the time set by the inspector."

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 96-126-M
Petitioner	:	A.C. No. 11-00061-05519
v.	:	
	:	Fox River Stone
FOX RIVER STONE COMPANY,	:	
Respondent	:	

ORDER DISAPPROVING SETTLEMENT AGREEMENT

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed a motion to approve a settlement agreement. The agreement recites that Citation No. 4537779 was vacated by the Secretary on July 17, 1996. A reduction in penalty for the remaining citation from $147.00 to $74.00 is proposed.

The citation alleges a violation of section 56.9200(a) of the Regulations, 30 C.F.R. § 56.9200(a), because a miner was observed riding in the bucket of a loader from the work area to the plant. The violation is alleged to be "significant and substantial," of "high" negligence and to have resulted from the Respondent's "unwarrantable failure" to comply with the Regulation. As justification for the settlement, the agreement offers that:

> The penalty is reduced in light of Respondent's good faith efforts in abating the condition within the time allowed by the MSHA inspector and its strong commitment to enforce compliance more strenuously in the future. The Respondent immediately disciplined this employee and further, requires all employees to take yearly safety training updates to assure compliance with it[s] own policies and MSHA regulations.

The Mine Act was passed with the intention that the Commission "assure that the public interest is adequately protected before approval of any reduction in penalties." S. Rep. No. 95-181, 95th Cong., 1st Sess. 45 (1977), *reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). In this connection, it is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in Section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481 (April 1996).

Consequently, Commission Rule 31(b)(3), 29 C.F.R. § 2700.31(b)(3), requires that a motion to approve a settlement include "[f]acts in support of the penalty agreed to by the parties" so that the judge can verify that the reduced penalty is appropriate. No such facts are provided with this agreement.

In spite of the low proposed penalty, on its face this appears to be a fairly serious offense. This is reflected both in the description of the violation and the findings of "significant and substantial," "high" negligence and "unwarrantable failure." The agreement does not propose a modification of any of these findings.

The agreement provides for a significant reduction in penalty, yet nothing is presented to show why the original assessment should be reduced. Section 100.3(f) of the Regulations, 30 C.F.R. § 100.3(f), "provides a 30% reduction in the amount of the regular assessment where the operator abates the violation in the time set by the inspector." Therefore, the Respondent's abatement efforts have presumably already been taken into account when the penalty was originally assessed. This case demonstrates nothing out of the ordinary in that regard. Indeed, the yearly safety training updates, cited as part of the good faith of the Respondent, are required by law, 30 C.F.R. § 48.8.

Similarly, a commitment to comply with the law in the future is expected of everyone. Further, such a commitment is one of the anticipated results of a citation or order. It certainly provides no basis for a reduction in penalty.

This agreement does not present any facts to demonstrate why the penalty should be reduced. The grounds set forth, to the extent they are relevant at all, should have been considered at the time the penalty was assessed. Consequently, having considered the representations and documentation submitted, I am unable to approve the proffered settlement.

ORDER

Accordingly, it is **ORDERED** that the motion for approval of settlement is **DENIED**. The parties have **15 days** from the date of this order to submit additional information to support the motion for settlement. Failure to submit additional information, or to resubmit a new agreement, within the time provided will result in the case being scheduled for hearing.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Gay F. Chase, Esq., Office of the Solicitor, Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

MR. Daniel P. Foltyniewicz, Fox River Stone Co., 7N 394 McLean Blvd., South Elgin, IL 60177 (Certified Mail)

/lt

*U.S. GOVERNMENT PRINTING OFFICE:1996-405-710/63376