

August 1981

Commission Decisions

8-04-81	Tazco, Inc.	VA 80-121	Pg. 1895
8-06-81	Rebel Coal Co.	WEVA 80-532-D	Pg. 1900

Administrative Law Judge Decisions

8-04-81	The Anaconda Co.	WEST 79-20-M	Pg. 1904
8-04-81	Tehama County Excavating	WEST 80-348-M	Pg. 1909
8-06-81	Consolidation Coal Co.	WEVA 81-259-R	Pg. 1914
8-10-81	Minerals Exploration Co.	D 81-1	Pg. 1919
8-12-81	MSHA ex rel Theodore Hazzard v. Cannelton Industries, Inc.	WEVA 81-392-D	Pg. 1923
8-13-81	The Anaconda Co.	WEST 81-94-M	Pg. 1926
8-14-81	Chemical Lime, Inc.	CENT 80-231-M	Pg. 1928
8-17-81	Johnson, Stewart & Johnson Mining Co., Inc.	WEST 79-175-M	Pg. 1937
8-18-81	Kaiser Sand & Gravel Co.	WEST 80-89-M	Pg. 1941
8-20-81	Rushton Mining Co.	PENN 81-24	Pg. 1948
8-20-81	National Cement Co.	SE 81-17-M	Pg. 1951
8-21-81	Amax Coal Co.	LAKE 81-37	Pg. 1975
8-21-81	Mark Segedi On behalf of: S.J. Ezarik, et al., v. Bethlehem Mines Corp.	PENN 80-273-D	Pg. 1987
8-24-81	C F & I Steel Corp.	WEST 79-239	Pg. 1989
8-24-81	Franklin D. Kaestner v. Colorado Westmoreland Inc.	WEST 81-24-D	Pg. 1994
8-26-81	Mathies Coal Co.	PENN 80-260-R	Pg. 1998
8-27-81	Beatrice Pocahontas Co.	VA 80-167-C	Pg. 2004
8-28-81	UMWA	CENT 81-223-R	Pg. 2016
8-28-81	V & R Coal Corp.	WEVA 81-188	Pg. 2019
8-31-81	United States Steel Corp.	PENN 81-9-R	Pg. 2027

Commission Decisions

AUGUST

The following cases were Directed for Review during the month of August:

Jones & Laughlin Steel Corporation v. Secretary of Labor, MSHA and UMWA, PENN 81-96-R; (Judge Laurenson, July 1, 1981).

Secretary of Labor, MSHA v. Capitol Aggregates, Inc., CENT 79-59-M, etc.; (Judge Vail, June 30, 1981).

Lloyd Brazell v. Island Creek Coal Company, KENT 81-46-D; (Judge Steffey, July 13, 1981).

Secretary of Labor, MSHA v. Monterey Coal Company, LAKE 80-413-R, 81-59; (Judge Moore, July 13, 1981).

Todilto Exploration and Development Corporation v. Secretary of Labor, MSHA, CENT 79-91-RM, 79-310-M; (Judge Boltz, July 21, 1981).

Review was Dismissed in the following case during the month of August:

Gerald Boone v. Rebel Coal Company, WEVA 80-532-D; (Judge Melick, July 8, 1981).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 4, 1981

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. VA 80-121
 :
TAZCO, INC. :

DECISION

In this civil penalty case arising under the 1977 Mine Act, 30 U.S.C. §801 et seq. (Supp. III 1979), the Secretary contests a judge's power to impose, in effect, a \$0.00 penalty by suspending payment of the actual penalty assessed. The judge assessed and then suspended a \$400 penalty against Tazco, Inc., in a November 17, 1980, decision issued in response to the parties' settlement motion. 2 FMSHRC 3299. For the reasons set forth below, we hold that the Commission and its judges lack the power to suspend penalties in whole or in part. We therefore affirm the judge's decision only insofar as it approved the settlement and reverse it with regard to the penalty suspension.

The underlying facts are undisputed. In January 1980, Tazco was cited for failing to drill roof bolt test holes at 20-foot intervals. Four days after the first citation, Tazco was cited for an unwarrantable failure (section 104(d)(1) of the Mine Act) to comply with the same roof control provision. The second citation is the subject of this case.

MSHA initially assessed for the second violation a \$500 penalty which Tazco contested. However, before the hearing, the parties agreed to a settlement of \$400. The Secretary moved for approval of this settlement in his Motion For Decision And Order Approving Settlement. To justify the \$100 reduction, the motion stated that: Tazco had reinstructed its foremen respecting the 20-foot test hole requirement after the initial citation; immediately after receiving the second citation, Tazco discharged the particular foreman who was apparently responsible for both violations; and Tazco alleged that the roof was sound, and the Secretary had no information to the contrary.

In his decision, the judge undertook an "independent evaluation and de novo review of the circumstances and the amount of the penalty warranted." 2 FMSHRC at 3299. The sole fact he discussed was Tazco's discharge of the offending foreman, which, he concluded, warranted suspension of the stipulated penalty. Id. Accordingly, he ordered

"that for the violation found the operator pay a penalty of \$400, with payment to be suspended." Id. at 3300. He then dismissed the case. 1/

A suspended penalty is virtually the same as assessing no penalty despite a violation. Both actions are contrary to the Mine Act's mandatory penalty structure to which we have alluded in previous cases. See, for example, Island Creek Coal Company, 2 FMSHRC 279, 280 (1980); Cf. R.M. Coal Company, 7 IBMA 64, 67-68 (1978) (holding that 1969 Coal Act mandated assessment of penalties). This case provides an appropriate occasion to elaborate on the Mine Act's mandatory penalty assessment scheme.

Section 110 contains the Mine Act's major penalty provisions. In mandatory terms, section 110(a) directs the Secretary, who has enforcement responsibility under the Mine Act, initially to assess a penalty for each violation; section 110(i) similarly provides that the Commission, which has adjudicative responsibility, "shall have authority to assess all civil penalties provided in [the] Act." 2/ The language of the

1/ We treat the judge's decision as approving the settlement, assessing a \$400 penalty, and then suspending its payment. The Secretary cast his motion as one for settlement approval. The judge recited only this characterization of the motion in his opinion, leading us to believe he accepted that characterization. Because he discussed disapprovingly only a single factor, we can conclude only that he tacitly accepted the remaining recitations in the motion. Thus, his treatment is in line with settlement approval where the judge's duty is to assure that the settlement was not reached for an improper reason violative of the Mine Act's objectives. Davis Coal Co., 2 FMSHRC 619 (1980).

2/ Section 110(a) provides in relevant part:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 for each such violation....

Section 110(i) provides:

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 a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

two subsections--indeed the language of all of section 110--is plainly based on the premise that a penalty will be assessed for each violation at both the Secretarial and Commission levels.

The Mine Act's legislative history also shows that Congress intended a mandatory penalty structure. Congress consistently described penalties as mandatory without entertaining any distinction between the assessment of a penalty at the Secretarial or Commission level. ^{3/} For example, Senator Williams, chief architect and a sponsor of the Senate bill, described the proposed Act as continuing the concept of "mandatory civil penalties [which] have been a feature of the enforcement of the Coal Mine Health and Safety Act since 1970." Leg. Hist. 88. The Senate report on the Senate bill states: "The Committee specifically rejects the suggestion that the imposition of civil penalties be discretionary rather than mandatory. ... [T]he Committee has adopted the civil penalties as they exist in the current Coal Act." S. Rep. 95-181, at 41, reprinted in Leg. Hist. 629. Further, in both houses, amendments which sought to make penalties discretionary were offered and rejected. Senate vote, Leg. Hist. 828, 1063; House vote, Leg. Hist. 1183, 1233. The debates which preceded the rejections did not draw any distinction between assessment at the Secretarial or Commission level. Views were again expressed simply that penalties should be mandatory. Leg. Hist. 1008.

In sum, both the text and legislative history of section 110 make clear that the Secretary must propose a penalty assessment for each alleged violation and that the Commission and its judges must assess some penalty for each violation found.

As previously noted, while in a strict legal sense, a \$0.00 penalty and a \$400 penalty with payment suspended are not identical remedies, their practical effect is the same. To allow the judge to accomplish de facto by penalty suspension what he cannot do directly strikes us as an incongruous result. It allows the judge to thwart the congressional intent that at least some penalty be assessed for each violation found. Thus, consistency with that intent weighs against a judge's power to suspend a penalty.

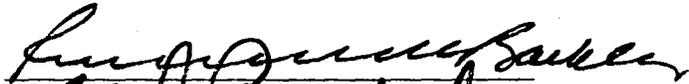
In addition, nothing else in the Mine Act confers a power to suspend penalties. Administrative law judges are subordinate to, and draw their powers from, their controlling agency and its organic statute. Administrative Procedure Act §7(b), 5 U.S.C. §556(c); Attorney General's Manual on the Administrative Procedure Act 74 (1947). Thus, it is axiomatic that an administrative law judge's power is limited by the limits on his agency's powers. The Mine Act does not expressly grant the Commission the power to suspend payment of penalties. Consequently, if the power is not otherwise inherent or implied by the broad grant of power given the Commission to "assess all civil penalties," the Commission and its judges lack the power. As discussed above, since the power to suspend is in opposition to the Mine Act's mandatory penalty structure, we cannot conclude that such implied power exists.

^{3/} In general, see Senate Subcommittee on Labor, Comm. on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 85, 88, 375-376, 600-601, 629, 910, 1167, 1211-12, 1364-65 (1978) ["Leg. Hist."].

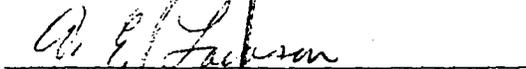
Furthermore, by way of analogy, the majority state rule and the federal rule are that even trial judges have no inherent authority to suspend the execution of sentences in criminal cases. Ex parte U.S., 242 U.S. 27, 42 (1916); see generally 73 ALR 3d 474 (1976). They gain the right to suspend sentences only by a statutory grant. Again, we stress the absence of a similar grant in the Mine Act.

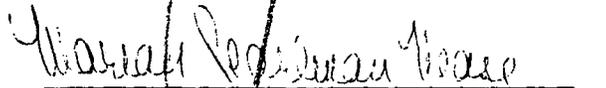
Therefore, the Commission and its judges do not have the power to suspend penalties either in whole or in part. If it is found in a given case that a low penalty is warranted, a low penalty may, of course, be assessed. 4/ Similarly, if a judge disagrees with a stipulated penalty amount in a settlement, he is free to reject the settlement and direct the matter for hearing.

For the foregoing reasons, we affirm the judge insofar as he approved the settlement and assessed a \$400 penalty; we reverse insofar as he suspended payment of the \$400 assessed penalty. Our decision therefore reinstates the \$400 penalty to which the parties stipulated.


Richard V. Buckley, Chairman


Frank F. Jeske, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

4/ We note, however, that this case does not require us to pass on the propriety of nominal penalties.

Distribution

Nancy S. Hyde, Esq.
Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Paul Merritt, Esq.
Tazco, Inc.
P.O. Box 367
Doran, Virginia 24612

Administrative Law Judge Joseph Kennedy
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 6, 1981

GERALD D. BOONE :
 :
 v. : Docket No. WEVA 80-532-D
 :
 REBEL COAL COMPANY :

ORDER

This proceeding was initiated by a complaint filed by Gerald D. Boone under the provisions of section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" alleging that Mr. Boone was discharged by the Rebel Coal Company in violation of section 105(c)(1) of the Act because he refused to comply with an order to drive a haulage truck he claimed was in a hazardous condition. On July 8, 1981, the judge issued his decision finding that Boone was discharged in violation of section 105(c)(1) of the Act. The judge neither granted nor denied any relief but ordered the parties "to consult and seek to stipulate as to the specific damages resulting from the discharge of Gerald D. Boone found unlawful in these proceedings and to report to me in writing on or before July 30, 1981, the results of such consultations."

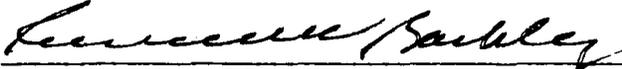
On July 30, 1981, Rebel Coal Company filed its Petition for Review raising questions of law and fact relating to the judge's decision.

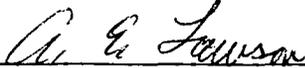
The Commission considered an analogous situation in Council of Southern Mountains, Inc. v. Martin County Coal Corp., 2 FMSHRC 3216 (Nov. 12, 1980). There the judge had issued his decision and granted some relief, but did not resolve the amount of attorney fees and other costs. We looked to section 113(d)(1) of the Act and Commission Rule 65(a) to conclude that failure to resolve these monetary awards did not constitute a final disposition by the judge to initiate the running of the statutory review periods under section 113 of the Act. In that case we dismissed the petitions for review as premature. In the instant case, the judge did not resolve any monetary awards, but ordered the parties to consult and to report back to him. Our reasoning and decision in Martin County Coal Corp., supra is applicable to this case.

Accordingly, the petition for review filed by Rebel Coal Company is dismissed as premature. The parties may file petitions for review

81-8-4

in accordance with section 113 of the Act and Commission Rule 70
(29 C.F.R. 2700.70) once the judge has made his final disposition of
this proceeding.


Richard V. Backley, Chairman


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

Distribution:

Daniel F. Hedges,
Appalachian Research and Defense Fund, Inc.
1116 - B Kanawha Boulevard
East Charleston, West Virginia 25301

Carl McAfee, Esq.
Cline McAfee and Adkins
1022 Park Avenue, NW
Norton, Virginia 24273

Cynthia Attwood, Esq.
U.S. Department of Labor
Office of the Solicitor
4015 Wilson Boulevard
Arlington, Virginia 22203

Administrative Law Judge Gary Melick
Office of Administrative Law Judges
Federal Mine Safety and Health Review Commission
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 4 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),)	
	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-20-M
)	
v.	)	MSHA CASE NO. 24-00338-05003 F
)	
THE ANACONDA COMPANY,	)	MINE: Berkeley Pit
Respondent.)	

DECISION

Appearances:

Ann M. Noble, Esq., Office of the Solicitor, United States Department of Labor, 1961 Stout Street, 1585 Federal Building, Denver, Colorado 80294
For the Petitioner

Edward F. Bartlett, Esq., and Karla M. Gray, Esq.
P.O. Box 689, Butte, Montana 59701
For the Respondent

Before: Judge Virgil E. Vail

I. Procedural Background

The above captioned civil penalty proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) [hereinafter referred to as "the Act"].

Pursuant to notice, a hearing on the merits was held at Butte, Montana on September 16, 1980. Respondent called Walter B. Brown and Robert G. Henderson as witnesses. Petitioner did not offer any oral testimony. The parties filed post hearing briefs.

II. Stipulations

During the course of the hearing, the parties entered into the following stipulations:

1. The Administrative Law Judge has jurisdiction to hear this case.
2. The respondent is a large company.

3. The assessment of a penalty in this case would not affect the respondent's ability to continue in business.

4. The autopsy report is admissible (P's Exhibit 1).

III. Findings of Fact

Based on the evidence, I find that the following facts were established:

1. Citation No. 341641 was issued as a result of a fatal accident which occurred on July 11, 1978.

2. Mr. Charles McNair, who was employed by the respondent at its Berkeley Pit, was fatally injured when he became entangled in a conveyor belt. (P's Exhibit 1).

3. Mr. Robert Henderson, a foreman at the Berkeley Pit when the accident occurred, observed Mr. McNair on the day of the accident when the latter turned in his time card. At that time Mr. Henderson did not observe anything unusual about Mr. McNair nor did he smell any alcohol. (Tr. 19-21).

4. A co-worker of the deceased, Mr. Walter Brown, saw the deceased on the bus used to transport the employees to their work areas. Mr. Brown did not notice anything unusual about Mr. McNair and testified that there was no indication that Mr. McNair had been drinking. (Tr. 14-15).

5. There were no witnesses to the fatal accident.

IV. Discussion

Citation No. 341641^{1/} charges the respondent with having violated mandatory safety standard 55.20-1. The standard provides that:

55.20-1 Mandatory. Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job.

^{1/} Citation No. 341641 reads as follows: On July 11, 1978, Charles W. McNair was fatally injured when he became entangled in the troughing rollers of the number 2 conveyor belt. An autopsy of the body of Charles McNair was ordered by the Silver Bow County Coroner's Office. The autopsy report, dated July 13, 1978, and issued by Silver Bow General Laboratory, Continental Drive, Butte, Montana, showed the blood alcohol level on the post mortem sample of blood at a level of 0.12%. Charles McNair was allowed on the job while under the influence of alcohol on July 11, 1978.

The sole issue is whether the respondent violated 55.20-1 by permitting the deceased on the job while he was under the influence of alcohol.

The phrase "under the influence," as used in 55.20-1, has not been defined any place within the standards or the Act. However, the petitioner urges application of the State of Montana's statutory blood alcohol level presumption.

The State of Montana, the situs of the accident involved herein, has adopted a standard which states that anyone with a .10% blood alcohol level is presumed to be "under the influence." This statute is contained in Title 61 of the Montana Code Annotated under "Driving Under Influence of Alcohol or Drugs." However, this presumption applies only to criminal prosecutions. MCA § 61-8-401.

I find no authority, nor has the petitioner in this case presented any, to the effect that a presumption found in a criminal statute can be used in an administrative proceeding. To the contrary, the cases appear to hold otherwise. In the case of City of Sioux Falls v. Christensen, 116 N.W. 2d 389, (S. Dak. 1962), the Supreme Court of South Dakota held that,

Our presumption statute is clearly limited to criminal prosecutions thereunder for the offense of driving a motor vehicle while under the influence of intoxicating liquor ... Consequently, the presumptions established therein have no application to prosecutions for violations of municipal ordinances. p. 390.

The Supreme Court of Arizona in the case of Mattingly v. Eisenberg, 285 P. 2d 174 (Ariz. 1955) reached a similar result. The court held that the statutory presumption of when a driver is under the influence applied only in criminal prosecutions of persons charged with driving while under the influence and did not apply to civil cases. See also Patton v. Tubbs 402 P. 2d 355 (Wash. 1965).

If the Montana presumption were to be applied in this case it would place an undue burden on mine operators across the country. Not only would they be forced to search the statute books for definitions that might be found to apply to them in the course of federal administrative hearings, but they would also be subject to the presumptions and definitions contained in state criminal codes.

Furthermore, I cannot believe that Congress intended that we look to state law in order to enforce what was intended to be a uniform piece of legislation. As the United States Supreme Court has held:

We must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide. Jerome v. U.S., 318 U.S. 101, 104 (1943). See also NLRB v. Natural Gas Utility District, 402 U.S. 600 (1971).

There is no indication in this instance that Congress intended that a state presumption be applied.

At the hearing, counsel for respondent stipulated to the admissibility of the autopsy report (Tr. 4 & 8). Now, however, respondent contends that the results of the chemical blood test are inadmissible: Respondent argues that the admissibility of the autopsy report and that of the chemical analysis are two entirely different matters. I conclude that since the autopsy report, which contains the chemical analysis, was admitted into evidence at the hearing counsel cannot now object to the admission of the blood tests contained in the autopsy report even though he reserved all legal objections.

The only evidence that the deceased miner was "under the influence" is the autopsy report offered by the petitioner, which showed under the heading "Chemical Analysis", that the miner's "Blood alcohol level on the post-mortem sample of blood showed a level of 0.12%." Various states have accepted the premise that blood alcohol levels of amounts less than the above constitute grounds that a driver of a motor vehicle may be presumed to be "under the influence of alcohol or drugs" for criminal prosecution. However, in this case, without additional evidence or proof, the finding of the autopsy report cannot be found to warrant a decision that the miner herein was "under the influence" as provided in the standard.

Medical testimony might have been of value in a case of this type in order to properly interpret the autopsy report. The District of Columbia Court of Appeals in the case of Lister v. England 195 A. 2d 260 (D.C. App. 1963) held that blood analysis results are not even admissible unless introduced by expert testimony. Because, as the court stated, "without benefit of such testimony or resort to the statutory standards the result of the analysis is meaningless." See Also Holt v. England 196 A. 2d 87 (D.C. App. 1963) and City of Sioux Falls v. Christensen, supra.

In that I find that the State of Montana statute relating to the presumption of driving while under the influence does not apply here, and in the absence of that presumption or other evidence to interpret the chemical analysis of the autopsy report, I must conclude that petitioner failed to establish a prima facie case that the miner was "under the influence of alcohol or drugs" at the time of the fatal accident.

Therefore, it is hereby ORDERED that Citation 341641 be vacated and the case DISMISSED.


Virgil E. Nail
Administrative Law Judge

Distribution:

Ann M. Noble, Esq.
Office of the Solicitor
United States Department of Labor
1585 Federal Building
1961 Stout Street
Denver, Colorado 80294

Edward F. Bartlett, Esq.
Karla M. Gray, Esq.
P.O. Box 689
Butte, Montana 59701

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 4 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
)	
Petitioner,	)	DOCKET NO. WEST 80-348-M
	)	A/O No. 04-04191-05003 H
v.	)	DOCKET NO. WEST 80-349-M
	)	A/O No. 04-04191-05004 W
TEHAMA COUNTY EXCAVATING,)	
	)	MINE: Lattin Pit & Mill
Respondent.)	

DECISION

Appearances:

Marshall P. Salzman, Esq., Office of the Solicitor, United States
Department of Labor, 450 Golden Gate Avenue, Box 36017, San Francisco,
California 94102

For the Petitioner,

Fred Lindauer, Pro Se
P.O. Box 615, Red Bluff, California 96080

For the Respondent

Before: Judge Virgil E. Vail

I. Procedural Background

The above-captioned civil penalty proceedings were brought pursuant to
Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
§ 820(a) [hereinafter referred to as "the Act"].

Pursuant to notice, a hearing on the merits was held in Redding,
California on November 25, 1980. Willie Davis, federal mine inspector,
testified on behalf of the petitioner. Fred Lindauer, President of the
respondent company, represented the company and appeared as a witness. Roy
Cone also testified on behalf of the respondent.

II. FINDINGS OF FACT

I find that the evidence establishes the following facts:

1. Respondent's operation involves removal of aggregate from stream beds. The aggregate is then transported to a screening plant. At the screening plant the aggregate is separated according to size. (Tr. 9).

2. The Caterpillar 966 front end loader, which is the subject of both the withdrawal order and the citation involved herein, is approximately 22 feet long, 10 feet high, 8 feet wide and weighs 20 tons. (Tr. 10).

3. On August 28, 1979, Willie Davis, federal mine inspector, asked the operator of the 966 Caterpillar to test the brakes. The brakes would not stop the machine. In order to stop the heavy piece of equipment, the operator had to use the gear lever. For example, if the equipment was moving forward he would shift into reverse and vice versa. (Tr. 11).

4. Davis informed the operator that he was going to issue a 107(a) withdrawal order and the operator would have to cease working. At that time the operator got in a car and left the area. (Tr. 12).

5. Approximately ten minutes later Mr. Lindauer appeared. Although he had been notified that the screening plant had been shut down, he proceeded to load two trucks using the 966 Caterpillar. (Tr. 13 and 25).

6. Not until after he had finished loading the trucks did he inquire of Mr. Davis as to why a withdrawal order had been issued. (Tr. 13). Mr. Lindauer then stated that he had no intention of shutting down his operation. (Tr. 15).

7. Lindauer did tell the operator to check the fluid levels on the brakes and radioed for Roy Cone, a heavy equipment mechanic, to work on the brakes. (Tr. 16 and 30).

8. When Cone arrived at the screening plant, the brakes on the loader were inoperable. (Tr. 33). He repaired an oil leak and also a cracked line or cylinder in the brakes. (Tr. 30).

9. On August 30, 1980, Davis returned to the site and again asked the operator to test the brakes. The brakes were still inadequate and would not stop the equipment. (Tr. 18). The operator told Davis that mechanics had been out twice to work on the brakes, but had not been able to fix them. (Tr. 18).

10. When Davis returned on September 11, 1980, and the brakes were still not fixed he issued a citation for violating the withdrawal order. (Tr. 19). A week later he returned to inform Mr. Lindauer that they were in the process of seeking a temporary injunction, in the United States District Court, to enjoin him from operating the 966 Caterpillar. (Tr. 20).

III. DISCUSSION

Respondent contends that Tehama's operation is not within the coverage of the Act. (Tr. 7). Neither side offered any evidence on this point. However, the Act defines its coverage as being,

Each coal or other mine, the products of which enter Commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act. Sec. 4.

It has long been established that sand and gravel operations are covered by the Act. In the case of Marshall v. Wallach Concrete Products, Inc., et al., the U.S. District Court held that sand and gravel operations are "mines" within the meaning of Section 3(h)(1) of the Act, and accordingly are within the coverage of the Act. 1 BNA MSHC 2337 (1980).

It has also been established that even though the products of a mining operation are not sold outside of the state where they are mined they are competing with interstate products. Therefore, there is what has been termed a "ripple effect" and it has been established that the products do affect commerce. Marshall v. Bosack 1 BNA MSHC 1671 (1978) See Also Wickard v. Filburn, 317 U.S. 111 (1942).

Also, Respondent had been issued citations prior to the ones involved in these cases and there is no evidence that jurisdiction was ever challenged.

In light of the above, I conclude that respondent is covered by the Act and that I have jurisdiction over these proceedings.

The 107(a) imminent danger order was issued on August 28, 1979.^{1/} There is no evidence in the record to the effect that the brakes were working. Mr. Lindauer testified that as soon as he was notified of the problem he called for a mechanic. (Tr. 25). Roy Cone, the mechanic, testified that the brakes were inoperable when he arrived. (Tr. 33).

^{1/} 381640 was modified on the same day, August 28, 1979, because the inspector had incorrectly designated the type of action as being taken under section 104(a) and the standard being violated as 56.9-2. The type of action was modified to read; 107(a)-104(a) and the part and section was changed to 56.9-3.

The loader was being operated on a public road. There were low banks approximately three feet high and there were trucks and people walking in the same area. (Tr. 11 and 12). Since the operator did not have complete control of the loader, I conclude that the operation of the loader presented an imminent danger not only to the operator, but to others in the vicinity. Therefore, the withdrawal order is affirmed.

Citation no. 381641 was issued on September 11, 1979 after Davis requested that the operator test the brakes, and again found that they were inadequate to stop the loader. The citation alleges that the respondent was operating the loader in violation of the withdrawal order.

Respondent failed to offer any testimony that would point to the brakes being in good condition on the day the citation was issued. Mr. Lindauer testified that he just assumed the brakes had been repaired after the withdrawal order had been issued. (Tr. 26). Roy Cone stated that he worked on the brakes subsequent to August 28, 1979, but could not remember the exact date or what work had been performed. (Tr. 33).

Based on the uncontradicted testimony of the inspector, I find that the citation should be affirmed.

Penalty Assessment

I find that the respondent is a small operator within the meaning of the Act. The company operates six months of the year and has only three employees. (Tr. 7). Prior to the violations involved herein, respondent had been issued only four citations. (Tr. 20). Based on this fact, I conclude that respondent had a small history of violations. There being nothing contrary in the record, it is assumed that the penalties imposed will not affect respondent's ability to continue in business. The negligence of the respondent in both instances was great. There was no explanation offered, nor is there one that I can think of that would justify the operation of a heavy piece of equipment without adequate brakes. This is especially so considering that it was being operated on a public road.

Based on the foregoing, I hereby impose a penalty of \$500.00 for withdrawal order no. 381640. In considering an appropriate fine for Citation no. 381641, I would point out that the respondent failed to act in good faith. Not only did the company not abate the condition upon which the withdrawal order was based, but it continued to operate the machine. It was not until action was initiated in the United States District Court that respondent corrected the defective brakes. Based on respondent's continued neglect of the matter, I find that \$1,000.00 is an appropriate penalty.

ORDER

Respondent is Ordered to pay the assessed penalties of \$1,500.00 within forty days of this decision.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

Distribution:

Marshall P. Salzman, Esq.
Office of the Solicitor
United States Department of Labor
450 Golden Gate Avenue, Box 36017
San Francisco, California 94102

Tehama County Excavating
Mr. Fred Lindauer, President
P.O. Box 615
Red Bluff, California 96080

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 6 1981

CONSOLIDATION COAL COMPANY,	:	Notice of Contest
Contestant	:	
v.	:	Docket No. WEVA 81-259-R
	:	
SECRETARY OF LABOR,	:	Loveridge Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 81-414
Petitioner	:	A.O. No. 46-01433-03117V
v.	:	
	:	Loveridge Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: James P. Kilcoyne, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for MSHA;
Jerry F. Palmer, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Consolidation Coal Company.

Before: Judge Merlin

This consolidated proceeding is a notice of contest by the operator challenging a section 104(d)(2) withdrawal order and a petition for the assessment of a civil penalty filed by the Solicitor based upon the alleged violation set forth in the order. 1/

A hearing was held on July 7, 1981 at which the parties represented by counsel appeared and presented documentary and testimonial evidence.

1/ The petition for penalty assessment originally contained two violations. The Solicitor previously filed a motion to sever the second violation which did not involve the same condition as was contained in the notice of contest proceeding. I have granted the motion to sever in a separate order so that the notice of contest and penalty docket numbers herein only involve the same situation.

At the hearing the parties agreed to consolidate these cases for hearing and decision and to the following stipulations:

- (1) The applicant is the owner and operator of the subject mine.
- (2) The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
- (3) I have jurisdiction of this case pursuant to the 1977 Act.
- (4) The inspector who issued the subject order was a duly authorized representative of the Secretary, and all witnesses who will testify are accepted generally as experts in coal mine health and safety.
- (5) True and correct copies of the subject order, and termination thereof, were properly served on the operator in accordance with the Act.
- (6) There was no intervening clean inspection subsequent to the issuance of the underlying (d)(1) withdrawal order, and the subject (d)(2) withdrawal order.
- (7) There exists a validly issued (d)(1) citation and a validly issued (d)(1) order underlying the subject order.
- (8) Imposition of any penalty will not affect the operator's ability to continue in business.
- (9) The operator is large in size.
- (10) The alleged violation was abated in good faith.
- (11) The operator's history is average and non-contributory to the amount of any penalty that might be assessed herein (Tr. 4-5).

At the conclusion of the taking of evidence counsel waived the filing of written briefs and agreed instead to make oral argument (Tr. 130). Extensive oral argument was given (Tr. 130-171). I advised the parties that I would issue a decision after the administrative transcript was received (Tr. 169).

Discussion and Analysis of the Evidence

Findings and Conclusions

The order sets forth the condition or practice as follows:

Float coal dust black in color has been allowed to accumulate on the rock-dusted surface of the floor and ribs of the No. 8 immediate return entry for the 7 South mains (055) section and

crosscuts between the No. 8 and No. 9 entries for a distance of approximately 1,000 feet. The floor in middle of No. 9 entry had been dragged, but float coal dust was still on the sides of the floor and ribs of the No. 9 entry.

The key to understanding this case is operator's exhibit No. 2. This exhibit consists of ten strips of paper ranging in color from pure white (No. 1) to jet black (No. 10). The middle strips of paper are, therefore, varying shades of gray which become darker as the numbers go higher. The inspector testified that a violation exists when the float coal dust appears as either "9" or "10", i.e. black. He further testified that in all the areas described in the order which he traversed, the float coal dust was black except, as noted in the order, for the middle of the No. 9 entry which had been dragged. Accordingly, the inspector testified that he cited a violation.

The inspector's evaluation of the color of the float coal dust is contradicted by the operator's witnesses. First, and most persuasively, the UMWA fire boss testified that when he was taking air readings he saw the entries shortly before the inspector and that they were only like the No. 5 or 6 strips, i.e., at most medium gray. The union fire boss is a man of many years experience and was a most believable witness. His statements alone would compel a finding of no violation and vacation of the order.

However, the testimony of the fire boss does not stand alone. The day shift section foreman testified that immediately after the order was issued he walked the entries and judged them to be about a "6" in color. When recalled to the stand he stated he did not see any footprints which had disturbed the float coal dust in the entries and diminished the degree of blackness of the float coal dust. Accordingly, the evidence of this witness also conflicts with the inspector's estimate of the color of the float coal dust.

So too, the midnight shift section foreman estimated the color as only a "7". Admittedly, he stated that he thought the color of the float coal dust at a "7" would be a violation whereas a "6" would not. With respect to the color of the float coal dust, this testimony is therefore, similar to that of the fire boss and the section foreman. Insofar as the degree of blackness which is necessary to constitute a violation is concerned, it is the inspector and not the operator's midnight shift section foreman who is charged with interpreting and applying the standard. And it most certainly is not my function to formulate and apply to the operator a more stringent test than the inspector did. As I advised counsel during oral argument, this estimate is germane because it is a measure of the truthfulness of the midnight shift section foreman that he set forth a tougher standard than did the inspector himself. But this does not mean that such a circumstance would constitute a violation where according to MSHA's own authorized representative it would not.

Three more witnesses also testified on behalf of the operator. They estimated the color of the float coal dust as ranging from "5" to "7" on the color scale. There was some suggestion that by the time some of these witnesses saw the area the float coal dust may have been churned up and thereby lightened by individuals walking on it, but there is no definitive evidence on this point and I find that this did not occur.

I recognize that the operator's witnesses did not agree exactly on the coloration of the float coal dust, but their estimates of from "5" to "7" are well within the range of judgment which could be expected since the gradations were so close. Indeed, I find the slight variations between the operator's witnesses enhanced rather than detracted from their credibility. It is to be remembered that at the hearing upon the Solicitor's request the operator's witnesses were sequestered. When watching these men select the appropriate color, it appeared to me that they were truly trying to remember as best they could the way the float coal dust looked on January 12.

In light of the foregoing, I find the operator's evidence more credible and based upon it I conclude that at most the float coal dust was medium gray and that therefore under the standard as applied by the inspector a violation did not exist. 2/

ORDER

Accordingly it is hereby ORDERED that the subject order be and is hereby VACATED, that the notice of contest be and is hereby GRANTED and that the petition for assessment of a civil penalty be and is hereby DISMISSED.

A large, stylized handwritten signature in black ink, reading "Paul Merlin". The signature is written in a cursive, flowing style with a long horizontal stroke at the beginning and a long horizontal stroke at the end.

Paul Merlin
Assistant Chief Administrative Law Judge

2/ It may be that the standard for determining how dark or how black float coal dust should be in order to constitute an accumulation is too imprecise. It may also be that in this case the inspector used too restrictive a standard. However, I only can act on the record before me and in any event, as I have already stated, the formulation of guidelines for judging when an accumulation of float coal dust exists is beyond the purview of this case and beyond the authority of an administrative law judge. What is clear here is that under the standard used by the inspector, the great weight of evidence demonstrates that a violation did not exist.

Distribution:

James P. Kilcoyne, Jr., Esq., Office of the Solicitor, U.S. Department
of Labor, Rm. 14480-Gateway Bldg., 3535 Market St., Philadelphia,
PA 19104 (Certified Mail)

Jerry F. Palmer, Esq., Consolidation Coal Company, 1800 Washington
Road, Pittsburgh, PA 15241 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 10 1981

Disciplinary Proceeding : Docket No. D 81-1
(Minerals Exploration Company) :
:
:

DECISION

Appearances: John A. Macleod, Esq., Crowell and Moring,
Washington, D.C.;
Page H. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia.

Before: Judge Merlin

The above-captioned matter came on for consideration as scheduled on August 6, 1981. After hearing from those involved, I rendered the following bench decision:

This case is a referral for possible disciplinary proceedings given by the Solicitor to Judge John A. Carlson, a judge of the Commission, during a conference in chambers on June 29, 1981, and transmitted by Judge Carlson to the Commission by memorandum dated July 13, 1981.

By order dated July 23, 1981, the Commission referred the case to the Chief Administrative Law Judge and the Chief Administrative Law Judge has, in turn, assigned the case to me.

This matter arises out of certain remarks made by counsel for the operator during a telephone conference call on June 22, 1981, participated in by Judge Carlson, his law clerk, an attorney in the Solicitor's office, a miners' representative and, of course, counsel for the operator.

The facts are set forth in the joint stipulations submitted to me by the Solicitor and by the attorney retained by counsel for the operator. I have reviewed the stipulations and have accepted them. They have been made a part of the record.

As set forth in the stipulations, the salient facts are briefly as follows: Judge Carlson was presiding in a review proceeding challenging the validity of a section 107(a) withdrawal order issued against Minerals Exploration Company. The conference call was specifically concerned with the union's participation in the hearing which was already underway. Of the two miners' representatives involved, one was on sick leave and one was on disability-maternity leave at the time. According to counsel for the operator, the company's personnel policy required that employees'

activities while on leave be consistent with their leave status. For this reason, therefore, counsel for the operator represents that during the telephone conference call he intended to alert the miners' representative to possible adverse personnel action if the miners' representatives traveled to Denver for the hearing without first changing their leave status. During the course of the conference call, counsel for the operator used such words as "discipline" and "discharge." Counsel for the operator has stated that he did not intend to interfere with the union's right under the Mine Safety Act and the Commission's regulations to participate in the hearing. Regardless of his intent, however, it appears that his remarks could have been, and were, in fact, interpreted by some of the other participants to the conference call as a deterrent to the union's participation in the review proceeding.

The attorney retained by counsel for the operator has stated at length this morning that counsel did not intend to prevent or frustrate the union's participation in the review proceeding, and that a misunderstanding of the words used occurred. In addition, this morning before me counsel for the operator also has stated that such was not his intent, and he has expressed regret for the untoward consequences of his remarks and for any inconvenience caused to the Commission and to me.

It must be stated that in light of what transpired during the telephone conference call, Judge Carlson's concern as evidenced in the conference in chambers was undoubtedly well-founded. So, too, under the circumstances, the Solicitor's referral was appropriate.

One has only to undertake a cursory reading of the Mine Safety Act and the regulations of the Commission to become readily aware that throughout the statutory and regulatory scheme, participation by miners and miners' representatives is not only allowed but also approved of and encouraged in the strongest manner possible. Attorneys who deal with this law and who practice before the Commission must be expected to be alert and sensitive to these participatory rights which are so integral a part of mine safety as envisaged and enacted by Congress.

Over and above the particular statute involved here is the responsibility of an attorney toward potential witnesses and parties. One of counsel's most fundamental responsibilities, if not his most fundamental responsibility, is his duty to insure the integrity of the administration of justice. Accordingly, when counsel speaks, he must think not only of what he means by his statements, but of how his statements will be perceived and interpreted by those to whom he is speaking, especially when they are not attorneys.

The remarks of counsel for the operator this morning demonstrate that he now is aware of these important considerations. As already noted, I have accepted the stipulations. I further accept the representations of

counsel for the operator that he did not intend his remarks to have any effect contrary to the Mine Safety Act and to the Commission's regulations regarding union participation. Yet it cannot be denied that his words may well have had and indeed, did have the proscribed effect, even if he did not so intend. Therefore, it is clear that counsel misspoke. Counsel must be more careful in the future. It is not only what counsel says but what others hear. The care which counsel exercises must be particularly intense when critical issues such as we see here today are involved.

As already indicated, I accept counsel's remarks and apology this morning. I note that the remarks made during the conference call on June 22, 1981, occurred during the first case in which counsel appeared under the Mine Safety Act and the Commission's regulations. I also note that they occurred during a conference call to which the presiding judge and his law clerk themselves were participants. I am confident that there will be no repetition of any such unfortunate situation involving counsel.

In light of the fact that counsel did not intend to violate the Mine Safety Act or the Commission's regulations, in view of his statements here this morning and because this was his first appearance in a Mine Safety Act proceeding, I conclude that no disciplinary proceedings are warranted.

There is one further matter which should be mentioned. This concerns not only the particular matter before me today but disciplinary cases generally. Both the Solicitor and the attorney retained by counsel for the operator have pointed out that at present; the Commission's regulations do not set forth how disciplinary proceedings are to be conducted. For instance, the regulations do not indicate if an individual referring a matter for disciplinary proceedings has the responsibility of presenting evidence in support of possible disciplinary action. Of course, circumstances vary. If an Administrative Law Judge of the Commission refers a matter for possible disciplinary proceedings, he should not be expected to present the evidence himself in any resultant hearing. On the other hand, the situation might be different where the Solicitor or an operator refers a matter for possible disciplinary proceedings. I recognize that under existing regulations the individual against whom possible disciplinary proceedings are considered is given adequate notice, opportunity for reply, and a hearing with opportunity to present evidence and cross-examine. Nevertheless, the overall context in which these rights are to be exercised is not delineated. Certainly, the judge who presides in a disciplinary matter should not have any other function. The situation obviously has many facets. I agree that the matter is worthy of attention and consideration.

The bench decision issued August 6, 1981 is hereby AFFIRMED and this matter is DISMISSED.

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

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

John A. Macleod, Esq., Crowell & Moring, 1100 Connecticut Ave.,
N.W., Washington, DC 20036 (Certified Mail)

Page H. Jackson, Esq., Office of the Solicitor, U.S. Department
of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified
Mail)

Bevelyn Suter, President, Progressive Mine Workers of America,
Local 1979 B, P.O. Box 359, Rawlins, Wyoming, 82301 (Certified
Mail)

Judge John A. Carlson, Federal Mine Safety and Health Review Commission,
Office of Administrative Law Judges, 333 West Colfax Avenue, Suite 320,
Denver, Colorado 80204 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 12 1981

SECRETARY OF LABOR,	:	Complaint of Discrimination
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 81-392-D
ON BEHALF OF THEODORE HAZZARD,	:	
Complainant	:	Pocahontas No. 3 & 4 Mine
	:	
v.	:	
	:	
CANNELTON INDUSTRIES, INC.,	:	
Respondent	:	

DECISION AND ORDER

This is a complaint for discrimination that came on for hearing on August 4 and 5, 1981 in Beckley, West Virginia. The gravamen of the charge was that the operator attempted to interfere with a miner's right to seek correction of what were claimed to be unsafe mining practices and conditions in the 4-B and Roadside Mines (Pocahontas No. 3 and 4 Mine). The charge arose in the context of a sharp disagreement between the complainant and MSHA's Subdistrict Office in Princeton, West Virginia over the timing and extent of fire drills prescribed by 30 C.F.R. 75.1704-2(e), and the requirement for the designation, approval and inspection of secondary escapeways, 30 C.F.R. 75.1704-1, -2; 1/ 30 C.F.R. 75.1707.

A third consideration that directly affected the actions of the parties involved two petitions for modification of the requirement of 30 C.F.R. 75.305 for weekly methane examinations of at least one entry

1/ MSHA has interpreted 30 C.F.R. 75.1704-2(e) as requiring the evacuation of all miners from the working face to the loading point every 90 days. With respect to the designation of approved escapeways, Section 317(j)(4) of the Act, 30 C.F.R. 75.1707 provides that belt and track or trolley haulage entries be separated from escapeways by relatively airtight stopping materials in order to provide a practically smoke free escapeway in the event fire should occur in the track and/or belt entries. MSHA Underground Inspection Manual II-619. Despite this, MSHA has permitted the track and belt entries to be designated as escapeways in both the Roadside and 4-B sections. This conflict between the requirements of the law and MSHA's practice has been a source of continuing friction between the Mine Safety Committee and management at this mine. The trial judge recommends that the Chief of MSHA's Safety Division work with the District and Subdistrict Offices to effect a clarification and resolution of what has been a serious source of contention between labor and management at this mine.

of each intake and return airway in its entirety. The first petition involved the left air return in both the 4-B and Roadside Sections. It was granted in September 1979 and permitted the monitoring of the airflow on a daily basis at specified stations instead of traveling the entire entry which was deemed unsafe. The second petition filed in April 1980 requested a waiver of the same requirement on the right return in only the 4-B section. Because of its concern over designation of the track and belt entry as a secondary escapeway, its lack of confidence in air monitoring systems, 2/ and its belief that the right return is or can be made travelable, the Mine Safety Committee and Local 6029 of the UMWA requested the International Union in Washington appeal MSHA's grant of the second petition in November 1980. At the time of the hearing, the complainant and the local union were under the impression that the decision on the second petition had not become final. Neither counsel was aware of its status.

On the merits, the evidence unequivocally established that the manifold misunderstandings and conflicts between complainant and other members of the Mine Safety Committee and with MSHA, management and the State Department of mines over walkaround rights, fire drills, evacuation procedures, and the petitions for modification when coupled with the stresses that stemmed from the explosion and resulting disaster at the Ferrell Mine and numerous grievances generated by a realignment of the labor force at several of the operator's mines led to a tense labor relationship that culminated in a heated verbal exchange between complainant and the operator's general superintendent of mines on December 17, 1980. Fortunately there is no need to detail this event. Suffice it to say that what was said by the management representative went beyond the pale of permissible legal reaction to what he in good faith believed to be an unjustified provocation. Much of the obvious ill feeling that prevailed at the beginning of the hearing was dispelled in the end by the opportunity afforded all concerned to thresh the matter out and to get things off their chest. For their candid cooperation in this inquiry counsel and the parties, especially Mr. Spengler, MSHA's Subdistrict Mgr. are to be commended.

Because the parties agreed to settle this matter on the terms set forth in the consent order entered on the record and adopted and confirmed in this decision, the parties are in a position to make a new beginning and to commence the work of reconciliation of their differences in an atmosphere cleansed of the poisonous suspicions of the past.

For these reasons, I find the settlement agreed upon in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that:

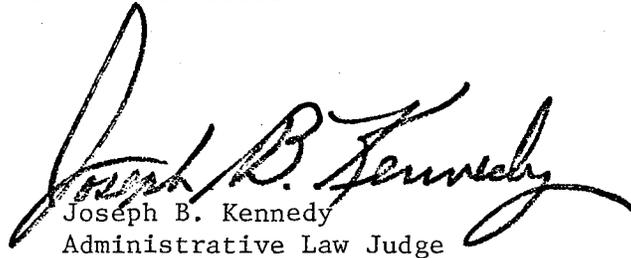
1. Cammelton Industries, Inc., its directors, officers, agents and employees be, and hereby are, ENJOINED and DIRECTED

2/ This stemmed from the failure of such a system at Westmoreland's Ferrell Mine in November 1980 to prevent a lethal buildup of explosive gas.

TO CEASE AND DESIST from making any and all statements, verbal or written, designed to interfere with, coerce or restrain any miner from freely exercising rights guaranteed by the Mine Safety Law, including the right to make, file or report alleged safety or health violations or dangers to management, MSHA or the appropriate State authorities.

2. Cannelton Industries, Inc. pay a penalty of \$1,500 for the violation found on or before Friday, August 21, 1981.
3. Cannelton Industries, Inc. immediately post on the Mine Bulletin Board or in places where notices to employees are customarily posted at the Pocohantas No. 3 and 4 Mine (Roadside and 4-B Sections), and maintain the same for thirty (30) consecutive days from the date of posting, a copy of this decision and order.

Finally, it is ORDERED that upon payment of the penalty agreed upon and subject to enforcement of this injunction under the contempt powers and procedures of the United States Courts of Appeals, the aforesaid consent order and this confirming decision be deemed a final disposition of this matter.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

William C. Miller, II, Esq., Cannelton Industries, Inc., Box 1226,
1250 One Valley Square, Charleston, WV 25324 (Certified Mail)

James P. Kilcoyne, Esq., U.S. Department of Labor, Office of the
Solicitor, 14480 Gateway Bldg., 3535 Market St., Philadelphia, PA
19104 (Certified Mail)

Theodore H. Hazzard, Box 21, Superior, WV 24886 (Certified Mail)

Doug Tolley, Vice President, Cannelton Industries, Cannelton, WV
25936 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 13 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
)	
Petitioner,	)	DOCKET NO. WEST 81-94-M
)	
v.	)	MSHA CASE NO. 24-00689-05018
)	
THE ANACONDA COMPANY,	)	MINE: Weed Concentrator
)	
Respondent.)	

ORDER

Respondent has filed a motion to dismiss this case. As reason therefor, respondent states that it has been prejudiced by the delay of nearly two years between the time the citation in question was issued and the assessment of a penalty. The Secretary in opposition to the motion argues that the respondent was not prejudiced by the delay as shown by the fact that it had retained sufficient evidence to persuade the MSHA assessment officer to reduce the penalty at a conference held on November 3, 1980.

The Federal Mine Safety and Health Act requires the Secretary to notify the mine operator of a proposed penalty within a reasonable time after the issuance of a citation. The remarks of the Senate Committee clarify the purpose for this requirement.

To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the mine operator and mine representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty. S. Rep. No. 95-181, 95th Cong., 1st Sess. 34 (1977).

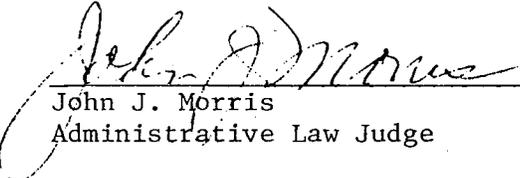
The Commission reasoned in a recent decision that the above expressed intent of Congress demonstrates their overriding concern with effective enforcement, and, thus a citation should be vacated only when to do so implements the remedial purpose of the Act. The Commission also recognized the secondary purpose of protecting mine operators from stale claims. Sec. of Labor v. Salt Lake County Road Dept., Docket No. WEST 79-365-M (July 28, 1981).

The Commission established a two prong test to determine if the late filing of the proposal for penalty addressed to the Commission is in substantial compliance with the Act and, therefore, should not result in the dismissal of the case. The Secretary must show that there was adequate cause for the delay. The mine operator must show that it has been prejudiced by the delay. These two requirements are to be balanced against each other with the scales weighing heavily on the side of enforcement. However, the objective of effective enforcement can be thwarted by the Secretary's inexcusable delay over a substantial period of time. The Commission warned the Secretary against any unwarranted dilatory action.

The above test is directly applicable here. Congress perceived that the prompt assessment of a penalty was necessary for effective enforcement. In the present case, the delay of nearly two years is on its face a blatant disregard of this objective. Contrary to the Secretary's statement in its response to the motion, Section 815(a) of the Act provides the statutory authority for the vacation of a citation where the Secretary has been so dilatory in assessing a penalty that effective enforcement of the Act is impossible.

In the present case the citation was issued on December 5, 1978. Due to the delay in the assessment of a penalty, this case was not ripe for the adjudication of the penalty until the filing of the proposal for penalty on February 5, 1981. The Secretary offers no reason for the delay. Such a lengthy delay is inherently prejudicial to the operators' preparation of a proper defense.

For the above stated reasons, the motion to dismiss is granted. This case is dismissed with prejudice.


John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor
United States Department of Labor
1585 Federal Building, 1961 Stout Street
Denver, CO 80294

Karla M. Gray, Esq., The Anaconda Company
Post Office Box 689
Butte, Montana 59703

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 14 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
	:	
Petitioner	:	Docket No. CENT 80-231-M
	:	A/O No. 41-00013-05004
v.	:	
	:	Docket No. CENT 80-232-M
CHEMICAL LIME, INC.,	:	A/O No. 41-00013-05005
	:	
Respondent	:	Mine: Clifton Quarry and Plant

DECISION

On January 19, 1981, the Petitioner filed a motion for summary decision based on a record jointly stipulated by the parties. This motion was resubmitted with amendments on May 4, 1981. As grounds for its motion, Petitioner asserted the following:

1. The parties have stipulated to all material facts including jurisdiction, coverage, the existence or occurrence of the alleged violations, and the appropriateness of the penalties proposed.

2. The only remaining issue to be resolved by the Review Commission is whether Defendant, as owner-operator of a mine, can be cited for violations of the Act committed by its independent contractors while employed at Defendant's mine property. This question has been addressed and answered most recently in Secretary of Labor v. Old Ben Coal Company, (FMSHRC Docket No. VINC 79-119), 1 MSHC 2177, and Secretary of Labor and United Mine Workers v. Monterey Coal Company (FMSHRC Docket No. HOPE 78-467), 1 MSHC 2232 where the Commission held that as matter of law, owner-operators can be held responsible for violations of the Act committed by its contractors. As the present case is indistinguishable, at least with respect to the independent contractor issue, from Old Ben, and Monterey Coal, *supra*, the Secretary is entitled to a Summary Decision affirming the contested citations, as a matter of law.

In the Joint Motion for Submission of Proceedings upon Stipulated Facts, the parties admitted that no genuine issue remained as to any material fact.

The submitted stipulations are as follows:

The following matters are hereby agreed and stipulated to by and between the parties hereto for consideration in connection with any Motion to Dismiss, Motion for Summary Judgment or Decision filed or to be filed herein, as well as any hearing or trial herein and any appeals resulting from rulings on such motions, hearing or trial. Each of the parties reserves the right to disavow all or any part of this Stipulation in connection with proceedings in any action other than those in connection with any Motion to Dismiss, Motion for Summary Judgment or Decision, as well as any hearing or trial and any appeals resulting from rulings thereon, and no matters set forth in this Stipulation shall have or be given any collateral estoppel or res judicata effects in any other action or proceeding, except the collateral estoppel or res judicata effect of the judgment or decision of the tribunal or Court rendered herein based upon such Stipulation, or parts thereof.

This Stipulation, along with the Complaints and Answers filed herein, and all matters incorporated by reference, constitute the entire record in this proceeding.

I. Definitions

Where used in this Stipulation:

1. MSHA refers to the Mine Safety and Health Administration.
2. Plaintiff refers to Ray Marshall, Secretary of Labor, U.S. Department of Labor.
3. Defendant refers to Chemical Lime, Inc.
4. The Act refers to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801, et seq.
5. The Commission refers to the Federal Mine Safety and Health Review Commission.
6. Clifton Quarry and Plant refers to a limestone quarry and plant.
7. Souther refers to Gene Souther Equipment.
8. Wales refers to Wales Industrial Service.

II. CENT 80-231-M

9. In September 1979, defendant owned mining rights to, and was conducting and causing others to conduct mining activities subject to the Act at the proposed limestone quarry and plant, designated by MSHA as Clifton Quarry and Plant.
10. On September 24, 1979, an inspection of said Clifton Quarry and Plant was conducted by a duly authorized representative of plaintiff pursuant to Section 103(a) of the Act, and as a result of this inspection, defendant was issued the following citation:

<u>CITATION NUMBER</u>	<u>DATE ISSUED</u>	<u>30 CFR STANDARD</u>
00154761	09/24/79	56.9-45

A copy of this citation is * * * incorporated herein by reference. 1/

11. Souther is a separate, independent contractor retained by defendant to install a new conveyor system for Chemical Lime, Inc.
12. Wales is a separate, independent contractor retained to assist Souther in the installation of a new conveyor system for Chemical Lime, Inc.
13. Souther and Wales worked on the installation of the conveyor system at the Clifton Quarry and Plant during the time in question and were independent contractors within the meaning of §45.4 of the Secretary's Proposed Regulation referred to in paragraph 37

1/ Citation No. 154761 was issued pursuant to section 104(a) of the Act. It alleged a violation of 30 C.F.R. § 56.9-45 and described the pertinent condition or practice as follows:

"Two sections of conveyor frame with walkway had been loaded on a flat bed trailer and were not secured. When additional material was loaded on the overhanging walkway of one of the conveyor sections it tipped over and fatally injured an employee."

Section 56.9-45 requires the equipment to be hauled shall be loaded and protected so as to prevent sliding or spillage.

The citation was terminated within 10 minutes of its issuance. The action taken to terminate the citation was given as follows:

"Operator was instructed on the need to secure equipment before adding additional material on the load."

below, that time through all times pertinent to this proceeding.

14. Citation No. 154761 refers to activities or omissions of Souther and/or Wales' employees or conditions of Souther and/or Wales' equipment or facilities relating to the performance of the contracted installment of the conveyor system at the Clifton Quarry and Plant.
15. The Production Supervisor of defendant had discussed safety procedures with the independent contractors prior to the accident on the day the accident occurred.
16. The condition described in Citation No. 154761 was abated by the employees of Souther and Wales.
17. The citation does not allege, and it is a fact that none of the defendant's employees, equipment or activities caused or contributed to the alleged violation.
18. None of the defendant's employees ever perform and work for Souther or Wales at the Clifton Quarry and Plant.
19. Defendant's employees had no authority to control the manner, methods, and details of the performance of contracted work by Souther or Wales and their employees, and this is outlined in the contract between Chemical Lime and the independent contractors.
20. Defendant does and did have employees permanently present at the quarry and plant, however, no company personnel were present when the accident occurred.
21. Defendant's contracts with Souther and Wales require compliance with applicable local, State and Federal laws, including the Federal Mine Safety and Health Act.
22. As a matter of law, Souther, Wales and defendant are now "operators" within the definition of §3(d) of the Act [30 U.S.C. §802(d)] as amended and pursuant to other relevant provisions.

III. CENT 80-232-M

23. In September, 1979, defendant owned mining rights to, and was conducting and causing others to conduct

mining activities subject to the Act of the proposed limestone quarry and plant, designated by MSHA as Clifton Quarry and Plant.

24. On September 24, 1979, an inspection of said Clifton Quarry and Plant was conducted by a duly authorized representative of plaintiff pursuant to section 103(a) of the Act, and as a result of this inspection defendant was issued the following citations:

<u>CITATION NUMBER</u>	<u>DATE ISSUED</u>	<u>30 CFR STANDARD</u>
154762	09/24/79	50.10
154763	09/24/79	50.12

Copies of these citations are * * * incorporated herein by reference. 2/

25. These citations were issued pursuant to Section 104(a) of the Act and comply with the provisions thereof in all particulars.
26. Citation No. 154762 refers to activities or omissions of employees of defendant.

2/ Citation No. 154762 was issued pursuant to section 104(a) of the Act. It alleged a violation of 30 C.F.R. § 50.10 and described the pertinent condition or practice as follows:

"A fatal accident occurred at approximately 11:30 AM on 9/20/79 and the Dallas Subdistrict Office was not notified until 2:30 PM on 9/21/79."

Section 50.10 requires that an operator immediately notify MSHA if an accident occurs.

The citation was terminated 5 minutes after it was issued. The action taken in abatement was given as follows:

"The operator was informed of his need to report a serious accident immediately."

Citation No. 154763 was issued pursuant to section 104(a) of the Act. It alleged a violation of 30 C.F.R. § 50.12 and described the pertinent condition or practice as follows:

"A fatal accident occurred at the mine property on 9/20/79 and the accident site had been altered when the accident was reported to MSHA in as much as the equipment and material had been moved to a different location."

Section 50.12 requires that an accident site be kept unaltered until completion of all investigations pertaining to the accident.

The citation was terminated within 10 minutes of its issuance. The action to terminate was given as follows:

"The operator was instructed on the need to preserve the evidence until investigation is completed."

27. The condition described in Citation No. 154762 was abated by employees of defendant.
28. As a matter of law, defendant was an "operator" within the then definition of §3(d) of the Act [30 U.S.C. §802(d)] and pursuant to other relevant provisions.

IV. General Matters

29. Subject to the qualifications of the preamble paragraph of this Stipulation:
 - a) The parties agree to the jurisdiction of the Commission over this proceeding.
 - b) The parties agree the mines, operators and miners mentioned herein were subject to all provisions of the Act at the time of the occurrence.
 - c) The parties agree the conditions alleged in each citation in fact occurred on the dates described in each citation and that the same constitute violations as follows:

Citation 154761 a violation of 30 CFR §56.9-45
Citation 154762 a violation of 30 CFR §50.10
Citation 154763 a violation of 30 CFR §50.12
 - d) For the limited purpose of agreeing to facts on which the Review Commission may rely to assess a penalty in this case, should it deem such an assessment appropriate, the parties agree that the size of respondent, defendant's history of previous violations, the gravity of the violations, respondent's good faith in abating the violations, and the negligence of the respondent with respect to the violations are accurately reflected and set forth in the proposed assessment issued to respondent.

Further, with regard to the negligence of the respondent with regard to the citations the parties agree and stipulate that respondent had instructed the subcontractor thoroughly in safe work procedures the morning prior to the accident and that the accident was therefore not foreseeable.

30. MSHA policy in existence at the time the citations mentioned herein were issued provided for the issuance of citations or orders at the time pursuant to Section 104(a) of the Act for Mine Safety and Health Violations to entities identified to MSHA by a Federal Mine Identification Number.
31. A Federal Mine Identification Number may be issued to any entity registering with the Mine Safety and Health Administration upon a demonstration that that entity controls, or is capable of controlling the activities affecting the health and safety of mine personnel. However, only one mine identification number is issued at any given mine.
32. Federal Mine Identification Numbers have been issued by MSHA to entities other than mine owners at mines subject to the Federal Mine Safety and Health Act.
33. Neither Souther nor Wales possessed a Federal Mine Identification Number for Clifton Quarry and Plant, the Federal Mine Identification Number having been issued to defendant.
34. Not having a Federal Mine Identification Number, neither Souther nor Wales could be issued a citation and therefore the defendant, as opposed to either one of the independent contractors, was proceeded against.
35. This agency wide policy to directly enforce the Act against only owner-operators for contractor violations was an interim policy pending adoption of regulations providing guidance to inspectors in the identification and citation of contractors.
36. On October 31, 1979, MSHA announced the availability of a draft proposal which would allow identification of certain independent contractors as operators under the Act, by publication at 43 Federal Register 50716. Forty-five days were given to comment on the draft rule.
37. On August 14, 1979, a proposed regulation for independent contractors (30 CFR Part 45) by which MSHA could identify certain independent contractors as operators under the Act, was published at 44 Federal Register 47746. The comment period for this proposed regulation closed on October 15, 1979 and the regulation has been enacted.

Documents attached to Petitioner's Motion to Amend Stipulation established that the size of Chemical Lime, Inc., was 94,315 man-hours per year in 1978 and that it received a total of eight prior assessed violations. In the absence of evidence to the contrary, it is found that the penalties assessed herein will not adversely affect the ability of Respondent to continue in business.

Pursuant to 29 C.F.R. § 2700.64(b), a motion for summary decision shall be granted if it is shown (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

The stipulations entered into by the parties have resolved the issue of whether the violations occurred as alleged. Each of the six statutory criteria were also resolved. No genuine issue as to any material fact remains undetermined.

Furthermore, it is clear that Petitioner is entitled to summary decision as a matter of law. The parties have agreed that the only remaining issue to be decided is whether Respondent may be held liable for violations committed by its contractors. As noted by Petitioner in its motion, the Commission has found that, as a matter of law, an owner-operator can be held responsible without fault for a violation of the Act committed by its contractor. Secretary of Labor v. Old Ben Coal Company, 1 MSHC 2177 (1979) (Old Ben). In view of the absence on the record of any basis on which to distinguish the instant cases from Old Ben, it is found that Respondent is liable for the three violations at issue herein.

The following findings of fact are made with regard to the remaining statutory criteria:

Citation No. 154761: Although the violation which gave rise to this citation resulted in a fatality, the violation was not caused by any negligence on Respondent's part. The violation was abated within a reasonable period of time.

Citation Nos. 154762 and 154763: These violations were occasioned by a moderate degree of negligence on the part of Respondent. It was improbable, however, that these violations would result in an accident or injury. Both violations were abated shortly after issuance of the respective citations.

Based on the information furnished in the stipulated record and supporting documents, and in consideration of the statutory criteria, the appropriate penalties in this case are found to be as follows:

<u>Citation No.</u>	<u>Assessment</u>
154761	\$100
154762	56
154763	56

ORDER

It is ORDERED that Respondent pay MSHA the sum of \$212 within 30 days of the date of this decision.

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

Distribution:

Patricia D. Keane, Esq., Office of the Solicitor, U.S. Department of
Labor, 555 Griffin Square Building, Suite 501, Dallas, TX 75202
(Certified Mail)

Arthur A. March, Esq., 60 East 42nd Street, New York, NY 10017
(Certified Mail)

3. The penalties proposed are appropriate to the size of the business and the imposition thereof will not impair respondent's ability to remain in business.

4. The citations were in fact issued on the date indicated on the citations, July 12, 1978.

CITATION 377977

The petitioner alleges a violation of 30 C.F.R. 56.5-50(b).^{1/} The evidence shows, and I find, that the pit crusher operator was exposed to approximately 200% of the permissible noise exposure based on the tables that were placed in evidence by counsel for the petitioner. The dosimeter utilized measured noise levels above 90 dBA and the sampling of the pit crusher operator took place for a continuous period of 445 minutes. It is undisputed that the noise exposure did exceed permissible limits.

The question, then, is whether or not feasible engineering or administrative controls were being utilized to reduce the exposure. In this case, the only action necessary was to move the pit crusher operator away from the crusher a distance farther than that which he had been standing during the course of his exposure. It is undisputed that this could have been done by the operator and that the noise exposure would then have been within permissible limits. Accordingly, I find that feasible controls were not being utilized. I also find that the respondent demonstrated good faith in achieving rapid compliance after notification of the violation.

The citation is affirmed and the penalty assessed will be \$20.00.

CITATION 377978

The petitioner alleges a violation of the same regulation as in the previous citation. In the Bench Decision, I stated that this citation should be vacated. However, on subsequent review of the transcript, I find that the citation should be affirmed.

A pit laborer was sampled for noise exposure for a period of 445 minutes. It is undisputed in the evidence presented that the pit laborer was exposed to 158% of the permissible noise level for this period of time, or 94 dBA. The permissible level is 90 dBA. Personal hearing protection was being worn. Since the employee's exposure exceeded that level listed in the table set forth in the regulations, the question again arises as

^{1/} [Mandatory.] (b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

to what, if any, feasible administrative or engineering controls should have been utilized by the respondent.

The petitioner introduced evidence as to the feasible controls that could have been utilized. One control consisted of an effort to ascertain the sources of greatest noise, so that steps could be taken to remove the need for the employee to be at those sources. The MSHA inspector testified that he suspected that the overexposure of the laborer occurred when he had to work directly under an operating crusher in order to clean up a spill from the conveyor. The spill occurred because the skirting was loose on the collection box under the conveyor. If the skirting had been properly secured there would have been no spill and, thus, there would have been no need for the laborer to be in that location close to the extremely noisy crusher. The inspector also testified that the respondent could have used a noise meter to "go out around the plant and sample".

The respondent had the burden of going forward with evidence to show that feasible controls would have failed to reduce the exposure to within permissible levels and, thus, that personal protection equipment was properly provided for the pit laborer in order to reduce the sound levels to within levels prescribed by the table. On review of the transcript, I find that there was no evidence presented by the respondent to show that any feasible administrative or engineering controls utilized would have failed to reduce the exposure to within permissible levels. Having failed to present evidence on this point, the citation must be affirmed as a matter of law. The penalty assessed is \$20.00.

CITATION 377980

Petitioner alleges a violation of 30 C.F.R. 56.5-5.²/ A pit laborer, who was sampled for dust exposure during a period of 445 minutes, was exposed to silica bearing dust in the amount of .92 milligrams per cubic meter. According to the threshold limit value adopted by the regulations, .42 milligrams per cubic meter should not have been exceeded. It is also undisputed that it was feasible to reduce these harmful airborne contaminants by use of water incorporated in the plant's spray system.

The respondent's witness testified that the spray system was on the crusher equipment, but because the plant had recently been moved the water system had not yet been connected to the main source of water supply.

2/ Mandatory. Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of the work involved ..., employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment

The witness also testified that production was started before hooking up the water devices. If the installation had been completed before production was commenced, the pit laborer would not have been exposed to harmful airborne contaminants in excess of the threshold limit value prescribed by the regulation. Thus, this citation is affirmed and the penalty assessed is \$10.00.

ORDER

The foregoing Bench Decision with regard to Citations 377977 and 377980 is affirmed and Citation 377978 is hereby affirmed. The respondent is ordered to pay a civil penalty of \$50.00 within 30 days of the date of this Decision.


Jon D. Boltz
Administrative Law Judge

Distribution:

Marshall P. Salzman, Esq.
Office of the Solicitor
United States Department of Labor
450 Golden Gate Avenue, Box 36017
San Francisco, California 94012

Kay H. Wilkins, Esq.
Corporate Counsel
Johnson-Stewart-Johnson Mining Co., Inc.
1635 N. Alma School Road
Mesa, Arizona 85201

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 18 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),)	
	)	CIVIL PENALTY PROCEEDING
)	
Petitioner,	)	DOCKET NO. WEST 80-89-M
)	
v.	)	A/O No. 04-01827-05006 F
)	
KAISER SAND AND GRAVEL COMPANY,	)	MINE: Radum Pit and Mill
)	
Respondent.)	
)	

DECISION

Appearances:

Marshall P. Salzman, Esq., Office of the Solicitor, United States
Department of Labor, 450 Golden Gate Avenue, Room 11071, Box 36017,
San Francisco, California 94102
For the Petitioner

Paul M. Heylman, Esq., Schmeltzer, Aptaker and Sheppard, P.C., 1800
Massachusetts Avenue, N.W., Washington, D.C. 20036
For the Respondent

Before: Judge Virgil E. Vail

Statement of the Case

The above-captioned civil penalty proceeding was brought pursuant to
Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30
U.S.C. § 820(a) (hereinafter referred to as "the Act").

Pursuant to notice, a hearing on the merits was held in San Francisco,
California on September 11, 1980. Richard C. Anderson, a mining engineer,
testified on behalf of the petitioner. Donald Streitz, Vernon Allen,
Tinnie Gunter and Claire Hay testified on behalf of the respondent.

Post-hearing briefs have been filed by both parties. Based on the
evidence presented at the hearing, a stipulation of facts entered into
between the parties during the course of the hearing and the contentions of
the parties, I find the following facts were established.

Findings of Fact

1. Respondent operates a sand and gravel pit and mill near
Pleasanton, California. (Tr. 10).

2. Citation no. 371557 was issued to the respondent as the result of a fatal accident which occurred on June 12, 1979, involving Vaughn F. Higgins (hereinafter referred to as "Higgins").

3. Higgins was employed by the respondent at the Radum Pit and Operation from June 23, 1976 until the time of his death.

4. Higgins was employed in the capacity of a dragline oiler, an occupation at which he had worked for the ten years preceding his death.

5. Sometime before 5:10 a.m. on June 12, 1979, Higgins was driving his own pickup truck enroute to work when he drove onto the blocked old service road to the respondent's pit.

6. Higgins proceeded down this road until he was approximately 18 feet from a dirt pile blocking the road and then he stopped.

7. Tire tracks indicate that Higgins then backed his truck up the service road, a distance of 82 feet, at which point the vehicle went over the left side of the road, falling 47 feet, crushing the truck's cab and killing Higgins.

8. The old service road was approximately 400 feet in length but was blocked by a dirt pile approximately 20 feet in height at a point 183 feet down the road.

9. The pile of dirt prevented further vehicular movement down the old service road on June 12, 1979.

10. The old service road was approximately 27 feet wide with a slight downgrade of approximately 2 to 5%. There was a drop-off of approximately 47 feet on the left side and an embankment of approximately 10 to 12 feet high on the right side.

11. A Coroner's autopsy revealed that Higgins's blood contained 6.5 mcg/ml of Phenobarbital.

12. The old service road had been in use for a period of three to four weeks prior to the accident.

13. On June 11, 1979, the day prior to the fatal accident, at approximately 6:30 p.m., the old service road was "blocked off" by a dirt pile when the Ko-Cal feeder was moved over and placed on the old service road. (Tr. 38).

14. A new service road into the pit had been opened for approximately two weeks prior to the fatal accident. (Tr. 38, Exhibit 2).

15. On June 12, 1979, sunrise at Pleasanton, California was at 5:45 a.m.; Pacific Daylight Time (Exhibit 4).

16. There were no witnesses to the fatal accident.

ISSUE

Whether the respondent violated mandatory safety standard 30 C.F.R. 56.20-11 by failing to place a barricade or warning sign at the entrance to the old service road on or before June 12, 1979?

Discussion

Citation no. 371557 ^{1/} charges the respondent with having violated mandatory safety standard 56.20-11. The standard provides that:

Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required.

The sole issue is whether the respondent violated 56.20-11 by failing to place a barricade or post warning signs at the entrance to the old service road. The respondent argues in its post-hearing brief that the company should not be cited in this instance since the hazard, a drop off on the side of the old service road, was an obvious hazard. Respondent further argues that the requirements of standard 56.20-11 applies only to health and safety hazards that are not immediately obvious to employees. In support thereof, respondent points out that the deceased was a long time employee of the respondent and familiar with the operation of the pit; that he knew the Ko-Cal feeder and the pendulum were moved every five to nine days, and that on the day prior to the fatal accident, the employees in the pit had begun to move this equipment to a point which would block off the old pit service road. Further, respondent argues that on June 12, 1979, when Higgins arrived for work he should have observed the equipment and the dirt pile barricade blocking the old pit service road from the entrance to the service road. Based upon these arguments, the respondent contends that the hazard was obvious.

^{1/} A fatality occurred at about 5:10 a.m. (June 12, 1979) on an abandoned pit service road. The road was not barricaded or posted against entry. An employee entered the road and backed his vehicle over the edge. The road had been in use as the pit service road for about 6 weeks and was the main entrance into the working pit area.

The known facts in this case do not appear to be contradicted. As set out in the statement of facts, Higgins arrived at the pit sometime before 5:10 a.m. on June 12, 1979 and started down what had previously been used as a service road into the pit. He apparently found that at a point 183 feet down the road there was a pile of dirt placed as a barricade to prevent further travel. In attempting to back up, he backed over a bank and was killed. Beyond these facts, much of the respondent's arguments as to what Higgins knew or should have known is conjecture since no one actually saw the accident.

From the above facts, it must be concluded that Higgins did not know that the service road was blocked, or if he did know or should have known he forgot. The evidence does not show that Higgins would have known that the dirt barricade was placed across the road. This road had been driven by another of respondent's employees, Mr. Vernon Allen, on the night prior to the accident after 6:00 p.m. and it was not blocked. (Tr. 49). The evidence further shows that the road was blocked around 6:30 p.m. on June 11, 1979 and that no one knows what time Higgins left work that day. (Tr. 42). A time card for Higgins showed that he quit work on June 11, 1979 at 6:00 p.m. (Tr. 44).

From this evidence it cannot be assumed that Higgins knew the old service road was blocked by the pile of dirt placed thereon at approximately 6:30 p.m., on the day prior to the fatal accident. The fact that Higgins started down the road on the day he was killed would indicate he did not know it was blocked. Therefore, if a hazard existed, it was not obvious. Furthermore, Mr. Allen testified that when he arrived at the respondent's pit at approximately 5:20 a.m. for work, he also started down the old service road to enter the pit (Tr. 50 and 55). Mr. Allen, in response to why he drove down this road on June 12, 1979, after testifying that he knew it would be blocked, stated that he did so from force of habit as he had been using the same road for a couple of weeks prior thereto. (Tr. 55).

Another employee, Tinnie Gunter, also testified that when he arrived for work on June 12, 1979, he started down the old service road to the pit from force of habit. The witness also testified that he had passed the pile of dirt placed as a barricade the night before on his way out. (Tr. 60).

From the evidence of record and the testimony of the witnesses referred to above, a sign or barricade at the entrance to the old service road would have warned or reminded the respondent's employees that the road was closed and should not be travelled. The respondent argues that standard 56.20-11 does not require warning signs where safety hazards exist that are immediately obvious to employees, that is, the drop off on the left side of the road over which Higgins truck fell and crashed. Respondent further argues that "obvious", as used herein, means "plain,

evident, or known" whereas the standard applied herein refers to safety and health hazards which employees cannot reasonably be expected to know of; rather than those which employees know or can reasonably be presumed to know of.

I am persuaded by the evidence of record that the old service road in this instance should have been posted by a sign or barricade at the entrance warning employees that the road was closed to travel. The fact that two employees, other than Higgins, started down this road on the day of the fatality, through force of habit indicates that the assumption made by the respondent that these employees should know differently, is insufficient. Further, a hazard did exist which is borne out by the results of the fatal accident. When Higgins arrived at the dirt barricade blocking the road, he was faced with either turning around or backing up the hill. That he decided to back his pickup truck up the hill, rather than turn around is immaterial at this time as any opinion of some other course of action would at best be second guessing. The fact is that the vehicle went over the side of a 47 foot embankment causing Higgins death. The dirt pile barricading the road in combination with the steep embankment is the hazard here. The evidence indicates there was not a berm on this road to warn drivers of approaching the edge of the road. If the road was not to be used at all, then a berm is not required. However, by placing the dirt pile a distance of 183 feet down the road from the entrance and failing to barricade or post notices that the road was closed at the entrance creates a hazard that is not immediately obvious to employees on the day shift and at the particular time this accident occurred.

Respondent further argues that they should not be held responsible for the aberrant and unpredictable actions of its employees, in this case the action of Higgins. Testimony was given that Higgins should have known of the barricade, that he was a fast driver and under the influence of drugs. As stated previously, the evidence does not show that Higgins left the pit the previous night after the dirt barricade was placed across the road. Also, that force of habit, as exhibited by witnesses Allen and Gunter starting down the old service road, showed that a sign or barricade at the entrance would have warned or given notice of the roads condition to those employees who either did not know or forgot the discontinuance of its use.

The testimony as to Higgins prior driving habits is not controlling here as it does not relate to the violation of the standard alleged herein. The violation was the failure to barricade or post signs warning of a safety or health hazard. Further, no witnesses saw the accident; or Higgins driving his truck prior to the accident, nor was there any evidence to show he was driving carelessly.

The fact that the Coroner's report showed that Higgin's blood contained a drug is meaningless unless medical testimony or expert testimony is utilized to indicate what conclusions can be drawn from such tests. The District of Columbia Court of Appeals in the case of Lister v. England 195 A. 2d 260 (D.C. App. 1963) held that blood analysis results are not even

admissible unless introduced by expert testimony. Because, as the Court stated, "without benefit of such testimony or resort to the statutory standards the result of the analysis is meaningless." See Also Holt v. England 196 A, 2d 87 (D. C. App. 1963) and City of Sioux Falls v. Christensen, 116 N.W. 2d 389, (S. Dak. 1962).

The argument of the respondent that they should not be held liable for the conduct of the employee, if it was aberrational and unpredictable, has been considered by the Federal Mine Safety and Health Review Commission. The Review Commission has consistently held that the operator is liable for violations of the mandatory safety standards without regard to fault. United States Steel v. Secretary of Labor 1 BNA MSHC 2151 (1979) and Secretary of Labor v. Marshfield Sand and Gravel 1 BNA MSHC 2475 (1980).

For the reasons stated above, I conclude that a violation did occur.

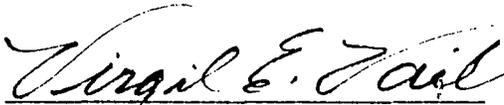
Penalty Assessment

I find that the citation issued by the inspector described a violation of 30 C.F.R. § 56.20-11. The respondent should have been aware of the hazard that existed on the morning of June 12, 1979 and that it would not be immediately obvious to its employees and therefore was negligent in permitting it to exist. However, in determining the extent of the respondent's negligence, I have considered the fact that this same service road had been used for some time by the employees coming and going to the pit and was removed from use as a means of access to the pit the preceding day by placing a dirt barrier across it. After such continuous past use, the action of Higgins in backing up this road a distance of 82 feet when he could have taken other means of exit, such as turning around and driving up, would appear to lessen the degree of negligence of the employer herein.

The respondent is a relatively large company and has a modest history of prior violations. The violation was abated immediately after the citation was issued. I conclude that a penalty of \$2,000.00 should be assessed.

ORDER

The respondent is ordered to pay the sum of \$2,000.00 within 30 days of the date of this decision.


Virgil E. Vail
Virgil E. Vail
Administrative Law Judge

Distribution:

Linda Bytof, Esq.
Office of the Solicitor
United States Department of Labor
450 Golden Gate Avenue, Box 36017
San Francisco, California 94102

Mr. Clair Hay
Kaiser Sand & Gravel Company
3311 Stanley Boulevard
P.O. Box 580
Pleasanton, California 94566

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 20 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 81-24
Petitioner : A.C. No. 36-00856-03037F
v. :
: Rushton Mine
RUSHTON MINING COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

The parties have reached a settlement of the five violations involved in the above docket in the total sum of \$22,000. MSHA's initial assessment therefor was \$35,000. The terms of the settlement are as follows:

<u>Citation/Order Number</u>	<u>Original Assessment</u>	<u>Compromised Settlement</u>
615758	\$ 2,000	\$ 750
802229	10,000	6,500
802230	10,000	6,500
802228	10,000	7,000
802232	3,000	1,250
	<u>\$35,000</u>	<u>\$22,000</u>

The reductions from the original assessment appear warranted.

1. Order No. 615758 was issued for a violation of 30 C.F.R. § 75.201-1(b) and originally involved a penalty assessment by MSHA of \$2,000. In conjunction with this order, section 104(d)(2) Order No. 802229 was issued for a violation of 30 C.F.R. § 75.200 for which Respondent was initially assessed a penalty of \$10,000. These two orders were both assessed for excessive roof-control widths. The first order was issued because no additional support was provided as required by the regulation. The inspector observed that for 350 to 400 feet, the width of the area was 21 to 24 feet instead of 20 feet as required by the regulation. The second violation, of drawings 7, 8, and 9 of the approved roof-control plan, was issued because the plan requires the roadway to be limited to 16 feet in width. These two violations were issued for the same length of roadway. Therefore, they duplicate each other. Accordingly, it is appropriate to reduce these penalties. Although these orders were issued in the course of a fatality investigation, it is conceded

by MSHA that the excessive widths did not contribute to the fatality. The fatality occurred during pillaring operations. This area had been developed many years before. When it was developed, the widths did not have to be narrowed as currently required. The Respondent mine operator was in the process of adding additional support to this roadway. The operator had not yet started pillaring the area. The approved roof-control plan provides, in relevant part, that roadways must be narrowed to 16 feet where pillaring is being done. However, as stated above, pillaring was not yet being performed. Rather, the operator was adding additional support to the entries surrounding the pillars and MSHA concedes that the operator was not unreasonable in interpreting the plan to allow additional support to be installed prior to narrowing the roadway. Additionally, MSHA indicates that the operator did intend to narrow the roadway after adding the additional support. Accordingly, because the two orders duplicate each other, because MSHA concedes it initially overevaluated the operator's negligence, and since this violation did not contribute to the fatality which occurred, penalties of \$750 and \$6,500, respectively, as agreed upon by the parties, are approved.

2. Order No. 802230 was issued for a violation of 30 C.F.R. § 75.201. MSHA originally assessed a penalty of \$10,000. MSHA has submitted the fatality investigation report relevant to this order. As MSHA points out, this report has in it a sketch of a mine map showing the section as it appeared when the fatality occurred. The Respondent operator was in the course of pillar recovery. It had begun pillaring in sequence along one row. Thereafter, it left several blocks of coal unmined due to bad roof surrounding the area. It then continued mining this same row of pillars. Upon completion of this row, the operator moved one row outby and began pillaring across the entries. At this point, the operator did not intend to go back inby to remove the pillars it had omitted. MSHA concedes that this is an acceptable mining method, i.e., where the operator believes that it is unsafe to mine certain pillars, the operator may omit those pillars provided it continues in sequence from that point. However, the state mine safety and health inspectors disagree with the Federal Government's position. The day prior to the fatality, the state inspectors were in the mine. They told the operator that it was necessary to return inby to the three pillars that had been omitted. Thus, the operator was required to add additional support throughout the area going toward the pillars that had originally been omitted. These particular pillars are designated as Nos. 6, 7, and 8 on the sketch provided by MSHA. By mining in this fashion, that is, going partially through one row then going outby another row and then returning inby, the operator failed to maintain a uniform pillar line. This is a violation of 30 C.F.R. § 75.201 and exposed miners to unusual dangers because it is, according to MSHA, a faulty pillar recovery method. This contributed to the accident as it caused excessive heaviness in an area of already poor roof. Accordingly, because the operator was following the instructions of the state inspector, MSHA concedes that the operator's negligence was initially overevaluated. MSHA also indicates that if this matter was to proceed to hearing, an expert witness for Respondent would testify that mining in this fashion does not create pillar points and is not less safe than mining straight across. Accordingly, the reduction to \$6,500 is approved.

3. Order No. 802228 was originally assessed at \$10,000. It involved a fatality. The operator was adding additional support to a developed entry in the course of pillaring operations. Respondent's old roof-control plan did not require 4-foot centers nor as extensive a bolting pattern as required by the current plan. The victim, who was a bolter helper, and the bolter himself were in the process of installing additional supports in accordance with the new plan when the fall occurred. MSHA indicates that there is a dispute as to whether this was spot bolting or rebolting. In either case, MSHA concedes the operator was acting in good faith. MSHA also concedes that the operator was taking extensive measures to make sure that this potentially dangerous area was given care. It is also significant to note that during this additional bolting stage, the section foreman told the bolters to be sure to make the roof safe by doing whatever was necessary. At first, 6-foot bolts were being used. When it was determined that this may not be sufficient, 8-foot bolts and metal straps were used. One of these straps was already in and more were to be inserted when the accident occurred. For these reasons, MSHA concedes that the degree of the operator's negligence was not high. The reduction to \$7,000 appears appropriate and is approved.

4. Citation No. 802232 was issued for a violation of 30 C.F.R. § 75.200. The citation charges the operator with not adequately training its bolting personnel in compliance with safety precaution No. 2 of the plan. MSHA indicates that the object of this citation was to charge the operator with not properly instructing its bolters on "rebolting" requirements. However, the bolter felt, and the operator agreed, that "spot" bolting was being conducted. MSHA concedes that this discrepancy does not indicate inadequate training, but rather the inherent conflict between what spot bolting and rebolting actually are. MSHA concedes the operator's negligence is lower than initially evaluated. The agreed-on penalty of \$1,250 is approved.

ORDER

Respondent, if it has not previously done so, is ORDERED to pay the stipulated penalties totaling \$22,000 to the Secretary of Labor within 30 days from the issuance date of this decision.



Michael A. Lasher, Jr., Judge

Distribution:

Barbara K. Kaufmann, Esq., Office of the Solicitor, U.S. Department
of Labor, 3535 Market Street, Room 14480, Philadelphia, PA 19104
(Certified Mail)

Timothy M. Biddle, Esq., Crowell & Moring, 1100 Connecticut Avenue, N.W.,
Washington, DC 20036 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 20 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 81-17-M
Petitioner : A.O. No. 01-0027-05017 F
: :
v. : Ragland Plant
: :
NATIONAL CEMENT COMPANY, INC., :
Respondent :

DECISION

Appearances: Murray A. Battles, Attorney, U.S. Department of Labor, Birmingham, Alabama, for the petitioner; J. Ross Forman, III, Esquire, Birmingham, Alabama, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on January 30, 1981, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with two alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing was held on July 14, 1981 in Birmingham, Alabama, and the parties appeared and participated therein. The parties waived the filing of post-hearing arguments, but were afforded the opportunity to make arguments on the record and they have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) of the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 119(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 20 CFR 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. National Cement Company, Incorporated is the owner and operator of the Ragland Plant located in Ragland, St. Clair County, Alabama.
2. The inspector who issued the subject order and termination was a duly authorized representative of the Secretary of Labor.
3. A true and correct copy of the subject order/citation and termination were properly served upon the operator in accordance with section 107(d) of the 1977 Act though National denies it is subject to Act.
4. Copies of the subject order/citation and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.
5. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based upon the fact that in 1979, the Ragland Plant produced 353,981 man-hours per year, and the controlling company, National Cement Company, Inc., had annual man-hours of 402,353.
6. The history of previous violations should be determined based on the fact that the total number of assessed violations in the preceding 24 months is 80 and the total number of inspection days in the preceding 24 months.

7. The alleged violation was abated in a timely manner and the operator demonstrated good faith in attaining abatement.

8. The assessment of a civil penalty in these proceedings will not affect the operator's ability to continue in business.

The jurisdictional question.

During the course of the hearing, respondent's counsel for the first time asserted that the Ragland Plant is not a "mine" within the meaning of the Act, and he contended that the respondent conducted a "milling operation" which is outside MSHA's jurisdiction (Tr. 91). Although Commission Rule 29 CFR 2700.5, requires an operator to deny any jurisdictional facts as part of its answer, respondent has never asserted that it is engaged in a milling operation which is outside MSHA's jurisdiction. Although its answer filed February 17, 1981, contains a denial that respondent operates "any coal or other mine", respondent admits that it operates "a limestone quarry, the products of which enter commerce within the meaning of the Act."

I take note of the fact that respondent's history of prior violations reflects that it has been served with a total of 87 citations for the period October 29, 1978 through October 28, 1980, and that respondent has paid these assessments without protest. Further, the inspector who issued the citations testified that the mine has been regularly inspected by MSHA and that the respondent has never objected or contended that the inspectors were acting without enforcement authority or jurisdiction over its mining operations (Tr. 15, 56). I also take note of the fact that MSHA Form 1000-179, which is attached as "Exhibit A" to the petitioner's initial proposal for assessment of civil penalties, filed January 30, 1981, contains a notation that prior to December 4, 1979, the Ragland Plant was known as the "Ragland Quarry and Mill".

Section 3(h)(1) of the Act defines "coal or other mine" as including, inter alia, "lands, excavations, structures, facilities, equipment, machines, tools, or other property * * * used in, or to be used in, the milling of * * * minerals, or the work of preparing * * * minerals."

The legislative history of the 1977 Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14;
Legislative History of the Mine Safety and Health Act, Committee Print at
602 (hereinafter cited as Leg. Hist.).

"Milling" is defined in pertinent part by the Mining Dictionary, (pg. 707), as "the grinding or crushing of ore", and 30 CFR 56.2 defines a "mill" as including "any ore mill, sampling works, concentrator, and any crushing, grinding, or screening plant used at, and in connection with, an excavation or mine".

The Ragland Plant is in the business of producing cement, the principal ingredient of which is the limestone which is mined from a nearby quarry owned by the respondent. The extracted limestone is used in the production of the cement which occurs at the plant site in question. The term "cement" is defined, amongst several definitions, as "a finely ground powder which, in the presence of an appropriate quantity of water, hardens and adheres to suitable aggregate, thus binding it into a hard agglomeration that is known as concrete or mortar." A Dictionary of Mining, Mineral, and Related Terms (U.S. Department of the Interior, Bureau of Mines) (1968) at p. 186.

Inspector Wilkie testified that respondent's quarry is located approximately seven miles from the plant, and that the limestone material is blasted at the quarry, loaded onto contract trucks by front-end loaders, and then hauled and dumped at the plant, where it is ultimately processed into cement. He described the cement-making process, which includes the screening and crushing of the quarried material for the production of cement and mortar. The finished raw product is then bagged and shipped by railroad cars or trucks. Plant production does not include the making of brick, pipe, or other concrete pre-fabricated products (Tr. 56-59). He also alluded to the fact that prior to 1980 respondent used another quarry which was approximately a mile from the plant and that the limestone from that quarry was crushed, loaded, and conveyed to the plant in question by conveyor belts. However, that quarry was flooded and is no longer used, but respondent never objected to any inspections which he had previously conducted at that facility (Tr. 61).

Inspector Wilkie described the plant operation in question as a milling operation and indicated that it had a separate MSHA mine identification number than the respondent's pit and quarry, and he confirmed the fact that he has inspected other similar cement plant operations in the State of Alabama and Georgia and that MSHA has enforcement jurisdiction over these operations (Tr. 61). The plant or mill area itself covers an area of approximately two and one-half acres, and Mr. Wilkie characterized it as a limestone milling operation (Tr. 94).

Limestone is a form of sedimentary rock, and the term "crushed stone" is defined as the "product resulting from the artificial crushing of rocks, boulders, or large cobblestones, substantially all faces of which have resulted from the crushing operation," and is a "[t]erm applied to

irregular fragments of rock crushed or ground to smaller sizes after quarrying." Op cit., p. 284. These definitions suggest that cement production at the plant in question requires, at a minimum, the crushing of limestone to produce a finely ground powder used in the finished product. This being the case, I believe that the respondent's plant may also be characterized as a "crushed stone operation" subject to the mandatory regulatory requirements of Part 56, Title 30, Code of Federal Regulations.

The record adduced in this proceeding reflects that the crushed limestone for the plant comes from company-owned quarry, that the cement was produced by the dry process, and the finished product was stored in silos for shipment in bag and bulk. The kiln which is used for a part of the cement making process is fueled by coal which is processed through the coal feed hopper where the accident in question occurred. (Tr. 92-93).

With regard to respondent's assertion that it conducts a milling operation, it seems clear to me that those activities would still be subject to the Act, as well as to MSHA's enforcement jurisdiction. Section 3(h)(1) of the Act states that: "[i]n making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners at one physical establishment."

Since mineral milling or preparation is not specifically defined by the Act, the Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA) have entered into an agreement by which they define their respective jurisdictions. 39 Fed. Reg. 27382, April 22, 1974, superceded by 44 Fed. Reg. 22827, which became effective on March 29, 1979. Pursuant to this agreement, safety and health infractions which occur on mine sites and in milling operations, such as cement plants, come under the enforcement jurisdiction of MSHA and its mandatory safety and health standards. In those instances where the provisions of the Act and the implementing standards found in Parts 55, 56, 57 do not cover safety and health hazards on mine or mill sites, OSHA has enforcement jurisdiction.

It seems clear to me that the statutory definition of a mine establishes that it was Congress' intent that MSHA regulate any milling activity which is an integral part of a mine, since mines fall within the specialized jurisdiction of MSHA and since mine employees typically operate such facilities. On the facts of this case, it also seems amply clear to me that the respondent's cement plant, even if it can be classified as a milling operation, is still an integral part of its limestone mining operation. Without the raw mineral material (limestone) respondent could not produce cement. Therefore, it seems further clear to me that respondent's operations, whether they be characterized as a crushed stone operation or a milling operation, are both subject to the Act as well as to MSHA's enforcement jurisdiction, and my conclusions in this regard are based on the statutory aforementioned definition of the term "mine" as well as the MSHA-OSHA memorandum of understanding.

Respondent has presented no evidence or testimony to rebut the petitioner's assertion that the plant is subject to the Act as well as to MSHA's enforcement jurisdiction. Under the circumstances, and in view of the aforementioned discussion with regard to this issue, respondent's jurisdictional arguments are REJECTED.

Discussion

The citations in issue in this case were served on the respondent after the conclusion of an investigation conducted by MSHA to ascertain the circumstances concerning a fatal accident which occurred at the plant in question on October 29, 1980. The official accident report is a part of the record (exhibit P-3), and briefly stated, the fatality occurred when an employee fell into a coal feed hopper while apparently attempting to free a coal hang-up and became entrapped in the coal and suffocated. Citation No. 082769, issued on October 31, 1980, charges a violation of section 56.16-2(b), and the condition or practice described is as follows:

A fatal accident occurred at this operation on October 29, 1980, when an employee entered a coal feed hopper and became entrapped and suffocated. The grizzly on which the man normally would have stood to free a hang-up had been removed.

Citation No. 082768, October 31, 1980, cites a violation of 30 CFR 56.16-2(c), and the condition or practice described is as follows:

A fatal accident occurred at this operation on October 29, 1980, when an employee entered a coal feed hopper without shutting off and locking out the discharge equipment. Additionally, the victim was not wearing a safety belt or harness, when the bridged coal collapsed, the employee became entrapped and suffocated.

Testimony and evidence adduced by the petitioner

MSHA Inspector William L. Wilkie testified as to his mining background and experience and confirmed the fact that he had conducted an accident investigation at the subject plant in October of 1980. He detailed the procedures he followed in conducting the investigation, summarized the statements taken from persons at the plant during the course of the investigation, and identified photographs of the hopper in question as well as a copy of the investigative report which he compiled (Tr. 15-23, exhibits P-11 through P-19, P-3, R-5).

Mr. Wilkie characterized a "grizzly" as the vernacular term for a grate, and he indicated that it was not in place over the hopper when he arrived at the plant and that he could not see one anywhere in the immediate

area. However, he did observe 6 or 9 steel supports inside the hopper which served as a support for the grizzly when it was in place. Mr. Wilkie testified that he interviewed shift foreman Howard Burnham and recorded in his notes what he believed Mr. Burnham told him about the accident (exhibit P-4), and that he also wrote up a statement for his signature describing the accident (exhibit P-6). Mr. Burnham told him that the accident victim Norris Johnson was standing on the coal in the hopper attempting to free up some coal with a long rod, and that after inserting his rod into the coal two times the bridged coal gave way and buried Mr. Johnson up to his hips. Mr. Burnham attempted to free Mr. Johnson from the coal, but after 10 to 15 minutes he became exhausted, shut down the vibrator, and went for help. Two or three men jumped into the hopper and frantically attempted to uncover Mr. Johnson from the coal while a man was attempting to push Mr. Johnson's legs up through the bottom of the hopper. Mr. Johnson was extracted from the coal and the rescue squad arrived on the scene, administered oxygen and CPR, all to no avail (Tr. 23-33).

Mr. Wilkie testified that Mr. Burnham admitted to him that there was no safety belt at the hopper, and that it was kept in a locker in the kiln control room. Mr. Burnham also told him that he did not instruct Mr. Johnson to get into or out of the hopper, and Mr. Burnham made an admission that both he and others had often stepped out onto the coal pile to unclog it (Tr. 36).

Mr. Wilkie confirmed that he issued the citations in questions, and he stated that a fellow inspector, R. L. Everett assisted him during the investigation and that Mr. Everett assisted him in filling out the inspector's narrative statements (exhibits P-1, P-2, Tr. 39-45).

Inspector Wilkie explained the reasons for the issuance of the citations in this case as follows (Tr. 45):

A. All right. The reason I issued these citations, I was obligated to issue them under the standards that I'm obligated to carry out. And had either one of these items been used; had there been a grizzly on the hopper bin, there would have been no accident. Had there been a safety belt used, there would have been no accident.

Q. But the grizzly now -- there is no standard as such that a grizzly has to be on there, is that true?

A. The grizzly was used, in this case, as a sizing device.

Q. Yes. But it was also used -- well --

A. It was used as a walkway.

Q. It would have been an adequate walkway under the standard.

A. It would have. We would have accepted it.

And, at pages 95-97:

Q. Now, on the first citation here, 082769, which is Petitioner's Exhibit 1, when you cited them for a violation of 56.16-2(b), I take it you did so on the theory that the grizzly also served as a suitable walkway or passageway and since it was not there, since it had been removed and not replaced, that they didn't have a suitable walkway or passageway. Is that the theory on which you issued the citation?

A. Yes, sir.

Q. Would Subsection (c), that first sentence, also suffice to describe the function of the grizzly, and if a grizzly were not present could you also have cited them with (c), which says where persons are required to enter, et cetera, that a platform or staging shall be provided?

A. Yes, sir. I would have issued that (c) since they did not cut off the discharge and they did not use the safety belt.

Q. Well, leave the safety belt and discharge aside now, and let's just concentrate on whether or not that first sentence, which requires them to have a ladder or platform or staging. Would that first sentence under (c) also have sufficed for a missing grizzly?

A. Yes, sir, it could have.

Q. Now, look up under "1" of the standard, where it says, "Shall be equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials."

Would the grizzly fall into the category of "equipped" with mechanical devices or other effective means?

A. It would fall under "effective means." It would serve as a walkway there.

* * * * *

Q. So you could have used either "1" or (c), but you chose (b), right?

A. Right.

Q. Now, let me ask you this. Isn't it true this grizzly is not a walkway or passageway in the usual understanding of that term, is it?

I mean, people don't usually egress?

A. No. In this case, the reason is the bin was enclosed on three sides; there was no other way to get in there except to step over and either stand on those supports or walk the grizzly to free a hangup.

Had the grizzly been in there, there would have been no accident. Had the grizzly been out and the man had to free a hangup like it was, had he had on a safety belt there would have been no accident.

Inspector Wilkie testified that Mr. Burnham told him that the grizzly had been removed for four or five months, and although Mr. Wilkie had conducted prior inspections at the plant, he could not state with any certainty if he observed the grizzly in place (Tr. 47). The citations were abated as soon as the investigation was completed and a new grizzly was purchased and installed over the hopper (Tr. 51). A safety rope and belt were installed at the hopper bin and a cable was also installed inside the hopper to facilitate the coupling of the belt or rope (Tr. 53). These actions remedied both of the citations (Tr. 79).

On cross-examination, Inspector Wilkie stated that he could not specifically recall inspecting the hopper during any of his prior inspections. He confirmed the fact that there is no specific safety standard that requires a grizzly to be installed, and stated that a grizzly is a grating device to size the coal and keep out extraneous materials. He also indicated that a grizzly may serve as a walkway and that MSHA has accepted this, but conceded that if coal were piled on top of the grizzly, a person would have to walk over it (Tr. 65). Mr. Wilkie described the hopper area, and he confirmed the fact that Mr. Burnham was emotionally upset at the time that he interviewed him shortly after the accident. He also described the operation of the vibrator feeder pan at the bottom of the hopper and he believed that it vibrated the walls of the hopper (Tr. 66-77).

In response to further questions, Mr. Wilkie stated that Mr. Burnham advised him that the grizzly supports which are fixed to the walls of the hopper are used for employees to stand on when freeing up coal hang-ups in the hopper (Tr. 86).

MSHA Inspector Barton Collinge testified that he discussed the citations with Mr. Wilkie before they were issued, and he stated that there is no mandatory safety standard which requires a hopper of the type in question to have a grizzly installed on it (Tr. 113). He indicated that the purpose of the grizzly is to facilitate the sizing of the coal which was dumped into it and to prevent hang-ups. He explained the purpose of the hopper, and indicated that it constituted a "screening process", and that from his experience, when coal is hung up in the hopper it is freed up by someone barring it down from the top. Usually, one stands on the grizzly and places the bar between the openings for this purpose, and in the instant case he did not know whether it could have been freed up by someone standing on the hopper edge (Tr. 114-116).

With regard to a question as to why the "walkway or passageway" subsection was cited, Mr. Collinge responded as follows (Tr. 117):

THE WITNESS: Travelways -- bringing it under travelways, it isn't really a travelway as such. It's not meant to be a walkway. However, it is an area to do a function, and the function was to free the hangup, and this is a normal function in hoppers.

To be very honest, we put it under this section because this standard deals with bins and hoppers. We have had too many fatalities in our area in bins and hoppers. We're very sensitive to them.

And, at pages 121-122:

THE WITNESS: Underground. But, if you'll pardon me, I know a word here and there is important, but coming back to the fact, the fact remains that there was a place to work, whether they call it a platform or a walkway, and the men would work on there, I would work on there. If it was your job to make sure that coal went through there, and to make sure the bin didn't hang up, as it would at times with damp coal, to go out and punch it down and get out of there. [sic]

Now, if the term "platform" would have been better, maybe I couldn't argue that point. But "walkway", "platform", the function remained the same.

In further explanation as to why a separate walkway citation was issued, Mr. Collinge stated that the removal of the grizzly resulted in the removal of the walkway (Tr. 136-137), but he conceded that the grizzly could also be classified as a platform under subsection (c), and that the use of the two terms "is a matter of choice of words" (Tr. 144). Further, explanation as to the issuance of a separate citation is reflected in the following trial colloquy (Tr. 154-155):

JUDGE KOUTRAS: In this case, it seems to me that the three conditions that were cited: the grizzly not being there, failure to lock out, failure to provide a balt or lanyard, all theoretically could come under (c) --

MR. BATTLES: I agree with that.

JUDGE KOUTRAS: And since two of them only came -- the belt and failure to lock out is in one, why wasn't the other also included in there and then we just have one citation. See?

And that's what one of the defenses is, is that here you're coming at us with a double barrel for a \$20,000 assessment for essentially a violation of (c) rather than (b) and (c). And that's simply what I'm trying to understand, is the theory as to why it was split out the way it was.

Anything further, Mr. Battles, from the Government?

MR. BATTLES: No, that's all, Your Honor. But looking at these, they do seem to be ambiguous and overlapping. Talking about the first one is: walkways and passageways --

JUDGE KOUTRAS: Just a minute. What's ambiguous and overlapping?

MR. BATTLES: (b) and (c).

JUDGE KOUTRAS: That's all right; there's nothing unusual about that.

MR. BATTLES: That's what I'm saying. This doesn't surprise me.

Testimony and evidence adduced by the respondent

Harold Burnham testified that he was the shift foreman on October 29, 1980, and the accident victim, Norris Johnson, was employed as a general laborer working under his supervision. Prior to the accident, he had instructed Mr. Johnson to unstop the coal hopper, and this is normally done by inserting an air lance from the bottom underside of the hopper at the vibrator pan, and freeing the coal by air pressure. Mr. Johnson had unstopped it once during the shift, but when it was clogged a second time, he instructed Mr. Johnson to go back to the hopper to check it out again, but he did not go with him, since he had to continue making his shift rounds (Tr. 160-167).

Mr. Burnham testified that when he drove up the incline to the hopper entrance and got out of his truck, he observed Mr. Johnson on the west side of the hopper standing on the metal ledge with a short bar, and the coal was banked up inside the hopper. He identified the location where Mr. Johnson was standing by reference to photographic exhibits R-1 and R-4. Mr. Burnham stated that as he approached the hopper on foot, Mr. Johnson had moved to the east side of the hopper and appeared to be standing on the hopper ledge which serves as a support for the grizzly. Mr. Johnson was using a long pole in his attempts to free up some coal which had apparently clogged in the hopper, and as he worked the pole through the coal it "caved out" and caught Mr. Johnson as he was standing on the coal. Mr. Burnham reached over the hopper ledge and grabbed Mr. Johnson's arm in an attempt to free him, but the

coal had him pinned against the side of the hopper (exhibit R-2). Mr. Burnham then left the scene to turn the vibrator off and to summon assistance, and in two or three minutes he had returned with three other persons to assist Mr. Johnson (Tr. 167-171).

Mr. Burnham testified that the accident was an instantaneous occurrence, and just as Mr. Johnson stepped out onto the coal pile and inserted the rod, the bottom coal fell out. The use of the air lance from underneath the hopper had apparently created a cavity under the coal pile, and when the pole was inserted it gave way and caught Mr. Johnson (Tr. 173). Mr. Burnham stated further that he had in the past stood on the hopper ledge to free up coal which had lodged in the hopper, but that he had never instructed anyone, including Mr. Johnson, to walk out onto the coal pile itself. The usual practice was to free any stoppage from the underside with the air lance, and that "seventy-five percent of the time it'll break loose from the bottom with an air lance" (Tr. 174). He did not believe that the fact that the vibrator was on contributed to the severity of the accident, and he knew that the grizzly had been removed, and he assumed that it was off for some four or five months (Tr. 175).

On cross-examination, Mr. Burnham stated that bars are kept at the hopper location to facilitate the freeing up of clogged coal when it cannot be freed up from the underside by means of the air lance. He conceded that he knew that the grizzly had been removed from the hopper for four or five months and that no life lines or safety belts were around the hopper area during this time. He did not know whether any safety belts or lines had ever been used during the time the grizzly was off the hopper, and he personally never observed any in use (Tr. 177). He conceded that a belt or a line could have been tied off on a nearby catwalk handrail, but that he had never had any occasion to use safety belts or lines because the majority of the time, any clogged coal could be freed up by use of the air lance (Tr. 178).

Mr. Burnham confirmed that Mr. Johnson was standing inside the metal edge or ledge of the hopper at the moment the coal gave way, and he identified the metal supports which hold the grizzly in place as those which are depicted in photographic exhibit P-19, indicated that they are located all around and inside the perimeter of the hopper and that he has stood on them while attempting to free up clogged coal, and he candidly admitted that he did not use a safety belt (Tr. 181).

Mr. Burnham stated that he did not know why the grizzly was removed, but he did state that it was too small and slowed down the payloader which dumped the coal into the hopper, and due to constant bumping by the payloader, the grizzly was "in bad shape" (Tr. 182). With regard to the vibrator, Mr. Burnham stated that it does not touch or shake the hopper itself, but works independent of it (Tr. 183).

In response to further questions, Mr. Burnham indicated that the function of the grizzly was to keep excess debris out of the coal which dumped into the hammer mill and that at times the payloader would shake

or bump the grizzly so as to break up the large lumpy coal which was dumped on top (Tr. 184). He also indicated that as a general laborer, Mr. Johnson worked on different shifts on a rotation "as needed" basis. He considered Mr. Johnson to be an excellent employee and he never had any problems with him (Tr. 199). Mr. Burnham stated that it never occurred to him to provide a safety line or belt at the hopper during the time the grizzly was off (Tr. 200), and he stated that in the event maintenance were required everything would be shut down (Tr. 202). In response to a question as to why he believed the accident happened, Mr. Burnham stated as follows (Tr. 205):

A. Well, there's the possibility that he could have been in a little too big of a hurry and he misjudged the ledge that he supposedly thought he was standing on.

Q. Let's assume that he were standing on the ledge, do you think that's a good practice, for someone to stand on that ledge and take a pole and stick it down in that coal?

A. Well, I have done it myself, but I've never told anybody to, no, sir.

Q. You know, people sometimes do things and later reflect on it. Would you do it again? Stand inside on that ledge and poke a stick down there without a life line or a belt?

A. No, sir.

Q. Do you normally shut down or lock out that equipment when you poke from under with the air line?

A. No. sir.

Q. You don't require them to do that?

A. No, sir. There's nothing there to.

Robert A. Daffron, Assistant Administrative Supervisor, and Plant Safety Director, testified as to his duties as safety director, and he indicated that they include safety inspections, monthly meetings with employees and supervisors, and the correction of safety deficiencies as they are brought to his attention. He detailed the procedures he follows in considering safety complaints which are brought by the safety committee, and he produced a copy of the company's safety rules and practices (exhibit R-7). Mr. Daffron also stated that as a general rule both he and the union safety representative accompany all MSHA inspectors on their safety inspections, and that safety notices and similar materials are posted on a bulletin board maintained in the canteen, as well as other plant locations. He also indicated that copies of the part 56 mandatory safety

requirements have been furnished to the employee union safety committee as well as to all union officers. With regard to the grizzly in question in this case, he testified that no one ever complained that the hopper was unsafe because the grizzly had been removed, no safety reviews have ever been requested because of any asserted hazard connected with the hopper, and he indicated that he was not aware of the fact that the grizzly had been removed (Tr. 211-220).

Mr. Daffron confirmed that a new grizzly was installed over the hopper on the day of the accident, and he identified a photograph (exhibit P-15) of the new grizzly. He stated that an MSHA inspection had been conducted in August of 1980, and no one said anything about the missing grizzly (Tr. 222).

On cross-examination, Mr. Daffron states again that he was unaware that the grizzly had been removed, and stated that 40% of his duties are devoted to safety matters. He did not know why the grizzly had been removed, and he confirmed the fact that he had received a copy of an MSHA safety publication (exhibit P-21), dated June 1980, dealing with bins and hoppers. He stated that the grizzly which had been removed from the hopper in question was not there for safety reasons (Tr. 222-224).

Regarding the company's safety record as reflected by MSHA's history of prior violations (exhibit P-10), Mr. Daffron commented that its "not good", and that "We strive for zero, but you never reach zero" (Tr. 226). In response to further questions, Mr. Daffron states that Mr. Johnson was a very good employee and that he never had any problems with him. He also characterized Mr. Burnham as a hardworking, conscientious, and dedicated supervisor, but did state that the practice of an employee stepping to the edge of a hopper to unclog coal in the hopper was not a good practice (Tr. 227).

Gene Allen Sumner, testified that he is employed with the respondent as headquarters Secretary and Controller. He testified as to the company's corporate make-up, its competitors, and testified that the Ragland Plant is the only manufacturing plant owned by the respondent. He also testified as to the general market conditions concerning the supply and demand for cement, and stated that respondent does not mine any coal, but does purchase it. He also alluded to the fact that the respondent has expended in excess of 50 million dollars for capital improvements, including air and water pollution abatement (Tr. 228-235).

On cross-examination, Mr. Sumner confirmed that the respondent company is a totally owned subsidiary of a French company, and characterized the respondent company as a "small cement company" (Tr. 237). He also indicated that the company produces some 700,000 tons of cement annually and employs 150 permanent hourly employees in addition to temporary hourly seasonal people (Tr. 238).

Findings and Conclusions

Fact of violation - Citation No. 082769

The respondent in this case has been charged with two violations of the provisions of mandatory safety standard 30 CFR 56.16-2, which provides as follows:

Mandatory. (a) Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be --

(1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials; and

(2) Equipped with supply and discharge operating controls. The controls shall be located so that spills or overruns will not endanger persons.

(b) Where persons are required to move around or over any facility listed in this standard, suitable walkways or passageways shall be provided.

(c) Where persons are required to enter any facility listed in this standard for maintenance or inspection purposes, ladders, platforms, or staging shall be provided. No person shall enter the facility until the supply and discharge of materials have ceased and the supply and discharge equipment is locked out. Persons entering the facility shall wear a safety belt or harness equipped with a lifeline suitably fastened. A second person, similarly equipped, shall be stationed near where the lifeline is fastened and shall constantly adjust it or keep it tight as needed, with minimum slack.

Both of the citations which were issued by Inspector Wilkie in this case were the result of the same event, the accident of October 29, 1980. Citation 082768 charges a violation of subsection (c), and it was issued because the hopper had not been locked out and the accident victim was not wearing a safety belt or lifeline. The locking out of the equipment and the use of a belt or line are set out as separate and distinct mandatory requirements in subsection (c), yet the inspector issued only one citation covering both of these requirements. However, he issued citation 082769 as a separate citation because the grizzly had been removed and was not replaced.

Citation No. 982769 charges the respondent with a violation of subsection (b) of section 56.16-2, which requires that suitable walkways or passageways be provided where persons are required to move around or

over hoppers. The inspector issued this separate citation because the grizzly which normally would be in place over the coal hopper or bin in question had been removed and not replaced. The inspector considered the grizzly to be a "walkway or passageway", and since it was not in place, he believed that a violation of subsection (b) occurred.

The terms "walkway", "passageway", and "grizzly" are not further defined by the regulations, and the term "grizzly" is not even mentioned in section 56.16-2. However, the Dictionary of Mining, Mineral, and Related Terms, published by the Bureau of Mines, U.S. Department of the Interior, 1968 Ed., at pg. 513, defines "grizzly" as follows:

- a. Guardrails or covering to protect chutes, manways, winzes, etc., in mines. Fay.
- b. A device for the coarse screening or scalping of bulk materials. See also bar grizzly; grizzly chute; live roll grizzly, ASA MH4.1-1958.
- c. A rugged screen for rough sizing at a comparatively large size (for example, 6 inches or 150 millimeters); it can comprise fixed or moving bars, disks, or shaped tumblers or rollers. B.S. 3552, 1962.

Respondent's answer to the proposal for assessment of a civil penalty for this alleged violation denies that subsection (b) of the cited standard requires that a grizzly or grid be installed in the bin hopper or that a walkway is required over the area in question. Respondent also maintains that no employee is "required" to move on or over the hopper or bin, and argues that the grizzly is not a walkway or passageway within the normally acceptable meaning of those terms because the hopper is enclosed on three sides and mine employees do not traverse or pass through the area as a regular means of moving about the area. The inspector who issued the citation believed that men routinely were required to move over and about the grizzly when it was in place so as to facilitate the clearing out any blockage or unusually large chunks of coal by means of a long pole or rod which is inserted between the opening of the grizzly.

On the facts presented in this case, I believe it is reasonable to conclude that the accident would not have occurred had the grizzly been in place. I believe it is also reasonable to conclude that if a person walks out on a pile of coal which has been dumped into a hopper for the purpose of inserting a long pole or rod in it to free some of the coal which has been "hung up" in the hopper chute, he exposes himself to a hazardous situation and may become entrapped in the coal as it is freed up under his feet. The same may be said of the individual who may stand on a grizzly support bracket inside the hopper. He exposes himself to the danger of falling into the hopper. In both of these situations, I believe that the provisions of either subsection (a)(1) or the first sentence of subsection (c) of section 56.16-2, more directly fit the facts presented in this case, and my reasons for these conclusions follow.

Subsection (a)(1) of section 56.16-2 specifically requires the use of mechanical devices or other effective means of handling materials so as to preclude persons from being entrapped by caving or sliding materials, and the first sentence of subsection (c) requires the use of platforms or staging where maintenance or inspections have to be performed. In my view, these sections are more directly applicable in this case, and strict application and enforcement of these subsections are more appropriate than the "walkway or passageway" requirement relied on by Inspector Wilkie.

Petitioner's counsel candidly conceded that the removal of the grizzly is not per se a violation of any mandatory safety standard, even though the inspector considered it to be an adequate walkway when it was in place (Tr. 221). Although recognizing that the inspector obviously believed that a grizzly which suffices as a platform may also be considered a walkway or passageway, he candidly questioned this conclusion, and agreed that the fact that someone has to stand on a grizzly doesn't necessarily transform it into a walkway in the normal sense of that word (Tr. 100, 104). He also conceded that the grizzly in question was not normally used as a travelway or walkway by miners, and he observed that while another safety standard covers "safe means of access" to working places, that standard was not cited in this case (Tr. 102).

Inspector Wilkie also conceded that there is no mandatory safety standard which requires that a grizzly be installed or maintained in place over a hopper or bin such as the one which has been cited in this case. On the facts of this case, it seems obvious to me that Mr. Wilkie views the terms "grizzly", "walkway", and "passageways" as interchangeable, notwithstanding the fact that from his own admission a grizzly is another term for a grate or filter whose principal function is to size materials, and that the grizzly in this case was enclosed on three sides by the hopper walls and was not a normal travelway for miners to come and go from the area.

With respect to petitioner's comment in the course of the hearing that the respondent could have been cited with a "safe access" violation pursuant to section 56.11-1, that was precisely what was done in a recent case decided by Judge Steffey on December 1, 1980, in MSHA v. A.H. Smith Stone Company, Docket VA 80-2-M. In that case an employee was attempting to climb out of a crusher feeder after performing some maintenance, somehow lost his footing while standing on the grizzly, and fell into the crusher suffering fatal injuries. The company was charged with a violation of section 56.11-1, for failing to provide secure and safe footing or a handrail to facilitate the employee's safe exit out of the crusher. The circumstances presented in the Smith Stone case are similar to those which prevailed in the instant case, yet the inspector there chose to cite the safe access safety requirements found in section 56.11-1, rather than those dealing with bins and hoppers.

As indicated earlier, petitioner has conceded that the removal of the grizzly was not in violation of any safety standard (Tr. 221). Further, while Inspector Collinge expressed a concern over reported bin and hopper accidents, MSHA's safety publication dealing with the hazards connected with bins and hoppers (exhibit P-21) contains not one word about the necessity for maintaining grizzly's in place over such bins and hoppers. The emphasis in the publication is directed to the use of safety belts and lines, and to the deenergizing of the equipment, and not one of the sketches depicting miners standing over and inside hoppers and bins show a grizzly anywhere in sight. It seems to me that if bins and hoppers do in fact present hazardous situations in the every day mine work environment, then MSHA should promulgate a mandatory standard directed at the specific hazard surrounding the use of a grizzly. Reliance on walkway, passageway, and other such nonsensical standards to the facts of this case contribute much to confuse the issue and very little in terms of safety guidance.

In this case the petitioner has proposed maximum penalty assessments of \$10,000, for each of the two citations. Although section 110(a) provides that "each occurrence of a violation of a mandatory health safety standard may constitute a separate offense", I do not believe that multiple violations stemming from the same event should be issued in such a manner as to result in arbitrary punitive sanctions. In this case, I believe that the inspector relied on subsection (b) because he believed that subsection (b) most nearly covered the situation at hand. In short, the inspector did the best he could with the standard as written, and while I sympathize with an inspector who often must choose among standards which may be imprecise, confusing, or contradictory, an operator should not be unduly penalized and subjected to an additional \$10,000 civil penalty assessment because the inspector made the wrong choice. In my view, the purpose of a civil penalty assessment proceeding is not only to deter future violations, but it should serve to put the operator on notice as to what is required of him in terms of future compliance. Penalty assessments for alleged violations which come "close" to a mandatory standard simply do not achieve these goals. The best method that I can think of to cure such a problem is to clarify ambiguous standards through the promulgation and application of standards which make sense.

In view of the foregoing, and after careful consideration of all of the testimony and evidence adduced on the record, including the arguments made by the parties in support of their respective positions, I conclude and find that the petitioner has failed to establish a violation of subsection (b) of section 56.16-2, as charged on the face of citation 082769. I believe that a reasonable interpretation of the terms "walkways" or "passageways" simply does not support the inspector's belief that the grizzly was such a walkway or passageway. Respondent's testimony establishes that the hopper in question was enclosed on three sides and that it was not regularly used as a means of travel by any mine personnel. In my view, the fact that someone must stand on a piece of equipment to perform some function does not necessarily transform it into a walkway or passageway. Citation No. 082769 is VACATED.

Fact of violation - Citation No. 082768

Citation No. 082768 charges a violation of subsection (c) of section 56.16-2, in that the hopper in question had not been locked out and the accident victim was not wearing a safety belt or lifeline when he entered the hopper to poke around with a pole in his attempts to clear out some coal blockage.

It seems clear to me from the testimony and evidence adduced in this case that Mr. Johnson was not wearing a lifeline or safety belt as required by the cited standard. Inspector Wilkie testified that he observed no safety belt or line at or near the vicinity of the hopper, but that one was available in the kiln room. Respondent's evidence and testimony in defense of the citation does not rebut the fact that Mr. Johnson was not wearing a belt or lifeline and shift supervisor Burnham admitted this. Although the standard does not require that a belt or lifeline be kept at a hopper or bin, it specifically requires a person entering such a facility to wear one, and it also requires that a second person be nearby to tend the line. Under the circumstances, I conclude and find that the petitioner has established the conditions cited by the inspector, and that said conditions constitute a violation of the cited standard.

With regard to the allegation that the hopper discharge equipment had not been shut off and locked out at the time Mr. Johnson attempted to dislodge the coal in the hopper, I also conclude and find that the petitioner has established this fact through a preponderance of the evidence adduced in this case. Respondent has offered no testimony or evidence to rebut this fact, and I find that the conditions cited also constitute a violation of the cited standard. Although there is some question as to whether the fact that the hopper vibrator had not been shut down and locked out contributed to the gravity of the violation, this may not serve as a defense to the citation, but may serve to mitigate the seriousness of the violation.

One of the respondent's defenses to the citation is the assertion that Mr. Johnson was not required to enter the hopper, and since the cited standard uses this language, respondent argues that the petitioner has not established that his supervisor Mr. Burnham gave him a direct order to enter the hopper, or otherwise required him to do so. This defense is rejected. It is clear from the facts of this case that Mr. Burnham instructed Mr. Johnson to go to the hopper facility to check out the coal blockage and to do what was necessary to take care of the problem. Although the usual method of freeing up coal from the hopper was to use an air device inserted from the underside of the hopper, it is also true that on several occasions employees had to do this by means of long poles or rods which were kept at the hopper for the specific purpose of inserting them into the top of the coal to dislodge any coal which had hung up in the hopper. Mr. Burnham admitted that this was the case, and he also admitted that he himself has used this procedure in the past. He also admitted that he has stood on the grizzly

brackets which are located along the inside top wall of the hopper and inserted the rods or poles into the coal for the purpose of dislodging large coal particles or hang-ups.

A second defense to the citation is the assertion by the respondent that Mr. Johnson had not entered the hopper at the time of the accident, but was merely standing outside or on the perimeter of a metal ledge or "lip" which served as a barrier for the endloader as it dumped the coal into the hopper. This defense is likewise rejected. I believe it clear from the testimony and evidence adduced in this case that Mr. Johnson was standing on a grizzly bracket located inside and along the top inner wall of the hopper when Mr. Burnham first observed him, that he stepped out onto the coal itself when he inserted the pole or rod, and that he was in fact on the edge of the coal pile when the bridged coal gave way and pinned him against the hopper wall. Mr. Burnham candidly admitted during testimony at the hearing that this was the case, and while it may be true that Mr. Johnson may not have been standing clearly out and in the middle of the coal pile as implied by the sketch which is a part of the accident report (exhibit P-3), I conclude and find that he was standing at the edge of the coal pile when it gave way and that this supports a finding that he had entered the hopper. Even if he were standing on the grizzly bracket, I would still find that he had entered the hopper.

One final defense suggested by the respondent during the course of the hearing is the suggestion that the accident was an unfortunate incident which resulted through no fault of the respondent, and that the respondent did all that was humanly possible to assist Mr. Johnson and to save his life. Assuming that this were the case, it is clear from the legislative history of the act, as well as some of the precedent decision that a civil penalty may be imposed on a mine operator for a violation even though the operator is without fault, J & H Coal Company, 2 IBMA 20 (1973); Valley Camp Coal Company, 1 IBMA 1976, 1 IBMA 245 (1972); Armco Steel Corporation, 6 IBMA 64 (1976). In other words, lack of negligence cannot excuse a violation, but it may be considered in mitigation of the amount of the penalty, Webster County Coal Company, 7 IBMA 264 (1977). See also: Heldenfels Brothers Inc., 1980 OSHD 24,606, where the Commission affirmed the decision of a Judge assessing a civil penalty against an operator even though he found that the driver of a mobile scraper was responsible for the accident that caused his death. On review by the Fifth Circuit on January 15, 1981, the Court affirmed the decision, Heldenfels Brothers, Inc. v. Marshall, et. al., Civ. No. 80-1607.

In view of the foregoing findings and conclusions, Citation No. 082768 is AFFIRMED.

Size of Business and Effect of Civil Penalty of Respondent's Ability to Remain in Business.

The parties stipulated that a civil penalty assessment in this case will not adversely affect the respondent's ability to remain in business. With regard to the size of the respondent's cement operation, there is a

dispute as to whether it is a large or small operation. Petitioner asserts that it is a large operation and its conclusion in this regard is based on the fact that respondent is a subsidiary of a larger foreign corporation whose annual man-hours and production were greater than that of the named respondent.

Respondent's secretary-controller characterized the Ragland Plant as a "small cement company", employing approximately 150 permanent hourly employees, producing some 700,000 tons of cement on an annual basis. The parties stipulated that for the year 1979, the Ragland site had 353,981 man-hours of production at that operation.

After consideration of all of the evidence and testimony adduced with regard to this issue, I conclude and find that the respondent is a medium-sized operator for purposes of any civil penalty assessment made by me in this case.

Good Faith Compliance

The parties stipulated that the violations issued in this case were abated in a timely manner and that the respondent demonstrated good faith in abating the conditions. I adopt this stipulation as my finding concerning this question.

History of Prior Violations

The respondent's history of prior violations is reflected in exhibit P-10, an MSHA computer print-out which shows that respondent has paid civil penalty assessments for a total of 86 citations issued during the time period October 29, 1978 through October 28, 1980. Although Inspector Wilkie characterized the respondent's prior compliance history as "poor" or "bad", I take note of the fact that the bulk of the prior citations concern non-compliance with two standards, namely, the guarding requirements of section 56.14-1, and the travelway safe-access requirements of section 56.11-1. The prior history reflects only one prior citation for a violation of section 56.16-2, for which the respondent paid an assessment of \$210 on August 18, 1980, approximately two months prior to the accident in question. Since the details of that citation are not of record, I have no way of evaluating the circumstances of that violation as they may reflect on the facts presented in the instant case. The same may be said of the 23 prior safe-access citations concerning section 56.11-1. Absent any information concerning the circumstances surrounding those citations, I have no way of determining whether those prior citations involved a hopper or bin of the type which is the subject of the instant proceeding.

Aside from the itemized listing of the prior citations, I have taken into consideration the testimony of Inspector Wilkie that the respondent has always been cooperative during his inspections (Tr. 15), that safety director Daffron has been courteous and cooperative on safety matters, and

has been eager to take corrective action where required (Tr. 83-84). I have also considered Inspector Collinge's testimony indicating his belief that the respondent's safety program needs improvement, that respondent's safety record, as compared to comparable operations is not too good, and the views expressed by both inspectors that safety director Daffron does not spend as much time as he should on safety matters (Tr. 131).

In view of the foregoing discussion, I cannot conclude that the respondent's overall safety record or prior history of violations is such as to warrant any additional increase in the civil penalty which I have assessed for the citation which has been affirmed. On the other hand, I cannot conclude that respondent's safety record is such as to warrant any special consideration or reduction in the civil penalty which has been assessed for the citation in question.

Gravity

The accident which occurred in this case resulted in the untimely and unfortunate death of a plant employee. Although the record supports a finding that his supervisor and fellow employees did all that they could to save his life, the fact is that the violation resulted in a fatality. While no one can say for certain that the use of a safety belt or life line would have prevented the victim's death, I believe that it may have kept him from being covered with coal until more help arrived. Mr. Burnham's frantic efforts to keep the victim from sinking deeper into the coal pile came to an end after ten or fifteen minutes when Mr. Burnham became exhausted and could no longer hold onto to him. A safety belt or line tied to the victim would have permitted Mr. Burnham ample time to summon additional help and possibly save the victim's life. In these circumstances, I find that the violation was very serious and this is reflected in the civil penalty which I have assessed for the violation in question.

Negligence

On the facts presented in this case I conclude and find that the failure by the respondent to insure that Mr. Johnson had a safety belt or line attached to his person while he was poking around the coal piled on top of a hopper which had the grizzly removed for a prolonged period of time amounted to a reckless disregard for Mr. Johnson's safety, and that this constitutes gross negligence. While it is true that the accident may have been a sudden or spontaneous occurrence, the record in this case establishes that the grizzly which normally covered the hopper had been removed for a period of some four or five months and that Mr. Burnham was aware of this fact. More surprisingly, the safety director, Mr. Daffron, was unaware of this fact, and I can only conclude that his ignorance in this regard resulted from his failure to inspect the hopper. Although Mr. Daffron stated that the grizzly is normally installed to size and filter larger coal particles, the fact is that it was at least used part of the time for men to stand on and poke down through the openings to free coal which had become lodged in the hopper. Once the

grizzly was removed, mine management, through Mr. Burnham, should have been aware of the fact that employees would likely stand on the grizzly supports inside the hopper so as to facilitate the use of the pole or rod to free up the coal, and poles and rods were kept at the hopper for this purpose. As a matter of fact, Mr. Burnham admitted that he had often done this without the use of a safety belt or line, and he watched Mr. Johnson do precisely the same thing on the day of the accident, and did not caution him or insist that he wear a safety belt, even though one was in the kiln room. The fact that he did not think to provide him with a safety belt or line is no excuse.

With regard to the question of whether the failure to de-energize the hopper or vibrator contributed to the severity of the accident, petitioner's counsel candidly admitted that it was difficult to prove that this was in fact in case, and he did not believe that this particular element of the case was significant. Although recognizing the fact that the feeder vibrator was installed in conjunction with the hopper bin for a particular purpose, he nonetheless conceded that there is nothing in the record to conclusively establish that the fact that the vibrator was not shut down prior to the time Mr. Johnson entered it to try and dislodge the coal with a pole contributed to the gravity of the violation (Tr. 192-194).

The official accident report states that the vibrator and discharge pan were attached to the bottom of the hopper, and it also contains the inspectors' conclusions that "failure to de-energize and lock-out the discharge vibrator possibly contributed to the severity of the accident".

Inspector Wilkie described the feeder pan vibrator and identified it as depicted in photographic exhibits R-5 and P-12 (Tr. 76-77). He testified that the feeder pan vibrates and shakes the coal down into the pan, which in turn feeds it into the mill. He indicated that it was his understanding that the vibrator vibrates the walls of the hopper (Tr. 77). He also indicated that no one should enter a bin or hopper if the vibrator is on, and even if one were wearing a safety belt, that would not suffice for compliance if the vibrator is operating (Tr. 98).

Respondent's witness Burnham testified that the vibrator feeder pan is not attached to the hopper and does not touch it. However, he did indicate that the hopper fits down inside the feeder pan and has about an inch of clearance all around the pan. The coal drops from the hopper into the feeder pan where it is vibrated into a coal hammer mill for crushing by means of a belt, and he denied that the vibrator vibrates the hopper bin (Tr. 163-164; 183). He also expressed the opinion that the fact that the vibrator was on or off would have made any difference as to the severity of the accident which occurred (Tr. 174-175). However, Mr. Burnham did state that as a general rule it would be advisable to lock out the vibrator before entering the hopper (Tr. 207-208).

After careful consideration of the testimony and evidence adduced with regard to the failure to lock out the hopper, I cannot conclude that the respondent was grossly negligent, or that the failure to shut down the vibrator directly contributed to the severity of the violation. Mr. Burnham testified that the vibrator is not required to be de-energized when the air spike is used to dislodge coal from the hopper. Further, it seems obvious to me that when Mr. Burnham happened on the scene and saw Mr. Johnson engulfed by the coal in the hopper, his first reaction was to attempt to free him, and I cannot conclude that his failure to immediately shut down the vibrator constituted a serious omission on his part. Further, absent any testimony from the inspectors as to whether or not the energized vibrator contributed to the gravity of the violation, an increased assessment based on speculation in this regard is simply not warranted. On the facts of this case, I believe that the cone-shaped configuration of the hopper, as well as normal gravity did more to prevent Mr. Johnson's ready escape from the hopper than did the fact that the vibrator was not shut down, particularly in light of the unrebutted testimony by Mr. Burnham that the vibrator is not afixed to the hopper and did not affect the severity of the violation.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of \$7,500 is reasonable and appropriate for the citation which I have affirmed, and respondent IS ORDERED to pay the assessed penalty within thirty (30) days of the date of this decision and order.



George A. Koutras
Administrative Law Judge

Distribution:

Murray A. Battles, Esq., U.S. Department of Labor, Office of the Solicitor,
1929 S. Ninth Ave., Birmingham, AL 35256 (Certified Mail)

J. Ross Forman, III, Esq., 1600 Bank for Savings Bldg., Birmingham, AL
35203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 21 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 81-37
Petitioner : A.C. No. 11-01526-03014-I
v. :
: Leahy Mine
AMAX COAL COMPANY, :
a division of AMAX, INC., :
Respondent :

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois, for
Petitioner;
R. Stephen Hansell, Esq., Amax Coal Company,
Indianapolis, Indiana, for Respondent.

Before: Administrative Law Judge Joseph B. Kennedy

Statement and Findings

This case is before me on cross-motions for summary decision and a joint stipulation of facts. The parties have waived the right to an evidentiary hearing. Respondent has also filed a motion to dismiss raising the same issues as the motion for summary decision. Respondent's motions will be considered together.

The parties have agreed to the following relevant facts:

On October 12, 1979, inspectors Joseph Wolfe and Ronald Zara of the Mine Safety and Health Administration conducted an investigation at respondent's

Leahy Mine. The inspection was due to the occurrence of an electrical burn-type accident which occurred on October 11, 1979, at approximately 3 p.m.

Prior to October 11, 1979, respondent experienced a continuing problem with the elevator motor circuit in the preparation plant, in that the elevator motor circuit would "trip" or "overheat" the breaker and as a result respondent would have to reset the circuit and the load in order to continue normal operations.

On October 11, 1979, at approximately 3 p.m., Greg Morris, a qualified electrician and employee of respondent since 1968, was assigned to locate and repair the problem with the elevator motor circuit in the preparation plant. He had been aware of the problem and opened the circuit breaker panel cover. He then deenergized only the elevator motor circuit within the panel by switching the breaker to the "off" position. Other circuits within the panel were not deenergized. Mr. Morris proceeded to check each connection with his screwdriver to see if there were any loose connections that were causing the problem.

In the course of checking the circuit, Mr. Morris used a screwdriver on an energized circuit above the open breaker, which caused an electrical arc. As a result, Greg Morris was severely burned on the face, neck, and arms. He was hospitalized for approximately one (1) week and lost three (3) weeks of work.

On October 12, 1979, respondent received Citation No. 0774168. It charged that a violation of 30 C.F.R. § 77.500 occurred in that the circuit

supplying three-phase, 480-volt AC power to the No. 2 elevator was not deenergized prior to work being performed on the circuit. Respondent abated the citation by instructing all electrical foremen and electricians not to work on energized electrical equipment and by posting the regulation in the bathhouse and preparation plant.

The special assessment in Citation No. 0774168 was not received until September 25, 1980, approximately 11-1/2 months after the accident occurred.

In 1980, respondent employed approximately 329 employees at the Leahy Mine. The daily production at the mine is approximately 7,434 tons of coal; annual production is 2,713,357 tons. Respondent operates nine surface mines and one deep mine employing 3,620 miners and 801 non-mine employees. Annual production of all of respondent's mines was 40,547,065 tons in 1980. Respondent had 35 violations assessed in the 24 months prior to the instant violation. Respondent does not contend that payment of the maximum penalty would impair its ability to continue in business.

Conclusions

A.

1. The operator contends that it is contrary to law for MSHA to wait almost 1 year for the proposed assessment of a civil penalty. Section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), requires that the Secretary notify the operator by certified mail of the civil penalty proposed to be assessed "within a reasonable time." Respondent argues that as a matter of law, 361 days is not a reasonable time.

Petitioner has argued that the necessity of assessing the penalty under 30 C.F.R. Part 100 procedures caused the delay and that respondent has shown no prejudice resulting from this delay.

Respondent has been unable to point to a single item of evidence or a single witness unavailable to it today that would have been available if the assessment had been proposed at an earlier date. Absent a showing of prejudice, I conclude that MSHA, as a matter of law, has not violated section 105(a) of the Act. In this I agree with Secretary of Labor v. Heldenfels Brothers, Inc., 1 MSHC 2414, (April 8, 1980), rev. den., 2 FMSHRC _____ (May 1980), aff'd. mem. 636 F.2d 312 (5th Cir. 1981), in which the judge found 220 days was not an excessive amount of time for the assessment of a civil penalty, absent a showing of actual prejudice. 1/ I find the assessment of the penalty in this case was not, per se, prejudicial to the operator's right to a fair hearing nor ultra vires as claimed by the operator.

Respondent also asserts that taking a period of almost 1 year for a proposed assessment violates 30 C.F.R. § 100.5 and is not in accord with the purposes and policies of the Act. Section 100.5(b) states: "The Office of Assessments shall make an initial review of the citation or order and shall

1/ MSHA has at last clarified what it considers a reasonable time for the serving of an initial proposed assessment in a civil penalty case. See, MSHA Policy Memorandum No. 81-3A. My determination that 1 year for the assessment of a proposed penalty is not in violation of the Act is also in accord with the Commission's recent decision, Secretary of Labor v. Salt Lake County Road Department, 3 FMSHRC _____ (July 28, 1981), in which the Commission found that a late filing of a proposal for a penalty under Commission Rule 27 is excused by the Secretary's claim that a lack of clerical personnel and a high volume of cases caused the delay. The Secretary in this case has pointed out that the need to comply with the requirements of Part 100 was the reason for the length of time taken by the Office of Assessments.

immediately serve by regular mail a copy of the Results of the Initial Review." This section requires that the results of the initial review, when completed, must be served "immediately." There is no evidence that the Office of Assessments failed to serve Respondent immediately once it had made its initial review. Therefore, Respondent's argument is without merit. Furthermore, although it is clear that prompt assessment of penalties promotes the safety of the miners and the policies of the Act, where there has been some delay but no showing of prejudice to the operator, the purposes of the Act would be completely defeated by a dismissal of the case. The Supreme Court has said in reference to the 1969 Act:

[i]f a mine operator does not also face a monetary penalty for violations, he has little incentive to eliminate dangers until directed to do so by a mine inspector. The inspections may be as infrequent as four a year. A major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.

National Independent Coal Operators' Association v. Kleppe, 423 U.S. 388 (1976).

2. Under 30 C.F.R. § 100.4, the Mine Safety and Health Administration may issue a special assessment in cases of "fatalities and serious injuries * * *." Where the victim spent 1 week in the hospital, lost 3 weeks of work, and could have been killed, it is futile to argue that the injury was not "serious." I note that respondent's own Supervisor's Report (RX-4) characterized the injury as "serious." It also was not improper for the Office of Assessments to make use of a Special Assessment without a finding of negligence. The Supreme Court has held that where a proposed assessment is subject to de novo review, there is no requirement that the proposed assessment include findings of fact. Kleppe v. Delta Mining, Inc., 423 U.S. 403 (1976).

Under section 110(i) of the Act, the administrative law judge assesses penalties de novo. Secretary of Labor v. Shamrock Coal Company, 1 MSHC 2069 (June 7, 1979). He is in no way bound by the proposal of the Assessment Office nor by the procedures of Part 100. Secretary of Labor v. Co-op Mining Company, 1 MSHC 2356 (April 21, 1980). The respondent can present evidence as to each of the statutory criteria to the administrative law judge and such evidence will be given full consideration. Therefore, respondent has in no way been prejudiced by any deficiency in the proposed assessment.

B.

Respondent contends that no violation of 30 C.F.R. § 77.500 occurred because:

[t]he portion of the panel on which work was to be done was, in fact, de-energized before work was done on the equipment. (Proposed Stipulation of Fact No. 16). The problem arose when the qualified electrician attempted to adjust a connection on a separate part of the panel which was a separate circuit, * * *. [Emphasis in original.] Respondent's Memorandum in Support of Motion for Summary Decision. (R. Memo).

The question before the court is whether the victim was performing work on an energized circuit at the time of the accident. It makes no difference if the victim had deenergized another circuit, if he also worked on a live circuit. Both the company's argument and the record as a whole support the conclusion that the victim deliberately performed some action on an energized circuit.

MSHA Accident Report Form 7000-1, completed by Richard G. Stanfield (RX-3) states: "[a]s he [Mr. Morris] was tightening connections on the top side of

the circuit breaker with the power on, the screwdriver came in contact with the side of the motor control center causing voltage to go phase to phase on top of the breaker." The work activity listed on the form is "repairing electrical circuit breaker."

The Amax Coal Company Supervisor's Report (RX-4) similarly described the events:

He [Mr. Morris] turned the breaker off and checked the connections on the motor starter and heaters. Then he started to tighten the connections on the top side of the circuit breaker with the power on (480 volts). He tightened the first one when he started on the second one the crewdriver [sic] contacted [sic] with the side of the motor control * * *.

As a contributing cause, the report lists "employee failed to de-energize circuit breaker before performing electrical maintenance."

The program coordinator, William Melcher, reported that Greg Morris "said he knew better; that he knew there was no way he could lose control of that screwdriver - he had both hands on it" (RX-7) (Emphasis in original).

The statement signed by Mr. Earl Butler, foreman, (RX-8) reports that Mr. Morris checked each connection behind the [open] breaker to see if there was a loose connection. "When he didn't find any problem, he did go to the line side of the breaker * * *. Greg told Homer Pits and Gary Degenhardt that he screwed up, he knew better than that, he just wasn't thinking at the time."

Pete Rhodes investigated the accident for the company and prepared an interoffice memorandum (RX-9). He concluded:

[n]o electrical work should have taken place on any part of the circuit while it was energized. The electrician reportedly stated that he was trying to tighten the lug screws on the bottom part of the refuge elevator breaker and has mistakenly worked on the top. This I would consider as an unsafe act or error by a qualified electrician.

From the statements made by company officials and reportedly by Mr. Morris, I conclude that Mr. Morris intentionally attempted to repair part of a live electrical circuit rather than pull the main breaker.

The company contends that Mr. Morris was testing or troubleshooting at the time of the accident, citing Secretary of Labor v. United States Steel Corporation, 2 FMSHRC 3220 (November 3, 1980). This contention is in direct contradiction to the evidence cited above. Mr. Morris was attempting to tighten the lug screws at the time he received the electrical shock. No evidence has been put forward to show that any procedure he may have contemplated required that the electrical circuit be live so that he could test for an electrical problem. In United States Steel, supra, the judge found that the mechanic was merely attempting to loosen a bolt so that he could remove a guard and observe the oil hose on the continuous miner. If the mechanic had not been able to see the oil leak, the oil pump would have had to be restarted so that the oil leak could be located. In this case, Mr. Morris assumed that the problem with the elevator originated in the circuit box and was attempting to repair the circuit by tightening all the screws without deenergizing all the circuits.

Even if Mr. Morris did not intend to work on the upper energized circuits, he was in violation of section 77.500. The MSHA Inspector's Manual states:

"[w]hen work is performed in close physical proximity to exposed electrical circuits or parts, they shall be deenergized * * *. All circuits within an electrical enclosure shall be deenergized before work is performed within the enclosure unless such energized circuits are guarded by suitable physical guards or adequate physical separation." The photographs and sketches provided by respondent (RX-9; RX-10) show that both the energized and deenergized circuits were located within the same circuit box. The very hazard presented by working on circuits located in close proximity to energized circuits, is the danger of contacting such circuits. I find that a violation of section 77.500 did, in fact, occur.

C.

Respondent asserts that it should be relieved of liability under the Isolated Misconduct Defense. Although there is such a defense under the general duty clause of the Occupational Safety and Health Act, the Mine Act is a strict liability statute and the operator is liable for violations of its agents and employees under the doctrines of respondeat superior and vicarious liability. Secretary of Labor v. Ace Drilling Coal Co., Inc., 1 FMSHRC 2357 (April 24, 1980) aff'd mem. 642 F.2d 440 (3rd Cir. 1981); Secretary of Labor v. Warner, 1 MSHC 2446 (April 28, 1980); U.S. Steel Corporation v. Secretary of Labor, 1 MSHC 2151 (September 17, 1979); Secretary of Labor v. Nacco Mining Company, 3 FMSHRC 848 (April 29, 1981); cf. Houston Systems Manufacturing Company, Inc., 1981 OSHD, CCH, ¶ 23,024.

The claim of employee misconduct, which the operator has failed to support, can be considered a mitigating circumstance under the negligence

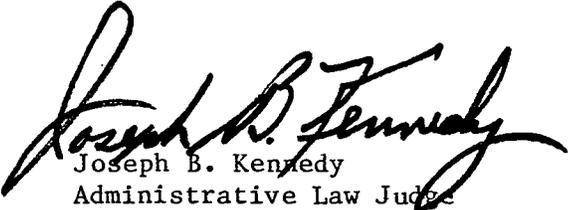
criteria of section 110(i) of the Act. "Only conduct that is willfully reckless, obviously inexplicable, demented or suicidal can reduce imputable conduct amounting to gross negligence to that of slight negligence." Warner, supra; accord, Marshfield Sand and Gravel, Inc., 1 MSHC 2475 (June 10, 1980). The company admits that Mr. Morris's conduct was not willfully reckless, demented or suicidal (R. Memo at 17). I must agree. This is not a case in which a supervisor or foreman took it upon himself to perform an inexplicable action which caused danger only to himself. Here an ordinary employee subject to the oversight and direction of others performed a task in a manner which assisted the company in maintaining production. I cannot conclude that the miner was unaffected by the knowledge that had he completely deenergized the circuit box by pulling the main breaker 4 feet away, he would have shut down some 26 other systems, including centrifuges, oil pumps, conveyors, breakers, feeders, vibrators, screens, crushers, blowers, etc. 2/

Where there is independent negligence on the part of the company, the unexpected action of its employee will not relieve the company of liability. Consolidation Coal Company v. Secretary of Labor, 1 MSHC 1742 (January 10, 1979). The company has pointed out that Mr. Morris violated a company rule when he worked on an energized circuit, that he had received the required electrical refresher training, and that he was a qualified electrician who could work without supervision. I do not find this convincing evidence of no negligence on the part of the company in the face of other evidence in the

2/ A finding of negligence on the part of the operator is not meant to imply that miners should be immune from liability under section 110(c) of the Act for their own negligence.

record. Miners respond to the general attitude of the company toward safety. Apparently, the company did not discipline Mr. Morris for his disobedience. There is no evidence that anyone has ever been disciplined for disobeying this or any other company safety rule. The company, on the contrary, argues that discipline severe enough to enforce compliance is not available (R. Memo at 12). Moreover, the company, after pointing out the number of systems involved, has argued that the regulation at issue cannot require deenergizing all power leading to the circuit or power equipment in all cases (R. Memo at 15). Where it is necessary to shut down part of a plant in order to work on a circuit safely, this is exactly what the regulation and common sense require. I find that the miner could not have been unaware of this attitude on the part of the company. It is entirely understandable and foreseeable that an employee would attempt to avoid causing trouble by a dangerous short cut of the this kind where violation of the law and company rules never result in discipline. I find, therefore, that Mr. Morris' actions were not so aberrational as to relieve the company of responsibility for his gross negligence or of its own failure to enforce compliance with the safety standard.

Accordingly, the Secretary's motion for summary decision is GRANTED and the Respondent's motion to dismiss and motion for summary decision is DENIED. It is ORDERED that Respondent pay a penalty of \$1,500 on or before Tuesday, September 1, 1981, and that subject to payment the captioned matter be DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor,
Federal Office Building, 230 South Dearborn Street, 8th Floor,
Chicago, IL 60604

R. Stephen Hansell, Esq., Amax Coal Company, 105 South Meridian Street,
Indianapolis, IN 46225

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 21 1981

MARK SEGEDI, : Application for Review
: of Discrimination
On behalf of: :
: Docket No. PENN 80-273-D
S. J. EZARIK, et al., :
Complainants : Somerset No. 60 Mine
: v. :
: BETHLEHEM MINES CORPORATION, :
Respondent :

FINAL ORDER AS TO COSTS AND EXPENSES

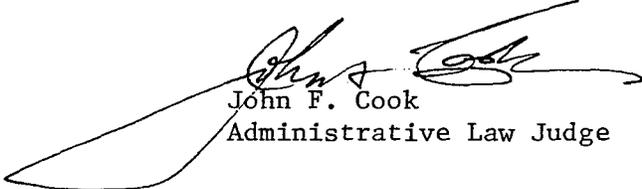
On March 31, 1981, a decision was issued in the above-captioned proceeding which contained an order which stated as follows in paragraph G:

G. IT IS FURTHER ORDERED that Respondent reimburse the Complainants identified in Part B of this order for all costs and expenses, including attorney's fees, reasonably incurred in connection with this proceeding. Counsel for the parties are directed to confer and attempt to agree as to the amount of such costs and expenses. If they are unable to agree, the Complainants identified in Part B of this order will, within 60 days from the date of this decision, file an itemized statement of costs and expenses. Thereafter the Administrative Law Judge will, after affording the parties an opportunity to be heard, determine the amount of reimbursable costs and expenses to be recovered by the Complainants identified in Part B of this order. For this purpose, I retain jurisdiction of this proceeding.

On July 10, 1981, a stipulation, signed by the Complainants' and the Respondent's attorneys, was filed which provides as follows:

In accordance with the order issued by Administrative Law Judge John F. Cook, dated June 3, 1981, and pursuant to Section G of Judge Cook's order dated March 31, 1981, counsel for Complainant and Respondent stipulate that Respondent has reimbursed the Complainants for all costs and expenses, including attorney's fees ordered by the Judge.

Accordingly, IT IS ORDERED that the above quoted action by Respondent in reimbursing the Complainants for all costs and expenses, including attorneys fees, constitutes fulfillment of paragraph G of the order and this order constitutes the final disposition of the issues pertaining to the assessment of costs and expenses in this case.



John F. Cook
Administrative Law Judge

Distribution:

Kenneth J. Yablonski, Esq., Yablonski, King, Costello & Leckie, 500 Washington Trust Building, Washington, PA 15301 (Certified Mail)

Thomas W. Ehrke, Esq., Senior Industrial Relations Attorney-Coal, Bethlehem Mines Corporation, Room 1871, Martin Tower, Bethlehem, PA 18016 (Certified Mail)

Harrison B. Combs, Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, D.C. 20005 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 24 1981

_____)		
SECRETARY OF LABOR, MINE SAFETY AND)	HEALTH ADMINISTRATION (MSHA),)	CIVIL PENALTY PROCEEDING
	Petitioner,)	DOCKET NO. WEST 79-239
	v.)	MSHA CASE NO. 05-02820-03011 V
C F & I STEEL CORPORATION,)	Respondent.)	MINE: Maxwell
_____)		

DECISION AND ORDER

Appearances:

James H. Barkley, Esq.
Office of the Solicitor
United States Department of Labor
1585 Federal Building
1961 Stout Street
Denver, Colorado 80294
For the Petitioner

Phillip D. Barber, Esq.
Welborn, Dufford, Cook & Brown
1100 United Bank Center
Denver, Colorado 80290
For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

This proceeding arose through initiation of an enforcement action brought pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. The Secretary of Labor, Mine Safety and Health Administration [hereinafter "the Secretary"], brought this action against C F & I Steel Corporation [hereinafter "C F & I"] alleging one violation of the Act. The Secretary seeks an order assessing a civil monetary penalty against C F & I for its alleged violation of the Act.

FINDINGS OF FACT

1. C F & I is the operator of an underground coal mine located near Weston, Colorado, known as the Maxwell Mine.
2. Products of the Maxwell Mine enter or affect interstate commerce.
3. On March 29, 1979, a duly authorized representative of the Secretary conducted an inspection of development Unit No. 2 of the Maxwell Mine pursuant to section 103(g) of the Act.
4. In the last crosscut of that unit, the MSHA inspector observed a complete cycle of roof bolting utilizing resin grouted roof bolts. The inspector observed that the roof bolter never attempted to wait a minimum of ten minutes before torque-testing the installed rod as required by the mine's roof control plan. ^{1/} Subsequent investigation revealed that the roof bolting crew was not provided with a torque wrench and that the roof bolting machine had a broken set of pressure gauges on its right side.
5. Order of Withdrawal No. 387995 ^{2/} was issued to C F & I by the MSHA inspector for its alleged violation of 30 C.F.R. § 75.203. ^{3/} Additionally, the order contained findings by the inspector pursuant to section 104(d)(1) of the Act that the violation was caused by an unwarrantable failure of the operator to comply with a mandatory safety standard.

^{1/} Paragraph 9 of the roof control plan then in effect at the Maxwell Mine reads:

"For test purposes, the first resin grouted rod installed in each cycle in each working place, after a minimum curing time of 10 minutes, shall be checked with a torque wrench or the bolter after installing the first line of permanent support and prior to removing any temporary supports. The torque applied should be 150 foot-pounds. Should the rod turn in the hole, a second rod shall be tested in the same manner. If this rod also turns, resin installation shall be discontinued until reasons for failure of the resin is determined."

^{2/} The condition or practice cited alleges:

"A torque wrench socket was not provided for the torque wrench for testing the installed resin grouted rods. The gauges for the torque value on the Long Airdox Roof Bolter Serial No. 52-1086 were also broken. So means was not available for testing installed bolts in Unit No. 2."

^{3/} Roof bolt tests. [STATUTORY PROVISIONS] When installation of roof bolts is permitted, such roof bolts shall be tested in accordance with the approved roof control plan.

6. At the time of this inspection, C F & I was relying upon prior statements made by an MSHA representative specializing in roof control that resin grouted roof bolts should not even be torqued because torquing the bolt increases the possibility that the bond between the roof bolt and the consolidated epoxy resin may be broken.

7. The requirement regarding the torque-testing of resin grouted roof bolts was subsequently deleted from the mine's roof control plan.

8. Payment of the proposed penalty will not impair the ability of C F & I to continue in business.

ISSUES

1. Did Respondent fail to test the roof bolts in Unit No. 2 in accordance with the mine's approved roof control plan?

2. If so, was the violation caused by an unwarrantable failure of the Respondent to comply with the mandatory safety standard?

DISCUSSION

The condition or practice cited was in fact a technical violation of the mandatory safety standard contained in 30 C.F.R. § 75.203. The Maxwell Mine roof control plan does permit the installation of roof bolts, and as such, they were to be tested in accordance with the approved plan. That plan called for test torquing with a torque wrench or roof bolter "after a minimum curing time of 10 minutes." The facts as found indicate this was not done.

C F & I raises the defense that they were excused from the plan's torquing requirements by their justifiable reliance on the representations of MSHA officials that torquing resin grouted roof bolts was counterproductive and, indeed, dangerous. From a technical standpoint, this may be true. However, as a matter of law, the requirements of the standard are enforceable. In Secretary of Labor, Mine Safety and Health Administration (MSHA), v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), the Review Commission held that a safety standard controls over an interpretation of that standard set forth in MSHA's interim inspector's manual. I find the situation presented here is analogous to the cited case in that the inspector's representations were merely informal and non-binding. Relying on the Commission's reasoning, I find that the requirements of the standard are binding and reject the defense.

C F & I raises an additional defense that they were excused from the plan's torquing requirements because compliance with the mandates of the standard posed a "greater hazard" to the miners than did noncompliance. As authority, C F & I cites Olga Coal Company, v. Secretary of Labor, Mine Safety and Health Administration (MSHA), and United Mine Workers of America, 1 FMSHRC 1580 (1979), and a line of cases interpreting the narrow "greater hazard" defense recognized under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. However, under this Act, the appropriate channel to follow to avoid such a conflict would have been to petition the Secretary for a modification of application of the standard pursuant to section 101(c), 30 U.S.C. § 811(c). In Secretary of Labor, Mine Safety and Health Administration (MSHA), v. Penn Allegh Coal Company, Inc., 3 FMSHRC 1392 (1981), the Review Commission held that the defense of diminution of safety is improperly raised in an enforcement proceeding and should properly be pursued in the context of the special standard modification procedures provided for in the Act. C F & I did not avail itself of that avenue of potential relief and to consider the defense in this forum would be inappropriate. Consequently, the defense is rejected and a violation of the Act is found to have occurred.

On the issue of whether the violation was caused by an unwarrantable failure on the part of C F & I to comply with the mandatory safety standard, I find for the Respondent. The evidence establishes that a significant degree of confusion ensued from the statements of the MSHA inspector regarding the effects of torquing resin grouted roof bolts once they had set. I conclude that it was not unreasonable for C F & I to be somewhat confused by these representations. On this basis, the finding of unwarrantable failure to comply should be vacated.

In determining an appropriate civil penalty for the violation, I take note of the fact that C F & I's roof bolters did utilize certain procedures in setting the roof bolts which allowed them to determine the integrity of the epoxy resin during the bolting cycle. By gauging the resistance of the bolt in relation to the constant force exerted by the drill, the installer was able to determine whether the resin had set. This procedure provided essentially equivalent protection to that insured by the plan. The fact that the torquing requirement was eventually dropped from the Maxwell Mine's roof control plan indicates the reduced degree of negligence and gravity associated with the violation.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. Petitioner proved that Respondent violated the Act as alleged in Order of Withdrawal No. 387995, but failed to meet the burden of proof that the violation of the Act was occasioned by an unwarranted failure of the Respondent to comply with its provisions.

3. Order of Withdrawal No. 387995 should therefore be affirmed and the finding of unwarrantable failure vacated.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Order of Withdrawal No. 387995 is AFFIRMED and that the finding of unwarrantable failure is VACATED. It is FURTHER ORDERED that Respondent shall pay a civil penalty in the amount of \$100.00 for its violation of the Act within 30 days of the date of this Decision.



Jon D. Boltz
Administrative Law Judge

Distribution:

James H. Barkley, Esq.
Office of the Solicitor
United States Department of Labor
1585 Federal Building
1961 Stout Street
Denver, Colorado 80294

Phillip D. Barber, Esq.
Welborn, Dufford, Cook & Brown
1100 United Bank Center
Denver, Colorado 80290

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 24 1981

FRANKLIN D. KAESTNER,)	
)	
Complainant,	)	COMPLAINT OF DISCHARGE,
	)	DISCRIMINATION OR INTERFERENCE
v.)	
	)	DOCKET NO. WEST 81-24-D
COLORADO WESTMORELAND INC.,)	
	)	MSHA CASE NO. DENV CD 80-28
Respondent.)	
	)	MINE: Orchard Valley

DECISION

Appearances:

Franklin D. Kaestner
P.O. Box 805
Paonia, Colorado 81428
Pro Se

Rosemary M. Collyer, Esq.
Sherman & Howard
2900 First of Denver Plaza
633 Seventeenth Street
Denver, Colorado 80202
For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

On October 20, 1980, the complainant, pro se, filed a complaint of discrimination against the respondent based on section 105(c) of the Federal Mine Safety and Health Act of 1977 [hereinafter "the Act"]. The complainant alleged that his employment with the respondent was terminated on July 1, 1980, since he had developed bronchitis and lung problems after working in respondent's underground coal mine. Complainant alleged that he "talked to the management at the mine about a less dusty job," but was told that management could not "create a job for me away from the dust." Complainant alleges that when he was hired by respondent and given a complete physical examination he was "given a clean bill of health," but that he [later] received a letter from the Department of Health, Education and Welfare stating that "traces" of pneumoconiosis were found in his lungs. Complainant also alleges that the respondent had other jobs he could perform on the outside of the mine or in the shops.

Respondent denies that it in any way discharged, discriminated or interfered with the rights of the complainant and alleges that complainant was terminated because he refused to work underground and that there was no position available that would have removed complainant totally from underground work.

At the completion of complainant's case, respondent moved to dismiss the complaint on the basis that complainant had not shown that he had engaged in any protected activities whatsoever, "much less adverse actions taken as a result of that protective activity." Ruling on the motion was reserved until respondent's evidence was presented.

ISSUE

Whether or not complainant's complaint of discrimination should be dismissed for failure of the complainant to establish a prima facie case. More specifically, the question is whether or not the complainant presented evidence which standing alone and unrebutted shows that he is entitled to relief.

FINDINGS OF FACT

Based on evidence introduced during complainant's case, I make the following findings of fact:

1. The complainant was hired by respondent to work at its underground coal mine as a general mine worker, commencing April 10, 1978.

2. Complainant resigned his employment with the respondent July 20, 1979, and was rehired August 20, 1979, with subsequent duties as a section mechanic.

3. Commencing approximately October 1979, complainant began to have severe coughing attacks underground and had difficulty breathing. Complainant attributed the health problems to a lung irritation due to dust.

4. A doctor consulted by the complainant recommended that complainant seek a less dusty job because his current job would create lung problems in the future.

5. On June 27, 1980, and just prior to going underground to work his shift, complainant told his supervisor that he did not believe he could take the dust any longer.

6. On July 1, 1980, the complainant was asked by the respondent to resign because respondent could not create a less dusty job for him. When complainant refused to resign, he was terminated.

7. Approximately a week or ten days after complainant was terminated, respondent attempted to obtain employment for the complainant with another mining company, but complainant would not take the employment because he "thought if one coal mine was going to kill me in ten years, ... another one will too."

8. Complainant had been notified in a letter from the Department of Health, Education and Welfare dated February 9, 1979, that his chest x-ray showed some evidence of pneumociosis, although breathing tests were normal. This letter was not given by complainant to respondent until July 30, 1980, approximately 30 days after complainant's employment had been terminated.

DISCUSSION

The activity which is protected is set forth in Section 105(c)(1) of the Act. It reads in part as follows:

No person shall discharge ... any miner ... because such miner ... has filed or made a complaint under ... this Act, including ... notifying the operator ... of an alleged danger or safety or health violation ..., or because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner ... has ... caused to be instituted ... any proceeding under ... this Act ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

In order for the complainant to establish a prima facie case showing a violation of section 105(c)(1), it is necessary for him to introduce evidence that (1) he engaged in a protected activity, and (2) that his termination was motivated in any part by the protected activity. Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980).

The complainant testified that he thought the Act was violated because of his termination "and I wasn't even given the opportunity to continue working underground. It wasn't safety violations. I thought my working rights were violated by terminating me because of the health conditions, and without even being allowed to continue working underground if I had wanted to."

The complainant introduced no evidence of making any complaint to the respondent in regard to an alleged danger or safety or health violation. Indeed, there was no evidence of any safety or health violation in the mine. There was no evidence that the complainant was entitled to any option of transferring from his position to another position in any area of the mine pursuant to applicable provisions of the Act.

During the course of his employment, the complainant had worked a total of approximately two years and one month underground. Complainant believed that dust encountered in the mine contributed to his bronchitis and caused coughing spells. Under these circumstances he wanted a less dusty job and informed his supervisor that he did not think he could take it (working underground) any longer. The respondent terminated the complainant because respondent had no other less dusty jobs in the mine and, in any event, complainant was not entitled to the option of transferring pursuant to any rights accrued under the Act.

Complainant has, thus, failed to show that he engaged in any protected activity and has therefore failed to establish one of the essential ingredients of the prima facie case.

ORDER

Respondent's motion, heretofore reserved, is granted and the complaint is dismissed.



Jon D. Boltz
Administrative Law Judge

Distribution:

Rosemary M Collyer, Esq.
Sherman & Howard
2900 First of Denver Plaza
633 Seventeenth Street
Denver, Colorado 80202

Franklin D. Kaestner
P.O. Box 805
Paonia, Colorado 81428

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 26 1981

MATHIES COAL COMPANY, : Notice of Contest
Contestant :
v. : Docket No. PENN 80-260-R
: Citation No. 839028; 5/16/80
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Mathies Mine
ADMINISTRATION (MSHA), :
Respondent :
SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 81-35
Petitioner : A.O. No. 36-00963-03120F
v. :
Mathies Mine
MATHIES COAL COMPANY, :
Respondent :

DECISION

Appearances: Barbara Krause Kaufmann, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for MSHA;
Jerry F. Palmer, Esq., Pittsburgh, Pennsylvania, for
Mathies Coal Company.

Before: Judge Merlin

This consolidated proceeding is a notice of contest filed by the
operator challenging a section 104(a) citation and a petition for the
assessment of a civil penalty based upon the alleged violation set forth
in the citation.

A hearing was held on July 22, 1981 at which the parties represented
by counsel appeared and presented documentary and testimonial evidence.

At the hearing the parties agreed to the following stipulations
(Tr. 5-6):

- (1) The operator is the owner and operator of the subject mine.
(2) The operator and the mine are subject to the jurisdiction of
the 1977 Act.
(3) I have jurisdiction of these cases.

(4) The inspector who issued the subject citation was a duly authorized representative of the Secretary.

(5) A true and correct copy of the subject citation was properly served upon the operator.

(6) Imposition of a penalty will not affect the operator's ability to continue in business.

(7) The alleged violation was abated in good faith.

(8) The history of previous violations is average.

(9) The operator's size is large.

(10) The witnesses who testify are accepted generally as experts in coal mine health and safety.

At the conclusion of the taking of evidence counsel waived the filing of written briefs and agreed instead to make oral argument (Tr. 152). I advised the parties that I would issue a decision after receipt of the administrative transcript (Tr. 152).

Discussion and Analysis of the Evidence

Findings and Conclusions

This consolidated proceeding arises from an alleged violation of 30 C.F.R. 75.1722(a) which provides as follows:

Gears, sprockets; chains; drive, head, tail, and take-up pulleys; flywheels; couplings, shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

The condition or practice which is set forth in the contested citation and which is the basis for the penalty petition is as follows:

It was revealed during a fatal accident investigation that the automatic elevator and associated parts at the Gamble Shaft Portal was not guarded adequately to keep persons from coming in contact with the elevator as it was moving in the shaft along the stairways at the first and second landings.

The testimony at the hearing set forth the physical circumstances at length. Briefly they are as follows: At the Gamble Shaft Portal an elevator transports men between the surface and the underground. The elevator has a device called a retiring cam which is attached to and protrudes out from one side of the elevator. The retiring cam does not move independently of the elevator but rather moves up and down with it. When the elevator reaches the top or bottom, the retiring cam hits a

switch on the side of the shaft; this contact causes the elevator doors to open. Next to the elevator shaft is a stairwell also going from the surface to the underground. The stairwell is 273 feet deep with 27 landings and eleven steps between each landing. At the top landing there is a door to the outside at the surface and at the bottom landing there is a door to the bottom of the mine. There are no other doors out of the stairwell. From approximately 24" ^{1/} above the second (i.e. next to the top) landing down to the bottom of the mine corrugated metal separates the elevator shaft from the stairwell. Where the corrugated metal ends above the second landing, there is an "I" beam separating the elevator shaft from the stairwell (MSHA Ex. 2). When the elevator passes by there is a space of 9 inches between the "I" beam and the elevator. In addition, on one side of the elevator shaft beginning at the level of the I beam and extending upwards there is a metal grating. There is a horizontal space of 26" between the grating and the elevator guide and there is a perpendicular space of 54" between the I beam and the top landing (MSHA Exh. 2). It is this area, 26" x 54", which the Solicitor contends was unprotected and required guarding.

The grating is significant for another reason. It is only about 2-1/2 feet below ground level so that an individual walking along the "I" beam to the outer edge of the elevator shaft could push out the grating, step out and reach the surface. This is just what the decedent was doing and how he was killed. The undisputed evidence shows that the decedent was trying to sneak out of work early. The decedent had climbed the stairs in the stairwell to the top; opened the door at the top landing to exit from the stairwell, and stepped outside onto the surface. However, he then saw his foreman. In an attempt not to be seen by the foreman, the decedent went back through the door onto the first landing and then went down the steps until he reached the "I" beam which as already noted separates the elevator shaft from the stairwell. He stepped onto the "I" beam going towards the grating with the apparent intent to push the grating out and climb up the 2-1/2 feet to the surface without being seen. Unfortunately, when the decedent was on the "I" beam the elevator began to descend and the decedent's tool pouch or belt was caught by the elevator's retiring cam. The decedent fell down the shaft and was killed.

The first and principal issue to be resolved is the existence of a violation. 30 C.F.R. 75.1722(a) covers certain specified machine components and "similar exposed moving machine parts." There are some differences over the measurements involved but there is agreement between the parties that the elevator was exposed for most of the area in question above the "I" beam. The operator's principal defense is that the elevator is not a machine "part" but rather an entire machine and therefore, not

^{1/} According to the operator the corrugated metal extended 32" above the second landing, but as appears infra, this makes no difference in the result.

within the standard. I cannot accept this argument because of testimony given by the operator's own witness, a metallurgical and environmental engineer whose job it is to analyze failures of machines and machine components. The engineer made clear that the men were in fact transported by the elevator cage and that the entire machine in question was composed not only of the cage but also of pulleys and motors which supplied power to the cage enabling the cage to move. He stated the pulleys were above the cage and that the motor also was in another location. It is apparent, therefore, that what was cited by the inspector was the elevator cage. I find this is sufficiently clear from the citation and was known to the operator, who was aware of all the circumstances. I conclude that the cage together with its retiring cam constituted moving parts of a machine made up of the cage, retiring cam and other units described by the engineer.

I have not overlooked the engineer's subsequent testimony that the machine parts specifically identified in 75.1722(a) transmit power from one source to another whereas he stated this is not true of the elevator cage which transports men. I received the indelible impression that this purported distinction was offered in recognition by the witness of the fact that he had conclusively identified the cage as a machine component rather than a total machine. Even assuming the engineer's differentiation based upon transferring energy was well-taken and overlooking the fact that the matter was hardly touched upon by either counsel at the hearing, I reject this as too fine a distinction for present purposes. The Act is to be liberally construed. The operator has offered no basis in the law or legislative history for me to so constrict the terms in question. In the absence of anything to the contrary and in light of the Act's avowed purposes I believe "similar" refers to the exposure to moving machine parts. Accordingly, I conclude that the cage with the retiring cam itself falls within the standard. Insofar as the cam is concerned, it moves and is exposed. Nothing in the standard indicates the moving part has to move independently of everything else.

The next issue is whether the exposed elevator cage and its retiring cam "may be contacted" by persons. The principal definition of "may" is "to be physically capable." Webster's New World Dictionary (1972); Funk & Wagnalls Standard College Dictionary (1966); Random House American College Dictionary (1970). The fatality in this case occurred because of the wantonly reckless and irresponsible behavior of the decedent in attempting to sneak out of work early without his supervisor's knowledge. However, the record makes clear that the entire stairwell was required to be examined weekly. Moreover, it could be used to enter and leave the mine if, for example, the elevator was not working. As already noted, there is some difference between the government and the operator over the exact dimensions of the exposed space but this is not determinative because regardless of whose measurements are accepted, it is clear that an individual while performing his regular routine work duties in a prudent manner might lose his footing and trip and fall on the second

landing thereby putting part of his body into the unguarded space and coming into contact with the elevator and its retiring cam if the elevator were descending at that time. Also, the arm of an individual descending the stairs from the top to the second landing could come in contact with a descending elevator cage. Admittedly, these events would have to occur simultaneously for the hazard to exist. But the history of mine disasters has been the history of unfortunate coincidences of unlikely factors. I cannot incorporate into this mandatory standard some sort of requirement for an indeterminate degree of probability. Such a requirement would be wholly subjective and open-ended and if pushed to its logical extreme would vitiate the standard itself. Moreover, I have no authority to read into the standard something which is not there.

In light of the foregoing I conclude a violation existed.

Gravity must now be considered. A fatality occurred. However this fatality cannot be divorced from the wantonly reckless and irresponsible actions of the decedent. The Solicitor expressly admitted that the operator should not be held accountable for the decedent's behavior. I believe the proper way to assess gravity is to determine it in terms of an individual discharging his work-related duties in a reasonably prudent fashion. As already noted, such an individual could trip and fall coming into contact with the descending elevator. A serious injury could result. However, as has also been discussed, the occurrence of such an injury depends upon a coming together of many factors, the likelihood of which is remote. Therefore, this mitigates gravity. I conclude the violation was serious.

Many of the foregoing circumstances, of course, affect negligence. I have previously held that a miner's aberrant behavior which could not be foreseen or prevented by the operator and which harmed only himself cannot be charged against the operator. Nacco Mining Company, Dec. 17, 1976 (Docket No. ^{VINC}76x99-P). This decision was upheld by the Commission in Secretary of Labor v. Nacco Mining Company, 4 FMSHRC 848 dated April 29, 1981. See also my decision in Marshfield Sand and Gravel, June 10, 1980 (YORK 79-68-M). The aberrational conduct of the decedent in this case went far beyond that considered in the cited cases. The operator is not to be held responsible for what the decedent did here. Nevertheless I find the operator was guilty of ordinary negligence in not guarding the area in question. The fact that this type of space had not been cited previously for a guarding violation has been taken into account but is not a basis for a finding of no negligence.

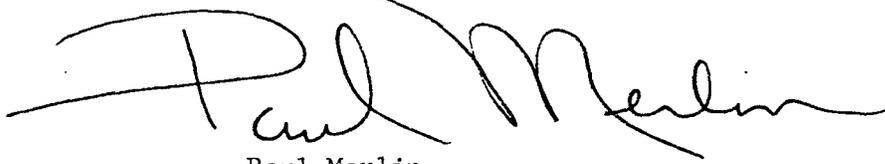
As set forth above, the remaining factors affecting the amount of the penalty have been stipulated to by the parties.

After taking all the relevant factors into account a penalty of \$750 is assessed.

ORDER

The operator is ORDERED to pay \$750 within 30 days of the date of this decision.

The operator's Notice of Contest is hereby DISMISSED.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department
of Labor, Rm. 14480-Gateway Bldg., 3535 Market St., Philadelphia,
PA 19104 (Certified Mail)

Jerry Palmer, Esq., Consolidation Coal Company, 1800 Washington
Road, Pittsburgh, PA 15241 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 27 1981

LOCAL UNION 1374, DISTRICT 28, : Complaint for Compensation
UNITED MINE WORKERS OF AMERICA :
(UMWA), : Docket No. VA 80-167-C
Complainant : Order No. 700382
: June 18, 1980
v. :
: Beatrice Mine
BEATRICE POCAHONTAS COMPANY, :
Respondent :

SUMMARY DECISION

Counsel for the complainant in the above-entitled proceeding filed on April 17, 1981, a motion for summary decision pursuant to 29 C.F.R. § 2700.64. The motion was accompanied by a joint stipulation of facts signed by counsel for both complainant and respondent. Since no factual issues are in dispute, I find that the motion for summary decision should be granted.

The issues to be decided in this case will be based on the parties' stipulation of facts set forth below:

1. The Beatrice Mine is owned and operated by the Beatrice Pocahontas Company.

2. The Beatrice Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (the "Act").

3. Representatives of the International Union, United Mine Workers of America ("UMWA"), are authorized representatives for the members of Local Union 1374, employed by the Beatrice Mine for purposes of this proceeding.

4. The administrative law judge has jurisdiction over these proceedings.

5. At times relevant herein Beatrice Pocahontas Company, at its Beatrice Mine, and Local Union 1374, UMWA, were bound by the terms of the National Bituminous Coal Wage Agreement of 1978 (the "Contract").

6. On June 18, 1980, at 6:15 p.m., Ronald Pennington, a duly authorized Mine Safety and Health Administration ("MSHA") inspector, issued Withdrawal Order No. 700382 to Beatrice Pocahontas Company at its Beatrice Mine pursuant to Section 107(a) of the Act.

7. Order No. 700382 was not terminated until 10:30 a.m. on July 10, 1980.

8. The aforesaid order was issued due to the accumulation of explosive concentrations of methane gas in the bleeder entries of the No. 3 longwall area of the Beatrice Mine.

9. No violation of any mandatory health and safety standard promulgated under the Act was alleged in the order.

10. The miners working on the 4:01-p.m.-to-12:00-a.m. shift during which the order was issued were paid for the balance of their shift in accordance with section 111 of the Act.

11. The miners normally scheduled to work the 12:01-a.m.-to-8:00-a.m. shift on June 19, 1980, reported for work. Respondent requested that they remain on the surface until it was determined whether the order would be terminated. After approximately 1-1/2 hours, all underground miners were sent home.

12. These miners received 4 hours of pay at their regular rates.

13. If normal mining operations had been conducted at the Beatrice Mine on June 19, 1980, between 12:01 a.m. and 8:00 a.m., each underground employee normally scheduled to work on that shift would have been offered the opportunity to work his/her full 8-hour shift.

14. Union Exhibit 2 (a copy of which is attached) is an accurate list containing (a) the names of each underground miner who reported to work on June 19, 1980, at 12:01 a.m., (b) his/her rate of pay as of June 19, 1980; and (c) the amount of compensation claimed.

Issue

The issue raised by the complaint in this case, according to UMWA's brief (p. 1), is as follows:

Are miners idled for six and one-half hours by a Withdrawal Order issued on the preceding shift entitled to receive 4-hours compensation under Section 111 of the Act where they received 4-hours reporting pay in accordance with their collective bargaining agreement?

In its brief (p. 2), respondent claims that the issue raised by the complaint is as follows:

Under the facts stipulated, are the miners who reported to work on the 12:01 a.m. to 8:00 a.m. shift at the Beatrice Mine on June 19, 1980, entitled to compensation, under § 111 of the Act, in addition to the 4-hours' compensation which they have been paid?

On page 1 of its brief, respondent states that the parties agreed that the judge should determine the wording of the issue raised by the complaint. I find for the reasons hereinafter given, that the issue raised by the complaint is as follows:

Are miners idled by a withdrawal order issued on the preceding shift entitled to receive 4 hours of compensation under section 111 of the Act if they also have received, in accordance with Article IX(c) of their collective bargaining agreement, 4 hours of pay for reporting to work?

UMWA's Argument

UMWA's initial brief contends (p. 2) that resolution of the issue in this proceeding requires an interpretation 1/ of the relationship between the statutory provisions of section 111 of the Act and Article IX(c) of the 1978 Bituminous Coal Wage Agreement. The pertinent part of section 111 provides as follows:

If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. ***

Article IX(c) of the wage agreement provides as follows:

Unless notified not to report, when an Employee reports for work at his usual starting time, he shall be entitled to four (4) hours' pay whether or not the operation works the full four hours, but after the first four (4) hours, the Employee shall be paid for every hour thereafter by the hour, for each hour's work or fractional part thereof. If, for any reason, the regular routine work cannot be furnished, the Employer may assign the Employee to other than the regular work. * * *

As indicated in Stipulation No. 6, Order No. 700382 was issued at 6:15 p.m. on June 18, 1980. According to Stipulation No. 10, the miners working on the 4 p.m.-to-midnight shift, when the order was issued, were paid for the remainder of the shift. Therefore, the first sentence in section 111 of the Act was satisfied. As indicated in Stipulation No. 11, the miners on the "next working shift" (midnight-to-8-a.m.) after issuance of Order No. 700382 reported for work. As also shown by Stipulation No. 11, they were asked to remain on the surface for 1-1/2 hours until it was determined whether the order would be terminated. After it had been determined that the order would not be terminated on their shift, the miners on the midnight-to-8-a.m. shift were sent home. According to Stipulation No. 12, the miners on the midnight-to-8-a.m. shift were paid for 4 hours at their regular rates of pay. If Order No. 700382 had not still been in effect, the miners on the midnight-to-8:00-a.m. shift would have been given the opportunity to work for a full 8-hour shift (Stipulation No. 13).

UMWA's brief (pp. 2-3) refers to the second sentence in section 111 and argues that interpretation of payment for miners on the "next working shift" must be made in light of the fact that the "period they are idled" pertains

1/ In its reply brief (p. 2) UMWA changed its position as to the need to interpret the Wage Agreement because no dispute exists as to the meaning of Article IX(c) of the Agreement.

to a full 8-hour shift. UMWA contends that the awarding of 4 hours of compensation under the second sentence of section 111 is not confined to the initial 4 hours of a shift, "* * * but becomes effective when the miner no longer receives compensation from his/her employer" (Br., p. 3). UMWA then cites the Commission's decision in Youngstown Mines Corp., 1 FMSHRC 990 (1979), in which the Commission held that miners "on the next shift" after issuance of a withdrawal order are entitled to compensation for the remaining 4 hours of their shift if they are used and paid for abatement work during the first 4 hours of the shift. The primary reason given for the Commission's holding in that case was that the miners would have worked and would have been paid for the last 4 hours of the shift if the withdrawal order had not still been in effect so as to idle them for the remaining 4 hours of their shift. UMWA also cites Peabody Coal Co., 1 FMSHRC 1785 (1979), in which the Commission held that miners were entitled to receive 3-1/2 hours of pay for the remainder of their shift even though Peabody had paid them for work performed during the first 4-1/2 hours of the "next shift" after issuance of a withdrawal order.

UMWA's brief (p. 4) states that respondent objects to UMWA's effort to use the Youngstown and Peabody cases as precedents for UMWA's position in this case. Respondent, it is said, seeks to distinguish the Commission's holdings in those cases by pointing out that in each of those cases, the miners were paid for the first half of their shifts for work actually performed, whereas in this proceeding, the miners were kept at the mine site at respondent's request for only 1-1/2 hours. Therefore, in this proceeding, UMWA says that respondent wants to restrict the Youngstown and Peabody holdings as being applicable only to the extent that they would require respondent to pay the miners for the first 1-1/2 hours while a determination was being made as to whether the order would be terminated on their shift. UMWA says that respondent argues, nevertheless, that since the miners were paid for 4 hours, they received the full 4 hours of compensation which they are required to be paid under the second sentence of section 111.

UMWA's brief claims that respondent's argument is defective because it misconstrues Article IX(c) of the Wage Agreement which clearly provides that miners who report for work are entitled to 4 hours of pay regardless of how much work is actually performed. Therefore, UMWA argues (Br., p. 5) that it is irrelevant that the miners received 4 hours of pay even though they were kept at the mine for only 1-1/2 hours before they were sent home. UMWA further argues that under Article III(b)(2) of the Wage Agreement, neither party to the Agreement waived any rights relating to the Coal Act. UMWA claims that section 111 of the Act must be interpreted so as to give full effect to the parties' intention to preserve both their statutory and contractual rights. UMWA claims that the aforesaid purpose can be achieved by interpreting the second sentence of section 111 so as to treat the first four hours of the "next working shift" as non-idle time. UMWA concludes the foregoing portion of its argument by claiming that there is no basis for distinguishing the Commission's holdings in the Youngstown and Peabody cases from the facts in this case because the important point in this proceeding and in those cases is that the miners on the "next working shift" were idled for the last 4 hours of the shift because of the issuance of a withdrawal order.

UMWA also argues (Br., p. 6) that respondent's interpretation of section 111 as providing for no pay over and above the 4 hours which the miners have already received "* * * disregards the well-established principle recognizing the separate and independent nature of statutory and contractual rights." UMWA supports that argument by referring to the Commission's decision in the Youngstown case, 1 FMSHRC at 993, in which the Commission rejected an argument to the effect that provisions in the Wage Agreement should be allowed to control an interpretation of section 110(a) of the 1969 Coal Act. UMWA also cites a statement by the court in Phillips v. IBMA, 500 F.2d 772, 777 (D.C.Cir. 1974) that "* * * if there is no right of action under the Mine Safety Act independent of the usual labor dispute settlement mechanisms, there is no right of action under the Mine Safety Act at all."

Respondent's Argument

As indicated above under the heading "Issue", respondent does not agree with UMWA's statement of the issue in this proceeding. Respondent claims that no reference whatsoever should be made to UMWA's contention that the 4 hours of compensation which the miners on the midnight-to-8-a.m. shift were paid was awarded to them under the "reporting pay" provisions in Article IX(c) of the Wage Agreement. Respondent argues that it is outside the scope of a disagreement as to the meaning of the second sentence in section 111 of the Act for the Commission to consider whether the 4 hours of compensation may have been awarded to the miners because they happened to report for work so as to trigger a contractual provision which requires respondent to pay the miners for 4 hours if they are allowed to report to work.

Respondent enlarges upon the argument above on page 2 of its brief by emphasizing that this is a case which has arisen solely under the provisions of section 111. Respondent argues that if any compensation in addition to that which has already been paid is found to be due, that determination must be made under the provisions of the second sentence of section 111 which clearly provides that the miners on the "next working shift" "who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift" [Emphasis supplied by respondent.]. Respondent states that it is abundantly clear that the requirements of the second sentence of section 111 have been satisfied in this instance. Respondent points out that the order in question was issued on the preceding shift and was not terminated at the beginning of the midnight-to-8-a.m. shift, or "next working shift" (Stipulation No. 7). Respondent further notes that the miners who reported for work on the midnight shift were undoubtedly idled by the order and were entitled to full compensation at their regular rates of pay for the period idled, but for not more than 4 hours of that shift. Respondent says that the miners have in fact been paid at their regular rates of pay for 4 hours (Stipulation No. 12). Therefore, respondent concludes that no further compensation can be found to be due under section 111.

Respondent's brief (p. 3) recognizes that UMWA claims that the facts in this proceeding require an interpretation of the relationship between the contractual provisions of the Wage Agreement and the statutory provisions of

section 111. Respondent also acknowledges UMWA's argument that respondent's position in this case misconstrues the "reporting-pay provisions" of the Wage Agreement. Respondent's answer to UMWA's arguments about the Wage Agreement is that the Commission has no jurisdiction over the Wage Agreement nor authority to mediate disputes arising under the Wage Agreement.

Respondent states (Br., p. 4) that even if one puts aside its jurisdictional argument above, there are defects in UMWA's interpretation of section 111. For example, respondent takes exception to UMWA's contention that the Commission can find that additional compensation is due under the second sentence by considering the 4 hours of "reporting pay" awarded the miners under the Wage Agreement as "non-idle time". Respondent argues that the word "idled", as used in section 111, must be considered to have the general meaning given to that word, namely, "not occupied or employed". Respondent says that if an individual is working, then he is working; if he is not working, then he is idled. Respondent concludes the foregoing argument by noting that there is nothing in the Wage Agreement which can change the meaning of a miner's "working/idled status" under section 111.

Finally, respondent's brief (pp. 4-5) contends that the Peabody and Youngstown cases, supra, relied on by UMWA, can readily be distinguished from the facts in this proceeding. Respondent points out that in each of those cases the miners on the "next working shift" were paid for working during the first half of the shift and that the Commission simply held that they were idled by the order during the second part of the shift and were entitled to receive up to 4 hours of compensation for the remaining part of the shift during which they were idled by the order. Respondent, therefore, concludes that the Youngstown and Peabody cases do not turn on the question of money received, but rather depend on "* * * the logical distinction between work time versus idle time upon which the Youngstown Mines and Peabody cases were decided" (Br., p. 5).

UMWA's Reply Brief

UMWA 's reply brief (pp. 1-2) cites the Commission's recent decision in Eastern Associated Coal Corp., 3 FMSHRC 1175 (1981), as grounds for rejecting respondent's claim that the Commission, in interpreting section 111, is precluded from recognizing provisions regarding "reporting pay" contained in the Wage Agreement. UMWA's brief (pp. 1-2) summarizes the holding in the Eastern Associated case as follows:

* * * In Eastern Associated, the UMWA requested compensation under Section 111 of the Federal Mine Safety and Health Act ("the Act") following the issuance of a withdrawal order pursuant to Section 103(k) of the Act. The order was issued a few hours after the miners had left the mine in accordance with Article XXII(k) of the National Bituminous Coal Wage Agreement of 1978 ("the Contract"). This clause provided for the withdrawal without pay of miners from the mine for a 24-hour memorial period following a fatality.

The Commission declined to award the compensation requested, reasoning that there was no causal connection between the idling of the miners and the withdrawal order. This result did not extinguish or supplant any contractual rights to compensation, since none existed under Article XXII(k) of the collective bargaining agreement. The Commission stated that in some cases it was necessary to examine contractual pay rights in order to delineate the statutory pay rights granted under Section 111.

Following the summary set forth above, UMWA's brief relies upon the following portion of the Commission's decision in the Eastern Associated case (3 FMSHRC at 1179):

We cannot agree with the Union's contention that denial of section 111 compensation would "supplant [the 1977 Mine Act] with a contract provision." Br. 3. It is true that we do not decide cases in a manner which permits parties' private agreements to overcome mandatory safety requirements or miners' protected rights; nor do we unnecessarily thrust ourselves into resolution of labor or collective bargaining disputes. See Youngstown Mines, *supra*, 1 FMSHRC at 993-995. However, section 111 requires us to determine whether there is a pre-existing private entitlement to pay. To make that determination, we are occasionally obliged to examine the parties' collective bargaining agreement which fixes pay rights. In addition, as here, we must sometimes look to the agreement to understand the reasons for a private withdrawal. In the present case, there is no need for contract interpretation because the parties are agreed that the miners withdrew pursuant to the memorial provision and have stipulated that under that provision the miners were not entitled to pay from Eastern Associated during the memorial period. Similarly, the Union's reliance (Br. 2-3 & nn. 2 & 3) on certain recitations in the contract that neither party waives its 1977 Mine Act "rights" would incorrectly transform section 111 into a statutory indemnity against absence, loss, or surrender of private pay entitlements. While the Union gave up a private claim to pay, it has not waived any statutory entitlement. [Commission's emphasis.]

UMWA's reply brief (pp. 2-3) contends that if the Commission's holding in the Eastern Associated case is applied to the facts in this proceeding, it will be found that no contractual interpretation is necessary in this case either because the parties have stipulated that the miners received 4 hours of pay for 1-1/2 hours of work (Stipulation Nos. 11 & 12). UMWA says that this payment was not the result of a mistake or any generosity on the part of respondent, but was rather required by the "reporting-pay provisions" of the Wage Agreement. UMWA says there is no dispute about the interpretation of the Wage Agreement and that there is no unnecessary intrusion into the collective bargaining process by a determination of the relationship between the reporting-pay provisions and section 111 of the Act.

UMWA's reply brief (p. 3) argues that there is a direct causal connection between the withdrawal order issued in this case and the failure of the miners to receive 4 hours of pay for the final 4 hours of the "next working shift".

UMWA contends, finally, that since there was a preexisting private entitlement for the final 4 hours of the shift, the miners are entitled under the second sentence of section 111 to receive compensation for those 4 hours of idlement resulting from issuance of the order.

Consideration of Parties' Arguments

In the portion of my decision entitled "Issue", supra, I stated that I would explain why I had largely adopted UMWA's instead of respondent's, statement of the issue. I believe that I am obligated under the Commission's decision in the Eastern Associated case, supra, to give recognition to the reason that the miners on the "next working shift" received compensation for 4 hours "at their regular rates of pay". In the portion of the Commission's decision in that case quoted above, the Commission stated that it believed that "* * * section 111 requires us to determine whether there is a preexisting private entitlement to pay" [Commission's emphasis]. In that case, the Commission found that no preexisting right to pay existed because the miners had waived their right to pay during the 24-hour memorial period. In this proceeding, it is undisputed that the miners "on the next working shift" were entitled to 4 hours of pay because they had reported for work and were kept for 1-1/2 hours until it was determined that the withdrawal order would not be terminated during their shift. As UMWA argues, the miners were paid for 4 hours of work through no mistake or generosity of respondent, but because the Wage Agreement required the miners to be paid for 4 hours if they were allowed to report for work.

My framing of the issue in this case by reference to the payment of 4 hours of compensation under the Wage Agreement is also supported by the fact that in the Eastern Associated case, the Commission referred to the Wage Agreement in stating the issue. Its decision began with the following statement (3 FMSHRC at 1175):

The issue in this case is whether miners are entitled to compensation under section 111 of the * * * Act * * * where a withdrawal order under section 103(k) * * * was issued after the miners had already withdrawn from the mine pursuant to their collective bargaining agreement's non-compensated "memorial period." * * *

In its Eastern Associated decision, the Commission made it clear that each dispute as to the proper interpretation of section 111 would have to be made on a case-by-case basis. The Commission also stated that compensation might be awarded under section 111 if withdrawal were "independently justified by exigent circumstances". Moreover, the Commission noted in its Eastern Associated decision that even if the order in that case had not been issued, the miners "would not have worked or reported" for work on the midnight-to-8-a.m. shift (3 FMSHRC at 1179). [Emphasis supplied.]

I think that UMWA correctly interprets the first 4 hours of the "next working shift" under the second sentence of section 111 as "non-idle time" in contending that the miners are entitled to 4 hours of additional compensation. There are at least two reasons for the foregoing conclusion. First, the miners on the midnight-to-8-a.m. shift, or "next working shift" were not

idle during the first part of their shift. The act of reporting for work was preceded by their driving from their residences to the mine. Exhibit No. 2 to the stipulations shows that there were 56 of them. In all the cases in which I have had testimony concerning the distances miners drive to work, I have found that some of them drive a considerable distance. Consequently, the act of reporting for work at today's gasoline prices is an activity for which the miners are entitled to be paid. The miners were not permitted to return home immediately, but were kept at the mine for 1-1/2 hours to their detriment. Consequently, the first 4 hours of the shift should be considered as "non-idle time". As respondent argues in its brief, a person is idle if he is not employed. The miners were employed and they reported for work, so I cannot see how they could be considered to have been idle at the beginning of their shift.

My second reason for considering the first 4 hours of the shift to be "non-idle time" is that I don't agree that respondent has sufficiently succeeded in distinguishing the holdings in the Youngstown and Peabody cases from the facts in this proceeding. Respondent claims that in those cases, the miners were paid for working during the first part of their shift and that the Commission held that they were entitled to be paid for the remaining part of the shift because they would have worked during the second part of the shift except that they were idled by the failure of the withdrawal order to be terminated. In the Peabody case, the Commission stated that "[i]n order to resolve a possible contractual dispute over reporting pay, Peabody permitted the eight miners to work the first four and one-half hours of their shift" (1 FMSHRC at 1787).

In this proceeding, respondent obviously chose to make an interpretation of the reporting-pay provisions of the Wage Agreement and chose to pay the miners for 4 hours of compensation. Thus, the payment of 4 hours of compensation in this proceeding was in return for the miners having reported for work. Consequently, I don't think that the Commission's holdings in the Youngstown and Peabody cases can be distinguished from the facts in this proceeding. In this proceeding, as in those cases, the miners were paid for something they did, namely, reporting for work and staying at the mine for 1-1/2 hours.

If a company allows its miners to report for work at all, it knows that it will have to pay them for 4 hours under the Wage Agreement. The company also knows that it will have to pay for 4 hours under the second sentence of section 111 if the order is not terminated. If I were to interpret section 111 as I am urged to do by respondent, a company would be able to act indifferently about notifying its miners not to report for work and could allow them to come to the mine and then leisurely determine within the first 4 hours of the shift whether the order is going to be terminated during the "next working shift". An imminent danger order had been issued in this instance because of an accumulation of explosive concentrations of methane in the bleeder entries of the No. 3 longwall area of the mine (Stipulation Nos. 6 & 8). The order was issued on June 18 and was not terminated until July 10 (Stipulation Nos. 6 & 7). It does not appear that management should have had any great difficulty in determining that the order would not be terminated on the "next working shift" so that the miners could have been notified not to report for work.

My decision that the second sentence in section 111 requires that the miners in this proceeding be paid for the remaining 4 hours of their shift, because they were idled for those 4 hours by the withdrawal order, is not unfair to respondent because it can reduce its exposure to having to pay the miners for 4 hours under the Wage Agreement and for 4 hours under section 111 by simply notifying the miners not to report for work "on the next working shift" when a withdrawal order issued on the preceding shift has not been terminated.

Interest

UMWA's brief (p. 8) requests that I award interest at the rate of 12 percent. UMWA correctly cites the Youngstown and Peabody cases, supra, as precedents for the Commission's having ordered the payment of interest in compensation cases. In each of those cases, the Commission awarded interest at the rate of 6 percent per annum. In the Peabody case, the judge had awarded interest at the rate of 6 percent per month which would be 72 percent per annum. The Commission reduced the rate from 6 percent per month to 6 percent per year without any discussion, presumably because a rate of interest of 72 percent per annum cannot be justified even at today's prevailing high interest rates.

I have ordered payment of rates of interest in discrimination cases in excess of 6 percent per annum. Except for having indicated in the Peabody case that a rate of 6 percent per month is excessive, I do not believe the Commission has established any guidelines to be used in determining how to arrive at an equitable rate of interest. UMWA's brief (p. 8) states that the National Labor Relations Board has adopted the sliding interest scale charged or paid by the Internal Revenue Service on the underpayment or overpayment of federal taxes. UMWA's brief (p. 8) states that when its attorney checked with the Internal Revenue Service, he learned that the current interest rate being used by IRS is 12 percent per annum.

UMWA points out that the federal prime interest rate at which businesses, such as respondent, borrow money is currently almost three times higher than the 6 percent rate awarded in the Youngstown and Peabody cases. UMWA states that the disparity between a 6-percent rate and the prime rate serves as an incentive for operators to delay payment of compensation owed under the Act for as long as possible since the operators are, in effect, borrowing money from the miners at about one-third the rate of interest the operators would otherwise pay.

Respondent's brief does not discuss the issue of interest raised in UMWA's initial brief.

It appears to me that UMWA has made a convincing argument for ordering the payment of compensation at a rate of 12 percent. I doubt that any miner could borrow money to buy an automobile or house at a rate of interest as low as 12 percent. Therefore, I shall hereinafter provide for the compensation due the miners under this decision to be paid at a rate of 12 percent. A rate of 12 percent is not unfair to respondent and is on the low side when considered from the standpoint of what the miners would have to pay to borrow money.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

(A) The motion for summary decision filed by UMWA on April 17, 1981, is granted.

(B) The Complaint for Compensation filed on March 23, 1981, is granted and respondent is ordered, within 30 days from the date of this decision, to pay each miner the 4 hours of compensation shown on Exhibit 2 to the parties' stipulations in this proceeding. The compensation shall be paid with interest at 12 percent per annum from June 19, 1980, to the date of payment.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

Kurt Kobelt, Esq., Attorney for United Mine Workers of America,
900 - 15th Street, NW, Washington, DC 20005 (Certified Mail)

Marshall S. Peace, Esq., Attorney for Beatrice Pocahontas Company,
P.O. Box 11430, Lexington, KY 40575 (Certified Mail)

Allen Williamson, Superintendent, Beatrice Pocahontas Company,
Drawer L, Oakwood, VA 24531

Assistant Solicitor, MSHA, U.S. Department of Labor, 4015 Wilson
Boulevard, Arlington, VA 22203

Special Investigation, MSHA, U.S. Department of Labor, 4015 Wilson
Boulevard, Arlington, VA 22203

Active Work Force on Third Shift
Beatrice Mine as of June 19, 1930

UNION EXHIBIT #2

<u>ME</u>	<u>HOURLY RATE</u>	<u>HOURS PAID</u>	<u>AMOUNT CLAIMED</u>
Tommy A. Absher	10.565	4	43.46
Mark S. Artrip, Jr.	10.160	4	41.84
Leve A. Bailey	10.565	4	43.46
Henry Baker, Jr.	10.160	4	41.84
Ed A. Baldwin	9.498	4	39.19
Joe Blevins	10.565	4	43.46
Earl G. Bobinski	10.160	4	41.84
Ben Boyd	10.160	4	41.84
Henry R. Boyd	10.160	4	41.84
Carliss R. Breeding	10.160	4	41.84
Booby Brown	9.498	4	39.19
Wesley Campbell	9.793	4	40.37
Lymond Clevinger	10.160	4	41.84
Essie L. Daniels	10.160	4	41.84
Frankie L. Deel	10.565	4	43.46
Alph J. Fitzgerald	10.160	4	41.84
Adrius M. Hagy	10.565	4	43.46
Adrius K. Hagy	10.565	4	43.46
Ordon R. Hale	9.498	4	39.19
James D. Hale	10.565	4	43.46
Paul W. Harris	10.160	4	41.84
Andrew E. Keen	10.160	4	41.84
Harry R. Keene	10.565	4	43.46
Arven D. Kincaid	10.565	4	43.46
James A. Mabe	9.793	4	40.37
Donnie E. Maggard	10.565	4	43.46
Edney A. Maxwell	10.565	4	43.46
Steven G. McBride	10.565	4	43.46
Henry D. Miller	10.160	4	41.84
Ernan D. Money	10.565	4	43.46
Arrell Owens	10.269	4	42.28
Harry Lee Perdue	10.160	4	41.84
Ernest W. Plaster	10.160	4	41.84
Phillips C. Presley	10.565	4	43.46
James C. Reynolds	10.565	4	43.46
Donald G. Richardson	10.565	4	43.46
Ernest Rife	10.565	4	43.46
James H. Shortridge	10.565	4	43.46
Wesley Shortridge	10.565	4	43.46
Donald W. Shortridge	10.565	4	43.46
Edy W. Shortt	10.565	4	43.46
Carlos Shortridge	9.793	4	40.37
Ernest C. Smith	10.565	4	43.46
Gregory K. Smith	10.565	4	43.46
Ernest C. Stanley, Jr.	10.565	4	43.46
Reddy Stiltner	10.160	4	41.84
Joe Roy Stiltner	9.906	4	40.82
Robby J. Street	10.565	4	43.46
Andrew Szaller	10.565	4	43.46
Reddie L. Tickle	10.160	4	41.84
Lymond E. Tiller	10.565	4	43.46
Donnie W. Toney	10.565	4	43.46
Henry W. Vandyke	10.565	4	43.46
Lucil Ward, Jr.	10.565	4	43.46
Edward A. Wells	10.565	4	43.46
Ernest J. White	10.565	4	43.46

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 28, 1981

UNITED MINE WORKERS OF : CONTEST OF ORDER
AMERICA (UMWA), :
Contestant : Docket No. CENT 81-223-R
v. :
: Order No. 1024387;
SECRETARY OF LABOR, : 5/13/81
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Charleston No. 1 Mine
Respondent :

ORDER OF DISMISSAL

On May 13, 1981, a Federal inspector issued a combined citation and imminent danger withdrawal order to Garland Coal Company. 1/ Contestant claims that the citation should be modified to contain a finding that the violation alleged by the inspector constituted an "unwarrantable failure" to comply with the cited standard. 2/ The Secretary of Labor contends that under the Act, findings of imminent danger and unwarrantable failure are mutually exclusive. Without passing on the issue raised by the Secretary, I conclude that Contestant does not have the right under the Act to challenge the citation.

1/ Section 104(a) directs an inspector to issue a citation if, on the basis of an investigation, he finds that an operator has violated any mandatory safety or health standard. In this case, the Inspector charged that Garland had failed to properly store explosives that had been carried to a blasting site, as required by 30 C.F.R. § 77.1303(c).

Section 107(a) requires an inspector who discovers an "imminent danger" to issue an order requiring the operator immediately to withdraw all persons from the affected area. An "imminent danger" is a condition that could be expected to cause death or serious physical harm before it can be corrected. Section 3(j).

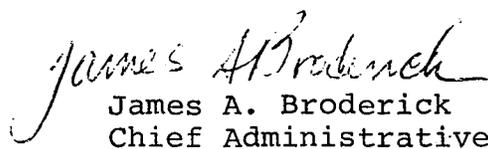
The record does not disclose whether Garland has challenged the citation/order before this Commission. Garland has not sought to intervene in this proceeding.

2/ There is no provision for unwarrantable failure findings in imminent danger orders issued under § 107. Contestant is challenging the citation, not the order.

Under § 105(d) of the Act, a mine operator may contest "the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty . . . or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104." (Emphasis added.) A miner or representative of miners ^{3/} may contest "the issuance, modification or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation of modification thereof issued under section 104." The words "or citation" are conspicuously absent from the list of items a miner or representative of miners may contest. Therefore, since Contestant is a representative of miners challenging a citation, the Notice of Contest must be dismissed. ^{4/}

Barring miners and representatives of miners from contesting citations may appear to leave an imbalance in the Act's enforcement scheme, particularly since miners are given a key role in that scheme. But the Act gives the Secretary primary responsibility for enforcing the Act. With that responsibility must come some measure of discretion. ^{5/}

Therefore, the case is DISMISSED.


James A. Broderick
Chief Administrative Law Judge

^{3/} Contestant's status as a representative of miners has not been questioned.

^{4/} The U.S. District Court for the District of Columbia recently declined to decide whether § 105(d) prevents miners and representatives of miners from contesting citations, preferring to have the Commission resolve the issue. Council of the Southern Mountains v. Donovan, No. 79-2982 (D.D.C. 1981), 2 BNA MSHC 1329, 1332, n. 8.

^{5/} Miners and representatives of miners may participate as parties to Commission proceedings if the mine operator elects to challenge a citation, or a civil penalty based on it. 29 C.F.R. § 2700.4

Distribution: By certified mail.

Joyce A. Hanula, Legal Assistant, United Mine Workers of America,
900 Fifteenth Street, N.W., Washington, DC 20005

Robert A. Cohen, Attorney, Office of the Solicitor, U.S. Depart-
ment of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 28 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 81-188
Petitioner	:	A.O. No. 46-05166-03015V
	:	
v.	:	Docket No. WEVA 81-189
	:	A.O. No. 46-05166-03016
V & R COAL CORP.,	:	
Respondent	:	No. 19-B Mine

DECISIONS

Appearances: Catherine M. Oliver, Attorney, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the petitioner.

Before: Judge Koutras

Statement of the Case

These civil penalty proceedings were initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for 12 alleged violations of certain mandatory safety standards. Respondent filed a timely answer and notice of contest and a hearing was convened on August 11, 1981, in Charleston, West Virginia. The petitioner appeared and presented its cases, but the respondent did not and was held in default. Bench decisions were rendered and they are herein reduced to writing in accordance with Commission Rule 65, 29 C.F.R. 2700.65(a).

Issues

The issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding; and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the

operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

The record in these proceedings reflects that the respondent received actual notice of the scheduled hearings in Charleston. Further, correspondence from the President of V & R Coal Company to the Philadelphia Regional Solicitor's Office advises the solicitor that respondent is no longer in business, has no assests, and that respondent wishes to "withdraw any contest of the above claims". However, as indicated above, the respondent failed to appear at the hearing to present any evidence regarding the status of its mining operations and I conclude that respondent has waived any further right to be heard. I have considered this case de novo and my decisions are rendered on the basis of the evidence and testimony of record as presented by the petitioner.

Findings and Conslusions

Docket No. WEVA 81-188

Fact of violations

MSHA Inspector Melvin C. Harper confirmed that he issued citation 0661931, upon inspection of the mine on June 2, 1980, and that he cited the respondent with a violation of mandatory standard section 75.200 for failure to follow his approved roof control plan in that a cut of coal had been taken out and no temporary roof supports had been installed (exhibit G-1). Mr. Harper identified the applicable roof control plan (exhibit G-2), and testified that drawing No. 1, item 2, page 14 of the plan required the installation of temporary supports and that this was the plan provisions violated by the respondent (Tr. 7-16).

Inspector Harper confirmed that he also issued citation 0661932 on June 2, 1980, charging the respondent with a violation of section 75.200 for a roof control violation. Permanent roof supports were not installed in an area which had been holed through, and this was in violation of drawing No. 2, item 4, page 15 of the applicable roof control plan (exhibits G-2, G-3); (Tr. 17-19).

I conclude and find that the petitioner has established the fact of violation as to both citations issued in this docket and they are AFFIRMED.

Gravity

With regard to citation 0661931, Inspector Harper testified that he believed the violation was serious because the mine has a history of two to six inch draw rock, which is unpredictable, and the likelihood of a roof fall would be greater in this case because he believed the cited roof conditions had been left unattended since the last production shift on May 29. A roof bolter and his helper were exposed to the hazard of a possible roof fall (Tr. 21-22).

Inspector Harper testified that the roof conditions cited in citation 0661932 were also serious because of the area of unsupported roof, which he estimated to be 20 feet wide by forty feet long, and the fact that the draw rock was present. Further, he indicated that the roof was totally unsupported, that is, there was not permanent or temporary support in the area cited and two men were exposed to a possible roof fall (Tr. 23).

I find the two citations issued by the inspector in this case were both very serious violations. They were issued at the approximate same location in the section and exposed miners who were present there to a possibility of a serious roof fall accident.

Negligence

Inspector Harper testified that the roof conditions cited in citations 0661931 and 0661932 should have been known to mine management because the area was required to be pre-shifted and on-shifted. His inspection revealed that the cited conditions had been left uncorrected since prior shifts, and he could find no indications that the cited areas had been pre-shifted. As a matter of fact, he indicated that these circumstances prompted him to issue the citations as section 104(d)(2) unwarrantable failure withdrawal orders (Tr. 21-23).

On the basis of the evidence and testimony adduced by the petitioner in this case, I conclude that the citations issued by inspector Harper resulted from the respondent's lack of due care and that the respondent was negligent. While I believe that the level of negligence borders on gross neglect, I am constrained not to make such a finding in this case absent any evidence of a deliberate and reckless omission by respondent's management.

Good faith compliance

Compliance was achieved by the issuance of withdrawals orders, and while Inspector Harper testified that the conditions were corrected

and the roof areas properly supported when he next returned to the mine, I cannot conclude that the respondent is entitled to any special consideration for rapid good faith abatement of the two citations in question.

Docket No. WEVA 81-189

Fact of violations

MSHA Inspector Issac H. Jenkins, Jr., testified that he conducted an inspection at the mine on July 24, 1980, and he confirmed that he issued five section 104(a) citations for violations concerning certain mandatory electrical safety standards. He confirmed that he issued citation 0640452 for a violation of section 75.521, citation 0640453 for a violation of section 75.703, citation 0640454 for a violation of section 75.900, and citations 0640455 and 0640456 for violations of section 75.503 (exhibits G-1 through G-5; Tr. 7-33).

Inspector Jenkins testified as to the conditions which prompted him to issue the aforementioned five citations. The first citation was issued after he found that grounding conductors for the surface lightning arresters were not separated from the underground power cable grounding conductor, the second for failure to properly completely ground a battery case located on a scoop battery charger to the frame of the charger, and the third one was issued for failing to provide an adequate ground phase protection for the section feeder breaker power cable in that a test conducted by him on the circuit revealed a faulty relay switch which failed to open and de-energize the system. As for the remaining two citations, he testified that they were permissibility violations for a shuttle car which had an excessive opening between the cover plate and starter enclosure, and a Galis roof bolter which had a damaged light fixture which was not securely fastened to the machine (Tr. 7-33).

Based on the testimony and evidence adduced by the petitioner with respect to the aforementioned citations, I conclude and find that the conditions and practices described by Inspector Jenkins on the face of each of the citations which he issued constituted violations of the cited mandatory standards, and that his testimony establishes the fact of violations as to each of the citations and they are all AFFIRMED.

Good faith compliance

Inspector Jenkins testified that all of the citations which he issued were abated in good faith by the respondent, and I adopt this conclusion by the inspector as my finding as to each of the citations in question.

Negligence

With regard to citation 0640452 concerning the inadequately grounded lightning arresters, Inspector Jenkins testified that he doubted the

respondent knew of the condition cited because the respondent did not make the initial electrical installation at the mine, that the condition would only be visible to the trained eye, and that there is no requirement for a daily pre-shift of the system. As for the remaining citations, Inspector Jenkins believed that the respondent should have been aware of the conditions cited through weekly or other inspections which should have disclosed the conditions cited.

Considering the testimony of Inspector Jenkins, I find that citation 0640452 did not result from the respondent's negligence, but that citations 0640453 through 0640456 resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence as to these four citations.

Gravity

I conclude and find that all of the citations issued by Inspector Jenkins were serious. Although he testified that the mine is not gassy and that the equipment he observed was in otherwise good condition, he did indicate that failure to properly ground the lightning arresters could have affected the underground mining equipment since the main power dable ground system was tied to the same arresters and could have resulted in energizing the machine frames. Failure to properly ground the battery frame and the defective relay switch could have resulted in shock hazards, and the permissibility citations could have developed into more serious hazardous conditions due to the continued use of the cited equipment.

MSHA Inspector Tony Romeo testified that he conducted an inspection of the mine on August 6, 1980, and he confirmed that he issued citation 0659330 for a violation of section 75.1715 for failure by the respondent to follow the mine check in and out system; citation 9659328 for a violation of section 75.303 after finding no record of a pre-shift date or initials by two belt conveyors; and citation 0659329 for a violation of section 77.410 after finding a payloader being operated on the mine surface area without an operable reverse signal alarm (Exhibits G-6 through G-8; Tr. 38-56).

Inspector Romeo confirmed that he issued citation 0659334, citing a violation of section 75.400 after finding an accumulation of dry, loose coal and coal dust on the mine floor in the number one entry. He measured the accumulations and they measured up to 12 inches deep, 18 inches wide, over an area of some 70 feet long. He observed no float coal, and the accumulations which he did observe appeared black in color and he saw no evidence of any rock dusting. He took several samples from the floor in accordance with his usual approved procedures, and submitted them for laboratory analysis to support the citation for a violation of section 75.403 for failure to adequately rock dust (exhibits G-9 through G-11; Tr. 48-57).

In view of the foregoing testimony and evidence adduced by the petitioner in support of the citations issued by Inspector Romeo, I conclude and find that the respondent violated the mandatory safety standards cited and the citations in question are AFFIRMED.

Good faith compliance

Inspector Romeo stated that each of the citations he issued were timely abated in good faith, and I adopt this testimony as my finding on this issue.

Negligence

I conclude and find that each of the citations issued by Inspector Romeo resulted from the respondent's failure to exercise reasonable care to prevent the conditions cited and that this constitutes ordinary negligence as to each of the citations.

Gravity

Inspector Romeo testified that the failure to follow the mine check-in-and-out system was not serious in this case because the mine was small, and only three of the six men on the one section did not check in. I concur in the inspector's conclusions and find that citation 0659330 was non-serious.

With regard to the failure to record the results of the conveyor belt pre-shift examination, Inspector Romeo stated that he did not know whether the examination had in fact been made, but the failure to make a record of such an examination by dating and signing the book could possibly result in someone not being apprised of possible hazardous conditions which may exist in the cited area. I find that this citation is serious.

With regard to the inoperative back-up alarm on the payloader, Mr. Romeo testified that he observed no one in the proximity of the machine and he indicated that the truck driver who came to the area to load his truck would in fact alight from the truck and operate the payloader himself. Thus, he would be the only person in the area, and in these circumstances, I cannot conclude that the citation was serious. I conclude that it was not.

With regard to the accumulations and rock dust citations, I find that they were both serious. Although Inspector Romeo testified that he observed no equipment operating on the day he issued the citations, he did see evidence that equipment and machines had operated in the area where he found the accumulations of coal and coal dust, and considering the extent of those accumulations as well as the results of the rock dust samples which reflects percentages far below the acceptable standards, I conclude that the citations were serious. Mining was taking place in the cited areas, and in the event of a fire, the accumulations as found by the inspector would certainly add to the hazard.

Size of business and the effect of the assessed penalties on the respondent's ability to remain in business.

The testimony of the inspectors reflects that the respondent no longer operates the mine in question and that MSHA considers it to be in a temporary abandoned status. All of the equipment has apparently been removed from the mine and production has ceased. Further, by failing to appear at the hearing, I have no way of confirming respondent's present financial condition and the effect of the assessed penalties on the respondent. Under the circumstances, I conclude that the penalties will not otherwise adversely affect his operation since he is apparently no longer in business.

As for the size of the operation, the record establishes that at the time of the citations the respondent leased the mine from Itmann Coal Company, but operated it as respondent's sole mining venture under a separate mine identification number. At the time of its operation, the mine operated on one production shift, with mine employment of approximately 24 employees, and daily coal production at 300 tons. Under the circumstances, for purposes of any civil penalty assessments, I conclude and find that the respondent's mining operations were small.

History of prior violations

Petitioner has submitted a computer print-out which reflects that during the period June 2, 1978 to June 1, 1980, respondent has paid \$2,196 for a total of 37 assessed violations issued during this time. The paid assessments include one prior citation for a violation of section 75.200, five prior citations for violations of section 75.503, and one each for sections 75.400 and 75.403. Considering the totality of all prior paid assessed citations, I cannot conclude that respondent's prior history of violations is such as to warrant any additional increases over the assessments which I have levied in these cases.

Penalty Assessments

On the basis of the foregoing findings and conclusions, I conclude that the following penalties are reasonable and appropriate for the citations which have been affirmed in these cases:

Docket No. WEVA 81-188

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
0661931	6/2/80	75.200	\$ 750
0661932	6/3/80	75.200	750
			<u>\$1500</u>

Docket No. WEVA 81-189

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
0640452	7/24/80	75.521	\$ 44.00

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
0640453	7/24/80	75.703	\$ 72.00
0640454	7/24/80	75.900	72.00
0640455	7/24/80	75.503	78.00
0640456	7/24/80	75.503	78.00
0659330	8/6/80	75.1715	15.00
0659328	8/6/80	75.503	38.00
0659329	8/6/80	77.410	25.00
0659334	8/6/80	75.400	60.00
0659335	8/6/80	75.403	28.00
			<u>\$ 510.00</u>

ORDER

The respondent IS ORDERED to pay civil penalties in the amounts shown above, totaling \$2,010 within thirty (30) days of the date of these decisions and order, and upon receipt by MSHA, these cases are DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

Catherine M. Oliver, Esq., U.S. Department of Labor, Office of the Solicitor,
3535 Marekt St., Philadelphia, PA 19104 (Certified Mail)

James Johnson, V & R Coal Corp., P.O. Box 3324, Charleston, WV 25333
(Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 31 1981

UNITED STATES STEEL CORPORATION,	:	Contest of Order
Contestant	:	
v.	:	Docket No. PENN 81-9-R
	:	
SECRETARY OF LABOR,	:	Robena No. 1 Mine
Respondent	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
Petitioner	:	
v.	:	Docket No. PENN 81-52
	:	A.C. No. 36-00909-03042V
UNITED STATES STEEL CORPORATION,	:	
Respondent	:	Robena No. 1 Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Secretary of Labor; Louise Q. Symons, Esq., U.S. Steel Corporation, Pittsburgh, Pennsylvania, for United States Steel Corporation.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

On October 7, 1980, United States Steel Corporation (hereinafter U.S. Steel) filed a notice of contest of an order of withdrawal issued on September 8, 1980, under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1) (hereinafter the Act). On January 24, 1981, the Secretary filed a petition for assessment of civil penalty with respect to this same order of withdrawal. Pursuant to the Secretary's motion filed February 10, 1981, these two proceedings were consolidated.

Upon completion of the prehearing requirements, a hearing was held in Pittsburgh, Pennsylvania, on June 22, 1981. The following witnesses testified on behalf of U.S. Steel: Louis E. Tiberi, Thomas Stavischek and Paul M. Kovell, Jr. Orlando J. Abbadini testified on behalf of the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA). Both parties submitted posthearing briefs.

ISSUES

1. Whether the order was properly issued.
2. Whether U.S. Steel violated the Act or regulations as alleged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), provides in pertinent part as follows:

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

§ 75.200 Roof control programs and plans.

[Statutory Provisions]

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

STIPULATIONS

The parties stipulated the following:

1. U. S. Steel owns and operates the Robena Number 1 Mine.
2. U. S. Steel is involved in the extraction of raw coal from its natural deposits in its operations at the Robena Number 1 Mine.
3. Inspector Orlando J. Abbadini was at all times relevant hereto, an authorized representative of the Secretary of Labor.
4. U. S. Steel and the Robena Number 1 Mine, are subject to the Act.
5. The Administrative Law Judge has jurisdiction over these proceedings.
6. The subject order and modification thereof, were properly served by a duly authorized representative of the Secretary of Labor, upon an agent of U. S. Steel, at the dates, times and places stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or the relevancy asserted therein.
7. The assessment of an appropriate civil penalty in this proceeding will not affect U. S. Steel's ability to continue in business.
8. The appropriateness of the penalty, if any, to the coal operators business, should be determined based on the fact that in 1979, the company had an annual tonnage of 15,080,435 production tons and the Robena Number 1 Mine, had an annual tonnage of 671,131 production tons.
9. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in obtaining abatement.
10. U.S. Steel is not challenging the inspector's determination that the violation was significant and substantial.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. U. S. Steel Corporation owns and operates the Robena Number 1 Mine.
2. Inspector Orlando J. Abbadini, who issued the subject withdrawal order, was a duly authorized representative of the Secretary of Labor.
3. Inspector Abbadini is qualified as an expert in the area of mine safety and health.

4. On August 26, 1980, Inspector Abbadini, as part of a regular triple A inspection, observed the conditions of the roof at Numbers 19 and 20 crosscuts. Upon observing slips and looseness in the roof in that area, he informed Mine Foreman Stavischeck of the conditions. Mr. Stavischeck indicated that he was aware of the problem and would take care of it. No citations or orders were issued with respect to the roof conditions on that day.

5. Assistant Mine Foreman Stavischeck was informed of the roof conditions in Nos. 19 and 20 crosscuts by Inspector Abbadini on August 26, 1980.

6. On September 8, 1980, Inspector Abbadini continued to perform a regular inspection of Robena No. 1 Mine and before going underground was told by Mel Tishman, the Motorman, that conditions at number 19 crosscut had not improved.

7. Inspector Abbadini did not inform management of Mel the Motorman's comments about the roof conditions.

8. On September 8, 1980, Inspector Abbadini asked Assistant Mine Foreman Paul Kovell whether the roof conditions in Nos. 19 and 20 crosscuts had been taken care of and he replied that they had not been corrected.

9. On September 8, 1980, Inspector Abbadini, accompanied by Paul Kovell, Louis E. Tiberi, General Assistant Mine Foreman, Don Albani, and the UMWA walkaround, returned to numbers 19 and 20 crosscuts and through the visual and sound methods of testing, determined that the roof required immediate attention.

10. The condition of the roof in the cited area had deteriorated between August 26, 1980 and September 8, 1980, to the point where the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.

11. On September 8, 1980, at 12:00 p.m., the inspector issued Order No. 841473 under section 104(d) of the Act for a violation of the operator's approved roof control plan. The order alleged the following:

The roof along No. 4 entry at No. 19 crosscut switch where empties and loads are stored and at No. 20 crosscut, an active track haulage for 3 Main 6-1/2 (018) section was loose, drummy, broken, potted cavities, with slips running across. The roof had fallen around several roof bolts, rendering the bolts ineffective. Additional supports had not been installed. This track haulage was used for mantrip travel and coal haulage. Assistant Mine Foreman Lou Tiberi and General Assistant Tom Stavischeck knew of this reported condition.

12. The conditions were as stated in withdrawal Order No. 841473.

13. The operator knew or should have known of the conditions described in withdrawal Order No. 841473.

14. On July 29, 1980, MSHA had issued Citation No. 0837858 to the operator pursuant to section 104(d) of the Act. No complete inspection occurred between the date that citation was issued and the date the inspector found the instant violation of mandatory health and safety standard 30 C.F.R. § 75.200.

15. The failure to abate the conditions prior to September 8, 1980, was due to the unwarrantable failure of the operator to comply with mandatory health and safety standard 30 C.F.R. § 75.200.

16. The conditions described in withdrawal Order No. 841473 were abated in a timely fashion by the installation of four cribs and supplemental 10 foot conventional bolts.

17. On September 8, 1980, the order was terminated and at 12:45 p.m. withdrawal Order No. 841473 was modified to delete reference to termination due date and time.

18. The operator demonstrated good faith in abating the condition.

19. Robena No. 1 Mine is a large coal mine and U.S. Steel is a large operator.

20. The assessment of an appropriate civil penalty in this proceeding will not affect U.S. Steel's ability to continue in business.

Violation of 30 C.F.R. § 75.200

Order No. 814173 was issued for an alleged violation of 30 C.F.R. § 75.200 which requires, inter alia, that "the roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." MSHA contends that the conditions of the roof in the area of crosscuts nineteen and twenty were such that the existing roof supports were inadequate. U.S. Steel asserts that the roof was well bolted at the No. 19 crosscut and that there were no slips. The operator also contends that the conditions in the No. 20 crosscut, specifically a cavity in the roof, did not indicate a need for immediate attention. It further states that there was no problem with the roof at No. 19 or 20 intersections.

Inspector Abbadini testified that he initially noticed the roof conditions in Nos. 19 and 20 crosscuts on August 26, 1980, while he was walking the haulage out. He saw slips, looseness of the roof and an exposed cavity, all of which were close to the manhole where the switch operator was stationed. The inspector observed a local fall at the No. 20 crosscut about 25 feet from the intersection and he also saw sloughing around some bolts in the No. 19 intersection. Since this was an active working area he

spoke to Tom Stavischek, an assistant mine foreman, who indicated that he knew about the roof condition and would take care of it. The condition was not serious enough to warrant issuing a citation at this time.

The inspector returned to this section of the mine on September 8, 1980, as part of a regular Triple A inspection. Upon arriving he spoke with Mel Tishman, the motorman, who complained about the condition at No. 19 crosscut. He also spoke with Assistant Mine Foreman Paul Kovell, who indicated that nothing had been done to correct the roof problems. The inspector then proceeded to the area in question accompanied by Louis Tiberi, Paul Kovell and Donald Albani. There he noticed that roof conditions had worsened, showing severe deterioration around the bolts. The slips had opened up due to stress from pillar mining. Visual and sound inspection indicated that there was drumminess in the roof. The inspector testified that the condition presented a danger of causing a fatal accident and that additional supports, cribs and roof bolts were necessary to remedy the situation.

U.S. Steel presented testimony contradicting the inspector's testimony and also challenging his conclusions about the roof conditions and the assessed danger. Thomas Stavischek stated that he spoke with Inspector Abbadini on August 26, 1980, and that he was not told about a roof problem. He was aware of a cavity in the No. 20 crosscut where there had been a roof fall but maintained that it had been there for 5 months with no change in size. He saw no slips in the No. 19 crosscut and felt that there were no problems with the roof which required immediate attention.

Paul Kovell, an assistant mine foreman testified that he was not aware of any roof problems in the Nos. 19 and 20 intersection prior to September 8, 1980. He indicated that rehabilitative work was being done at that time inside the No. 20 crosscut where there was a cavity. Mr. Kovell stated that he had an opportunity to observe roof conditions from a jeep during his weekend runs, but had not noticed any slips in the Nos. 19 and 20 intersections requiring additional support.

Louis Tiberi, a general assistant mine foreman, testified that the condition was good at the No. 20 crosscut. He had instructed Mr. Kovell to bolt a small cavity located in the No. 20 crosscut, but the task had not been completed by September 8, 1980. Mr. Tiberi insisted that this cavity did not present a hazard, and that a man doing a preshift inspection would probably not notice it. He saw nothing wrong with the roof in the No. 19 crosscut and felt that the additional cribs which were installed to abate the order served no purpose and provided no support. Mr. Tiberi, could not remember testing the roof for drumminess on the day the withdrawal order was issued.

U.S. Steel argues that Inspector Abbadini's testimony regarding the violation is not credible. It asserts that Mr. Abbadini had difficulty describing the condition of the roof on August 26, 1980 and September 8, 1980 except to say that it looked drummy and had slips. It also found the inspector's definition of a slip or a clay vein to be inadequate. U.S. Steel maintains

that the testimony of the management witnesses was straight forward and consistent and that their observations concerning the safety of roof conditions should be believed.

MSHA argues that the inspector's testimony regarding roof conditions was corroborated by notes which he made contemporaneously with his inspection. It points out that the inspector was consistent in his testimony on both direct and cross-examination. Finally, MSHA relies on the inspector's qualifications as an expert witness and his ability to judge the safety of roof conditions as factors supporting the inspector's credibility.

In resolving the issue of credibility, I find that the inspector's testimony is not unclear or inconsistent. If there are discrepancies, they are only minor. As U.S. Steel concedes, the errors were with regard to "inconsequential matters" and he was evasive only about "collateral matters." (U.S. Steel Brief p. 7 and 8). The instances cited by U.S. Steel do not undermine the inspector's qualifications as an expert witness. He kept careful and descriptive notes of his observations which accurately reflect his testimony (Exh. G-5 and G-6). He also made a drawing, illustrating the roof conditions while they were still fresh in his mind (Exh. G-1).

While the operator's witnesses all agreed that the roof conditions were not serious enough to warrant a withdrawal order, they each admitted that there was a cavity in the No. 20 crosscut. The operator's exhibit representing the area in question shows a slip which extends into the intersection at the No. 20 crosscut. (Exh. O-2). This drawing reinforces the inspector's testimony rather than management testimony regarding roof conditions. As the inspector stated at the hearing, slips indicate that the roof is unstable, posing a danger of a roof collapse and a fatal injury.

The inspector tested the roof for drumminess through the visual and sound methods of testing. While the inspector recalled that Mr. Tiberi assisted him in these testing procedures, Mr. Tiberi simply states that he does not remember whether he tested the roof on September 8. Since the inspector's notes indicate that Mr. Tiberi had agreed that the roof needed immediate attention, it appears that Mr. Tiberi's lack of recollection was used to avoid acknowledgement of the test results.

Having concluded that the conditions in the Nos. 19 and 20 crosscut were as indicated in Order No. 841473, I find that MSHA has established a violation of 30 C.F.R. § 75.200.

Unwarrantable failure

U.S. Steel has also challenged the issuance of the withdrawal order on September 8, 1980. It claims that it had no notice of the alleged dangerous roof conditions and that it could not have been aware of any problem prior to the inspector's issuance of the order. U.S. Steel also claims that the withdrawal order is defective because the inspector did not personally observe the conditions which were the subject of the order. It maintains

that Mr. Abbadini heard about a roof bolting problem while he was still on the surface, and issued the order before going down to actually check on the situation. U.S. Steel asserts that the inspector was therefore obligated to find violations to support his order even though they did not actually exist. Finally, the operator states that Inspector Abbadini received his information about roof conditions from a miner and was obligated under section 103(g)(1) of the Act to have the complaint reduced to writing and presented to management. It concludes that the inspector's violation of the Act justifies vacating the Order. MSHA has countered each of U.S. Steel's arguments and maintains that the withdrawal order was issued properly and should be upheld.

The term "unwarrantable failure" was defined by the Interior Board of Mine Operations Appeals as follows:

[A]n inspector should find that a violation of a mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or a lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

This definition was approved in the legislative history of the Act. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 32 (1977).

MSHA argues that U.S. Steel knew or should have known of the roof conditions in Nos. 19 and 20 crosscuts. It presented evidence demonstrating that the operator had actual knowledge of the violation. Inspector Abbadini testified that he had observed the roof conditions while engaging in a regular inspection on August 26, 1980. He noticed sloughing in No. 19 intersection around the bolts. The inspector stated that he was worried about the looseness of the roof and the exposed cavity since it was an active area and close to the location of the switch operator. Since the condition was not serious at the time, the inspector stated that he told management about the problem and recommended bolting and cribbing. During the course of his conversation with Tom Stavischeck on August 26, he learned that management was aware of the problem and would take care of it. According to MSHA's statement of facts, when the inspector arrived on September 8, 1980 to conduct a regular triple A inspection, he asked Mr. Kovell whether the bad roof conditions in 19 and 20 crosscuts had been abated, and Mr. Kovell replied that they had not. The inspector then rode the mantrip in with Mr. Kovell and Mr. Tiberi, and observed the conditions. Finding that immediate attention was necessary, the inspector issued the withdrawal order.

MSHA also offered exhibits showing the inspector's notes which were written following the inspections of August 26, 1980 and September 8, 1980. These notes mention the conversations the inspector had with management on both inspection days.

U.S. Steel contends that the inspector did not inform management prior to September 8, 1980 of the roof conditions. Mr. Stavischek testified that the inspector did not mention any roof problems on August 26, 1980. Mr. Kovell testified that when the inspector asked him whether the conditions at 19 and 20 crosscuts had been taken care of, he replied that he had not done any work in these areas. U.S. Steel does not attempt to explain this statement, although Mr. Kovell's testimony implies that he did not know the conditions to which the inspector was alluding.

After careful consideration of the testimony and evidence submitted, I find that U.S. Steel did have actual knowledge of the conditions in Nos. 19 and 20 crosscuts. The inspector's testimony, together with his notes and Mr. Kovell's statement that he had not done any work, lead me to this conclusion. Furthermore, even if the operator was not actually informed of the roof conditions on August 26, 1980, it should have known that a dangerous condition existed. The operator is required by law to preshift the area and as MSHA points out, examination would have revealed the worsening conditions. The evidence indicates that management was aware of the cavity in No. 19 crosscut and additional testing would have revealed the drumminess, sloughing, and slips. Therefore, U.S. Steel knew or should have known of the violation of 30 C.F.R. § 75.200. The inspector's finding of an unwarrantable failure is reasonable in light of the facts and circumstances presented. See Zeigler Coal, supra, at 296.

U.S. Steel has also challenged the withdrawal order based upon its contention that the inspector did not personally observe the alleged condition but rather issued the order from the surface based upon a miner's complaint. I find this claim to be groundless. MSHA has established that Inspector Abbadini came to the mine on September 8, 1980, and spoke with the motorman on the surface, who informed him that conditions at Nos. 19 and 20 crosscuts had not been taken care of. He confirmed this complaint in his conversation with Mr. Kovell, and thereupon, proceeded to the area in question accompanied by management. He issued the withdrawal order only after observing the deteriorated conditions. It was, therefore, validly issued.

Alleged Failure to Comply With Section 103(g)(1) of the Act

U.S. Steel's argues that the inspector was required to have the motorman's complaint presented in writing to the operator pursuant to section 103(g)(1). Although citing no authority, U.S. Steel states that "the purpose of this part of the Act is clearly to get a dangerous situation corrected as soon as possible." (Brief p. 6). The language of this section clearly demonstrates that it is inapplicable to the present situation. The pertinent part states:

(g)(1) Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard

exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists.

On both August 26, 1980 and September 8, 1980, Inspector Abbadini was engaged in a regular triple A inspection, when he received a complaint from Mel the motorman. As the inspector stated at the hearing, "we get these complaints every portal we go to, we get all kind of complaints from different miners and if any of the complaints are dealing with any Health and Safety, any violations of any Health and Safety Act, we're to follow it up." (Tr. p. 60). The inspector did not go to Robena Mine pursuant to a miner complaint and he would have inspected the area in question regardless of any specific complaint. MSHA asserts that, "if such conversations by themselves were to make an inspection into a 103(g) inspection, the clear language of the Act requiring miner complaints to be written would be subverted, [since] virtually every inspection conducted would be considered 103(g) inspections and the inspector could be placed in the intolerable position of not being able to talk with miners informally for fear of having all enforcement actions vacated for failure to get every miner statement placed in writing." I agree with this contention, and find that the withdrawal order is valid since there was no need for a written complaint pursuant to section 103(g).

Assessment of a Civil Penalty

MSHA has proposed a civil penalty of \$1,000.00 for the violation herein. In considering the appropriateness of this penalty, the six criteria set forth in section 110(i) of the Act have been considered. The parties have stipulated to the size of the operator and the effect of the proposed penalty on the operator's ability to remain in business. I have considered the operator's history of 194 violations over a 2 year period.

MSHA submits that the operator should be found grossly negligent in failing to correct the violation because the evidence shows that the operator knew or should have known of the violation. I disagree with this determination since the roof conditions did not deteriorate until after the August 26th inspection. The inspector testified at the hearing that he did not issue any citations on his initial inspection because the roof conditions were not serious at that time. Therefore, although the operator ignored the inspector's instructions about correcting the condition, its negligence in this regard involves only a 13 day period between inspections. U.S. Steel offered evidence showing that it was correcting other roof problems which indicates that the operator was concerned about roof falls and mine safety. Accordingly, I find that the operator should be charged with ordinary negligence.

The inspector testified that the area where the violation occurred was an active area since it was the main travelway for entering and exiting the working face. He evaluated the likelihood of an accident occurring as probable. The inspector indicated that the conditions presented a danger of a roof collapse with a probable fatal injury to exposed miners. Based upon this evidence, I find the violation to be serious.

While U.S. Steel did not exercise good faith in correcting the condition prior to September 8, 1981, it did abate the condition immediately upon issuance of the withdrawal order. The evidence supports the stipulation that the operator demonstrated good faith in achieving timely abatement.

My reduction in the amount of negligence attributed to the operator should be reflected in the civil penalty. I therefore conclude that a penalty of \$600 should be imposed for the violation found to have occurred.

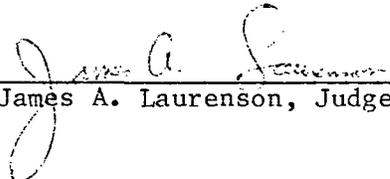
CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. U.S. Steel and its Robena Mine are subject to the Act.
3. Withdrawal Order No. 841473 issued on September 8, 1980, charging a violation of mandatory safety standard 30 C.F.R. § 75.200, is affirmed.
4. The violation of the above mandatory standard was caused by the unwarrantable failure of U.S. Steel to comply with 30 C.F.R. § 75.200.
5. Withdrawal Order No. 841473, was properly issued under section 104(d)(1).
6. The violation of the above mandatory standard could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.
7. U.S. Steel's contest of Order No. 841473 is denied.
8. Considering the criteria specified in section 110(i) of the Act, U. S. Steel is assessed a civil penalty in the amount of \$600 for the violation of 30 C.F.R. § 75.200.

ORDER

WHEREFORE IT IS ORDERED that the contest is DENIED and the subject order is AFFIRMED.

IT IS FURTHER ORDERED that U.S. Steel pay the sum of \$600 within 30 days of the date of this decision as a civil penalty for violation of 30 C.F.R. § 75.200.


James A. Laurenson, Judge

Distribution Certified Mail:

Louise Q. Symons, Esq., United States Steel Corporation, 600 Grant Street,
Pittsburgh, PA 15230

David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor,
Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

Harrison B. Combs, UMWA, 900 15th Street, NW., Washington, DC 20005

* United States Government Printing Office:1981--341-638/4360