August 1982

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

AUGUST

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

Walter Schulte v. Lizza Industries, Inc., Docket No. YORK 81-53-DM. (Judge Melick, July 6, 1982)

UMWA on behalf of Billy Dale Wise v. Consolidation Coal Company, Docket No. WEVA 82-38-D. (Judge Koutras, July 16, 1982)

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

Fred Ganchuk and Lesko Bugay v. Aloe Coal Company, Docket Nos. PENN 81-164-D, PENN 81-165-D. (Judge Koutras, July 8, 1982)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 12, 1982

LLOYD BRAZELL	:	
	:	
v.	:	Docket No. KENT 81-46-D
	:	
ISLAND CREEK COAL COMPANY	:	

DECISION

This discrimination case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. IV 1980). The administrative law judge concluded that Island Creek Coal Company had not discriminatorily terminated Lloyd Brazell. 3 FMSHRC 1773 (July 1981) (ALJ). We affirm.

Brazell began working for Island Creek in June 1970 and was promoted to a management position in 1974. On May 30, 1980, the date of his termination, he was serving as a belt foreman. At the time that Brazell was laid off the mine was reducing its work force, and several other managerial employees, and numerous rank-and-file miners, were also laid off in connection with this cutback.

Brazell filed a discrimination complaint with the Secretary of Labor pursuant to section 105(c)(2) of the Act. 30 U.S.C. § 815(c)(2). The Secretary concluded that no discrimination had taken place. Brazell then instituted this proceeding before the Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815 (c)(3).

Brazell describes numerous incidents in which he was involved during the course of his employment by Island Creek. The administrative law judge thoroughly reviewed these incidents and concluded that Brazell had failed to establish a prima facie case of discrimination in every instance. We have reviewed the record in light of the arguments presented by Brazell on review and conclude that the judge's factual findings are supported by substantial evidence. 30 U.S.C. § 823(d)(2)(A)(ii)(I). We also conclude that based on the evidence the judge correctly found that Brazell failed to establish a prima facie case of discrimination under section 105(c).

In order to establish a prima facie case a miner must prove by a preponderance of the evidence that: (1) he engaged in protected activity, and (2) the adverse action was motivated in any part by the protected activity. Secretary of Labor on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom., Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). Many of the incidents described by Brazell were not the subject of safety

complaints, nor did he otherwise bring them to the attention of management or MSHA. Several of the incidents clearly fall outside the scope of section 105(c) of the Act, e.g., complainant's failure to cash small bonus checks and his efforts to prevent pornographic materials from being brought into the mine. As to these and similar incidents Brazell failed to establish the first element of a prima facie case of discrimination, i.e., that he engaged in protected activity.

Several other incidents related by Brazell could be viewed as involving protected activity, particularly his complaints about an improper splice, unsafe conduct by miners, and inadequate firebossing. However, Brazell has failed to establish by a preponderance of the evidence the second element of a prima facie case, i.e, that his lay off was motivated in any part by these happenings. Although "direct evidence of motivation is rarely encountered" and, therefore, oftentimes "the only available evidence is indirect", 1/ sufficient indicia of discriminatory intent have not been presented in this case for us to draw inferences from the evidence different from those drawn by the judge. To the extent that the judge's decision weighed the sometimes conflicting testimony on the facts in dispute, we find no persuasive reason to disturb the judge's findings. 2/

1/ Secretary of Labor on behalf of Johnny N. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (Nov. 1981), reconsideration den., 3 FMSHRC 2765 (Dec. 1981), pet. for review filed, No. 81-2300, D.C. Cir., Dec. 11, 1981.

2/ Brazell alternatively requests a remand to the administrative law judge for further evidence directed towards disproving the credibility of the mine superintendent who testified at the hearing in this case. The sole basis for this request is the fact that on July 6, 1981, a multi-count indictment was filed in federal district court charging a former MSHA official with several instances of criminal misconduct. One of the counts alleges that the official impeded an MSHA investigation concerning the mine herein involved "by approving a Ventilation and Methane and Dust Control Plan submitted by Island Creek Coal Company when he well knew that citations for excessive dust levels were in effect." United States v. Craft, No. CR 81-00009-0(G), W.D. Ky.

We simply have no basis for inferring from this allegation against a former government official that the mine superintendent testified untruthfully before the administrative law judge concerning the events herein at issue. No connection between the events at issue in this proceeding and the criminal charges has been demonstrated or a connection between the individuals involved. In our view a sufficient showing has not been made that a remand for additional evidence is warranted.

In sum, we agree with the judge that as to each of the incidents described by Brazell, in his complaint and during the hearing, a prima facie case of prohibited discrimination was not established. Accordingly, the judge's decision is affirmed. 3/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

3/ In light of our conclusion that Brazell failed to prove that his lay off was in any part motivated by protected activity, we reject his argument that Island Creek's failure to rehire him constitutes illegal discrimination.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 31, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VINC 79-227-P
v.	:	
SOUTHERN OHIO COAL COMPANY	:	

DECISION

This penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. IV 1980), and involves two alleged violations of 30 C.F.R. § 75.200. 1/ The administrative law judge found that two violations of the standard had occurred, and assessed the maximum penalty of $10,000 for each violation. Southern Ohio Coal Co., 2 FMSHRC 350 (February 1980)(ALJ). Southern Ohio Coal Company (SOCCO) filed a petition for discretionary review of the judge's decision, which we granted in part. For the reasons that follow, we affirm the judge's finding that the two violations occurred. 2/ We find, however, that lower penalties are warranted and we assess penalties totalling $10,000.

On the day before the events at issue, miners employed by SOCCO encountered abnormal conditions while advancing the face in entry 15. There was excessive water and soft bottom, and several shuttle cars were damaged while the miners were trying to load coal. To circumvent the problems, the miners stopped advancing the face and tunneled back through

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1/ The cited standard provides in pertinent part:

§ 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 .... No person shall proceed beyond the last permanent support unless adequate temporary support is provided.

2/ Our review of the record convinces us that there is substantial evidence to support the judge's conclusions that there were two violations of the Mine Act. As discussed further infra, however, in certain respects we find the judge's decision to be in need of modification. Therefore, where necessary we make factual findings. 30 U.S.C. § 823(d)(2)(C); 5 U.S.C. § 554(b) (1980).

in an outby direction from a crosscut driven from the number 14 entry. This unusual mining procedure resulted in an area of about 23 feet 9 inches by 17 feet 6 inches of unsupported roof.

During the midnight to 8:00 a.m. shift on May 5, 1978, an overhanging rib in number 15 entry was sheared, spilling coal onto the mine floor. Three temporary supports were then set at the inby end of the unsupported area. Three temporary supports were also set at the outby end of the area. Tr. II at 172, 174. Later that day during the 4:00 p.m. to midnight shift, Lonnie Darst, the section foreman, instructed James Six, a member of his crew, to remove the inby row of temporary supports with a loading machine. The supports were to be removed so that equipment could be brought in to load out coal from the sheared rib and to clean up the area. After giving the instructions to remove the temporary supports, Darst left the area. While under roof supported only by temporary supports, Six removed two of the inby temporary supports by hand. He was assisted by Johnny Lee Endicott (a shuttle car operator and helper) who removed the third inby support by hand. Six and Endicott then walked outby about 18 to 21 feet under unsupported roof to remove the outby supports. As Six and Endicott were removing these supports the roof fell, killing Six.

The Mine Safety and Health Administration (MSHA) conducted an investigation and issued two citations to SOCCO alleging violations of 30 C.F.R. § 75.200. Citation No. 279023 stated:

> The results of a coal mine fatal[ity] investigation revealed that two persons were inby permanent supports in the No. 15 entry of the section. The area of unsupported roof was 23 feet 9 inches in length by 17 feet 6 inches wide.

Citation No. 279024 stated:

> The investigation of a fatal accident revealed that the approved roof control plan was not being complied with because temporary roof supports were not being removed remotely or additional temporary supports were not installed so that workmen removing the supports remain[ed] in a safe area. The operator's approved roof control plan requires that if it is necessary to remove temporary supports before permanent supports are installed, such supports shall be installed in such a manner that the workman removing the supports remains in a supported area.

After a hearing the administrative law judge rendered a bench decision, which he later adopted and supplemented in a written decision. The judge concluded that the two alleged violations had occurred and

that SOCCO was liable for the violations. Because the violations were the "proximate cause" of a miner's death, the judge found them to be "extremely serious." The judge also found that SOCCO was negligent in that it was responsible both "for the imputed negligence of its agents and employees [and] its own acts of independent and contributory negligence." He concluded that a $10,000 penalty was warranted for each violation.

On review, SOCCO disputes the judge's findings that it is liable for the violations, that "top management," its foreman, and the miners were negligent, and that the negligence of the foreman, as well as the rank-and-file miners, should be imputed to it.

Actions of the Foreman and the Miners

The judge concluded that foreman Darst was negligent in supervising the miners involved in the accident. SOCCO argues that Darst was a safe foreman and that any negligent acts were committed by Six and Endicott in direct contravention of company policy and Darst's instructions. SOCCO also urges that it was unusual for miners to work under unsupported roof, and that because Six and Endicott were safe and experienced miners, Darst had properly determined that they did not need special attention.

In deciding whether Darst was negligent, we look to whether Darst acted with the care required under the circumstances. We conclude that he did not. 3/ The evidence establishes that both Six and Endicott had been observed under unsupported roof on other occasions, and that Six had received two prior warnings for violations of roof control procedures. Tr. at 94, 131, 136, 160; Tr. II at 77. The evidence also establishes that chronically bad, potentially dangerous roof conditions existed in the section where the accident occurred, and in the accident area on the day of the roof fall. Tr. at 56, 72, 87, 89-90, 105-106, 108, 111, 137, 139, 172-174, 177-178; Tr. II at 21, 23-24, 44-45, 82-83, 116-117. The poor condition of the roof in the section should have caused the foreman to pay particularly close attention to any activity occurring in the vicinity, in this instance the removal of temporary supports. Furthermore, Darst's directions as to the removal of the jacks were, at best, incomplete. In the dangerous situation confronting the miners that day, the foreman did not give specific instructions as to how to remove the jacks with a loader, and left the area while the work was in progress. Tr. II at 101, 107-109. Consequently, we conclude that the judge's finding that Foreman Darst negligently supervised Six and Endicott is supported by substantial evidence.

3/ SOCCO's major premise is that the judge erroneously determined that Darst never instructed the miners to remove remotely the first row of temporary supports with the loader, and that this finding is inconsistent with other parts of his decision. We agree that the judge's decision permits the inference that Darst did not give the loader instructions, and to the extent it does so is wrong. The evidence is undisputed that Darst instructed Six to remove the jacks with the loader. This fact does not, however, resolve the ultimate issue of Darst's negligence.

The judge further found that the violations also were the result of a reckless disregard for safe mining practices by both Six and Endicott. The evidence amply demonstrates that in going under unsupported roof the miners knowingly behaved in a manner contrary to safety instructions, company policy. Tr. at 62-63, 109-111, 113, 131, 140, 160; Tr. II at 144. Both failed to exercise reasonable care for themselves or for each other under hazardous conditions. Thus, substantial evidence supports a finding that both rank-and-file miners acted in a negligent manner.

SOCCO's Liability for the Miners' Violative Acts

Section 75.200 provides that "[n]o person shall proceed beyond the last permanent support unless adequate temporary support is provided." There is no dispute that the miners violated this proscription. SOCCO's approved roof control plan requires that temporary supports be remotely removed. There also is no dispute that Six and Endicott did not do so. Although SOCCO does not dispute the facts underlying the violations, it contends that the miners' behavior was idiosyncratic and unpredictable, and, therefore, that imputation of their violative acts to it is improper.

It is well-settled that under the Mine Act, an operator is liable without fault for violations of the Act and mandatory standards committed by its employees. Allied Products Co. v. FMSHRC, ____ F.2d ____, No. 80-7935, 5th Cir. Unit B (Feb. 1, 1982); American Materials Corp., 4 FMSHRC 415 (March 1982); Kerr-McGee Corp., 3 FMSHRC 2496 (November 1981); El Paso Rock Quarries, Inc., 3 FMSHRC 35 (January 1981). Thus, we reject SOCCO's argument that it is not liable for the violations.

Number of Violations

The judge concluded that the operator was liable for two violations of the Mine Act. SOCCO asserts that it was charged twice with the same violation: "The required conduct was the same [i.e., persons should not work under unsupported roof]; the alleged violations merged; and MSHA should have been required to elect to proceed under one provision or the other for the single occurrence." SOCCO argues that the same evidence supporting the allegation that the miners removed temporary supports by hand, rather than remotely, demonstrates also that these miners traveled and were working under unsupported roof. 4/

4/ SOCCO also challenges the judge's conclusion that it was legally responsible for designing and enforcing a safety program to ensure compliance with the Mine Act. It is clear that under the Mine Act, the operator is responsible for maintaining a safe workplace. S. Rep. 95-181, 95th Cong., 1st Sess., 18 (1977); reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 606 (1978) (Legis. Hist.). The Act, however, imposes no specific duty to design and implement a safety program which ensures employees' perpetual compliance with the mine safety laws. The question properly before the judge was to determine, in assessing a penalty, whether the operator was negligent. SOCCO's safety procedures are relevant only in judging whether SOCCO exhibited a lack of care in regard to the occurrence of the violations. See discussion, infra.

The miners violated section 75.200 and the roof control plan adopted thereunder in two ways: by omission, in failing to remove remotely the temporary supports, and by commission, in traveling and working under unsupported roof. Despite the fact that these transgressions arose out of a single series of events, the miners committed separate violations. Cf. Peabody Coal Co., 8 IBMA 121, 129 n.2 (1977); Eastern Associated Coal Corp., 1 IBMA 233, 236 (1972). Thus, we affirm the judge's conclusion that two violations occurred. 5/

Imputation of the foreman's and miners' negligence for penalty purposes 6/

Two distinct imputation principles are involved in this case: (1) as we have already discussed, the imputation of the employees' acts to establish the operator's liability for violations; and (2) the imputation of the employees' negligent acts for penalty purposes. We have concluded that the judge properly imputed the miners' violative acts to the operator for purposes of liability. The remaining question is whether he properly imputed the foreman's and the miners' negligent acts to SOCCO for penalty purposes.

Section 110(i) of the Act requires that in assessing penalties the Commission must consider, among other things, "whether the operator was negligent." 30 U.S.C. § 820(i). We have previously held that "[s]ince operators typically act in the mines only through such supervisory agents, ... consideration of a foreman's actions is proper in

5/ The judge also concluded: "The record shows the section foreman's failure to supervise and monitor the remote recovery of the temporary supports [violated] the safety precautions set forth in 30 C.F.R. § 75.200-14." He then specified the ways in which Darst purportedly violated 30 CFR § 75.200-14, and in each instance he found that Darst's failure to comply with the provisions was indicative of the foreman's and top management's negligence. The judge erred in using § 75.200-14 as a benchmark for negligence. Sections 75.200-6 through 75.200-14 are criteria promulgated by the Secretary for the guidance of his District Managers in their approval of roof control plans. These sections do not impose a duty upon an operator. Rather, the duty is imposed by the approved and adopted roof control plan, which may or may not contain provisions equivalent to the criteria. The judge's error is not prejudicial, however, because there is substantial evidence apart from this finding to support the findings of violations and SOCCO's negligence.

6/ Although the judge's primary conclusion was that the foreman and the miners were negligent, and that their negligence was imputable to SOCCO, he also concluded that the operator was independently negligent. The record does not support the judge's inferred findings that SOCCO failed to supervise its foremen adequately and that SOCCO "top management" decided to remove the coal, necessitating removal of the temporary supports. The error is not material, however, because, as discussed infra, the operator's negligence is established by that of its foreman.

evaluation of negligence for penalty assessment purposes." Nacco Mining Co., 3 FMSHRC 848, 850 (April 1981)(construing analogous penalty provision in 1969 Coal Act). Therefore, we hold that the judge properly imputed the foreman's negligent actions to the operator in considering the amount of penalty to be assessed. 7/

Whether the negligence of a rank-and-file miner may be imputed to an operator for penalty purposes has not yet been addressed. Congress imposed primary responsibility on operators for providing a safe work environment, although it noted that the effort must be a joint one with miners. Legis. Hist. at 606. Congress further stated that the purpose of civil penalties is to ensure the operator's compliance with the requirements of the Mine Act. Legis. Hist. at 628-629, 1347-1348. "Operators" include their agents, who are defined in section 3(e) of the Mine Act as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." (Emphasis added.) 30 U.S.C. § 802(e). Furthermore, the legislative history of the 1969 Coal Act, from which the relevant provisions of the Mine Act were derived, stated that the provision for assessment of civil penalties is "necessary to place the responsibility for compliance with the Act and the regulations, as well as the liability for violations on those who control or supervise the operation of coal mines as well as on those who operate them." It declared further that agents of operators should include supervisors such as foremen. S. Rep. 91-411, 91st Cong., 1st Sess. 39, 44 (1969); reprinted in Legislative History of the Federal Coal Mine Safety Act of 1969 at 165, 170 (1975). The Senate Report on the Mine Act reiterated this view and added: "In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards." Legis. Hist. at 628-629. Thus, where agents are negligent, that negligence may be imputed to the operator for penalty purposes.

As seen from the above review, the statutory language and the legislative history are not directed at imputing the negligence of rank-and-file miners to the operator for penalty purposes. Thus, we reverse the judge's holding that the negligence of a rank-and-file non-supervisory employee may be directly imputed to the operator for purposes of penalty assessment. However, where a rank-and-file employee has violated the Act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct. Nacco, supra, 3 FMSHRC at 850-851. We examine below the record evidence in this regard in the context of the proper penalty assessment.

7/ In Nacco, we described the circumstances in which a foreman's negligence might not be considered to be the operator's for penalty assessment purposes: "Where ... an operator has taken reasonable steps to avoid a particular class of accident and the erring supervisor unforseeably exposes only himself to risk, it makes little enforcement sense to penalize the operator for 'negligence.'" 3 FMSHRC at 850. The Nacco holding is inapplicable here because the foreman's negligence helped to expose miners, whose supervision was his responsibility, to danger.

Assessment of penalty

We have affirmed the judge's finding of two violations and his imposition of liability on SOCCO. We must now consider whether, in light of our discussion regarding imputation of negligence for penalty purposes, the judge's penalty assessments are appropriate. Section 110(i) requires that in assessing a penalty the Commission consider the operator's history of previous violations, the appropriateness of the penalty to the size of the business, the effect on the operator's ability to continue in business, the operator's good faith in attempting to achieve rapid compliance, the gravity of the violation, and whether the operator was negligent. The parties stipulated as to the first four of these criteria, and the judge accepted their stipulations. Tr. at 29-31. With respect to gravity, the judge found the violations were extremely serious, and we agree.

We do not agree, however, with the judge's discussion of the negligence criterion and his assessment of maximum penalties in this case. We have held that the judge erred in directly imputing the rank-and-file miners' negligence to SOCCO for penalty assessment purposes. As discussed, the correct inquiry is to determine whether their violative conduct was attributable to an omission of the operator. In this regard, SOCCO presented evidence directed at establishing the adequacy of its safety programs. Tr. at 26, 63, Tr. II at 70-73, 161-162, 194, 199-204, 220. While there may be some question about the overall effectiveness of these programs (Tr. at 95; Tr. II at 115-116, 132, 165, 167-169, 191-193, 219-220), the record does not support a finding that the safety programs contributed directly or indirectly to the violations at issue. Thus, we conclude that apart from the foreman's negligence, which has been established and is imputable to the operator, the evidence does not establish further negligence by SOCCO.

Because the judge's assessment of maximum penalties for each violation was in large part based on his conclusions that the rank-and-file miners' negligence was imputable to the operator and that the operator was independently negligent, conclusions that we have overturned, we must re-evaluate the penalties to be assessed.

Through his special assessment procedures, the Secretary proposed that a penalty of $6,000 be assessed for the failure to remotely remove roof supports, and that a penalty of $4,000 be assessed for travelling and working under unsupported roof. Under the Act the Secretary is authorized to propose penalties for violations (30 U.S.C. § 815(a)), but in a contested case the responsibility for assessing penalties rests with the Commission. 30 U.S.C. § 820(i). Shamrock Coal Co., 1 FMSHRC 469 (June 1979), aff'd, No. 79-3393, 6th Cir. (March 9, 1981). Based on our independent review of the record and application of the statutory penalty criteria, we agree with the Secretary that penalties totalling $10,000 for the two violations are appropriate. However, unlike the Secretary, in the circumstances of this case we find no basis for assessing a higher penalty for the roof support removal violation than for the working under unsupported roof violation. Rather, we find that, in light of the interrelation of the two violations, penalties of $5,000 for both violations are appropriate and consistent with the statutory criteria.

Did the judge comply with 29 C.F.R. § 2700.65?

We have stated previously that Commission Rule 65, 29 C.F.R. § 2700.65, 8/ and the Administrative Procedure Act, 5 U.S.C. § 557(c)(3) 9/:

> [R]equire findings of fact, conclusions of law, and supporting reasons in order to prevent arbitrary decisions and to permit meaningful review. As the D.C. Circuit has emphasized, these requirements "are not mere procedural niceties; they are essential to the effective review of administrative decisions." U.S.V. Pharmaceutical Corp. v. Sec'y of HEW, 466 F.2d 455, 462 (1972). Our function is essentially one of review. See 30 U.S.C. § 823(d) .... Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively. See Duane Smelser Roofing Co. v. Marshall, 617 F.2d 448, 449-450 (6th Cir. 1980); U.S.V. Pharmaceutical Corp., supra; UAW v. NLRB, 455 F.2d 1357, 1369-1370 (D.C. Cir. 1971); Anglo-Canadian Supply Co. v. F.M.C., 310 F.2d 606, 615-617 (9th Cir. 1962); R.W. Service Systems, Inc., 235 N.L.R.B. No. 144, 99 L.R.R.M. 1281 1282 (1978).

The Anaconda Co., 3 FMSHRC 299-300 (February 1981).

The judge's decision under review minimally complies with our rules and the APA. It contains findings of fact supporting the conclusion

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8/ 29 C.F.R. § 2700.65 states in pertinent part:

> (a) Form and content of the judge's decision. The judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order. If a decision is announced orally from the bench, it shall be reduced to writing after the filing of the transcript....

9/ 5 U.S.C. § 557(c)(3) provides in part:

> All decisions, including initial, recommended, and tentative decisions are a part of the record and shall include a statement of--
>
> (A) findings and conclusions, and the reasons or basis therefor, on all material issues of facts, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof. (Emphasis added.)

5 U.S.C. § 557(c)(3) is applicable through § 105(d) of the Mine Act, 30 U.S.C. § 815(e), which provides for hearings in accordance with 5 U.S.C. § 554.

that the violations occurred and that SOCCO was liable for the violations. It also contains findings sufficient to support the conclusion that SOCCO, through its foreman, was negligent in allowing the violations to occur, and that the violations were extremely serious. It does not, as did the decisions in Anaconda, "cross the line from the tolerably terse to the intolerably mute." 3 FMSHRC at 302.

Conclusion

Accordingly, we affirm the judge's conclusion that two violations of 30 C.F.R. § 75.200 occurred and assess penalties of $5,000 for each violation. 10/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

10/ We respectfully disagree with our dissenting colleague's suggestion that failure to grant paragraphs 3 and 4(a) of the operator's petition for review which were specifically directed toward the appropriate penalty, precludes us from reviewing and reducing the penalty assessed by the judge in this case.

Failure to grant review of a portion of a petition may bar consideration of the issues raised therein. 30 U.S.C. § 823(d)(2)(A)(iii). However, in this case we do not reach the question. Here, among the issues which we did direct for review is the question of whether the judge correctly evaluated the operator's negligence in relation to the violations found (see paragraphs one and two of the operator's petition).

The Act mandates determination of an operator's negligence as a component in penalty assessments. 30 U.S.C. 820(i). Accordingly, we have reviewed the negligence issue raised by paragraphs one and two of the petition on review. We conclude that on the record before us the negligence that can be attributed to the operator is considerably less than suggested by the judge. Under these circumstances, it is appropriate for us to reduce the maximum penalties assessed by the judge. To not do so would afford the operator little relief in light of our findings regarding negligence.

Commissioner Lawson concurring in part and dissenting in part:

I am in agreement with the majority and the judge below in their respective findings of two violations of the Act. Roof falls continue to be the leading cause of death in the mines, and the roof here was indisputably bad. 1/ Tr. I at 63, 137, 177-178; Tr. II at 107. Further, the violations here directly resulted in the death of miner James Six. But I dissent from my colleagues' reduction of the penalties imposed on this mine operator.

The petition for discretionary review filed by the operator sought review of numerous questions. On some of these review was granted. However, review was sought but specifically denied on all issues involving the amount of the penalty, and reducing the penalties in this case is thus procedurally improper. 2/

As a consequence of the Commission's denial of review of these issues, neither the operator nor the Secretary, of course, briefed the Commission on whether or not the penalties assessed were excessive. The operator's contentions in its petition for review were restricted to whether it was responsible for the violations, not the amount of the penalties assessed. Nevertheless, the majority has determined that the penalties assessed by the ALJ are excessive, and that "lower penalties are warranted." Page 1, supra.

1/Indeed, fatalities as the result of roof falls from January 1 to June 4, 1982 have dramatically increased; twenty-nine miners have died this year, compared with nine deaths in 1981, and twelve deaths in 1980 for this same time period. Daily Fatality Report, U. S. Dept. of Labor, MSHA, June 4, 1982 and June 4, 1980.

2/More specifically, review was denied on the issues of:

...

"(3) Judge Kennedy's Decision and Order is contrary to law in that SOCCO was denied the due process of law by being ordered to pay a penalty $10,000 higher than the proposed assessments it would have been obligated to pay if it had not exercised its right to challenge the proposed penalties through the hearing process;

(4) The following substantial questions of law, policy or discretion are involved in this matter:

(a). Whether an Administrative Law Judge can properly increase and impose penalties to a total of $20,000 "in order to deter further violations, to heighten top management's awareness of the need for meaningful supervision and sanctions to back up the mine safety laws, and to ensure, if possible, voluntary compliance with those laws;" Petition for Discretionary Review, page 2.

Section 113(d)(2)(A)(iii) of the Act sets forth the relevant requirements of a petition for discretionary review, viz: "If granted, review shall be limited to the questions raised by the petition."

Section 113(d)(2)(B) enumerates the procedural requirements under which the Commission may, on its own motion, order a case before it for review, whether or not a petition for discretionary review has been filed, but the issue of the amount of penalty was not raised here by the Commission on its own motion. As that section provides: "If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph."

Thus, the Commission did not grant review of any issue asserting that the penalty amount was excessive--indeed denied review when such was sought by SOCCO--nor did it raise this issue sua sponte. Accordingly, the statute prohibits considering the issue of penalty excessiveness in this review proceeding.

Although one need not endorse every step of the penalty assessment process taken by the judge below, my colleagues have failed to provide a more reasoned analysis for reducing by fifty percent the penalties to be imposed. All statutory penalty assessment criteria (set forth in section 110(i) of the Act) were agreed to before the judge, except "negligence" and "gravity." There is no disagreement with the judge's conclusion that "the violations were extremely serious," nor that this operator was negligent.

However, the majority seeks to sever the negligence criterion, not pursuant to the statute--which incorporates no separation of the enumerated criteria to be considered in assessing penalties--but on the totally unsupported assertion that the judge's penalty assessment "...was in large part based on his conclusions that the rank and file miners' negligence was imputable to the operator and that the operator was independently negligent, conclusions that we have overturned, (and) we must reevaluate the penalties to be assessed." Page 7, supra.

The decision below, however, does not suggest, much less state, that any dollar, percentage, or other numerical value is to be assigned to the "negligence", or any of the other criteria listed in section 110(i) of the Act. Notwithstanding this void, the majority would now embark upon the uncharted waters of independent penalty assessment. My colleagues have thus determined that miner Six's death is worth $5,000 for each violation, contrary to not only the evaluations of the judge below, but those of the Secretary and the MSHA Office of Assessments as well. 3/ Nor does the majority herein cure what it views as the deficiencies in the opinion below by any independent assignment of numerical or other objective indicia to the Act's "negligence" criteria. No future guidance is therefore furnished for either mine operators or the Secretary, and conclusorily glossing over the fifty percent penalty reductions may be superficially attractive, but falls short of being statutorily satisfactory or in accord with the Act.

3/The majority's disagreement with the quantum of negligence assigned to these violations by the judge fails to address the inseparability of the six statutorily required criteria required to be considered in penalty assessment, and, as noted, review was denied on the issue of penalty assessment, and the parties consequently denied the opportunity to present their views thereon.

The majority thus holds that these penalties are "appropriate and consistent with the statutory criteria" (page 7, supra), but its opinion is entirely silent as to four of the section 110(i) criteria, does not dispute the gravity of the violations, and parses the negligence admittedly involved in a manner obviously different than did the judge below, but in a manner substantially less explicated. The judge below was closer to the mark--and the Act--in noting that the purpose of penalties is deterrence, and that the amount warranted for each violation was imposed for that reason. Contrary to the majority's opinion herein, that at least is in accord with the legislative history of the Act. Legis. Hist. at 603, 628-630.

As the Senate Committee Report notes:

> "In overseeing the enforcement of the Coal Act the Committee has found that civil penalty assessments are generally too low, and when combined with the difficulties being encountered in collection of assessed penalties (to be discussed, infra), the effect of the current enforcement is to eliminate to a considerable extent, the inducement to comply with the Act or the standards, which was the intention of the civil penalty system." Legis. Hist. at 629, (Emphasis added).

The majority's contradictory analysis is best summarized in its own words, as quoted in the Legislative History:

> "In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards." Legis. Hist. at 628-629. Page 6, supra.

In addition to ignoring the procedural requirements of the Act by reviewing an issue denied review, and reducing the penalty assessed below by 50% founded upon no more than disagreement with the judge, the majority has further erred in reversing the judge's imputation of non-supervisory miner negligence to the operator for penalty purposes. 4/

The question before the Commission is more properly framed as:

> "If an operator is responsible without fault for a violation, should it not also be responsible without fault for the penalty imposed for the violation?"

It is well established that "...an operator is liable without fault for violations of the Act and mandatory standards committed by its employees." Page 4, supra, (and authorities cited). The statute does not shield the operator, nor should we, from penalty assessment solely because no fault by the operator may have been established. An operator acts only through

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4/ There is no dispute concerning the imputation of negligence to the operator for his agents or supervisory personnel, for penalty purposes. "Thus, where agents are negligent, that negligence may be imputed to the operator for penalty purposes." Page 6, supra.

its employees, and if a non-supervisory or rank and file miner has violated the Act--indisputably the case here--and negligence is established--also not in dispute--that negligence is properly required to be considered in assessing penalties. United States v. Illinois Central Railroad Co., 303 U.S. 239, 244 (1938).

Here, both supervisory and non-supervisory miner negligence unquestionably occurred. To artificially allocate penalty dollars for that negligence between the operator and its rank and file miners provides a ready avenue for an operator to escape penalties and their intended deterrent effect. The operator which structures its operations to avoid supervisory responsibility will now be rewarded. Neither the resulting reduced penalty, nor this denied supervision, is in accord with the intent of the Act, nor does this scheme accord with the mandatory penalty assessment processes required by the Act.

While one can perhaps conceive of a case in which the only negligence could be that of the rank and file miner, this is not that case, and, as we have recently noted, examining claims "in a legal vacuum" is contrary to Commission precedent. Frederick G. Bradley v. Belva Coal Co., 4 FMSHRC 982, 987 (June 1982). The majority's dicta is particularly unfortunate in this case, given its unprecedented independent excursion into penalty assessment.

The majority has apparently read the legislative history as silent with regard to the imputation of the negligence of rank and file miners to the operator for penalty purposes, and leaped from that reading to the assumption that Congress did not therefore intend to include in penalty calculations any negligence of the operator's rank and file miners.

However, providing a means for the avoidance or drastic reduction of penalties is clearly to undercut compliance, more particularly in this case in which there is no question of the presence of negligence admittedly assignable to the operator. This operator is therefore not without responsibility for the violative actions of its rank and file miners, to which it has confessed. 5/

Examination, as the majority suggests, (page 6, supra), of this operator's "supervision, training, and disciplining of its employees", reveals that the judge below found substantial evidence that this operator's "safety programs" contributed to the violations. The majority not only ignores that evidence, and cites none to the contrary, but admits that "...there may be some question about the overall effectiveness of these programs." Page 7, Tr. II at 196.

As to this operator's disciplining its miner-employees for misconduct in performing their assigned duties in violation of the Act--and although the decision of the judge below is silent--the majority refers to Miner Six's having received "...two prior warnings for violations of roof control procedures." While Six had received "two unsafe practice reports,"

5/This operator has conceded that "...it did have miners who were engaged in practices that were stated in those citations." Tr. I at 16.

admittedly non-punitive, no disciplinary action was ever taken against him, despite his having twice failed in his obligations, to properly set a jack as required, and to set temporary supports for the roof in the mine section in which he was working. Tr. II at 76-79, 191-192. Nor had any non-supervisory miners ever been suspended for safety violations. Tr. II at 163-164.

Miner Endicott had never been warned or otherwise disciplined for working under unsupported roof, although the operator had observed both Endicott and Six working under such roof on "other occasions." Page 3, supra. Tr. I at 94, 151, 160; Tr. II at 77-78. Even more shockingly, neither Miner Endicott nor Foreman Darst received any unsatisfactory slips, much less warnings, for their action at the time of the violations which here resulted in the death of Miner Six. Tr. I at 151; Tr. II at 132. To ignore roof control violations, as did this operator, is to invite precisely the sort of disaster which ensued. 6/

Operator witness Darst, the foreman in charge of these miners, testified that he had never issued written warnings or taken any miners to the superintendent for "reckless" behavior. 7/ Tr. II at 115-116. On direct examination this operator named those actually disciplined for safety violations; neither the miners here involved nor their supervisor were ever so disciplined. Tr. II at 162, 165-168. Indeed, Mine Superintendent Roberts made "a conscious decision in this case not to take any disciplinary action." Tr. II at 168-169. In response to the judge's questioning, Superintendent Roberts agreed that he "didn't consider that what occurred on May 5th, 1978 as officially serious as to warrant any disciplinary action with the miners involved." Tr. II at 165.

This operator's supervisory deficiencies are also amply reflected by this record. 8/ Although there was an approved safety training program, as required by the Act (Tr. I at 26), the record fails to reveal any instruction of either miners Endicott or Six, notwithstanding the latter's previously known performance deficiencies.

6/ This operator also stipulated to an admitted fifty-one violations of mandatory standard 30 CFR 75.200 between May 1976 and May 1978. Tr.I at 29.
7/Foreman Darst testified that while he had supervised miners he considered to be reckless, "what I call reckless is if he's running a piece of machinery and he don't take care of it." Tr. II at 115.
8/As to instructions to Miner Six to perform the work that killed him, Foreman Darst responded to the judge's questioning: (Tr. II at 109).

Q.91 Is that the only jack that you intended to have him knock out?
A. Yes.
Q.92 Is that what you told him?
A. No, I just told him to knock the jacks out with a loader. I didn't specify on certain jacks.

Miner Endicott received no instructions from Foreman Darst as to what he "and Six were supposed to be doing in the 15 Entry." Tr. I at 94, 106-107; Tr. II at 108.

In summary, the determination of the judge below that there was substantial--indeed ample--evidence that this operator was grossly negligent in supervision, discipline and training of its rank and file miners is fully supported by this record and SOCCO's negligence, in this regard as well, is fully established. There are no more serious derelictions in underground coal mining than those affecting roof control. Must there be multiple deaths to warrant imposition of the full penalties provided for by the Act?

I therefore dissent to the reduction of the penalties imposed.

A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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August 31, 1982

ELIAS MOSES	:	
	:	
v.	:	Docket No. KENT 79-366-D
	:	
WHITLEY DEVELOPMENT CORPORATION	:	

DECISION

This discrimination case raises several issues under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. IV 1980). These issues include whether an operator violates section 105(c)(1) by interfering with a miner's exercise of a protected right through coercive interrogation and harassment, and whether an operator violates that section by discharging a miner on the suspicion or belief that he has exercised a protected right, when in fact the miner has not. The judge answered both these questions in the affirmative in this case, and for the reasons that follow we affirm his decision. 1/ We remand, however, for the limited purpose of allowing the parties to present arguments and additional evidence concerning the proper amount of back pay to be awarded the discriminatee.

I.

Elias Moses filed a discrimination complaint alleging that Whitley Development Corporation ("Whitley") violated section 105(c)(1) of the Mine Act by firing him because it believed he had reported an accident at Whitley's mine to the Mine Safety and Health Administration. 2/ The administrative law judge issued a decision concluding that Whitley had unlawfully interrogated and harassed Moses as to whether he reported the accident and that it had unlawfully discharged him because it suspected he had reported the accident, even though he had not. 3/ The judge awarded Moses various forms of relief including reinstatement with back pay. We granted Whitley's petition for discretionary review of the judge's decision.

1/ The judge's decision is reported at 3 FMSHRC 746 (March 1981).

2/ Moses filed his discrimination complaint under section 105(c)(3) of the Mine Act since the Secretary of Labor, after investigating Moses' charges, declined to file a complaint on his behalf.

3/ The judge also found that even if Whitley had not discharged Moses, it had nonetheless violated section 105(c)(1) because it failed to retain or rehire Moses solely because he had filed a discrimination complaint. Because we agree Moses was in fact illegally discharged, we find it unnecessary to review this alternative holding.

The factual background of this case is not complicated. Whitley, which is owned by Pascual White and his wife, operates two strip mines located in proximity to one another in southeastern Kentucky. In May 1979, Moses asked Pascual White to hire him as a bulldozer operator. Moses had worked for White as a laborer some nine years before. After Moses applied for the job, his brother-in-law, an MSHA inspector who inspected the Whitley mines, also asked White to hire Moses. White testified that he decided to give Moses a job because he felt "pressured" into taking him on, and hired him without checking his ability to operate a bulldozer. 3 FMSHRC at 748, 761; Tr. 242-44. 4/ Moses started to work for Whitley on May 9, 1979.

On June 19, 1979, a bulldozer overturned at the mine where Moses was working. Although Moses did not see the accident, he was told about it by his foreman, Richard McClure. The next day, MSHA inspectors, including Moses' brother-in-law, arrived by helicopter to investigate the site. 5/ After they had left, McClure asked Moses "if he was the one that called the federal inspectors on that accident." 3 FMSHRC at 748-49; Tr. 187. 6/ Moses replied he had not. Despite Moses' denial,

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4/ The judge found that Moses was hired, in part, because of the pressure placed upon Pascual White by Moses' brother-in-law, the MSHA inspector. 3 FMSHRC at 753, 761. (Substantial evidence supports the judge's rejection of Whitley's suggestion that this pressure was the only reason Moses was hired. Id.) We endorse the judge's conclusion that it was "improper" for the brother-in-law, an MSHA inspector, to ask Whitley's owner to hire Moses. Id. at 756. While Whitley expresses general criticism of this incident (Br. at 3), it advances no claim that it was legally prejudiced in the present case by any impropriety committed by the MSHA inspector in question prior to the operative events and proceedings herein.

5/ White testified that he was aware that he could request inspection by someone other than Moses' brother-in-law if he feared biased inspection. 3 FMSHRC at 761; Tr. 260. MSHA supervisory inspector Kenneth Howard, the brother-in-law's supervisor, also testified:

> [I]t's not our practice to send an inspector to inspect a job where a member of his family is working. If I'd known ... Moses was present at the time ... and that they were related[,] I wouldn't have had [Moses' brother-in-law] sent out there. Permissiveness [in the inspection under such circumstances] is a logical assumption to make.

3 FMSHRC at 751; Tr. 124.

6/ Section 103(g)(1) of the Mine Act grants miners the right to obtain an immediate inspection by MSHA if they believe a violation of the Act or of a mandatory health or safety standard has occurred, or if they believe an imminent danger exists. It also prohibits MSHA from revealing the name of the miner requesting the inspection. The section states in part:

> 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

(footnote 6 continued)

McClure accused him in front of other employees, on two subsequent occasions, of reporting the accident to MSHA. 7/

Near the end of June 1979, Moses was laid off because the bulldozers at the mine were out of order. He was told he would be recalled when repairs on the equipment were completed. On July 2, 1979, while the repairs were still in progress, Moses and his wife drove to Whitley's repair shop to pick up his paycheck. Moses went inside and met with White. There were conflicting versions of the heated conversation that followed and the judge credited Moses' account over that of White. 3 FMSHRC at 749-50, 756-57. Moses testified that he and White argued over whether he had called the inspectors, that he told White he had not, and that he would make White prove he had. According to Moses, at the end of the argument White threatened to fire him. Moses' wife, who overheard the argument, corroborated Moses' story.

Moses drove that night to the home of MSHA supervisory inspector Kenneth Howard. He told Howard he had been accused of reporting the bulldozer accident and asked Howard to "clear" his name. Howard agreed to go to the mine the next morning and inform White that the accident had not been reported by Moses, but rather by a woman whose name had to be kept confidential.

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footnote 6 cont'd.

> 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. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification.

7/ Concerning the two subsequent conversations after McClure's initial questioning, Moses stated that McClure first said to him, in front of others, "He called an inspector on us. He called his brother-in-law." Tr. 63. Moses also testified that after the bulldozer driver who was involved in the accident returned to work, McClure said, in front of the driver, "Oh, he's happy. He called his brother-in-law inspector." The driver responded, "You mean they was out here?" And McClure replied, "Oh yeah, they come out." Moses testified that at this point, he stated: "I don't want to hear it anymore. I'm going to make you prove it." Tr. 64. The judge credited Moses' testimony. 3 FMSHRC at 756.

The following morning, July 3, 1979, Moses went to the mine seeking confirmation that he still had a job. At that time, the bulldozers had not yet been repaired. Moses spoke with McClure, who offered Moses the opportunity to work filling drilled holes with explosives. Moses testified the offer was made in a derogatory fashion. An exchange of profanities ensued. McClure testified that he said if Moses was not going to work, it would be better for Moses to get in his truck and "go on to the house." 3 FMSHRC at 750, 754; Tr. 236. Moses took this to mean he was fired.

Later that same morning, Inspector Howard arrived at the mine. White was not there, so Howard talked to McClure. Howard explained that Moses had been to see him the night before and feared he would be discharged because of suspicions he had asked MSHA to investigate the accident. Howard assured McClure that the accident had not been reported by Moses. McClure told Howard he had already fired Moses that morning. 3 FMSHRC at 751, 754; Tr. 117.

Moses thereafter filed a discrimination complaint with MSHA. Before the bulldozers were repaired, Whitley received a copy of the complaint pursuant to section 105(c)(2) of the Mine Act. After the bulldozer repairs were completed, Moses was not recalled to work.

II.

The first issue to which we turn is whether Whitley coercively interrogated and harassed Moses concerning the reporting of the accident and, if so, whether its actions violated section 105(c)(1) of the Act. The underlying question is whether such interrogation and harassment may ever constitute a violation of section 105(c)(1).

Section 105(c)(1) states that "no person shall discharge or in any manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner." (Emphasis added.) We have previously noted the high priority Congress placed upon the unencumbered exercise of rights granted miners under the Mine Act. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2790 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). As we concluded in Pasula, Congress viewed the free exercise of miners' rights as "essential to the achievement of safe and healthful mines." 2 FMSHRC at 2790. Furthermore, it is clear that section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against "not only the common forms of discrimination, such as discharge, suspension, demotion ..., but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal." S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977) ["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) ["Legis. Hist."].

We find that among the "more subtle forms of interference" are coercive interrogation and harassment over the exercise of protected rights. A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may

not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act. We therefore conclude that coercive interrogation and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act. 8/

This brings us to McClure's conversations with Moses. The judge's findings with respect to the coercive nature of McClure's interrogation of Moses and of McClure's comments concerning him are supported by substantial evidence and to the extent that these findings are credibility resolutions, will not be disturbed on review. Under section 103(g)(1) of the Act, Moses had the right to request an inspection and to do so anonymously. The persistence with which the subject of his supposed reporting of the bulldozer accident was raised and the accusatory manner in which it was done could logically result in a fear of reprisal and a reluctance to exercise the right in the future. These conversations thus constituted prohibited interference under section 105(c)(1). We address below, as part of our analysis of the discharge issue, the question of whether Moses' lack of actual protected activity automatically precludes a finding of interference or discrimination. As we explain below, we conclude that it does not.

III.

With regard to the issue of whether Whitley violated section 105(c)(1) by discharging Moses on the suspicion he had reported the accident, we first must determine whether Moses was in fact fired. As a threshold argument, Whitley asserts that he was not, contending that he voluntarily quit after refusing alternative employment. We conclude, however, that substantial evidence supports the judge's finding that Moses was discharged.

During the crucial discussion on July 3, 1979, McClure told Moses to "go on to the house." This term, the judge found, was commonly used in the coal fields as a synonym for discharge. 3 FMSHRC at 754. The judge's finding is supported by the testimony by White himself. Tr. 265. The judge also found that Inspector Howard stated that McClure had told him later the same morning that Moses had been fired. Id. at 751, 754. The judge credited Howard's testimony, and we see no reason to disturb his finding. Finally, the judge deemed it significant that McClure failed to tell Howard that Moses had not been discharged when Howard explained to McClure that Moses could file a discrimination complaint over his dismissal. Id. at 754. We agree with the judge that if McClure had been misunderstood by Moses, surely McClure would have explained to Howard at that point that he had not fired Moses.

8/ This is not to say that an operator may never question or comment upon a miner's exercise of a protected right. Such question or comment may be innocuous or even necessary to address a safety or health problem and, therefore, would not amount to coercive interrogation or harassment. Whether an operator's actions are proscribed by the Mine Act must be determined by what is said and done, and by the circumstances surrounding the words and actions.

Did Moses' discharge violate section 105(c)(1) of the Mine Act? The judge found the discharge occurred because the operator thought the complainant had engaged in protected activity, even though he had not. Section 105(c)(1) prohibits discharge, discrimination, or interference "because" of "a miner's exercise of any statutory right afforded by [the] Act." While a literal interpretation of this provision might require the actual or attempted exercise of a right before the protection of section 105 comes into play, we reject such a reading for two reasons. First, such an interpretation would frustrate Congressional intent that miners fully exercise their rights as participants in the enforcement of the Mine Act. Second, that approach would also wrongly fail to redress or deter situations where an operator, with the intent of frustrating protected activity, takes adverse action against an innocent miner.

Section 105(c)(1) was intended to "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the [Act]." S. Rep. at 36, Legis. Hist. at 624 (emphasis added). Miners would be less likely to exercise their rights if no remedy existed for discriminatory action based on an operator's mistaken belief that a miner had exercised a protected right. Indeed, the adverse effect of such action might be even more debilitating than discrimination over actual protected activity. In such instances, employees could reasonably fear that they might be treated adversely on the basis of suspicion alone, and thus would seek to avoid even the appearance of asserting their rights. The same reasoning applies with regard to the various forms of interference such as coercive interrogation and harassment previously discussed in this decision. An equally important consideration is that an affected miner suffers as much by mistake as he would if he were discriminated against because he had actually engaged in protected activity. We conclude that discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though,in fact, he has not, is proscribed by section 105(c)(1).

We now examine the evidence surrounding Moses' termination. In Pasula, supra, we set forth an analytical framework for deciding discrimination cases. We concluded that the complainant establishes a prima facie case of a violation of section 105(c)(1) if he proves by a preponderance of the evidence that (1) he engaged in protected activity, and (2) that the adverse action was motivated in any part by the protected activity. 2 FMSHRC at 2799. We also held that an operator may respond by either rebutting the prima facie case or if it cannot rebut, by showing in defense that even if part of its motive were unlawful, (1) it was also motivated by the miner's unprotected activities, and (2) would have taken the adverse action in any event for the unprotected activities alone. Id. at 2800. See also Robinette v. United Castle Coal Co., 3 FMSHRC 803, 818 n. 20 (April 1981). A similar, but modified, framework is appropriate for resolving allegations of discrimination for the suspected exercise of a statutory right. In such cases, the complainant establishes a prima facie case by proving that (1) the operator suspected that he had engaged in protected activity, and (2) the adverse action was motivated in any part by such suspicion. The operator may, of course, still successfully rebut or further defend along the lines summarized above.

Applying this analysis to the facts at hand, there is no doubt on this record that White and McClure believed Moses had reported the bulldozer accident to MSHA. The next inquiry concerning the prima facie case is whether Whitley discharged Moses in any part because of this belief.

The judge found that White was very "sensitive" to what he regarded as MSHA influence on his operation, and consequently "resented the reporting of [the] accident" and was very concerned to discover who had reported it. 3 FMSHRC at 753. The judge also credited Moses' wife's testimony that during the July 2d conversation White told Moses "You don't work for them damn inspectors. I write your checks." 3 FMSHRC at 749, 757; Tr. 170. This testimony is significant because it tends to corroborate Moses' statement that during their discussion about calling the inspector, White said "You go get [your brother-in-law, the inspector], and ... you'll not work here any more." Tr. 69. Finally, on July 3d, the day of the firing, McClure's and Moses' argument, at least in part, involved who had called MSHA. This evidence supports the conclusion that Moses lost his job, at least in part, because of Whitley's belief that Moses had engaged in a protected communication with MSHA. Thus, we conclude that Moses established a prima facie case of discrimination.

We must next examine whether Whitley nevertheless would have discharged Moses for certain unprotected activities alone that it asserts were the cause of his departure. Whitley argues that Moses repeatedly failed to discharge his duties competently, and also used bad language toward McClure and White. The evidence, however, does not support a successful defense against the prima facie case.

Concerning the company's allegations of Moses' inept performance as a bulldozer driver, James Davis, who was in charge of servicing the bulldozers, stated that the breakdowns in the equipment were "about the same" after Moses came to work as they were before. Tr. 138. Davis testified that he had watched Moses operate a bulldozer every day Moses worked, and had never seen him misuse the equipment. Tr. 131. When asked if Moses possessed the skill of other operators, Davis said he had seen better bulldozer operators but he had also seen worse. Tr. 137. Bobby Durham, who also worked with Moses, concurred in Davis' assessment. Tr. 153-54. This evidence undercuts the company's claim that Moses was irresponsible with the equipment. Further, Whitley failed to present any evidence as to what its usual practices and policies were with respect to bad operators of equipment. As we have noted, evidence of practices and policies consistent with the adverse action taken may be persuasive support of an operator's defense of justifiable cause. Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982). We have previously emphasized that it is not our role to concern ourselves with the general wisdom or fairness of an operator's decision to take an adverse action. See Belva Coal, supra, 4 FMSHRC at 993-94; Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2516-17 (November 1981), pet. for review filed, No. 81-2300, D.C. Cir., December 11, 1981. However, in this case, we find Whitley's evidence regarding Moses' allegedly poor performance to be so weak that this defense seems virtually pretextual, and we therefore agree with the judge (3 FMSHRC at 760) that Whitley

failed to show that it would have fired Moses in any event for this asserted reason. 9/

Whitley's other justification for termination was that Moses had a bad attitude and used abusive language with his supervisors. The judge found that because Moses had worked for respondent in 1970, Whitley "must have known what sort of person he was hiring ... in 1979," and that therefore the record failed to support a finding Moses would have been discharged for those reasons alone in any event. 3 FMSHRC at 761. Unlike the contention that Moses was an unskilled bulldozer operator, the record reveals Moses' use of bad language (Tr. 12, 70, 190, 206, 236), and also shows his "bad attitude," at least in the eyes of White. Tr. 260. Whitley argues that its justification cannot be dismissed on the basis of speculation that White knew what Moses' personality was like merely because Moses had worked for him 9 years before. If this were all that supported the judge's conclusion, we might well agree. There is nothing in the record to indicate what Moses' work habits and relationships were when he was previously employed. However, Whitley presented no evidence showing that prior to White's and McClure's angry reactions over Moses' supposed reporting of the accident they were concerned enough with Moses to fire him for those reasons. Indeed, as the judge correctly noted, much of the language and improper attitude arose in response to Whitley's unlawful and provocative attempts to determine if Moses had called the inspectors. 3 FMSHRC at 761. We thus conclude that Whitley has not proven that it would have fired Moses for his language and attitude alone. In sum, we affirm the judge's conclusion Whitley violated section 105(c)(1) when it fired Moses on the belief that he had exercised a protected right.

IV.

The final issue concerns back pay. In his notice of hearing, the judge advised the parties of his intent to render an oral decision at the close of the evidence which would later be reduced to writing. At the close of the hearing, however, the judge did not render a bench decision, but rather requested that additional evidence be submitted, including Moses' payroll record. Neither party had introduced any evidence concerning back pay at the hearing. After Whitley sent the judge a copy of Moses' payroll sheet (marked Exhibit "H"), the judge issued his written decision. The judge ordered, among other things, that Whitley reinstate Moses and pay him back wages on the basis of a 40-hour week.

9/ In an attempt to establish Moses' abuse of equipment, Whitley submitted numerous repair bills for its equipment. Moses was not the only person to operate the bulldozers, and there was no evidence connecting Moses to any of the repairs which were paid for during and after the time Moses was employed by Whitley in 1979. Although Whitley argues that the judge improperly interpreted the bills in a variety of ways, the bills are but one item leading to the judge's conclusion that Moses' allegedly poor performance would not have led to his discharge. Other evidence supports his findings, so that Whitley's justifications fail regardless of consideration of the bills.

Whitley argues that it was deprived of due process when the judge failed to issue an oral decision at the close of the evidence. Whitley also appears to be contending that such a decision could not have included the remedy of back pay since no evidence on that issue had been offered. It further argues that it was denied an opportunity to present argument and further evidence with respect to the issue after it submitted the payroll sheet.

We find no fault in general with the decisional process adopted by the judge. The judge's intent to issue a decision from the bench at the hearing's close was not an ironclad guarantee. The dynamics of trial often reveal complicated issues requiring further contemplation. Moreover, section 113(d)(1) of the Act requires a judge to make a decision constituting a "final disposition of proceedings," and Commission Rule 65(a) states that the judge's final disposition of the proceedings "shall be in writing." 29 C.F.R. § 2700.65(a). We have previously held that a bench decision is not a "final disposition" until it is written. Capitol Aggregates, Inc., 2 FMSHRC 1040, 1041 (May 1980). Thus, even had the judge issued his intended oral decision, it could have been subject to revision by the judge. Moreover, a claimant's failure to present evidence as to back pay is not tantamount to abandoning a claim, and, unless there are compelling reasons to the contrary, relief should nonetheless be awarded. Bobby Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2-3 (January 1982).

The record in this case was left open at the close of the hearing for the submission of additional evidence regarding back pay. Whitley submitted the information requested and, indeed, offered more. 10/ Under these circumstances, we perceive no abuse of due process. Nor do we believe, strictly speaking, that Whitley was denied an opportunity to present argument concerning the payroll data it submitted or to adduce further evidence with respect to the issue. Certainly no action by the judge foreclosed such a submission. Also, Whitley did not, as it might have done, present an interpretive analysis with its data; nor did it, as it should have done, indicate to the judge or to Moses that it had additional evidence it wished to submit. In silence and inaction, Whitley came close to waiving whatever objections it might have had.

Yet we recognize that it may have been difficult for the parties to know how to proceed with regard to back pay. Although the judge stated in his notice of hearing that the issues to be tried were "whether [Moses] was discharged in violation of section 105(c)(1) of the Act so as to entitle him to ... relief ... including reinstatement ... with back pay and other benefits," he did not spell out for the parties the procedural course he wished to take with regard to the back pay issue. While the judge was not compelled to do so, under the circumstances of this case both parties might well have benefited from a detailed explanation of the procedures to be followed. Therefore, in

10/ In a letter accompanying the payroll data, Whitley's attorney stated to the judge: "If after inspecting the enclosed documents you require any further information regarding this matter I will be most happy to provide whatever you desire."

the interest of procedural regularity and to insure fairness to the parties, we remand this matter to the judge for the limited purpose of reconsideration of back pay issues concerning the proper amount, if any, to be awarded Moses. The judge should afford the parties the opportunity to present any argument and any additional relevant evidence on back pay issues, including but, not limited to, the interpretation of the payroll data already submitted, and the proper number of hours per week upon which to compute back pay. The parties may also submit evidence, if any, with respect to any actual interim earnings of Moses since July 3, 1979.

For the foregoing reasons, we affirm the judge's conclusions that Whitley violated section 105(c)(1) of the Mine Act, and we remand for the expedited reconsideration of back pay issues.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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August 31, 1982

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. PITT 77-15
ADMINISTRATION (MSHA)	:	PITT 77-16
	:	PITT 77-17
v.	:	PITT 77-18
	:	PITT 77-19
FLORENCE MINING COMPANY	:	PITT 77-23
HELEN MINING COMPANY	:	
ONEIDA MINING COMPANY	:	IBMA 77-32
NORTH AMERICAN COAL CORPORATION	:	

DECISION

This case arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq (1976)(amended 1977)("the Coal Act"). 1/ The issue is whether the administrative law judge erred in concluding that 30 C.F.R. § 75.1405 does not apply to certain mine haulage equipment that travels both on and off tracks. For the reasons that follow, we reverse the judge's decision.

The standard at issue essentially reiterates section 314(f) of the Coal Act and provides:

> All haulage equipment acquired by an operator of a coal mine on or after March 30, 1971, shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment. All haulage equipment without automatic couplers in use in a mine on March 30, 1970, shall also be so equipped within 4 years after March 30, 1970.

1/ On March 8, 1978, this case was pending on appeal before the Department of Interior's Board of Mine Operations Appeals ("the Board"). Accordingly, it is before the Commission for disposition. 30 U.S.C. § 961 (Supp. IV 1980). The Mine Safety and Health Administration (MSHA) has been substituted in the caption for its predecessor agency, the Mining Enforcement and Safety Administration (MESA).

In this case review was sought of an unabated notice of violation. For the reasons stated in our decision in Eastern Associated Coal Corp., 4 FMSHRC 835 (May 1982), we will review the merits of the notice at this time.

30 C.F.R. § 75.1405-1, which delineates the scope of the above standard, provides:

> The requirement of § 75. 1405 with respect to automatic couplers applies only to track haulage cars which are regularly coupled and uncoupled (emphasis added).

The six notices of violation at issue allege that the operators (all subsidiaries of the North American Coal Company at the time the notices were issued) failed to equip "rubber-rail" mine cars with automatic couplers. 2/ The issue is whether the standard applies to "rubber-rail" equipment.

This case has an involved procedural history. Litigation of the issue began on April 3, 1974, when the companies filed separate petitions for modification of § 75.1405 under section 301(c) of the Coal Act. The petitions alleged that the standard was inapplicable to rubber-rail equipment or, in the alternative, that application of the standard would diminish safety. The petitions for modification were consolidated. On March 26, 1976, the administrative law judge ruled that the rubber-rail vehicles were not "track haulage cars" within the meaning of § 75.1401-1. He made no findings with respect to the diminution of safety argument. The Secretary appealed this decision to the Board of Mine Operations Appeals.

Thereafter, the Board ruled in a different case that a petition for modification alleging that a mandatory safety standard was inapplicable did not state a claim upon which relief could be granted under section 301(c) of the Coal Act. Itmann Coal Co., 6 IBMA 121, 128 (1976). Subsequently, the Board reviewed the judge's modification decision in light of its holding in Itmann and concluded: (1) the applicability of § 75.1405 to rubber-rail equipment was not a proper issue under section 301(c) of the Coal Act, but (2) the issue could be litigated if the companies were issued notices of violation of § 75.1405 and applied for review of the notices under section 105 of the Coal Act. Oneida Mining Co., 6 IBMA 343, 349-350 (1976).

The Secretary then issued the presently contested notices of violation. The companies filed for review and the case was assigned to the same judge who had heard the modification case. The parties stipulated that the issue before the judge was whether § 75.1405 was applicable to rubber-rail vehicles and that this issue should be decided on the basis of certain specified exhibits and specified portions of the testimony from the previous modification proceeding.

2/ Rubber-rail equipment can be used both on and off track. When operating on track, a rubber-rail car is pulled by a small locomotive and moves along the track on steel wheels similar to traditional railroad equipment (Tr. 149). When the car reaches the end of the track, the rubber tires, which are suspended along the side of the car, are dropped and they "literally lift the vehicle up off the rail" (Tr. 149). The car is then pulled by a battery powered vehicle and can move along the mine floor or in the supply yard where there are no tracks.

On April 20, 1977, the administrative law judge rendered a decision, the substance of which was virtually identical to his decision in the modification case, finding that the regulation was not applicable to the company's rubber-rail cars. Prior to his discussion and resolution of the issue, the judge set forth those findings of fact he believed to be essential. The findings which are relevant for purposes of our decision are those pertaining to the equipment, the method of coupling and uncoupling the equipment, and MESA's history of enforcement of the automatic coupler standard.

The judge found that approximately 600 rubber-rail cars were operating at the six mines. The cars are coupled and uncoupled manually by the draw bar and pin method (Dec. at 3). The draw bar is a steel bar 1-1/2 inches thick, 4 inches wide and 30 to 36 inches long (Tr. 179-180). It serves as the horizontal link between two cars and is secured by steel pins which are inserted vertically through holes in "pockets" at the end of each car. Coupling takes place when the pocket holes are aligned with holes at each end of the draw bar and the pins are dropped through the holes in the pockets. The process is reversed for uncoupling (Tr. 168). Alignment of the draw bar holes with the pocket holes and insertion of the pins are done manually.

The judge found that the rubber-rail cars are used solely to transport men, equipment and supplies. 3/ He also found that the cars are used intermittently and that 2 to 3 times as many couplings and uncouplings are performed off track as are performed on track (Dec. at 3-4).

The judge found that the rubber-rail cars are loaded on the surface (in the supply yard) and moved on track into the mine in trips of 5 to 15 cars (Dec. at 4 and Tr. 151-155). The trips are pulled by locomotives (Tr. 150). He found that once in the mine the trips are broken down into small groups of 1 to 5 cars, the wheels are lowered and the small trips are pulled by tractors to the section where the supplies are needed (Dec. at 4). The process is reversed after the supplies are unloaded. 4/

At the time the evidence was taken below, MESA was divided into 9 administrative districts. Each district was headed by a district manager responsible for enforcement of the Act in his district. The mines in this case were located in District 2, with headquarters in Pittsburgh. The judge found that from the passage of the Coal Act until

3/ Coal is moved out of the mines on conveyor belts.

4/ After the cars are uncoupled, a tractor picks up the empty cars, one by one, and takes them back to the track. The locomotive goes from section to section picking up cars which have been put on the track. Once the locomotive has about 15 cars it pulls the trip back to the supply yard. After a complete return trip is assembled underground, no further coupling or uncoupling occurs until the trip reaches the supply yard (Tr. 154-155).

February 1974, § 75.1405 was not enforced with respect to rubber-rail cars in District 2 (Dec. at 4). He also found that, in a memorandum dated November 21, 1973, the district manager indicated that when the regulation was written, § 75.1405 was not intended to apply to rubber-tired haulage cars and was intended to apply only to track haulage cars (Dec. at 5). The judge also found that during this period of non-enforcement the companies, relying on this policy of non-enforcement, purchased 230 rubber-rail cars not equipped with automatic couplers (Dec. at 4). The judge further found that the Secretary at one time proposed to amend § 75.1405 to specifically include rubber-rail cars (Dec. at 6). 5/ Finally, he found that MESA's enforcement policy changed on February 7, 1974, and the Secretary began applying the automatic coupler requirement to rubber-rail vehicles in District 2.

The judge's ultimate conclusion was that rubber-rail cars are not "track haulage cars" within the meaning of § 75.1405-1. He noted that § 75.1405 applies to "all haulage equipment." He found that the phrase "all haulage equipment" is not ambiguous, that the word "haulage" as used in mining parlance refers to the hauling of men and supplies as well as ore, and that the word "equipment" is very broad. Thus, he found that if the statutory language had been literally applied, there would be little doubt that rubber-rail haulage equipment would be required to have automatic couplers (Dec. at 5-6). However, in implementing § 75.1405, the Secretary promulgated § 75.1405-1 which states that § 75.1405 applies "only to track haulage cars." (Emphasis added.) The judge attempted to determine whether Congress had intended that section 75.1405 apply "only to track haulage cars." He first examined the legislative history. The sole reference in the legislative history to section 314(f) is contained in a letter from the Director of the Bureau of Mines to Congressman John Dent. Congressman Dent had asked the Director to conduct a technological review of safety standards which had been proposed as amendments to the House bill. The automatic coupler provision was one of those amendments. The Director stated "[t]he provisions relative to coupling mine cars ... will make a positive contribution to safety." The judge found this reference to be uninstructive (Dec. at 6).

Next, the judge examined the structure of section 314 itself and found this to be persuasive:

> Perhaps the best indication of what Congress intended can be obtained from viewing section 314 of the Act in its entirety. It consists of six subsections, "a" through "f" and is headed "Hoisting and Mantrips." Subsections "a," "b," "c," and "d"

5/ The proposed amendment stated:

> § 75.1405-1 automatic couplers, haulage equipment. The requirement of § 75.1405 with respect to automatic couplers applies only to track haulage cars, including rubber-rail cars, which are regularly coupled and uncoupled.

The proposal was one of many contained in a February 10, 1975, MESA memorandum which was addressed to all underground coal mine operators (Exhibit 12). The memorandum stated that hearings would be conducted on the proposed changes and requested the operators to submit comments. The change with respect to rubber-rail cars was never adopted nor was the change ever formally proposed in the Federal Register.

> deal specifically with hoists and generally with the transportation of men and material. However, in "e" locomotives and haulage cars are mentioned for the first time in connection with the requirement that they have automatic brakes. Next follows 314(f) and its reference to "all haulage equipment." I believe subsections "e" and "f" are generally different than the preceding four subsections and should be read together. Following this approach, the phrase "haulage equipment" would relate back to subsection "e" and its mention of locomotives and haulage cars. Since in customary coal mining jargon, the word "car" and the term "haulage car" has reference to vehicles used on railroad track, I would conclude that this is what Congress had in mind, even though the phrase "all haulage equipment" when taken out of context is not patently ambiguous outside the mining industry (Dec. at 7, fn. 12).

The judge stated that the Secretary in promulgating § 75.1405-1 had done what Congress intended--that is, had made the automatic coupler provision applicable to equipment which solely traveled on track (Dec. at 6-7). He also concluded that because the record showed rubber-rail cars at the 6 mines were used only intermittently, were primarily operated off track and represented a technological variant not contemplated by Congress, they were not "track haulage cars" within the meaning of § 75.1405-1 (Dec. at 6-7).

Finally, the judge found that MESA's enforcement practice for the first four years of the Coal Act limited the coverage of § 75.1405 to locomotives and haulage cars which traveled on track, and concluded that this constituted a "binding construction of the statute" (Dec. at 7).

The Secretary asserts that the rubber-rail vehicles are "track haulage cars" which are "regularly coupled and uncoupled" and therefore come within the purview of § 75.1405. He first argues that the judge's decision effectively modifies § 75.1405-1 to apply to haulage cars that operate exclusively on track. He asserts such an interpretation is erroneous because the Coal Act was remedial and regulations adopted thereunder should be given a liberal construction. He states that the purpose of section 314(f) of the Coal Act and § 75.1405 is to prevent accidents while track haulage equipment is coupled and uncoupled. In his view, it makes no difference if the cars are coupled and uncoupled on the track only some of the time. In short, the Secretary argues that interpreting the standard so as to include rubber-rail equipment best effectuates its purpose.

The Secretary next argues that the rubber-rail vehicles are "regularly coupled and uncoupled." According to the Secretary the proper test for regularity should be whether the equipment is coupled or uncoupled in the normal course of routine operation or on a cyclic basis. The Secretary

argues that in testifying about rubber-rail procedures the companies' safety manager described routine on track couplings and uncouplings both in the supply yard and the point of track nearest the working sections (citing to Tr. 150-155).

The Secretary also argues that the agency cannot be estopped from enforcing § 75.1405-1 if it applies to rubber-rail equipment. An agency, the Secretary states, can change its interpretation of a regulation if that change is within the scope of the regulation. 6/

The operators maintain that, although the language of section 314(f) requires automatic couplers on "all haulage equipment," the judge and the parties agree that Congress never intended the standard to be applied literally. They also assert that the parties agree that § 75.1405-1 attempts to make explicit the limitation intended, but not stated by

6/ The Secretary makes two other arguments which do not warrant extended discussion. First, he argues that the judge erred in admitting the testimony of the then district manager of District 2, Robert Barrett, concerning his understanding of the proper interpretation of § 75.1405. Barrett had a dual role with regard to the regulation. He was assigned by the director of the Bureau of Mines to coordinate the efforts of those writing the Coal Act's implementing regulations--including § 75.1405-1 (Tr. 40, 46). Moreover, as district manager for District 2 he was responsible for enforcing all standards in the district. Barrett testified as to his opinion concerning the type of equipment the drafters of section 75.1405-1 intended to cover. He also testified concerning the enforcement policy he pursued while district manager (Tr. 49-56, 59-63, 81-88, 91). The Secretary asserts the testimony of a participant in the drafting of a regulation cannot be admitted to prove regulatory intent. He asks that any findings or conclusions based upon Barrett's testimony be rejected. A review of the judge's decision, however, fails to indicate any findings of fact or conclusions of law based upon Mr. Barrett's testimony concerning his view of the drafters' intent or his understanding of Congressional intent in enacting section 314(f). (Finding of fact No. 12 relates to a memorandum issued by Barrett). Thus, even if we were to assume that admission of Barrett's testimony regarding intent was erroneous, it was harmless error.

Second, the Secretary asserts that the Board of Mine Operations Appeals in Canterbury Coal Co., 6 IBMA 276 (1976), affirmed a judge's decision disallowing a modification of § 75.1405 for several types of track equipment, including rubber-rail equipment, and refused to stay its decision with respect to rubber-rail equipment until the instant case was decided. The Secretary views this as de facto recognition by the Board that the standard applies to rubber-rail equipment. However, the Board's refusal to stay the part of the proceeding relating to rubber-rail equipment was based on factual differences it perceived between the Canterbury case and this case. 6 IBMA at 286. Moreover, the validity of the application of the standard to rubber-rail equipment could not have been at issue in the modification case, the Board having ruled that such an issue could only be raised in an enforcement proceeding.

Congress. They assert the original intent of section 75.1405 was to apply the automatic coupler requirement only to coal haulage equipment that operates solely on track and that this original intent must control. They argue this intent may be derived from the legislative history, i.e., the letter to Congressman Dent, and from the structure of section 314. Moreover, they assert that the Secretary's consistent policy from 1971 to 1974 of excluding rubber-rail equipment from coverage under § 75.1405 is the type of contemporaneous construction of the regulation by those charged with its enforcement to which deference should be accorded. They view this consistent administrative interpretation over a period of four years as compelling evidence of the original intent underlying the statutory and regulatory provisions. They also view the Secretary's proposal to amend § 75.1405-1 so as to include rubber-rail vehicles as evidence that such equipment was not originally covered.

In short, the operators argue that because of the legislative history, the Secretary's contemporaneous construction of the standard, the four year enforcement policy of not requiring automatic couplers on rubber-rail equipment and the proposal to amend § 75.1405-1, the judge correctly concluded that the Act and regulations do not require automatic couplers on rubber-rail equipment. The companies state that if the Secretary wishes to change a regulation he should follow the promulgation procedures set forth in the Act, rather than legislate through interpretation. 7/

Our resolution of this case begins with an examination of the words of the statute and standard. The judge and parties agree that section 314(f) and § 75.1405 on their face apply to "all haulage equipment." They also agree that Congress could not have intended literal application of the standard to all haulage equipment because there are many types of equipment used to transport coal, men and supplies (e. g., shuttle cars, battery powered tractors, and battery powered personnel carrier) which travel alone and upon which automatic couplers would serve no purpose. The judge and the parties also agree that in order to clarify Congressional intent and to narrow the overly inclusive language of the statutory standard the Secretary promulgated § 75.1405-1 limiting the automatic coupler requirement to "track haulage cars which are regularly coupled and uncoupled."

The word "track" indicates that the regulated cars travel on rails as opposed to free moving vehicles. All parties agree the rubber-rail cars travel on rail from the supply yard into the mine to the point on the track nearest the section where the supplies are to be used (Tr. 150-152, Dec. 4). Thus, the rubber-rail vehicles qualify, at least in this facet of their operation, as "track" equipment. The term "haulage

7/ The operators insist that they are not raising an estoppel argument. Rather, they are arguing that the original interpretation of the standard is the correct interpretation and must be followed. They state that the agency "is free to change the regulation despite reliance on the old regulation so long as [the agency] pursues the proper procedures." (Brief at 17.)

cars" in mining parlance indicates cars which carry either ore, equipment, supplies or personnel. 8/ The rubber-rail vehicles are used for the transport of men, equipment and supplies. Thus, we conclude that, based on a plain reading of the standard and the nature of the use of the equipment at issue, the rubber-rail vehicles involved are a type of "track-haulage car." 9/

The Secretary's inconsistent enforcement of the standard against the operators involved is troubling, but it does not lead us to a different result. The prior practice in District 2 of not enforcing section 75.1405-1 against rubber-rail equipment was contrary to the plain language of the standard. Further, although an agency's contemporaneous interpretation of a regulation can be given weight, the interpretation must be a consistent practice implemented by the agency as a whole. See 2 Davis, Administrative Law Treatise, § 7.14 at 66-69 (2d ed. 1979). The record indicates confusion among agency personnel regarding enforcement of the standard and it cannot be determined what interpretation, if any, had been adopted as the official agency position on the standard.

This leaves the question of whether the cited rubber-rail vehicles are "regularly coupled and uncoupled" within the meaning of the standard. The adverb "regularly" suggests a practice or implies uniformity or a method of proceeding. It excludes isolated or unusual occurrences. We believe that the record reflects a uniform method and practice of on-track coupling and uncoupling. The judge's finding that the rubber-rail cars are used only intermittently and are not regularly coupled and uncoupled is difficult to explain. None of the sources cited by the judge states or infers that the use of the equipment was only intermittent or that on-track coupling and uncoupling are not routine practices.

8/ Haulage cars. Rail haulage cars for surface or mine shaft operations are used to carry ore and equipment to and from the digging site. They may be of the trailer type or self-propelled, and include dump cars, flat cars, personnel cars, etc. Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior at 530.

9/ There is a great deal of discussion by the parties as to whether Congress intended section 314(f) to apply to rubber-rail vehicles. The judge concluded that the Secretary "correctly divined Congressional intent" when he promulgated § 75.1405-1 (Dec. 6). Our attempt to determine Congressional intent is inconclusive. We have found no indication that Congress in drafting section 314(f), or the Secretary in promulgating § 75.1405-1, considered rubber-rail equipment. See 35 Fed. Reg. 17890 (Nov. 20, 1970). At most section 314(f) and the legislative history indicate that automatic couplers are required on mine cars which run on track and which carry loads. Thus, we perceive no definitive indication from the legislative history, or the context of section 314, as to whether automatic couplers are to be installed on such cars that run only part of the time on track.

We therefore find that the rubber-rail cars are track haulage equipment that are regularly coupled and uncoupled on track and, therefore, that the standard applies.

Finally, we note that the operators initially raised two separate challenges to the enforcement of 30 C.F.R. § 75.1405 against their rubber-rail equipment: (1) that the standard did not apply, and (2) that such enforcement would result in a diminution of safety. In our decision we have addressed only the first argument concerning the applicability of the standard. From our review of the previous decisions of the administrative law judge and the Board in this matter, it appears that the question of diminution of safety has never been finally resolved. We are not unaware of the operators' expressed concerns about the safe use of automatic couplers when rubber-rail equipment is operated off track. But as we have previously held, it is "important that questions of diminution of safety first be pursued and resolved in the context of the special procedure provided for in the Act, i.e., a modification proceeding." Penn Allegh Coal Co., 3 FMSHRC 1392, 1398 (June 1981)(emphasis added). This Commission was established as fully independent of the Secretary by the 1977 Mine Act. As a result we do not have jurisdiction, as did the Board, to rule on petitions for modification based on diminution of safety. 30 U.S.C. § 811(c)(Supp. IV 1980).

The present status of the previously instituted modification proceeding is unclear. Whether the previous petition for modification is still pending or filing of a new petition would be required, the operators should at this time, if they so choose, pursue their diminution of safety claims before the Secretary of Labor. 30 C.F.R. Part 44. 10/

Conclusion

Accordingly, we reverse the judge's conclusion that 30 C.F.R. § 75.1405 does not apply to the track haulage cars at issue and reinstate the notices of violation.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

A. E. Lawson, Commissioner

10/ The present case arose from an application for review filed by the operators, rather than a petition for assessment of penalties filed by the Secretary, and only the question of the applicability of the standard is being resolved herein. Therefore, we need not explore in this case the effect that a previously instituted modification proceeding should have on a subsequently filed action seeking civil penalties for noncompliance with the standard sought to be modified. See Sewell Coal Co., 3 FMSHRC 1402, 1414-15 (June 1981).

Jestrab, Commissioner dissenting:

I most respectfully dissent.

Regulations 30 C.F.R. 75.1405 and 1405-1 are ambiguous insofar as they purport to cover the on-track/off-track rubber tired vehicles at issue here. It appears from the record that on or about February 10, 1975 the Secretary proposed an amendment to this regulation so as to deal with on-track/off-track rubber tired vehicles. (Exhibit P-12) The final disposition of this proceeding is not disclosed in the record. Further, statutory modification proceedings to cover the on-track/off-track rubber tired vehicles of these applicants were commenced, but here again these proceedings apparently have not reached final disposition. (JD-2, footnote 2) Reference is made in the record to the practice of the Secretary in other districts, but there is no evidence in the record as to whether the vehicles are operated under individual modifications of the regulation or if, in fact, the regulation is enforced as it is presently written. It thus appears that the interpretation and enforcement policy of the Secretary may be inconsistent. (e.g. T-51-57)

It is of parenthetical interest to note that there is testimony in the record that any attempt to adapt automatic couplers to rubber tired vehicles operating off-track could be dangerous to the safety of miners. (T-67-68, 202) Vertical movement of the automatic coupling on the uneven mine floor, together with the difficulty of lateral alignment in off-track operation, lends considerable force to this testimony. Here it is well to have in mind that this regulation is being applied to rubber tired vehicles which in fact operate off-track. To say that the question raised by the operator in this case should have been the subject of a modification proceeding is to beg the question presented to us.

In my opinion, if the Secretary wishes a regulation that requires automatic coupling devices for on-track/off-track rubber tired vehicles, he should amend the regulation 75.1405 to expressly so provide. See Diamond Roofing v. Occupational Safety and Health Review Commission 528 F.2d 645 (5th Cir. 1976) In the course of the rulemaking process set forth in § 101 of the Mine Act (30 U.S.C. 811), 11/ the technology, feasibility and safety considerations so important to miners and the industry could be developed and a rational result reached. See King Knob Coal Co., 3 FMSHRC at 1420, 1421 (1981); B&B Insulation v. Occupational Safety and Health Review Commission, 583 F.2d at 1371, 1372 (5th Cir. 1978).

I would affirm the order of the Administrative Law Judge for these reasons and for the reasons set forth in his opinion.

Frank F. Jestrab, Commissioner

11/ Similar provisions existed in section 101 of the Coal Act.

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. KENT 81-133 A. C. No. 15-08906-03039V
v.	:	Docket No. KENT 81-134 A. C. No. 15-08906-03040
N.B.C. ENERGY, INC., Respondent	:	Docket No. KENT 81-137 A. C. No. 15-08906-03041
	:	No. 1 Mine

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Petitioner;
Wayne W. Clark, President, N.B.C. Energy, Inc., Prestonsburg, Kentucky, for Respondent.

Before: Judge Lasher

A hearing on the merits was held in Pikeville, Kentucky, on May 19, 1982. After consideration of the evidence submitted by both parties and proposed findings and conclusions proffered during closing argument, a decision was entered on the record. This bench decision appears below as it appears in the official transcript aside from minor corrections.

These proceedings have arisen upon the filing of proposals for assessment of civil penalty by the Secretary of Labor in July 1981. At the formal hearing held in Pikeville, Kentucky, on May 19, 1982, the Secretary was represented by counsel and the Respondent was represented by its owner and President, Mr. Wayne W. Clark.

At the outset, Respondent indicated that it did not challenge the occurrence of the violations and that the issue paramount in its defense related to the statutory penalty assessment factor relating to the adverse effect payment of penalties would have on its ability to continue in business.

The parties stipulated that the Federal Mine Safety and Health Review Commission has jurisdiction over the parties to and the subject matter of these proceedings; that the Respondent, after notification of the violations, proceeded in good faith to rapidly achieve compliance with the violated mandatory health and safety standards; that the Respondent in 1981 produced approximately 45,000 to 75,000 tons of coal; 1/ that, except for the single citation involved in Docket No. KENT 81-133, i.e., Citation No. 954184 dated January 21, 1981, the remaining twelve violations occurred as a result of ordinary negligence on the part of Respondent and its agents; and finally, except for the subject citation in Docket No. KENT 81-133, the degree of seriousness to be attributed to all violations is that demonstrated by the penalty points fixed by Petitioner during the administrative penalty assessment process for the three gravity subcriteria, i.e., (a) probability of occurrence, (b) severity of anticipated injury, and (c) number of persons exposed to risk.

In addition to the foregoing stipulations, Petitioner, MSHA, introduced as evidence on the remaining statutory penalty assessment criterion a computerized history of Respondent's previous violations for the 24-month period ending January 15, 1981, which latter date is the approximate date on which the first citation issued in these proceedings was completed by the Inspector (actually, the first violation in these proceedings was reflected in a citation issued on January 14, 1981). This history of previous violations reflected in Court Exhibit 1 indicates that seven violations were issued for which the paid penalties amounted to $425.00. 2/

The primary issue in these proceedings is whether payment of reasonabale penalties would jeopardize the Respondent's ability to continue in business.

The Respondent, through its President, Mr. Clark, established that NBC Energy, Inc., began operating its No. 1 Mine in July 1979. According to Mr. Clark, this mine was abandoned two days prior to the hearing on May 17, 1982. Mr. Clark

1/ I find therefrom, and from other evidence in the record indicating that the Respondent had on its payroll over the last three years an employee complement ranging from 12 to 23 miners at its No. 1 Mine, that Respondent is a small coal mine operator.

2/ I infer therefrom that the seven violations were not particularly serious and that this is but a moderate, if not modest, history of infractions which preceded the first violation involved here. Violations which occurred after the subject violations are not properly considered as a part of the Respondent's history.

testified that when the violations in question were committed, NBC Energy, Inc., had three equal owners, Jack Bush, Stanley Neese, and himself. The mine, since January or February 1982, has been operated by a new corporation wholly owned by Mr. Clark, Wayne Clark, Inc., which has the license to operate the No. 1 Mine which has not been producing coal since May 12, 1982.

Mr. Clark testified that approximately two years ago, Jack Bush and he bought out Stanley Neese, and that since that time he and Bush each had a 50% interest in the NBC Energy, Inc., establishment. At the beginning of 1982, Mr. Bush and Mr. Clark entered into an agreement wherein Mr. Clark received Mr. Bush's 50% interest in NBC Energy, Inc., and Mr. Bush received Mr. Clark's 50% interest in another corporation, C and B Coal Company, Inc. No money was exchanged in this "swap."

Mr. Clark's primary bases for urging substantial reduction of penalties are that: (1) at the present time a judgment is outstanding against NBC Energy, Inc., in the approximate sum of $24,500.00, of which only $5,000.00 has been satisified; (2) a second suit has been filed against NBC by Old Republic Insurance Company, seeking approximately $31,000.00 for non-payment of Workmen's Compensation premiums; (3) total mine safety penalty assessments (presumably MSHA's administrative assessments) totaling $20,000.00 are presently being processed; (4) for the corporate fiscal year ending May 31, 1981, in its U. S. Corporation Income Tax Returns, NBC reflected a net operating loss, for which a deduction was taken, in the sum of $108,860.00. Mr. Clark testified that NBC had other debts of an unspecified amount.

On the other hand, evidence indicates that the No. 1 Mine is presently producing approximately 4,000 tons of coal per month; that Mr. Clark, who is the sole owner of Wayne Clark, Inc., and, effectively, the operator of the No. 1 Mine as an individual, is taking out a salary of from $800.00 to $1,500.00 per month from either NBC or C and B Coal Company, Inc.

The only reliable and probative evidence of Mr. Clark's individual worth, assets, and ability to pay penalties, is reflected on Exhibits R-1, 2, and 3 (his U. S. Individual Income Tax Returns for the years 1979, 1980, and 1981, respectively), which indicate his adjusted gross income for those years was, in general terms, $33,000.00, $22,000.00, and $9,700.00, respectively.

Much of Respondent's evidence was general, and which I find to be self-serving and clearly of a quality which is not sufficiently probative of the rule which this proponent seeks to have determined herein: that it is unable to pay reason-

able penalties, 3/ without jeopardizing its ability to stay in operation.

A clear statement of all assets of Mr. Clark, as an individual, and of the corporations with which he is now or has been associated, is impossible to arrive at because of the approach to this proceeding taken by the Respondent. Establishing an economic defense, the burden of which rests with the operator because of his exclusive knowledge of the subject matter, is difficult. The documentary evidence which primarily consists of Court Exhibit 2 (seventeen pages of disclaimed balance sheets, and the aforesaid income tax return and its attachments) is not persuasive. Thus, the balance sheet was accompanied by a certified public accountant's cover letter which indicated that:

> "A compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements, and accordingly, do not express an opinion or any other form of assurance on them.
>
> Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles, including the statement of retained earnings and the statement of changes in financial position. If the omitted disclosures were included in the financial statements, they might influence the users conclusions about the company's financial position, and results of operations. Accordingly, these financial statements are not designed for those who are not informed about such matters. Likewise, without audited financial statements, verified lists of assets, one is left unconvinced by the opportunities for asset concealment and manipulation which occurs through the use of the creation of multiple corporations."

I conclude, after considering the quality of testimony and documentary evidence, that Respondent has provided no reliable basis for substantial reduction of otherwise reasonable penalties in these cases.

The only other matter litigated relates to the citation in Docket No. KENT 81-133, which involved a violation of 30 CFR 75.518, which provides:

3/ MSHA's proposed penalty assessments for the thirteen violations involved in the three dockets amounted to approximately $2635.00.

> Automatic circuit-breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuit and overloads. Three-phase motors on all electric equipment shall be provided with overload protection that will de-energize all three phases in the event that any phase is overloaded.

The description of the violation contained in the citation is that:

> The automatic short circuit breaker device in the switch box that supplied electrical power to the number two belt head conveyor was bridged across the fuse holders with #10 copper wire. The operator at this mine does his own electrical work."

This violation became the subject of a special assessment by MSHA for which a penalty of $500.00 was sought. Respondent contended that the Inspector was not an electrical inspector and that he failed to recognize that between the switch box in question and the Number Two belt head conveyor there were two circuit breakers, one on a three-foot long rectifier and one on a belt motor starter, which would have been triggered and have cut off the power had there been an overload.

The Inspector testified, and I do find, that the switch box in question had one, possibly two, fuses which had either been bridged over or by-passed by a copper wire. The Inspector said he did not see, or "observe," as he put it, any other circuit breakers. A clear conflict in the testimony between the Inspector and Mr. Clark thus has occurred, the question being whether or not there were circuit breakers as alleged by Mr. Clark, or not.

The Inspector's version is accepted for the reason that his testimony wss based on what he saw at the time and place in question whereas Mr. Clark couched his testimony in the vein that it was the way things ordinarily were in the mine; the way he understood it should be -- rather than what he saw. Mr. Clark was not in the area at the time the citation was issued nor was his recollection precise as to what occurred and what happened at the time.

The co-owner of the mine, Mr. Bush, was present at the time. The Inspector indicated that Mr. Bush in effect agreed that this violation occurred. So, even though at the outset of the hearing the parties did stipulate that the violations all occurred as charged, including the violation charged in this citation, I have re-evaluated whether a violation did occur and I conclude that based upon the Inspector's testimony which I believe should be accepted, a violation did occur.

With respect to the seriousness of the violation, the Inspector indicated that the danger posed was a mine fire, or shock hazard, and with respect to the possibility of a mine fire occurring, he indicated that there was coal around the belt head which could supply a fuel source for a fire. I therefore find that this was a serious violation, based on his testimony. However, I do not consider that there is any evidence of gross negligence in the occurrence of this violation based upon the Inspector's belief that the Mine Foreman at the time (Mr. Bush) was aware of the violation (Tr. 118, 119). The record indicates that any of the miners in the mine knew how to bridge over the fuses in the switch box, and there is no indication when the violation occurred, how long it might have been in existence, and whether or not the operator's management personnel were aware of it. I am unable to infer that there was willful disregard of the safety standard and intentional violation here, nor does the evidence establish gross negligence. I therefore find that this violation occurred only as a result of ordinary negligence. I conclude that it should not have been the subject of a special assessment under all the circumstances.

The amount of a penalty should relate to the degree of a mine operator's culpability in terms of willfulness or negligence, the seriousness of a violation, the business size of the operator, and the number of violations previously discovered at the mine involved. Mitigating factors include the operator's good faith in abating violative conditions and the fact that a substantially adverse effect on the operator's ability to continue in business would result by assessment of penalties at some particular monetary level. Factors other than the six criteria expressly provided in the Act are not precluded from consideration, either to increase or reduce the amount of penalty otherwise warranted.

Considering all these factors in connection with Citation No. 954184, I find that the operator's size, the operator's good faith abatement of the violation, and the only ordinary degree of negligence involved, mitigate for a lessening of the penalty. I have previously rejected the operator's economic defense. Also, the penalty should not be increased on the basis of the history of previous violations which has been introduced in this proceeding. The only factor which weighs in favor of a large penalty is that of the seriousness of this violation, which had the potential for a hazard of catastrophic proportions. Weighing all factors, I conclude that a penalty of $300.00 is reasonable and the same is assessed.

Turning now to Docket No. KENT 81-134, which contains nine violations, it is again noted that all violations have been admitted and that all statutory penalty assessment factors, other than seriousness, have been stipulated to and treated previously.

Taking each citation one at a time, and based upon evidence in the record which has previously been analyzed, I find that Citation No. 9927446 is not a serious violation; that Citation No. 953110 is a serious violation; that Citation No. 953111 is a moderately serious violation; that Citation No. 953113 is a very serious violation; that Citation No. 953114 is a very serious violation; and that Citation Nos. 953115, 954182, and 954183 are moderately serious violations. Finally, I find that Citation No. 953581 is not a serious violation.

With respect to these nine violations, the parties have stipulated that they resulted from only ordinary negligence and I conclude that the payment of reasonable penalties as to these violations will not jeopardize the Respondent's ability to continue in business based upon the rationale contained in Docket No. KENT 81-133.

Based on the factors previously noted, the following penalties are assessed:

Citation No. 9927446	-	$ 50.00
Citation No. 953110	-	$225.00
Citation No. 953111	-	$125.00
Citation No. 953113	-	$375.00
Citation No. 953114	-	$275.00
Citation No. 953115	-	$140.00
Citation No. 954182	-	$125.00
Citation No. 954183	-	$125.00
Citation No. 953581	-	$ 75.00

Turning now to Docket No. KENT 81-137, which involves three citations, based upon my analysis in the record and the evaluation of MSHA's penalty points which was authorized by stipulation between the parties, Citation No. 993112 is found to involve a violation which was moderately serious. Likewise the same finding is made as to Citations 954181 and 927486. Based on these gravity findings and my prior evaluation of the remaining five statutory criteria, Respondent is aasessed the following penalties:

Citation No. 951112	-	$200.00
Citation No. 954181	-	$140.00
Citation No. 927486	-	$ 90.00

ORDER

Respondent is ordered to pay the Secretary of Labor within 30 days after receipt of this decision the penalties assessed herein-above totalling $2,245.00.

Michael A. Lasher, Jr., Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 4 1982

SOUTHERN OHIO COAL COMPANY, Contestant	:	Contest of Order and Citation
	:	Docket No. LAKE 82-78-R
v.	:	Order/Citation No. 1120758; 4/14/82
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Meigs No. 2 Mine

DECISION

Statement of the Case

By joint motion filed July 19, 1982, the parties seek my approval of a proposed "settltment" of this case, and contestant moves to withdraw its contest challenging the captioned section 107(a) imminent danger order. In support of the proposed "settlement", the parties assert that they have discussed the six statutory criteria found in section 110 of the Act, and the motion contains arguments concerning such matters as negligence, gravity, good faith compliance, size of business, and the contestant's history of prior violations. The motion also contains a full discussion concerning the cited conditions, including an assertion by MSHA that it now proposes to modify the order to a section 104(a) citation because of certain circumstances and actions taken by the operator as discussed in the motion.

Discussion

This case concerns a contest filed by Southern Ohio Coal Company on May 14, 1982, challenging the legality and propriety of a section 107(a) imminent danger order served on Southern Ohio on April 14, 1982. The case was docketed for hearing in Columbus, Ohio, July 22, 1982. However, the hearing was cancelled and continued after MSHA's counsel advised me that the parties proposed to settle the matter. The aforesaid settlement motion was then filed urging my approval of MSHA's proposal to modify the order from a section 107(a) imminent danger order to a section 104(a) citation.

As far as I know no civil penalty case has been filed by MSHA seeking a civil penalty assessment for the citation in question. Under the circumstances, I have no jurisdiction to approve any prospective settlement concerning any civil penalty proposal which may be filed by

MSHA in this matter, and the normal civil penalty matters set out in section 110(i) of the Act are not in issue in these proceedings.

With regard to MSHA's proposed modification of the order in question, the justification given for this proposal appears to be reasonable and proper and I see no reason why it should not be done. However, I believe this is a matter best left to the discretion of MSHA as the enforcing arm of the Secretary. In this regard, I assume that MSHA will modify the order to reflect that it is a section 104(a) citation and that Southern Ohio will then pay any assessment levied for that citation. I also assume that Southern Ohio's motion to withdraw its contest is conditioned on the modification of the order and that once this is done, Southern Ohio has no further interest in challenging the violation.

ORDER

In view of the foregoing, contestant's motion to withdraw its contest IS GRANTED, and this case is DISMISSED. Although the proposed disposition and modification of the order in question by MSHA appears to be proper and reasonable, I decline to specifically approve it as a "settlement" of any civil penalty dispute. However, should MSHA renege on its proposed modification of the order in question, Southern Ohio is free to file an appropriate motion with me for further relief.

George A. Koutras
Administrative Law Judge

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AUG 3 1982

SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceedings
	:	Docket No. LAKE 80-363-M AC No. 12-00109-050061
v.	:	
	:	Docket No. LAKE 80-364-M AC No. 12-00109-05007
SELLERSBURG STONE COMPANY, Respondent	:	

CORRECTION OF TYPING ERROR IN DECISION

The decision entered on July 26, 1982, is corrected and amended, at page 2, the fourth line, by changing the word, "drill," to read, "check."

William Fauver
WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

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AUG 4 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEST 81-267-M A.O. No. 04-94295-05001W
v.	:	Miller Mine
MILLER MINING CO., INC., Respondent	:	

DECISION

Appearances: Debra L. Gonzalez and Marshall P. Salzman, Attorneys, U.S. Department of Labor, San Francisco, California, for the Petitioner; Michael Miller and Arnold Kopelson, Esquires, Los Angeles, California, for the Respondent.

Before: Judge Koutras

Statement of the Case

These proceedings concern a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment for an alleged violation of an Order issued pursuant to Section 103(k) of the Act.

Respondent filed a timely answer contesting the alleged violation, denying that it operates a "mine" subject to the Act, and requesting a hearing. A hearing was convened in Sacramento, California on April 1, 1982 and the parties appeared and participated fully therein. Posthearing briefs were filed by the parties and the arguments presented therein have been full considered by me in the course of this decision.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., and in particular sections 104(a) and 103(k).

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (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.

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The basic issue is whether a violation occurred, and if so, should the respondent be held accountable for that violation and assessed a civil penalty in accordance with the criteria set forth at section 110(i) of the Act. Additional issues raised by the parties are identified and discussed in the course of this decision.

Stipulations

The parties stipulated to the following (5-8; Exh. JE):

1. Respondent Miller Mining Company, Inc. is and at all relevant times was the owner and operator of the Miller Mine.

2. Respondent Miller Mining Company, Inc., and the Miller Mine, are, for the purpose of this proceeding, subject to the jurisdiction of the Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et seq.

3. Miller Mine is an underground gold mine.

4. Copies of the subject citations, modifications and terminations of the violations in issue are authentic and may be admitted into evidence for the purpose of establishing their issuance.

5. True and correct copies of the citations were served upon representatives of the operator.

6. Imposition of a reasonable civil penalty or that proposed by MSHA will not affect the Respondent Miller Mining Company, Inc. ability to continue in business.

7. During the two year period prior to September 5, 1980, Respondent Miller Mining Company, Inc. had no assessed violations.

8. Respondent Miller Mining Company is a small or medium sized operator.

Discussion

The facts in this case show that on August 8, 1980, a fire broke out in the main mine tunnel approximately 520 feet from the portal. The fire resulted from a spark from a cutting torch igniting a bale of straw. MSHA inspectors were dispatched to the scene, and at approximately 4:00 p.m. that same date, a section 103(k) Withdrawal Order, No. 379711, was issued ordering everyone out of the mine (Exh. P/R-1). The order was subsequently modified the next day, and as modified, it prohibited persons from entering the mine portal without authorization from MSHA's Western District Manager, and it required that any modifications or alterations of the mine fan ventilation system be monitored by the MSHA inspector on duty (Exh. P/R-2). The order was modified again on September 2 and 3, 1980, and the modification of September 3 permitted persons to enter the portal to establish a permanent bulkhead near the fire (Exhs. P/R-5 and P/R-6).

The initial withdrawal order of August 8, 1980, states as follows:

> A mine fire started in the main tunnel about 2:20 p.m. The fire occurred approximately 520 ft. from the portal.

The modified order of August 9, 1980, states as follows:

> Original order should read -- Type of inspection 030. Added to condition or practice should be -- No person shall enter the mine portal without direct authorization from MSHA's Western District Manager. Any modification or alterations of the mine fan ventilation system shall be monitored by the MSHA inspector on duty.

On September 2, 1980, after receiving authorization from MSHA and state mining officials, one four-man rescue team consisting of company employees was permitted to enter the mine. After advancing for a distance in excess of 100 feet, they turned back because it was too smoky and they could not see. That evening, a hole approximately 2 by 2 feet was cut into the 42-inch ventilation line about 10 feet from the surface fan in an attempt to exhause the smoke from the mine. Beach balls and an umbrella were pushed down the vent line and the fan was turned on; however, the ball would not travel down the vent and it determined that the line was plugged underground at station 4+58. A decision was made to discontinue efforts to unplug the vent line until the next morning, September 3, and at approximately 11:30 p.m., September 2, the portal was secured, except for the security guards, the assistant safety director, and the crew working in the shaft.

On the morning of September 3, the vent line which had been cut to facilitate the attempts to exhause the smoke from the mine was repaired, and when the fan was turned on again, it began exhausting smoke from the mine. At approximately 2:00 p.m., after receiving permission from

MSHA and state officials, a four-man rescue team entered the mine. One of these men was MSHA inspector Felix Muniz. Upon exiting the mine at approximately 2:30 p.m., Mr. Muniz indicated that he had found that a hole approximately 2 by 2 feet had been cut into the 42-inch ventilation line at the 4+58 station. He surmized that it had been cut with a sharp tool, and he took pictures of the hole which had been cut into the line, as well as some foot-prints which he observed (Exh. P-2). Subsequently, work progressed to establish a temporary bulkhead, but was discontinued because of the lack of sufficient oxygen. Thereafter, on September 5, a meeting was held with MSHA and state inspectors to discuss additional work required, and that same day company officials, state officials, and MSHA inspectors entered the mine again to evaluate the bulkhead and to investigate a suspected unauthorized mine entry and an MSHA special investigator was with this group (Exh. R-2). Mr. Muniz issued his section 104(a) Citation No. 0601832 at 5:00 p.m., on September 5, 1980 (Exh. P/R-8). He issued the citation because he believed that someone had entered the mine between the time it was secured on the evening of September 2, and the morning of September 3, and cut a hole in the ventilation line at the 4+58 station. Since Mr. Muniz believed this was an unauthorized entry contrary to the conditions imposed by the original section 103(k) withdrawal order, as subsequently modified, he based his citation on a violation of that order.

The citation issued by Mr. Muniz on September 5, 1980, describes the following condition or practice:

> On the day September 3, 1980, at approximately 1400 hours it was apparent that 103-K order # 379711 had been violated by one or more persons entering the mine and performing work which endangered human life.

Mr. Muniz's citation was subsequently modified on March 2, 1981, by another MSHA inspector, and that modification states as follows (Exh. P/R-12):

> This citation is modified in order to clarify the violation. The Miller Mining Company submitted a mine re-entry plan to the M.S.H.A. inspectors at the mine property on or about August 13, 1980. This plan stated that qualified mine rescue personnel consisting of two separate 5 man teams be established, trained and briefed on the mine and mine fire before entering the mine. This plan was answered by letter to Mr. Michael Miller on August 28, 1980, by Tom Lukins, Western District Manager. The district manager's letter clearly stated the condition to be followed before anyone could re-enter the mine. The company plan to enter the mine and the MSHA re-entry conditions letter were both violated in that during the early morning hours of September 3, 1980, the mine was entered by persons unkown after all personnel and guards

had been removed by company directions. The cautionary procedures as stipulated were not taken, nor were back-up crews present. The entry was in violation of good common sense, established fire fighting practices, and complete disregard for human life.

Work in the tunnel resumed on September 8, 1980, and continued during the months or September and October 1980, and according to MSHA's report of investigation (Exh. R-2), the fire was either extinguished or isolated from the main tunnel, and on November 24, 1980, the section 103(k) order was terminated. The report notes that "no personal injuries were sustained during the entire incident". The citation issued by Mr. Muniz was subsequently terminated on January 7, 1981, it states as follows (Exh. P/R-11):

> On September 3, 1980, at approximately 1400 hrs. it was apparent that the 103-K order no. 379711 had been violated by one or more persons entering the mine and performing work which endangered human life. The citation was abated after management was made aware of the danger and public law 95-164.

Testimony and evidence adduced by the petitioner

MSHA Inspector Nicholas Esteban testified as to his background and experience, and confirmed that his duties included the inspection of the mine in question from June 1979 to approximately December 1981. He was at the mine when the fire started, left for a short while, and then returned and found that the portal area had been sealed. He then issued a section 103(k) order, served a copy on general manager Benny Licari, and explained it to him. No one was trapped in the mine, and since the operator sealed it, the section 103(k) order was issued to insure MSHA control of the mine, and to insure the health and safety of anyone entering the mine, as well as to insure that anyone entering the mine did so with permissible and approved equipment. The fire presented a danger of Carbon Monxide poisoning and possible explosion (Tr. 18-26).

On cross-examination, Mr. Esteban confirmed that he was at the mine on August 7, 1980, the day before the fire, but was not sure whether he actually went into the mine. On August 8, 1980, he did go underground as part of the continued inspection started the day before, but does not recall issuing any citations for violations of any standards. He confirmed that he issued the control order in question on August 8, 1980 (Exh. P/R-1). He also confirmed that he marked the block on the citation form "see reverse", and his intent was to call the operator's attention to the information on the reverse side of the citation form (Tr. 27-37). Mr. Estaban stated that he had orders from his district supervisor to go to the mine and close it down. If there were anyone underground, the mine would have been completely taken over by MSHA. He explained that when there is a fire in a mine, he is told to issue an order (Tr. 47).

Mr. Esteban identified a copy of a modification of his order, issued by Inspector Gene Ainslie (Exh. P/R-2), but he indicated that he was not at the mine when Mr. Ainslie issued the modification and Mr. Ainslie probably received orders from the district manager to issue the modification (Tr. 50). Mr. Esteban confirmed that his original order did not include a requirement that the mine operator first seek the district manager's permission before entering the mine portal (Tr. 62). He also identified copies of three additional modifications to his order which he issued (Exhs. P/R-3, P/R-4, P/R-5). He also confirmed that he and Mr. Ainslie conducted an investigation of the fire and prepared a report (Exh. R-2). The respondent and its personnel were cooperative with MSHA during the investigation (Tr. 76).

Mr. Esteban testified that he did not participate in the investigation conducted September 2, 1980, to determine who may have entered the mine. An MSHA special investigator was called in, and Mr. Esteban stated that he did not know the identity of the individual who may have made the unauthorized entry into the mine (Tr. 77).

MSHA Inspector Felix Muniz confirmed that he was with Inspector Esteban on August 8, 1980, when the section 103(k) order was issued. He also confirmed that he was at the mine on the evening of September 2, 1980. Respondent's mine personnel, Mike Miller, Benny Licari, and Dean Hansen were attempting to determine the cause of a ventilation tube plugging up. The tube was located at the portal and it is hooked to the ventilation fan and goes down the portal decline. Work stopped approximately 11:30 pm., and Mr. Miller told everyone to go home and to return the next morning. Mr. Muniz then left the mine site with Mr. Esteban and two other MSHA representatives. Before leaving, Mr. Miller informed him that he should post a security guard at the portal to insure that no one would go in. Mr. Hansen and Mr. Licari stayed at the mine, and Mr. Muniz indicated that to his knowledge no MSHA personnel returned to the mine during the period between 11:30 a.m. and 8:00 a.m., the next morning (Tr. 78-88).

Mr. Muniz stated that he returned to the mine at 8:00 a.m., September 3, 1980, and he went straight to the portal where he found Mr. Licari parked by some bales of hay at the mine entrance. Shortly thereafter, the ventilation fan was turned on, and it started sucking smoke from the portal. He found this unusal, and it was obvious to him that someone had unplugged the ventilation tube since smoke was coming out. Mr. Muniz then entered the mine at approximately 2:00 p.m. to evaluate the temporary or permanent seal and also to investigate the circumstances connected with the underground portion of the ventilation tube. He was accompanied underground by three individuals, all of whom were certified in mine rescue by MSHA, and established procedures for going underground at that time were followed (Tr. 88-92).

Mr. Muniz confirmed that while underground, he was at the approximate area of the fire, and he observed footprints and an "opening hole on the vent tube". He took pictures and identified them for the record

(Exh. P-2). The hole in the vent tube was approximately 20 to 30 inches in diameter, and from his observations, it appeared that someone used a sharp tool to cut the hole in the tube (Tr. 94). In his opinion, had someone entered the mine without following MSHA's established procedures, the person could have been subjected to a potential explosion or to being overcome by gas. In addition, they could have encountered ground control problems, such a falling rock, and become entrapped in a gaseous atmosphere (Tr. 97). He had never observed the vent tube in question prior to his entry into the mine on September 3rd (Tr. 98). Had the hole in the vent tube been there the previous day, the fan would have been working. The vent was apparently blocked by some concrete which had been poured into the area from the surface (Tr. 99).

On cross-examination, Mr. Muniz confirmed that while he was at the portal on September 2, it was sealed with plywood and plastic and small amounts of smoke was coming out of the seal. Respondent's safety representatives were monitoring the gasses and smoke coming from the portal along with him (Tr. 101, 132). He confirmed that he did suffer a headache from the smoke coming out of the mine, that he had occasion to go within 10 or 20 feet of the portal, but issued no orders requiring people to stay away from a certain distance of the portal (Tr. 100). With regard to the footprints which he observed, Mr. Muniz stated that they could not have been caused by a team which entered the mine on September 2, because that group only went in approximately 127 feet and returned. The area where he observed the footprints was approximately 200 feet into the mine. Prior to the September 2d entry by a rescue team, MSHA had given no one permission to enter the mine, and to his knowledge no one entered subsequent to the August 8th closure (Tr. 104, 117, 118).

Mr. Muniz confirmed that he issued the citation for an illegal entry on September 5, 1980, and he waited a few days because the special investigation was going on. Mr. Muniz did not interview any mine personnel to determine the identity of the person why may have entered the mine (Tr. 128).

Allan White testified that he was employed by the respondent in September 1980 as a security guard, and that on September 3, 1980, he was on duty on the "graveyard shift", 12:00 midnight to 8:00 a.m. He arrived at the mine at approximately 11:45 p.m. and reported to work at the main gate. His specific area of responsibility and post was "the patrol truck which was stationed next to the plaza area in front of the portal" (Tr. 135). Two other security guards were also at the mine during his shift. When he went to his post at the plaza, company safety personnel were present, as well as the "swing" and "graveyard" miner work shifts who were coming and going (Tr. 135). At approximately 12:30 a.m. he received a radio call from his supervisor Ron Schmidt who informed him that mine manager Licari was coming to his area to issue some orders to the miners working there and that he (White) was to insure that they were carried out. When Mr. Licari arrived, he instructed the graveyard shift foreman to send his men home for the rest of the evening and

the crew left. Mr. Licari instructed him to remain in the area and to insure that all the miners left, but gave him no reasons for these instructions (Tr. 129-137).

Mr. White stated that after all the miners left the plaza area, the only people who remained were himself and graveyard safetyman Alan Koepke. Shortly thereafter, Mr. Schmidt arrived at the plaza post and ordered Mr. Koepke to leave the area. Mr. Schmidt then directed him (White) to secure the plaza area and to move his guard post from the plaza area to the top of the hill by the mine access road, and he did so at approximately 12:45 to 1:00 a.m. Mr. White stated that from his new guard post he had a partial view of the lower plaza area but could not see the portal or actual entry to the mine (Tr. 141). While at his new post, Mr. White stated that Mr. Schmidt would drive by for a routine check of the area every hour or half hour, and that he would drive to the lower plaza area and remain there for five minutes or so and then would leave. Mr. Schmidt directed him not to let anyone else past his guard post on the hill. Sometime between 3:30 and 4:00 a.m., Mr. Schmidt went to the lower plaza area and stayed there for 15 to 20 minutes. No one else crossed his post, but Mr. Koepke attempted to, and explained that he needed to obtain some air sample test tubes from the supply trailer in the plaza area. Mr. White advised him that he was under orders not to let anyone pass, and Mr. Keopke left to find Mr. Schmidt at the main gate to obtain his permission to pick up his air samplers (Tr. 144).

Mr. White believed it unusual for Mr. Schmidt to be at the mine during the graveyard shift. Mr. White also stated that he observed surface foreman Dean Reed there also during the shift at approximately 4:00 a.m., at the main gate, and that he was looking for Mr. Schmidt. Mr. Reed did not enter the mine area, and Mr. Schmidt was not on the property at that time. He did not know what Mr. Reed was doing there, and he found his presence unusual since Mr. Reed was seldom seen in the mine hour after hours (Tr. 145).

On cross-examination, Mr. White confirmed that when he left work at approximately 8:00 a.m., September 3, 1980, he had some discussions with the security personnel who were relieving him, and he recalled mentioning the fact that his post had been moved from the plaza area to the top of the hill, that Mr. Schmidt had been there most of the night, and that the incoming security shift would have to await further instructions (Tr. 148). He testified that the mine plaza area could be entered from areas other than the access road, namely through a stockpile area which was lighted. However, he could not observe anyone coming that way from his vantage post on the hill (Tr. 152). Mr. White confirmed that he did not know who may have entered the mine, but "rumor and scuttlebutt" indicated four possibilities, namely, Mr. Reed, Mr. Licari, surface superintendent Billy Canapa, "and possibly even Ron Schmidt" (Tr. 160). The basis for these rumors was the fact that "there had been things that were appropriated for going into the tunnel on a safe means and they had all of a sudden disappeared" and the fact that Mr. Reed was there at night when he was never known to show up at those hours (Tr. 161).

Mr. White confirmed that he was no longer employed by the respondent, and he left its employ on October 11, 1980, after a dispute over a suspension he received for disciplinary reasons and two of his company paychecks which "bounced" (Tr. 161). He also confirmed that while he was on duty during the aforementioned night in question, he personally observed no one enter the mine portal (Tr. 162).

Dean Hansen, testified that in September 1980, he was employed by the respondent as the underground superintendent. He confirmed that he was part of the approved group who entered the mine on September 2d at approximately 11:00 a.m., for the purpose of checking the fire to determine how to contain it so that mining could be resumed. The group had MSHA's approval, they were all equipped with Gregor mine rescue units, and a back-up team certified by MSHA in mine rescue was standing by (Tr. 165). He described the conditions underground on that day, and the evening was devoted to attempts to clear up the fan ventilation tubing which had been blocked. He returned to the mine the next morning, September 3d, at approximately 8:00 a.m. He met Mr. Licari, and Mr. Licari asked him "to go for a ride where we could talk without being interrupted" (Tr. 170). Mr. Hansen related the conversation which took place, as follows (Tr. 171-174):

> Q. What did you talk about?
>
> A. Dreams and the force.
>
> Q. Could you explain that? Could you explain what the conversation was?
>
> A. Yeah, I can pretty well repeat it. It sounds pretty silly. He said -- Benny told me that he'd had a dream.
>
> Q. Benny Licari?
>
> A. Yeah. That the Force was with him. That a rock fell out of the back of the tunnel and put a hole in the fan line. And I asked him if he was all right.
>
> Q. What did you mean when you asked him if he was all right?
>
> A. Well, he talked incoherently. I never heard of such a positive dream projection, and he wanted me to go turn the fan on before I done anything else.
>
> Q. Did he ask you to turn the fan line on?
>
> A. Yeah, and the Force was with him. So I said, I'll turn the fan line on. I was going to turn it on to humor him. And lo and behold, the fan run just fine.
>
> Q. What else do you remember from the conversation that you had with Mr. Licari that morning? Was there any other explanation or any other --

A. No. Just that he had that dream, that there was a hole in the fan line, that a rock fell out of the roof at the tunnel and put a hole in the fan line and he just knew it happened.

Q. Did you ask him how he knew it happened?

A. Yeah.

Q. What was the response?

A. He said he just knew it, that the force was with him and rock fell out of the back of the tunnel and put a hole in the fan line. And he asked me to convince the other miners that that's how a hole got put in the fan line.

Q. And did you eventually go turn on the fan?

A. Yes.

Q. And did it work?

A. Yes.

Q. What was -- can you describe how Mr. Licari was having this conversation with you? Was he excited?

A. Yes, he had to be pretty excited. And real enthused. I mean like there was no doubt.

Q. Do you know where Mr. -- well, whether Mr. Licari lived on the mine property?

A. Yes, I do, I did.

Q. Could you tell us where he lived on the property?

A. He lived, when you approach the line he had a patrol in the guard shack, it's right in here -- let me look at this a little closer. (Witness examines document.) This is the guard shack --

* * *

Q. Did you -- did you find your conversation with Mr. Licari that morning unusual?

A. Yeah, found it real strange. I wasn't too sure -- I really thought mayb e he had a load on, I thought maybe he'd been drinking a little bit through the night. And later when I turned the fan on and it run I got quite angry with Mr. Licari out in the parking lot. And I got angry because I told him that I felt using the powder would have been a hell of a lot better way it was done, the hole got put in the fan line.

Q. How -- after you turned the fan on and it worked --

A. Mm-hmm.

Q. What conclusion, if any, did you draw from that?

A. Well, I knew the fan line was open. That somebody had to have went in there and I accused Benny of doing so.

Q. That morning you accused him of doing so?

A. Yes. I got very hostile about it and the safety director, Sandy was there. And I told him, I said, you're going to have us all in court over this thing. And that's were [sic] we're sitting today.

Mr. Hansen confirmed that he was part of the rescue team that went underground with Inspector Muniz on September 3, 1980, after the vent tube was unclogged. He observed two sets of footprints, part of a broken axe and a piece of fan line in the area where the vent tube had been cut, and he assumed the axe was used to cut the tubing, but did not believe it could have been made by falling rock (Tr. 176). He also confirmed that Mr. Licari and Mr. Canapa were scuba divers, and he observed scuba tanks and gear stored at Mr. Licari's house. He also stated that Mr. Licari had previously asked MSHA and the state inspectors whether scuba gear could be used to enter the mine because the Gregor rescue units were not at the site, but the state officials indicated that it could not be used (Tr. 178).

As for the identity of the person or persons who may have entered the mine, Mr. Hansen stated that Mr. Koepke told him the next day, September 4, 1980, that it was Mr. Licari and Mr. Canapa. Mr. Hansen stated further that Mr. Koepke told him that he saw Mr. Licari, Mr. Canapa, Mr. Reed, and quarry superintendent Ron Frasee at the portal area on the morning in question, but that he did not actually see anyone enter the mine portal or punch a hole in the portal seal (Tr. 180-181).

On cross-examination, Mr. Hansen confirmed that he personally does not like Mr. Licari, and he related that Mr. Licari had made some statements regarding the operation of the mine to the local press, and that Mr. Hansen and the respondent are involved in a court suit concerning "defamation of character". Mr. Hansen also confirmed that he is a party to another court suite concerning moving costs connected with his employment with the respondent (Tr. 183). He testified further as to the conditions of the underground mine the day he entered it with the rescue team, indicated that it was intensely hot on September 2d, but that it had cooled down after the smoke was vented the next day.

Mr. Hansen stated that he mentioned the axe which he observed underground to MSHA investigator Juan Wilmouth some ten days later when Mr. Wilmouth came to his house to speak with him. Mr. Hansen also confirmed

that he is a party to another court suit concerning moving costs connected with his employment with the respondent (Tr. 183). He testified further as to the conditions of the underground mine the day he entered it with the rescue team, indicated that it was intensely hot on September 2d, but that it had cooled down after the smoke was vented the next day.

Mr. Hansen stated that he mentioned the axe which he observed underground to MSHA investigator Juan Wilmouth some ten days later when Mr. Wilmouth came to his house to speak with him. Mr. Hansen also confirmed that he resigned his job with the respondent on September 8, 1980, and that he gave his "quit" to Mr. Licari. He also confirmed that after he quit, he was involved in an automobile accident on mine property and was charged with felony drunk driving (Tr. 190). Mr. Hansen stated that to his knowledge none of the certified rescue team members, including himself, entered the mine bewteen the hours of 12:00 midnight and 8:00 a.m., September 3, 1980. He also indicated that Mr. Licari, Mr. Canapa, and Mr. Schmidt are not certified in mine rescue by MSHA (Tr. 193). To his knowledge, none of these individuals entered the mine at the time in question (Tr. 194). He also conceded that the maximum age for one to serve on a rescue team is fifty, and that at the time he served on the team he was fifty-two (Tr. 194). However, he indicated that MSHA authorized his entry and excepted him from the age requirement (Tr. 195). Mr. Hansen also stated that when Mr. Licari told him about the "force", he felt that Mr. Licari knew that a hole had been cut in the fan line (Tr. 200).

Testimony and evidence adduced by the respondent

Arnold Kopelson, testified that he is an attorney, that his firm represents the respondent, and he confirmed that he is a co-partner with Mr. Miller in the ownership of the mine in question. He testified that he and Mr. Miller were at the mine site on September 2, 1980, and they went there to ascertain a manner in which to gain entrance to the portal for the purpose of putting out the fire. He confirmed that he participated in the conferences with MSHA representatives that day and also confirmed the fact that a mine entry was made that day by a rescue team. He was standing 30 or 40 feet from the portal, but was moved back to a distance of 250 to 300 feet on orders by company safety officer Sandy Rettagliata. Sometime during that evening he started to feel nauseous and dizzy, and experienced severe headaches and a burning in his nose and throat, and decided that he had to leave the area. He spent the next day in bed. He expressed a concern for the safety of the people in the area, and expressed his view that 250 to 300 feet from the portal would be a safe distance for people to be. He asked Mr. Miller to convey these views to Mr. Licari so that he could keep people away from the portal (Tr. 225-228).

Mr. Kopelson stated that he did not give anyone permission to enter the mine portal, except as authorized by MSHA. Mine management specifically told Mr. Licari to stay away from the mine portal because of the smoke, and this included security personnel. He did this out of concern for the

safety of his people. He also stated that the mine employed approximately 105 people and was the second largest employer in Calaveras County. The community was concerned that the mine would go out of business, and in view of the potential economic disaster on the community. Mr. Kopelson believed that "anyone could have gone down that hole" (Tr. 229).

On cross-examination, Mr. Kopelson stated that prior to September 2, he and Mr. Miller had made many trips to the mine, but except for the day the fire started, he could not recall being as close to the portal as he was on September 2 (Tr. 233).

Jean Baudizzan, testified that he is employed by the respondent as a security guard, and that on September 3, 1980, he was working the graveyard shift from 12:00 midnight to 8:00 a.m. He was assigned to shack guard post Number 2. During that evening he had occasion to see Mr. Koepke while making his security rounds. He first saw him at his guard post at 12:00 midnight when he came to speak with the miners, and later saw him in his pick up truck some 60 feet from his post. Mr. Koepke came and went at various times, and was also asleep in his vehicle for about two hours during the time in question (Tr. 237).

Mr. Baudizzan confirmed that from his guard post he could not see the portal entrance to the mine. He also confirmed that he was interviewed by MSHA personnel concerning the alleged entry to the mine on September 3, and that his supervisor discussed the matter with him and advised him to tell the truth to the investigator (Tr. 239). Mr. Baudizzan stated that he heard rumors that "practically every employee there and past employees had gone into the mine at one time or another", but that he heard no actual names mentioned (Tr. 240).

On cross-examination, Mr. Baudizzan confirmed that the "rumor" he heard about concerned people allegedly entering the mine "after the mine was supposed to have been entered", after September 3d (Tr. 242).

Michael Miller, confirmed that he was at the mine on September 2, 1980, and that he was with Mr. Kopelson during most of the day and evening. He observed a great deal of smoke coming out of the portal seal, and he too was ill that evening and the next day. He testified that no one, including himself, ever gave anyone working for him permission to enter the mine. Prior to the instant citation, the mine had a perfect safety record since ground was broken on March 1, 1979. Mr. Miller stated that he has no knowledge as to who may have entered the mine, and has seen no credible evidence as to the identity of the person who allegedly entered the mine. He confirmed the fact that the mine operation had a significant impact on the economy of the county, and that his payroll was approximately $200,000 a month. He also confirmed that he had received numerous phone calls from people telling him that "they would be only too happy to go into that mine and just knock the damn fire out", but that in each instance, these offers were rejected. To the best of his knowledge, "we followed the rules and regulations" (Tr. 245).

On cross-examination, Mr. Miller testified that he visited the mine approximately 10 times during the period August 8 through September 3, 1980. He also confirmed that he made no offers to have the people who volunteered to enter the mine become certified in mine rescue procedures (Tr. 246).

In response to further bench questions concerning the issuance of the order and the modifications, Mr. Miller stated as follows (Tr. 247-249):

> THE WITNESS: That is correct. I mean, I will testify to an opinion. I found MSHA to be inaccurate in the conclusions they reached, I found them to be obstructionist, I found them to be extremely uncooperative. And I'm not talking about Mr. Esteban, who is our regular inspector. I'm talking about the entire team of people who came down. I consider the behavior of MSHA on this case disgraceful.
>
> JUDGE KOUTRAS: In what regard now?
>
> THE WITNESS: We were getting orders all the time and modification of orders, and we were being -- one time, Your Honor, we had made a request that we would try and get members of the San Francisco Fire Department, who are trained fire fighters, to come down and help us to end this fire, which we believed was a smouldering fire, and that offer was refused. Every time we turned to try and make what we considered to be a carefully considered suggestion as an appropriate method for dealing with this fire, some reason was found as to why we could not do it. I also find the orders inconsistent. A lot of the conclusions reached were based upon hearsay, circumstance, and very inconsistent with themselves.
>
> I also must say, Your Honor, that under the circumstances, with the pressure that everybody understands that I was under, the Company was under, I took a look at the letter of the 28th of August and I did see what I thought to be a statement that you may enter the mine as long as four conditions are complied with. We recommend that the portal be sealed, we recommend -- twice, they stated -- that the portal be sealed. But we forbid anybody from entering this mine unless the following four conditions are met. Then there is a circumstantial case that someone did enter the mine. I don't think that anybody in his right mind would question the fact that somebody must have gone into the mine.
>
> But the issue is, it was never linked to this Company, which had a perfect safety record up until that date, cooperated with the investigation, has never seen one shred of credible evidence to establish who went in, the circumstances under which they went in, and whether it violated the letter of August 28. You put all those facts together and I don't understand why I'm here today.

Mr. Miller confirmed that he did not contest the withdrawal order, and that he tried "to work with the people in complying with the order" (Tr. 251).

Benjamin J. Licari, testified that he is a graduate geologist and that on September 3, 1980, he was serving as mine project manager. The only persons senior to him were the mine owners, and Mr. Hansen was the underground superintendent working under his supervision. Mr. Hansen was responsible for the direct construction of the shaft and tunnel, and Mr. Licari conceded that during the period of September 2 or 3, 1980, he and Mr. Hansen were not getting along. He confirmed that he too received offers from members of the community to help put out the fire, that he considered these offers to be serious, but that he never engaged any of these people in the fire fighting activity (Tr. 254-257).

Mr. Licari stated that mine management at all times did their best to insure the safety of their personnel and to comply with all of the agency regulations in attempting to put out the fire, and that at no time did Mr. Miller or Mr. Kopelson ever give him authority, permission, or directions to violate any order, rule, or regulation of any state or federal safety agency (Tr. 257).

Mr. Licari confirmed that he had a discussion with Mr. Hansen at the mine on the morning of September 3, 1980, and that during that conversation he expressed his displeasure over any attempts to use dynamite in the tunnel because of the fact that MSHA and OSHA had advised him that the gasses in the tunnel were approaching the lower explosive limits. He explained to Mr. Hansen that the use of beach balls and umbrellas should be discontinued because he (Licari) had drafted a schedule for reopening the mine. With regard to Mr. Hansen's testimony regarding the "force", Mr. Licari denied that he had mentioned any "dreams" to Mr. Hansen, and explained that he generally used the phrase "may the force be with you" in greeting or saying goodbye to people. He denied that he entered the mine, and stated that he had no knowledge as to who may have entered the mine contrary to MSHA instructions (Tr. 259).

On cross-examination, Mr. Licari confirmed that he no longer was employed with the respondent company, but is employed with Demex International, who in turn is doing work for the respondent. He also confirmed that at the time of the incident in question, he was not trained in mine rescue, but is now. He also confirmed that he is a certified advanced scuba diver and that he had scuba equipment stored on the mine site at the time of the entry in question (Tr. 261). He stated that at the time of the alleged illegal entry, he did order security personnel out of the mine portal area (Tr. 261).

Mr. Licari stated that when he discussed his mine reentry plan with Mr. Hansen, he had prepared it sometime between the hours of 12:00 midnight and 8:00 a.m. (Tr. 265). He stated that the original portal seal was airtight and composed of sand and other materials, but that the seal was removed to facilitate the entry of the authorized mine rescue team, and to his knowledge this was the first time anyone had entered the mine

since the fire started (Tr. 267). He stated that in view of the fact that safety director Rettagliata was hospitalized on September 3, for carbon monoxide inhalation, and the fact that smoke was coming from the sael into the plaza area, he believed it was best to post security people at a safe distance to keep people away from the portal (Tr. 268). Mr. Licari stated that he gave Inspector Esteban a copy of his mine reentry plan on the morning of September 3 (Tr. 273).

Petitioner's arguments

The facts presented in this case are detailed in the post-hearing "proposed findings of fact" submitted by the petitioner in support of its case, and they are as follows. On August 8, 1980, a fire broke out in the underground portion of the mine and it was apparently started when a spark from a torch ignited bales of hay stored underground. Shortly after the fire started, an MSHA inspector appeared on the scene and issued a withdrawal order pursuant to section 103(k) of the Act, withdrawing mine personnel from the mine and prohibiting anyone from reentering until such time as MSHA determined that any hazards connected with the fire had been eliminated. The original order was modified several times by MSHA inspectors, and the gist of these modifications prohibited anyone from reentering the mine without direct authorization from MSHA's Western District Manager.

In response to the modified order, respondent issued a plan for reentering the mine, and MSHA's district manager responded to that plan and advised the respondent that MSHA would not permit mine reentry unless four conditions were met. The conditions were (1) all persons were to use approved 2-hour self-contained oxygen breathing devices; (2) all persons entering the mine must be currently certified by MSHA in mine rescue procedures; (3) the persons entering the mine must consist of a minimum of four properly equipped persons and a back-up team of four additional persons to be maintained in immediate readiness to enter the mine if necessary; and (4) industry recognized mine rescue procedures and techniques must be followed by all persons entering the mine. Respondent agreed to comply with these conditions.

On September 2, 1980, in an attempt to facilitate mine reentry, respondent made an effort to remove smoke from the mine by use of a ventilation fan. During this process, the fan somehow became blocked, and attempts to unblock it by various methods were unsuccessful. All surface mining activities ceased, attempts to unblock the fan were discontinued, and all mine personnel were instructed to leave the mine site. At approximately 12:30 a.m., September 3, 1980, all mine personnel had left the mine, and the mine security staff was instructed to secure the mine protal area and to insure that everyone left the area. Once this was done, certain mine security personnel were instructed to relocate their security post away from the mine portal area to an area near the entrance to the mine property, and they were further instructed not to allow anyone past the guard post other than the chief of security.

On the morning of September 3, 1980, shortly after 8:00 a.m., the ventilation fan was turned on and smoke began to be removed from the mine. At approximately 2:00 p.m. that same day, an approved rescue team consisting of an MSHA inspector and mine personnel entered the mine portal and the inspector discovered that someone had cut a hole in the underground ventilation tubing, thereby facilitating the venting of the smoke from the mine. The inspector believed that this was done sometime within the hours of midnight and 8:00 a.m., that same day, and since MSHA had no knowledge of this, and since it was obvious to the inspector that an unauthorized entry had been made contrary to the terms of the orders which had previously been issued, he issued the citation which is the subject of these proceedings.

Petitioner concludes that the respondent failed to adequately safeguard against persons reentering the mine and thus violated the 103(k) order issued on August 8, 1980, and as modified on September 2, 1980. Since the respondent has not challenged the validity of the order in question, petitioner asserts that the only issue presented is whether the respondent, either by actions or inaction, violated section 103(k) of the Act.

In support of its case, petitioner argues that there is no question that one or more persons entered the mine between the hours of 12:45 a.m. and 8:00 a.m. on September 3, 1980, and cut a hole in the fan line, and that respondent's president Michael Miller conceded that this is the case. Petitioner asserts that there is an abundance of facts from which the logical inference can be made that the individuals who entered the mine on September 3, 1980 did not comply with the four conditions set forth by MSHA's letter dated August 28, 1980. First of all, if the persons who entered the mine were intending to meet MSHA's requirements, there would be no logical reason to commit the entry in the twilight hours. More specifically, it would have been necessary for eight persons (4-person rescue team and 4-person back-up team) certified in the mine rescue to have participated in the entry in order to meet the second- and third-enumerated MSHA conditions. However, the individuals certified in mine rescue by MSHA, namely respondent's Underground Superintendent Dean Hansen, Mark Gentry, Robert Holbrook, Charlie Smythe and MSHA Mine Inspector Felix Muniz, were not present at the mine on September 3, 1980 between the hours of 12:45 a.m. and 8:00 a.m. In addition, the individuals who were present at the mine on that day and at that time, namely respondent's Project Manager Benny Licari, Security Director Ron Schmidt and Surface Foreman Dean Reed, were not at that time certified in mine rescue by MSHA. If the persons who entered the mine were interlopers, it is highly unlikely that they were MSHA-certified in mine rescue.

Petitioner maintains that it is improbable that the persons who entered the mine wore MSHA-approved self-contained oxygen breathing apparatus because the respondent did not have any MSHA-approved self-contained breathing apparatus readily available at the mine and it is

inconceivable that interlopers intending to enter the mine without the knowledge of the respondent would concern themselves with procuring self-contained breathing apparatus approved by MSHA.

Petitioner argues that the section 103(k) withdrawal order issued by MSHA's inspector placed a duty on the respondent to exercise a high degree of care to insure that no persons entered the mine. Respondent was ordered "to cause immediately all persons . . . . to be withdrawn from, and to be prohibited from, entering" the mine, and the August 9, 1980 modification of the original withdrawal order prohibited "any person from entering the mine portal without direct authorization from MSHA's Western District Manager." The district manager's letter of August 28, 1980, which was incorporated by reference into the September 2, 1980, modification of the original withdrawal order, stated that MSHA would "not allow persons to re-enter the mine" unless the enumerated conditions were met. Thus, petitioner maintains that the withdrawal order and the subsequent modifications did not limit their scope to "miners" or "operator's employees". Instead, the word "persons" was used in the withdrawal order and its subsequent modifications, and respondent's duty of care extended not only to its miners and its employees, but extended to all individuals.

Petitioner states that there are several factors which indicate that the mine entry on September 3, 1980, was accomplished with the knowledge and involvement of respondent. In support of this conclusion, petitioner points out that top-level mine management, who were not ordinarily at the mine during the graveyard shift, were at the mine on September 3, 1980, at the time the entry occurred. On the morning following the entry, respondent's Project Manager, the highest level on-site manager, made statements which indicated that he at that time already had knowledge of the hole in the fan line and knew the fan would function properly. Furthermore, petitioner points out that it was respondent who had the most to gain from the entry to the mine because it would have been impossible to put out the fire without making a hole in the fan line.

Petitioner asserts that participation by the respondent in the entry of the mine would constitute gross negligence because it would be a reckless disregard of an order issued by MSHA for the purpose of insuring the health and safety of all persons in the area. In the alternative, petitioner argues that the respondent certainly failed to exercise reasonable care to prevent the entry of persons into the mine. In support of these conclusions, petitioner points out that immediately after the mine fire began, the portal area was sealed off and a permanent security post was established at the portal area. Additionally, respondent had received numerous offers, which respondent considered sincere, from people in the local area volunteering their assistance in extinguishing the mine fire. Thus, petitioner concludes that it is obvious that respondent recognized the danger of an unauthorized entry to the mine if the portal area were left unguarded and realized the importance of having constant security in the area. Despite this knowledge, respondent nevertheless removed its security guard from the portal area on September 3, 1980 to a post where the guard could not see the portal. Petitioner maintains that the removal of the security guard to a location where he had no view of the portal at the very least constitited ordinary negligence.

Respondent's arguments

In addition to the arguments advanced during the hearing in this case, respondent points out in its post-hearing brief that prior to the fire which occurred at the mine on August 8, 1980, respondent had never been issued any order or citation by MSHA. Respondent also points out that it voluntarily evacuated the mine, reported the fire to MSHA, and that at the time the inspector issued the withdrawal order on August 8, 1980, no one was in the mine.

Respondent's arguments include a recitation of the facts surrounding the issuance of the order and the subsequent modifications, including respondent's argeement to comply with MSHA's four conditions before reentering the mine. Respondent asserts that investigations conducted by MSHA as well as the respondent failed to determine the identity of the person or persons who may have entered the mine, the training of any such person, the equipment used by such persons, or any circumstances surrounding the alleged entry. Further, respondent maintains that persons other than mine officers or employees had strong motives to aid the respondent by an entry into the mine. However, respondent concludes that no evidence was adduced to prove that it enticed, solicited, encouraged, allowed, permitted, or suffered any person or persons to enter the mine during the time in question.

Respondent maintains that it took reasonable and responsible precautions to prevent any unauthorized entry in violation of the withdrawal order, and that it did not violate that order, as modified.

Findings and Conclusions

Fact of Violation

The respondent in this case is charged with a violation of section 103(k) of the Act, and the theory of MSHA's case is that someone made an unauthorized entry into the underground mine tunnel on September 3, 1980, contrary to the conditions and prohibitions imposed on the respondent by the section 103(k) order and modifications.

Section 103(k) of the Act states in pertinent part:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

MSHA's regulations dealing with the reporting and investigation of mine accidents, Part 50, Title 30, Code of Federal Regulations, states as follows in the "definitions" found at section 50.2(h)(6):

> "Accident" means,
> * * * *
> An unplanned mine fire not extinguished within 30 minutes of discovery;

It seems clear to me that section 103(k) clearly authorized the issuance of the initial order of August 8, 1980, withdrawing miners from the mine. The fire in question is clearly an "accident" within the meaning of the regulations requiring that it be reported, as well as the authority of MSHA to conduct the investigation which took place in this case. In addition, I conclude and find that the issuance of the subsequent modifications to the initial order were within the authority granted the inspectors by section 103(k), were properly and validly issued, and that the respondent was obligated and bound by the conditions set forth in those modifications. See: MSHA v. Eastern Associated Coal Company, HOPE 75-699, IBMA 76-98, 2 FMSHRC 2467, 2472, September 2, 1980, where the Commission held that an inspector is not restricted to enforcing only mandatory safety standards or preventing imminent dangers. Eastern Associated Coal concerned the very same statutory section 103(k) provision in issue in the instant case.

Section 110(a) of the Act, 30 U.S.C. 820(a), provides in pertinent part that "/t/he 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 . . ." (emphasis supplied). In the instant case, respondent is charged with a violation of the conditions imposed upon it by the validly issued modified withdrawal order issued pursuant to section 103(k). If MSHA can establish by a preponderance of the credible evidence adduced here that the terms of the modified order have been violated, then it has established a violation of section 103(k), and a civil penalty assessment may be made for that violation. Therefore, the first question to be addressed is whether or not MSHA has carried its initial burden of establishing the violation as charged. Secondly, if a violation has been established, the next question is whether or not the respondent Miller Mining Company should be held accountable and responsible for that violation and assessed a civil penalty.

Respondent does not dispute the fact that someone entered the mine on September 3, 1980, and that MSHA's district manager had not approved this mine entry. In addition, it is clear that respondent understood and agreed to abide by the conditions imposed by the district manager before reentering the mine (Exhs. P/R-3 and P.R-4). In addition, as argued by the petitioner in its post-hearing submissions, it seems clear to me from all of the evidence presented in this case that there is a strong inference that the person or persons who made the mine entry did not follow MSHA's conditions precedent at the time the entry was made. The

thrust of respondent's defense is that MSHA produced no credible evidence to establish that the person or persons who entered the mine were employees of the respondent or that the respondent authorized or otherwise permitted the illegal entry. This is a matter bearing on the respondent's negligence, and it may not be used as an absolute defense to the question of whether a violation has occurred.

It is clear from the case law, that under the 1977 Mine Act an operator may be held liable for a violation which occurs on mine property regardless of fault; United States Steel Corp., 1 FMSHRC 1306, 1 BNA MSHC 2151, 1979 CCH OSHD 23,863 (1979); El Paso Rock Quarries, Inc., 3 FMSHRC 35, January 28, 1981; Nacco Mining Company, 3 FMSHRC 848, April 29, 1981, (1969 Coal Act).

In an "independent contractor" case arising under the 1969 Coal Act, Bituminous Coal Operators' Assn. v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977), the Court held that mine owners are absolutely liable for violations by independent contractors. Based on its analysis of the law, the Court held that the mine owner is liable for a violation regardless of who violated the Act or created the danger. The Court reaffirmed this holding in a per curiam opinion on December 24, 1981, dealing with a case arising under section 103(k) of the 1977 Act, Harman Mining Corporation v. FMSHRC, 4th Cir., No. 81-1189. My prior decisions in Harman, which subsequently became the final decisions of the Commission, are reported at 3 FMSHRC 45, January 2, 1981. Although the case at hand does not involve an independent contractor, the principal that a mine owner is liable for a violation occurring on mine property, regardless of falut, still applies.

In view of the foregoing, and on the basis of a preponderance of the evidence adduced in this case, I conclude and find that the petitioner has established a violation of section 103(k) of the Act as stated in the citation. Accordingly, Citation 0601832, September 5, 1980, IS AFFIRMED.

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

The parties stipulated that the respondent is a small to medium size mine operator and that a reasonable penalty will not adversely affect its ability to continue in business, and I adopt these stipulations as my findings on these issues.

History of Prior Violations

The record establishes that the citation issued in this case was the first one served on the respondent under the 1977 Mine Act, and that the respondent has had no previously assessed violations. I find this to be an exemplary safety record and this is reflected in the civil penalty assessed by me for the citation in question.

Gravity

The facts in this case reflect that no injuries resulted from the mine fire in question, and that at the time the order issued all personnel had been removed from the underground mine by mine management. In

addition while it is true that no one knows whether the person or per sons who entered the mine were protected from exposure to hazardous gasses or somke, the fact is that the conditions at the mine portal on September 2 and 3, 1980, presented a hazard of exposure to smoke and gasses from the mine fire in question. I believe it is reasonable to assume that anyone entering the mine was exposed to these hazards. Accordingly, I conclude and find that the violation was serious.

Good Faith Complaince

The order issued in this case was terminated on January 7, 1981, after the respondent "was made aware of the danger and public law 95-164" (Exh. P/R-11). In addition, the record reflects that respondent cooperated with MSHA during the course of its investigation in this case, and the inspector's who prepared the report in this regard acknowledged this fact (Exh. R-2, p.6). I conclude and find that respondent demonstrated good faith compliance.

Negligence

Respondent argues that it took reasonable and responsible precautions to prevent any unauthorized entry into the mine in violation of the withdrawal order. Although respondent does not elaborate further in its posthearing written submissions, during the course of the hearing Mr. Miller and Mr. Kopelson testified that the decision to remove security personnel from the mine portal area was based on safety considerations because of the smoke and gasses being emitted from the portal. Both Mr. Miller and Mr. Kopelson testified as to certain ill effects they experienced while in close proximity (30 or 40 feet) to the portal, and testimony was also presented that the company safety director (Sandy Rettagliata) suffered from possible smoke inhalation and may have been hospitalized. Given these circumstances, respondent suggests that the decision to remove all personnel, including the security guard, away from the portal area for a distance of 250 or 300 feet, was to insure the safety of personnel, rather than to provide an opportunity for someone to enter the mine without being seen by the guard.

Former security guard Allan White testified that Project Manager Licari came to the portal area sometime after 12:30 a.m., September 3, 1980, and instructed him to remain in that area to insure that all miners left and that the area was secure. Mr. White claims that Mr. Licari gave him no reasons for those instructions, and that sometime later Security Chief Schmidt instructed him to remove himself from the portal plaza area and establish his guard post "on top of the hill". Although Mr. Smith had a partial view of the plaza area from this newly established position, he could not see the actual mine portal. He also indicated that no one crossed his guard post on the hill except for Mr. Keopke and Mr. Schmidt, but that there were other means of access to the plaza area which he could not observe.

Although Mr. Schmidt and Sandy Rettagliata did not testify in this case, Mr. Licari could not recall ordering security personnel away from the plaza area, but "assumed" that he did (Tr. 262). He explained that he did so out of concern for the safety of all mine personnel, and that he was concerned even before Mr. Miller instructed him to secure the area. He also explained that the reason personnel were not removed from the plaza area prior to this time was that the period September 2-3, was the first time the portal was opened (Tr. 268).

Petitioner's arguments in support of a finding of gross negligence on the part of the respondent is based on certain circumstances and factors dealing with the control and posting of the guard force, the "unusual" presence of mine management personnel at the mine in the early hours of the morning, management's "motive" in wishing to see the fire extinguished, and the damaging testimony by Mr. Hansen, which petitioner concludes establishes a strong inference that Mr. Licari had prior knowledge of the hole in ventilation tubing and that the fan would exhaust the smoke once it was turned on.

Petitioner's alternative argument in support of a finding of ordinary negligence is based on an assertion that respondent's removal of security guard White from the portal plaza area to a position on a hill where he could not see anyone entering the sealed portal area at least constituted ordinary negligence, partiucaly in view of the numerous offers of assistance from the nearby community to enter the mine and extinguish the fire. Petitioner argues that respondent had a duty to do everything reasonable to safeguard against anyone entering the mine, and petitioner obviously believes that removing a guard to a position where he could not observe anyone entering was unreasonable.

Considering all of the circumstances presented in this case, petitioner's "circumstantial case" arguments are plausible. That is, it is possible for one to conclude that mine management embarked on a "watergate" type conspiracy to set the stage so that someone could enter the mine and knock a hole in the ventilation tubing with an axe, thereby solving a problem that State and Federal Enforcement officials could not solve from the day the fire started in the mine. On the other hand, respondent's assertions that mine personnel were removed from the area for safety reasons is equally plausible. However, the one disturbing feature in respondent's explanation is that the one person who could have prevented the entry, the security guard, was ordered to withdraw to a position where he could not see the portal and do the job that he was hired to do, namely to insure that no one entered the mine. I am not convinced that the security guard could not have been positioned in such a manner as to insure his safety as well as to insure that absolute security against an illegal mine entry be maintained. In short, after careful consideration of all of the evidence in this case, I conclude and find that respondent had a duty to insure that no one enter the sealed mine portal, and that by ordering the security guard to reposition himself to an area where he could not maintain the area in question totally secure

against an illegal entry, respondent failed to exercise reasonable care to prevent the violation. Failure to exercise reasonable care in these circumstances constitutes ordinary negligence, and that is my finding.

Penalty Assessment

On the basis of the foregoing gindings and conclusions, and taking into account the requirements of section 110(i) of the Act, including the fact that respondent has an excellent safety record, and voluntarily withdrew all miners and secured the mine when the fire started, I conclude and find that a civil penalty assessment of $250 is reasonable for the citation which I have affirmed.

Order

Respondent IS ORDERED to pay a civil penalty in the amount of $250 within thirty (30) days for the violation in question, and upon receipt of payment by the petitioner, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 5 1982

CONSOLIDATION COAL COMPANY Contestant	:	Contest of Citation
	:	Docket No. PENN 82-44-R
v.	:	Citation No. 1143669
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 82-99
	:	A.C. 36-00807-03107 V
v.	:	Renton Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert Vukas, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company;
David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", to contest a citation containing special findings under section 104(d)(1) of the Act (Citation No. 1143669) and for review of a civil penalty proposed by the Mine Safety and Health Administration (MSHA), for that citation. 1/ The issues before me are whether the Consolidation Coal Company (Consol)

1/ Section 104(d)(1) provides in part as follows:
"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety

violated the regulatory standard at 30 C.F.R. § 75.1725(a) as alleged and, if so, whether that violation was "significant and substantial" as defined in the Act and as interpreted in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), and whether the violation was the result of the "unwarrantable failure" of the operator to comply with the law. An appropriate civil penalty must also be assessed if a violation is found. Evidentiary hearings on these issues were held in Pittsburgh, Pennsylvania on June 24, 1982.

The citation at bar was issued by MSHA inspector Frank Murin on December 18, 1981, and alleges as follows:

> A 103(g)(1) request 2/ was initiated concerning a malfunction that had occurred to the man-hoist at the Renton Mine on the 4 p.m. shift on October 21, 1981. During the course of the investigation it was revealed that repairs were made to the overspeed device for the hoist, however [sic] were not completed prior to lowering workmen into the mine. A locking screw that prohibits movements of the overspeed retaining nut was not replaced into position. (The retaining nut is used to hold the overspeed assembly in place.)

The cited regulatory standard, 30 C.F.R. § 75.1725(a) reads as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

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fn. 1 (continued)
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."

2/ A request for an inspection by the Secretary under Section 103(g)(1) of the Act, is one initiated by a miner or representative of miners.

The essential facts in this case are not in serious dispute. The specific issue is whether those facts support a violation of the cited standard, i.e., whether or not the cited man-hoist had been operated in an unsafe condition. The problem arose on October 21, 1981 at the beginning of the 4 p.m. shift. As the man-hoist (cage) was being lowered for the third time that shift it suddenly stopped. According to Leonard Conti, one of the miners on the cage at the time, it stopped so suddenly that it buckled his knees and "bounced up and down." It was about 15 minutes before the cage started again and descended the remaining 50 to 75 feet to the bottom of the 520-foot shaft. Conti had previously experienced similar sudden stops of the cage as a result of blown fuses.

Maintenance foreman Richard Murphy and general plant foreman Emerick Kravic were called in to correct the problem. A round retaining nut designed to hold a brass washer and tripping mechanism on the man-hoist overspeed governor had come loose thereby causing the overspeed governor to prematurely trigger and stop the man-hoist. When operating correctly the governor is designed to bring the man-hoist to an emergency stop if for some reason the rate of ascent or descent exceeds a pre-set speed. After the emergency stop in this case the miners in the third cage were apparently lowered to the bottom as Murphy held the trip bar in position with a screwdriver. The MSHA inspectors did not find this procedure to have been unacceptable for the limited purpose of allowing the miners to escape.

The evidence shows that Murphy then tried to re-thread the retaining nut onto the rotating shaft of the governor as the man-hoist was raised. Initially there was some difficulty in re-threading the nut and it apparently slipped off the shaft several times during the ascent. There was only a small opening in which to work and the nut was rounded with no machining (see Operator's Exhibits 16, 17, 19 and 22). According to Murphy, he was nevertheless able to re-thread the nut aided by the rotation of the shaft as the cage ascended. No one was in the cage during this ascent and MSHA does not question these efforts by the operator to correct the problem.

However mine superintendent Andrew Hathaway then directed that the cage again be lowered with additional miners without an intervening "dry run." Maintenance foreman Murphy went down with the miners in this cage even though he was aware that the retaining nut could again unthread as the hoist descended and the shaft rotated in the opposite direction. Murphy testified that he was nevertheless satisfied that necessary repairs had been completed.

Harley Pyles, director of engineering services for Consol and a graduate mechanical engineer, conceded that it would be "common knowledge" that a setscrew or similar locking device would be necessary to prevent a retaining nut, such as the one here at issue, from loosening on a rotating shaft. Maintenance foreman Denny Myers also told inspector Murin that a tapered locknut or cotter pin should have been used to prevent the retaining nut from unthreading. Myers was nevertheless confident the nut would stay in position on the fourth cage because "he watched it all the way down."

The fourth cage was lowered without incident and the governor was then dismantled. It was at this point discovered that the retaining nut contained a recessed setscrew which, if tightened, would prevent the nut from unthreading on the rotating shaft. The setscrew was apparently not previously discovered because it was obscured by grease and dirt. Because of the relatively old age of the hoist there was, moreover, no operating manual available that might have shown the existence of the setscrew.

In deciding whether there was a violation of the cited standard in this case it is essential to determine whether the man-hoist was, during its fourth descent, being "maintained in [a] safe operating condition" or alternatively whether that man-hoist should have been removed from service because it was in an "unsafe condition." As might be expected there is great divergence of opinion in this regard. On the one hand, MSHA inspector Murin testified that it was unsafe to have operated the fourth cage without the setscrew to lock the retaining nut on the governor. According to Murin, without that setscrew or other means to prevent the retaining nut from unthreading, that nut could indeed have again come loose, engaged the governor and brought the man-hoist to a sudden stop. Murin thought that such abrupt stopping would in itself be hazardous. He thought that resulting injuries from possibly falling to the floor or

against the walls of the man-hoist could be serious and involve broken limbs and sprained muscles. Murin also opined that the sudden stopping of the man-hoist could place undue strain on the wire rope causing it to stretch or "pop a cord." He thought the rope might also jump from the drum and become entangled. Murin admitted however that in spite of these alleged hazards he knew of no requirement or suggestion by MSHA, by the rope manufacturer, or by anyone else for an examination of the rope and/or drum after such sudden stops. Moreover, MSHA inspector Gerald Davis, who has specialized training and experience inspecting elevators and man-hoists, conceded that he has in the past tested man-hoists, including the man-hoist in this case, in an overspeed condition to determine whether the overspeed governor was properly functioning. Although Davis performs these tests during the ascent phase of the man-hoist operation it would appear nevertheless to place a similar strain upon the wire ropes.

On the other hand it appears to be undisputed that the fourth cage was lowered manually at a controlled slow rate of speed and that at least one person kept watch on the suspect retaining nut to make sure it did not unthread during the descent. In addition, mechanical engineer Harley Pyles testified that even assuming that the cage would have been stopped by the overspeed governor that would have been unlikely to have lead to any rope or drum damage. He pointed out that the braking effect was not that extreme and that the ropes are in any event designed with a safety factor of from 5 to 10. At worst, according to Pyles, the riders would experience some buckling of the knees.

The evidence in this case also shows that over the course of a year the man-hoist at issue will come to an emergency or sudden stop about six times. There is no evidence that anyone has ever been injured or that any damage has ever occurred as a result. I also note that the hoist rope is examined by x-ray every six months and is visually inspected every 24 hours.

For the reasons that follow I conclude that although the operation of the fourth cage in the cited manner was indeed not free from danger it did not constitute a "significant and substantial" violation. At the very minimum there was the admitted danger according to Consol engineer Harley Pyles to the mechanics who were manually rethreading the retaining nut while the shaft was in motion. A similar

potential danger existed during the fourth descent of the cage as the mechanics watched the nut and inferentially were prepared to intervene should that nut begin to unthread.

Whether a violation is "significant and substantial" depends on whether, based on the particular facts surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822 at page 825. The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury.

On the precise facts of this case I find a very low probability of injury. The retaining nut that had caused the initial problem had been completely rethreaded before the cited fourth descent, the descent was monitored and manually controlled at a low rate of speed and an individual continuously monitored the position of the retaining nut during the descent to make sure that it did not become unthreaded. I therefore find it highly unlikely that the cage could not have been brought to a gradual and complete stop before any loss of the retaining nut. Moreover, even with the unlikely loss of that retaining nut it is not disputed that the descent of the man-hoist would have been halted by the intervention of the overspeed governor. Since the cage was also descending at a slow rate of speed the alleged dangers attributed to sudden stopping would have also been greatly diminished. In addition the evidence shows that over the course of a year the man-hoist had almost routinely come to abrupt stops for various reasons without any history of resulting injuries or damage. Finally, I observe that MSHA's own man-hoist "expert" admitted performing tests of the cited overspeed governor by triggering an emergency stop of the man-hoist. Although the test was apparently performed during an ascent phase I do not find significant variance between this acceptable "test" and the alleged hazardous operation cited. It would appear that if MSHA's "test" does not place unacceptable stress on the wire ropes then Consol's operation of the man-hoist in the manner here cited posed no significantly greater hazard in this regard.

Under all the circumstances I cannot find that the violation was "significant and substantial." It is not therefore necessary to decide whether the violation was the result of "unwarrantable failure," Note 1/ supra. Since I

have found that the hazards alleged by MSHA were in fact quite improbable I attribute relatively low gravity to the violation. To the extent that there was some hazard, however remote, in operating the fourth cage without a setscrew, locking nut or other locking device on the retaining nut and in light of the concessions by Consol's own witnesses that the use of such a device would be generally accepted "common practice" I find that the operator was negligent. It is observed that after the fourth cage was lowered the entire overspeed mechanism was dismantled and, upon discovery of the setscrew in the retaining nut, was reassembled with the setscrew tightened to prevent the unthreading of the retaining nut. The condition was accordingly abated in a timely fashion and indeed even before the condition had been cited by MSHA. It is undisputed that the operator is large in size. I note that the Renton Mine has a rather substantial history of paid violations, however, there is no evidence that any violation of a similar nature has ever been cited. Under all the circumstances and considering the evidence in light of the criteria under Section 110(i) of the Act I conclude that a civil penalty of $100 is appropriate.

ORDER

Citation No. 1143669 is affirmed, however the special "significant and substantial" findings made therein are hereby stricken. Consolidation Coal Company is ORDERED to pay a civil penalty of $100 for the violation in Citation No. 1143669 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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AUG 9 1982

JOSEPH W. HERMAN, Complainant,	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE
v.	DOCKET NO. WEST 81-109-DM
IMCO SERVICES, Respondent.	Mine: Mountain Springs Plant

Appearances:

Joseph W. Herman, appearing Pro Se,
Reno, Nevada

Richard O. Kwapil, Jr., Esq.,
Woodburn, Wedge, Blakey & Jeppson
Reno, Nevada
For the Respondent

Before: Judge John J. Morris

DECISION

Complainant Joseph W. Herman, (Herman), brings this action on his own behalf alleging he was discriminated against by his employer, Imco Services, (IMCO), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The applicable statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. 815(c)(1), provides as follows:

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

> potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties a hearing on the merits was held in Reno, Nevada on February 21, 1982. The parties filed post trial briefs.

ISSUES

The threshold issue is whether complainant's failure to file any complaint for almost a year after he was allegedly discriminated against requires a dismissal of his claim.

Secondary and alternative issues are whether respondent discriminated against complainant, and, if so, what damages are appropriate.

SNYOPSIS OF THE CASE

Joseph Herman asserts he was fired when he complained to company officials and to the Mine Safety and Health Administration (MSHA) about an unsafe storage bin at IMCO's Battle Mountain project. Imco denies these allegations and asserts that budget overruns resulted in the termination of the project and Herman's position as supervisor.

The legal principles applicable in this case are enumerated in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980) rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall _____ F 2d _____ (3rd Cir. 1981) and in Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2765, (1981).

SUMMARY OF THE EVIDENCE

The uncontroverted evidence concerning the late filing of the complaint will be initially reviewed.

Herman was terminated as Senior Project Engineer by IMCO at the Battle Mountain project on April 9, 1979 (Tr. 56, P1). After being discharged Herman thought he was a scapegoat and, after thinking it over, he filed a claim (Tr. 152). Herman's initial effort at filing a claim was a letter he wrote on March 3, 1980 to the Employment Security Department for the State of Nevada. His letter was referred to the Department of Occupational Safety and Health (Nevada) on March 11, 1981. The Department forwarded Herman a complaint form.

On April 7, 1980, Herman used the form furnished to him by Nevada and filed a detailed two page discrimination complaint with the State (Tr. 139, 142, P1). In due course the complaint was referred by Nevada to the Federal Mine Safety and Health Administration (MSHA). The agency assigned Juan Wilmoth as a special investigator for the case (Tr. 139, 144, 147, P5, P7).

On September 3, 1980, after conducting its investigation, MSHA advised Herman that no discrimination had occurred within the meaning of the Act (P6). There was subsequent correspondence between Herman and MSHA. Herman lodged his complaint before this Commission on January 5, 1981 (Commission File).

DISCUSSION

Section 105(c)(2) of the Act, [30 U.S.C. 815(c)(2)], provides in part as follows:

> Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.

It has been held that none of the deadlines in the discrimination section of the Act are jurisdictional in nature. This view originates in cases arising under the 1969 Coal Act. Christian v. South Hopkins Coal Company, 1 FMSHRC 126, 134-36 (1979).

In Bennett v. Kaiser Aluminum and Chemical Corporation, 3 FMSHRC 1539, (June, 1981) it was stated that

> The proper test is whether tolling the filing period is consonant with the purposes of the statute. American Pipe and Construction Co. v. Utah, 414 U.S. 538, 557-58 (1974). Congress spoke plainly on the subject when it declared that the 60 day filing period "should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances." S. Rep. No. 95-181, 95th Cong., 1st Sess. at 36, reprinted in, (1977) U.S. CODE CONG. & AD. NEWS at 3436.

The first action taken by Herman in regards to his discrimination claim was when he wrote to the Nevada Employment Security Department on March 3, 1980 (Tr. 152, P8). I consider this letter to be at least an attempt, within the meaning of the Act, to file a complaint. However, by that time almost 11 months had passed since the alleged discrimination.

During the trial the Judge explained the 60 day statutory limitation to Herman. Herman gave two reasons for his late filing. These were that he discussed the filing with MSHA officials. Further, he stated he "wasn't familiar with court procedures naturally associated with a case of this nature" (Tr. 154, 156).

I find from the evidence that Herman's discussion with MSHA officials occurred after investigator Wilmoth had been appointed. In point of time this was after the complaint filed with Nevada had been referred to MSHA (Tr. 157, 159, P5). Accordingly, this was not a situation where Herman could have been mislead by MSHA officials as in Christian v. South Hopkins Coal Company, Inc., supra.

Herman's secondary claim that he was unfamiliar with court procedures does not constitute justification for the delay. Herman no doubt remained unfamiliar with court procedures since when he filed his complaint it was in the wrong jurisdiction. The evidence fails to establish any facts that would justify the late filing of the complaint.

For these reasons I conclude the complaint was not timely filed and it should be dismissed.

IMCO asserts that a further procedural delay requires dismissal of the claim. This delay arises from the statutory requirement that the person claiming to have been discriminated against has 30 days to proceed with his own suit after the Secretary has refused to proceed, 30 U.S.C. 815(c)(3).

IMCO's secondary procedural argument lacks merit. The Commission file reflects that MSHA wrote Herman on September 3, 1980 and advised him that they found no violation of the Act. On November 24, 1980, after Herman had apparently written to the MSHA office in Reno, Nevada, MSHA again wrote and advised Herman that he had "30 days to file with the Review Commission." The Commission file further contains Herman's letter of January 5, 1981 directed to the Commission inquiring about his claim. After he was advised by MSHA that they would not pursue his case Herman's actions were such that the strict application of the 30 days filing requirement would not be warranted.

Herman's post trial brief states that there is a two year limitation controlling in this case. Perhaps such a limitation is contained in the general statutes of the State of Nevada. However, a Nevada statute would not apply here. The pertinent controlling limitation for filing a complaint is the 60 day provision contained in the Act, 30 U.S.C. 815(c)(2).

However, for the reasons initially stated, namely, because of the delay of approximately 11 months before any claim was filed, I rule that the complaint should be dismissed as not timely filed.

The cases previously cited relating to the timely filing of complaints are Judge's decisions. Inasmuch as the Commission has not passed on this issue, I deem it necessary to review the merits of the case and to enter alternative findings of fact and conclusions of law.

Accordingly, all findings of fact and conclusions of law hereafter stated relating to the merits of the case are in the alternative to the primary ruling dismissing the complaint.

EVIDENCE ON THE MERITS

The essential facts are controverted and as hereafter noted I credit Herman's version of the facts.

Joseph W. Herman, age 65, with a degree in mechanical engineering, was hired by IMCO on April 4, 1978 (Tr. 20, 21). He was employed as the Senior Project Engineer at the IMCO Mountain Springs plant near Battle Mountain, Nevada (Tr. 22). Herman's duties included the supervision and construction of facilities to enhance the production of barite (Tr. 23, 24). Barite, which is mined by the open pit method, is a white chalky powder. It is used as a seal in the drilling process (Tr. 24).

Herman's supervisor was Norman Cornell, located in Houston, Texas. On the site Herman cooperated with Dave Brown and John Miller, IMCO managers (Tr. 25, 26). IMCO and Herman agreed his work assignment was of a temporary nature which would terminate when the Battle Mountain project was finished. Herman also agreed not to leave before the project was completed (Tr. 28).

Herman supervised the building of a boiler room as well as the installation of the boiler. His principal duties involved the drier. His crew averaged about 25 workers (Tr. 34). The only other engineer available was Cornell who would occasionally fly in from Houston (Tr. 34).

About March 3, 1979, a question arose over the safety of a 200 ton storage bin. The dimensions of the bin had been furnished by IMCO's engineering department. Herman (not a structural engineer) calculated the load bearing capability of the structure and became alarmed. After discussing the matter with Cornell it was agreed that the concrete slab could be enlarged (Tr. 37-39).

After the slab was poured the next question centered on the supports for the structure (Tr. 39). On April 9, Cornell and Herman talked at length. Herman told Cornell that when the bin was loaded the columns would self destruct, twist, and collapse (Tr. 40). Herman further explained the basis for his views (Tr. 40-41). Herman recommended that certain remedial action be undertaken (Tr. 42).

Cornell told Herman to proceed with the construction "irregardless", and under any condition (Tr. 39). Cornell also said not to worry if it

was unsafe but to proceed as per the drawings and sign them (Tr. 41, 43). Herman told Cornell that to make him liable for something he felt was unsafe would jeopardize his engineering integrity (Tr. 42).

The next day Herman, following Cornell's directions, erected the bin by raising it into position with a boom. Herman intended to expedite the erection of the bin and then reinforce it before it was used (Tr. 44, 47).

The following day Herman scheduled a meeting with Donald R. Barris, an MSHA representative. Before the meeting with MSHA Herman met Ed Ruth, an IMCO employee, in downtown Reno. Ruth told Herman that Dave Brown, the IMCO Manager, had advised Houston about Herman calling in MSHA about the bin (Tr. 129, 130).

The meeting with Herman and MSHA took place on April 11, 1979. MSHA representatives Burris and McAlexander attended. Also present were Lambert, the contractor, and Ed Ruth (IMCO). In addition IMCO's manager John Miller was "in and out" of the meeting (Tr. 48, 49, R7).

The focus of the meeting was the storage bin. Herman submitted his calculations to MSHA and it was agreed that MSHA would have its technical staff in Denver review the matter. The technical staff subsequently concluded that the bin structure should be redesigned (Exhibit P3).

Herman called Cornell by telephone and told him of the meeting with MSHA to evaluate the safety of the bin (Tr. 56). 1/ Before Herman could finish [his conversation] Cornell said "Lay off your crew, and you are terminated immediately" (Tr. 57). Cornell stated the company was shutting down the project for reasons of economy. The Company had run out of money (Tr. 105).

Herman told Cornell he would not leave until he had secured the area and properly shut it down. Herman shut down the project on April 12, 1979 and left on April 13, 1979 (Tr. 62-64).

Two weeks later Herman visited the site. Contractor Tomporski was present at that time (Tr. 64).

1/ The record is unclear whether this pivitol telephone conversation between Herman and Cornell occurred before or after the meeting with MSHA. In either event the exact sequence is not vital.

DISCUSSION

The factual setting here involves extensive conflicts in the evidence. IMCO contends Herman failed to establish a prima facie case of discriminatory discharge. I disagree.

Herman's complaints about the 200 ton bin which culminated in him calling in MSHA for an opinion were clearly protected activity. The evidence establishes Herman was forthwith and abruptly fired for that activity. The direct evidence: "I told him [Cornell] of the meeting with MSHA to discuss the safety of the bin ... and before I [Herman] could finish he [Cornell] said I was terminated and lay off your crew" (Tr. 56, 57). A clear case of protected activity, adverse action, and hostility has been established here Cf Chacon v. Phelps Dodge Corporation, supra.

IMCO denies the statements attributed to Cornell by Herman. Cornell states the engineering problems had nothing to do with the decision to fire Herman. That determination was made because the project costs were exceeding the budget (Tr. 199-201).

Cornell's testimony of the telephone call resulting in Herman's discharge is based solely on Cornell refreshing his recollection with a summary previously prepared from his telephone logs. This summary was apparently prepared in April 1979 at the request of R.E. Jones, Cornell's supervisor (Tr. 214, R8). No further explanation appears in the record why the logs were prepared. The underlying original detail of the daily telephone call logs was destroyed when Cornell left IMCO.

I do not find Cornell's version of the telephone conversation to be credible. As indicated the foundation of the logs themselves is mysterious. Cornell has no direct recollection of the conversation when he discharged Herman but an obvious element in this case is Herman's volatility in matters of safety and engineering integrity.

Herman agrees that Cornell said he was shutting down the project because of budget problems but in my view Cornell seized on that reason to terminate Herman.

The telephone log appears to be at best a self serving document. Unrelated to any particular date on the telephone log is the statement that "all candidates for the position of Project Engineer are given a copy of a list which is entitled 'Duties of a Project Engineer'. Copy attached. Joe Herman had been given this list. He does not measure up to the minimum as far as performing these duties" (R8). However, according to Cornell the basis for this observation was that he had on occasion reprimanded Herman concerning the costs of the project. In addition, Herman would miss an occasional weekly report (Tr. 215). The record reflects that the project costs were only incidentally the responsibility of Herman. In fact Herman was so unrelated to the costs of the project he was not one of the company officials receiving a copy of the projected budget overrun prepared by

IMCO's Manager Brown in April 1979 (R6). In addition, an occasional missing weekly report would not appear to establish that Herman did not "measure up."

Cornell's testimony is conflicting. At one point he testified he was not aware of the bin problem before Herman's termination (Tr. 217, 218). At another point he testified to the contrary (Tr. 220).

A further issue requiring discussion involves the specific date of the telephone conversation when Cornell fired Herman. The evidence indicates that this conversation took place on April 9, 1979. Herman noted there was a discrepancy as to that date. (Tr. 56, 57). Due to Herman's subsequent activity on the job site I conclude he could not have been terminated on the exact date of April 9. But the actual date is not vital to the case since the pivitol issues concern the protected activity and resultant immediate discharge.

Was there a budget overrun? The budget overrun was initially generated in a memorandum dated April 3, 1979. The written report, prepared by IMCO's manager Brown states, in part, "assuming a 10% allowable overrun, available capital was $1,980,000. This leaves a maximum balance of $194,359. Further, if these estimates are even remotely accurate, and I emphasize that they are extremely rough, we will be short by $116,500" (Tr. 180, R6).

By IMCO's figures there would be an .058 shortfall. The projected shortfall is not impressive in relation to the total budget. IMCO's manager testified a written memorandum later confirmed his superior's verbal approval of his proposal. However, no such written confirmation was offered in evidence. The project was eventually completed within the original budget figure (Tr. 188).

Was the project shut down? I believe IMCO simply misspoke on this issue. IMCO's managers agreed the project continued (Tr. 182, 183). Herman found contractor Tompokaski was on the site when he visited two weeks after his discharge (Tr. 64).

Was there a reduction in force, commonly called a RIF? IMCO's evidence shows contractor Tomporaski continued on the job after Herman's discharge. And the size of his crew remained the same (Tr. 183). Also destroying IMCO's claim of a RIF is its own written budget estimate (R6). That document states by April 20 "we should resume work on the drier" (R6, page 6). In short, work was to be resumed on the drier on the very day Herman's salary was terminated. Since the drier was Herman's primary responsibility any RIF was illusory rather than real.

If a budget overrun, shut down, or reduction in force occurred they can be established by more credible evidence than that offered here.

In Chacon v. Phelps Dodge Corporation, supra the Commission directed its Judge's not to exceed appropriate limits in examining a company's business practices and I assume without deciding that a budgetary cutback can be a business practice. However, I find IMCO did not sustain its burden of proof as required by Pasula, supra. I conclude the IMCO's proported justification is so weak and so implausible that it was a mere pretext seized upon to cloak a discriminatory motive.

But for the primary ruling of untimely filing, this case would be affirmed on the merits.

REINSTATEMENT

Complainant does not seek reinstatement (Tr. 68).

MONETARY AWARD

Any monetary award requires a summary of the evidence.

Herman was hired at an annual salary of $24,000 (Tr. 22, 63). He left the the project on April 12, 1979. Herman estimated the project would be finished about the last week in May, 1979. The project was 85 to 90 percent completed when he left (Tr. 27, 63-64). Herman's wages were terminated as of April 20, 1979. His agreement with IMCO was to stay until the project was finished (Tr. 101).

Herman sought employment with several Nevada companies in the months following his discharge (Tr. 79). Generally, Herman would talk to the plant or personnel manager at the place of prospective employment. When he interviewed with these companies the same "barriers" arose when he discussed why he left IMCO (Tr. 79-87).

Herman found employment on October 20, 1979, when he took a job with Sikorsky Engineering as an hydraulic engineer (Tr. 67).

DISCUSSION

In a proceedings brought by a miner on his own behalf under Section 105(c)(3) the Commission is to award back pay with interest as well as a sum for "all costs and expenses."

Concerning the award for back pay: Herman was hired solely for the Battle Mountain project. His pay was terminated on April 20, 1979.

Accordingly, his award for back pay would be for the six weeks until the project would have been completed. Based on his annual pay of $24,000 Herman would be entitled to $2,769.18 (weekly gross of $461.53 x 6 weeks). Any award for back pay would necessarily include deductions for applicable state and federal laws concerning the withholding of taxes. Estle and Dunmire v. Northern Coal Company 4 FMSHRC 126 (1981).

No further award would be made since there is no evidence of any additional costs or expenses.

Herman seeks $166,000 in lost wages and $150,000 in punitive damages. No evidence supports the claim of lost wages other than as stated above. Herman's claim for punitive damages appears to be based on his view that IMCO interfered with his subsequent efforts at securing employment. Herman claims that this "interference" arose with prospective employers when he would advise them of the fact that he had left IMCO over an argument concerning safety.

The evidence fails to show that this information in any manner influenced any decision of any prospective employers to hire or not hire Herman. The Act does not authorize punitive damages but if Herman had proven interference by IMCO with his subsequent employment his resultant costs and expenses could have been substantial.

One additional feature of this case requires discussion. In his post trial brief Herman states he is not a miner. IMCO's reply brief accepts Herman's statement and asserts that the Commission lacks jurisdiction to entertain the case.

I reject IMCO's argument. I consider Herman's statement to mean that he is a mining engineer and not per se a miner as that vocation is primarily defined. 2/ The uncontroverted evidence shows that at this facility barite is mined by the open pit mining process. Herman was the mining engineer on the project. Since IMCO does business in Nevada and Texas it is, on these facts, a mine operator subject to the Act.

2/ A miner: One who mines; as (1) one engaged in the business or occupation of getting ore, coal, precious substances, or other natural substances out of the earth. A Dictionary of Mining, Mineral, and Related Terms, United States Department of Interior, 1968.

CIVIL PENALTIES

The Commission order of February 9, 1982 sets the perimeters of the complaint to be those facts set forth in the document filed with State of Nevada. The Commission order further refers to civil penalties set forth in the Act.

The Act provides that any violation of the discrimination section shall "be subject to the provisions of section 108 and 110(a) of the Act [30 U.S.C. 818, 820(a)]. The Act also authorizes a penalty in an amount not to exceed $10,000. 30 U.S.C. § 820(a).

In assessing civil monetary penalties the Commission is to be guided by Section 110(i) of the Act [30 U.S.C. 110(i)]. In construing a similiar civil penalty statute the United States Court of Appeals for the 8th Circuit stated that "[t]he assessment of penalties is not a finding but an exercise of a discretionary grant or power." Brennan v. OSHRC and Interstate Gas Company 487 F. 2d 438 (8th Cir. 1973).

Considering the pertinent statutes and in view of the facts I deem that if an award were to be made in Herman's favor a civil penalty of $1,500 against IMCO would be appropriate.

However all of the alternative findings are not operative and, based on the primary findings of fact and conclusions of law, I enter the following:

ORDER

The complaint is dismissed as not timely filed.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 10 1982

SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceedings
	:	Docket No. PENN 81-86 AC No. 36-00970-03080
v.	:	
		Maple Creek No. 1 Mine
UNITED STATES STEEL CORP., Respondent	:	
UNITED STATES STEEL CORP., Contestant	:	Contest of Citation and Order
	:	Docket No. PENN 81-47-R
v.	:	
SECRETARY OF LABOR, Respondent	:	Maple Creek No. 1 Mine

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent
Louise Q. Symons, Esq., for Contestant

Before: Administrative Law Judge William Fauver

These proceedings involve the same citation and order. In PENN 81-86-P, the Secretary seeks a civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.. In PENN 81-47-R, under section 105(d) of the Act the company seeks review and vacation of the citation and order involved in the penalty proceeding. The cases were consolidated and heard at Falls Church, Virginia.

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

FINDINGS OF FACTS

1. At all pertinent times, United States Steel Corporation ("Respondent") operated Maple Creek No. 1 Mine, which produced coal for sale or use in or substantially affecting interstate commerce.

2. On July 11, 1974, Notice to Provide Safeguard Number. 1 RCM was issued at the mine by the Secretary's statutory predecessor, the Secretary of the Interior. The safeguard reads in pertinent part:

The No. 13 self-propelled personnel carrier in 6 flat 20 Room Section was not provided with a lifting jack. All self-propelled personnel carriers at this mine shall be provided with a suitable lifting jack and bar.

3. On November 3, 1980, about 8:00 a.m. Federal Mine Inspector Joseph Reid inspected the Spinner Shaft bottom of the mine, where he discovered four jeeps, each missing a lifting jack. He was accompanied by David Leone, Respondent's Safety Inspector, and told him that citations would be written on the four jeeps and that Respondent would be required to provide a lifting jack for each . For three of the jeeps, lifting jacks were provided in short order, but a jack could not be found for the fourth jeep. Inspector Reid testified that then he told Leone that Respondent would have until 9:15 a.m. to abate the violation as to the fourth jeep. However, Leone testified that while underground Inspector Reid never mentioned an abatement time and did not give him anything in writing to show a time allowed for abatement.

4. After inspecting other parts of the mine, Inspector Reid returned to the Spinner Shaft bottom about 11:55 a.m., still accompanied by David Leone. Reid found the fourth jeep in the same position as he had left it, with no jack but a notation "Shop, no jack" chalked on the jeep. Finding that the jeep was still operable and connected to power, he determined that the abatement time should not be extended and issued a section 104(b) withdrawal order on the jeep. Reid testified he would not have issued the order if the jeep had been rendered inoperable, that is, removed from power. To disconnect the jeep from the trolley wire would have taken a few minutes. A red MSHA tag was put on the jeep showing that a government withdrawal order applied to it. Within about one hour the condition was abated and the withdrawal order was terminated. Later, at the mine surface Reid wrote Citation No. 844321, which specified a "Due Date" of "09:15" hours. His inpsector's note book apparently includes a note of abatement time of 9:15 a.m. for this citation.

5. A lifting jack for a jeep is necessary to return the jeep to the tracks in the event of a derailment. In such cases the time needed to get a jeep back on the track is likely to be in important safety factor, for example, to reduce the risk of collision with other vehicles or to remove a derailed jeep that may be blocking an effective and safe exit to miners in an emergency.

DISCUSSION WITH FURTHER FINDINGS

An adequately worded notice of safeguard was issued in 1974, requiring that each jeep (personnel carrier) be provided with a lifting jack. This safeguard was violated as charged in the citation on November 3, 1980.

However, the order of withdrawal was improperly issued because in the oral issuance of its antecedent citation there was no clear communication of an abatement time.

MSHA's procedure of orally notifying an operator's representative underground of a violation and writing a citation for it on the mine surface meets the notice requirements of the Act so long as the violation is described with sufficient specificity. However, to sustain a section 104(b) withdrawal order, MSHA must prove that an abatement time was specified and communicated clearly to the operator's representative and that the violation was not abated within such time. There is a bona fide dispute between the inspector and Respondent's representative as to whether an abatement time was orally communicated to Respondent's representative. I find that the government has not proven by a preponderance of the evidence that Inspector Reid communicated a specified abatement time to Leone while Reid and Leone were underground. As a result, MSHA has failed to meet its burden of proof of an essential element. In cases of oral communication of a citation underground, it would appear a sounder practice for the Federal mine inspector to deliver something in writing to the mine operator's representative as to the abatement time, rather than risking a dispute of testimony on that point.

The citation will be sustained, but the order of withdrawal will be vacated. A penalty will be assessed for the violation based on the condition proved under the citation but not for conduct alleged in the vacated order of withdrawal.

This was a serious violation because of substantial safety risks to miners in failing to equip a jeep with a lifting jack.

Respondent was negligent in not providing a lifting jack for the fourth jeep before the citation was orally issued.

The company's act of marking the jeep "Shop, no jack" was not sufficient to withdraw the jeep from service, because it was not disconnected from power or otherwise rendered inoperable. Such marking alone could not relieve the company of abating the violation. Cf. Secretary of Labor v. Eastern Associated Coal Corp., 1 FMSHRC 1473 (October 23, 1979). However, the government has failed to prove its allegation of untimely delay in abating the violation because it did not sufficiently prove that an abatement time was communicated to Respondent's representative.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of these proceedings.

2. In PENN 81-47-R, Respondent violated 30 CFR § 75.1403 as charged in Citation No. 844321. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory standard, Respondent is assessed a penalty of $200 for this violation.

3. In PENN 81-47-R, the Secretary proved the validity of the citation, but failed to prove the validity of the withdrawal order.

ORDER

WHEREFORE IT IS ORDERED:

1. In PENN 81-47-R, Respondent, United States Steel Corporation, shall pay the Secretary of Labor the above-assessed penalty of $200.00 within 30 days from the date of this decision.

2. In PENN 81-86, Citation No. 844321, November 3, 1980, is SUSTAINED, and Order of Withdrawal No. 844325, November 3, 1980, is VACATED.

William Fauver
WILLIAM FAUVER, JUDGE

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 11 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. VA 81-87
v.	:	A. C. No. 44-05630-03001
BILLY RAY MASTERS, Respondent	:	No. 1 Mine

DECISION APPROVING SETTLEMENT

Counsel for the Secretary of Labor filed on August 2, 1982, in the above-entitled proceeding a motion for approval of settlement. Under the settlement agreement, respondent would pay reduced penalties totaling $147, instead of the penalties totaling $294 proposed by the Assessment Office for the five violations involved in this proceeding.

The motion for approval of settlement appropriately discusses the six criteria and gives reasons to support the parties' agreement under which respondent would pay penalties only half as great as those proposed by the Assessment Office. Respondent's answer to the Secretary's petition for assessment of civil penalty raises jurisdictional issues which should be addressed by me in this decision for respondent's future guidance even though the Secretary's counsel, in a settlement proceeding, was under no obligation to discuss the jurisdictional issues.

Respondent's answer contends that his operations are not subject to the provisions of the Federal Mine Safety and Health Act of 1977 or to the regulations promulgated thereunder. Respondent explains that he is the owner and sole operator of equipment used to improve real estate for third parties. Respondent says that he does not employ any workers and that the mere fact that coal was removed from construction sites does not require him to comply with a set of complicated regulations because Congress did not intend for the Act to protect an individual from himself.

All of the foregoing arguments have been made by other persons and have been rejected by the courts and the Commission. In Cyprus Industrial Minerals Corp., 3 FMSHRC 1 (1981), the Commission held that a site where an independent contractor was clearing land so that assessment of an ore claim could be made was a mine within the meaning of the Act. The Commission cited S. Report No. 95-181, 95th Cong., 1st Sess, 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess, Legislative History of Federal Mine Safety and Health Act of 1977, p. 602, in support of its ruling:

> 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 the Committee that doubts be resolved in favor of inclusion of a facility within coverage of the Act.

In Ray Marshall v. Bobby Donofrio, 465 F.Supp. 838 (U.S.D.C.E.D. Pa 1978), the court held that the Act covers coal businesses being operated by the owners of the businesses. The court noted that a miner is any individual working in a coal mine and that the Act does not exclude a person who owns and works in a mine. The court observed that the proposed Act to exclude coverage of mines worked by two or fewer persons was never passed.

In Kraynak Coal Co. v. Ray Marshall, 604 F.2d 231 (3rd Cir. 1979), the court affirmed a district court's holding that Kraynak Coal Company was subject to the Act even though the only persons involved in operating the mine were four brothers. In Secretary of the Interior v. Shingara, 418 F.Supp. 693 (M.D.Pa. 1976), Ed and Fred Shingara had a small coal mine which they alone operated. Ed went underground and Fred operated a hoist. They produced only 10,000 tons of coal per year which was sold to a company which ground up the Shingara's coal and shipped it with other coal in interstate commerce. The court held that the Shingaras were subject to the Act and noted that the term "affecting commerce" used in the Act was employed by Congress when it wanted to achieve the farthest reach of the commerce clause.

In this proceeding, respondent removes coal after he has removed earth and rocks to prepare a site for construction by other parties. According to information in the official file, respondent sells about 12,500 tons of coal on an annual basis which is a larger tonnage than that involved in the Shingara case, supra, but even if respondent removed much less coal than 12,500 tons per year and even if respondent did not sell the coal to persons outside the state of Virginia where the coal is produced, his operations would be subject to the jurisdiction of the Act and the regulations promulgated thereunder because respondent's operations would have an effect on interstate commerce.

Now that respondent's jurisdictional arguments have been considered, further attention may be given to the motion for approval of settlement. Section 110(i) of the Act lists six criteria which are required to be used in determining civil penalties. As to the criterion of the size of respondent's business, the proposed assessment sheet attached to the motion shows that respondent produces only about 12,500 tons of coal on an annual basis. That volume of coal supports a finding that respondent operates a very small coal mine. Under the penalty formula described in 30 C.F.R. § 100.3 which was in effect prior to May 21, 1982, when the violations involved in this proceeding were being considered, the Assessment Office assigned no penalty points under the criterion of the size of respondent's business.

As to the criterion of respondent's history of previous violations, the motion for approval of settlement states that respondent has no history of previous violations and the Assessment Office assigned no penalty points under that criterion under section 100.3(c). As to the criterion of whether the payment of penalties will cause respondent to discontinue in business, the motion for approval of settlement states that payment of the settlement penalties agreed upon by the parties will not adversely affect respondent's ability to continue in business.

The remaining three criteria of negligence, gravity, and respondent's demonstrated good faith in achieving rapid compliance will be discussed in connection with the violations alleged in this proceeding. The five violations are all related to the paper work associated with opening and operating a coal mine. Citation No. 686584 alleged a violation of 30 C.F.R. § 41.20 because respondent had not filed a notification of legal identity with MSHA. Citation No. 686585 alleged a violation of section 77.1000-1 because respondent failed to file a ground-control plan. Citation No. 686586 alleged a violation of section 77.107-1 because respondent failed to file a plan regarding the training and retraining of certified or qualified personnel. Citation No. 686587 alleged a violation of section 77.1702(c) because respondent had failed to make arrangements for obtaining emergency medical assistance. Citation No. 686588 alleged a violation of section 48.23(a)(1) because respondent had not filed a training plan for new miners or for retraining of experienced miners. A withdrawal order was issued with respect to each of the five citations described above when respondent failed to file the required reports or plans. The Assessment Office considered all of the alleged violations, except failure to arrange for emergency medical assistance, to have been nonserious, to have been associated with a high degree of ordinary negligence, to have shown a lack of good faith in achieving compliance, and proposed a penalty of $60 for the first three violations described above, $66 for the fourth violation, and $48 for the fifth violation.

The motion for approval of settlement states that the proposed penalties should be reduced to half of the amounts proposed by the Assessment Office. In support of the reductions, the motion avers that the operator's failure to comply with the cited standards did not in and of itself create any safety or health hazards, that the violations were essentially bookkeeping oversights, that respondent was working by himself and honestly believed that the unique activities he was performing exempted him from the provisions of the Act and regulations, and that respondent's attitude was not wholly unreasonable when it is considered that several of the plans he was required to file referred to training of employees whom he had not hired and did not plan to hire.

I find that the motion for approval of settlement has given adequate reasons for approving the parties' settlement agreement under which respondent would pay half of the penalties proposed by the Assessment Office. It should be noted that an amount of $20 of each of the penalties proposed by the Assessment Office was assigned to the penalties under the criterion of respondent's lack of good faith in failing to file the required

reports and plans. It should be observed, however, that respondent did submit all of the required reports and plans within 5 or 6 days after the citations were written. Respondent was convinced clear up to the time that he filed his answer on September 21, 1981, in this proceeding that he was not subject to the jurisdiction of the Act. Since respondent, in good faith, believed that he was on sound legal ground in refusing initially to file the required reports and plans, a fair evaluation of the basis for his action justifies a reduction in the penalties under the criterion of respondent's good faith in achieving compliance.

The same type of consideration is warranted with respect to the criterion of negligence which accounts for nearly all of the remaining portion of the penalties proposed by the Assessment Office. A respondent should not be given a high penalty under the criterion of negligence when the facts show that the failure to file the reports and plans is attributable to an honest conviction that the Act does not apply to the operations of a single person who is scooping up coal from sites prepared for construction projects.

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

(A) The motion for approval of settlement is granted and the settlement agreement is approved.

(B) Pursuant to the settlement agreement, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $147.00 which are allocated to the respective alleged violations as follows:

Citation No. 686584 4/15/81 § 41.20	$ 30.00
Citation No. 686585 4/15/81 § 77.1000-1	30.00
Citation No. 686586 4/15/81 § 77.107-1	30.00
Citation No. 686587 4/15/81 § 77.1702(c)	33.00
Citation No. 686588 4/15/81 § 48.23(a)(1)	24.00
Total Settlement Penalties in This Proceeding	$147.00

Richard C. Steffey

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 18 1982

CONSOLIDATION COAL COMPANY, Contestant	:	CONTESTS OF CITATIONS
	:	Docket No. WEVA 82-84-R
v.	:	Citation No. 861816; 10/19/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Four States No. 20 Mine
	:	Docket No. WEVA 82-140-R
	:	Citation No. 864582; 1/6/82
	:	Humphrey No. 7 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 82-186
	:	A.C. No. 46-01431-03103
v.	:	Four States No. 20 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 82-246
	:	A.C. No. 46-01453-03151
	:	Humphrey No. 7 Mine

DECISION

Appearances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company;
Aaron M. Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", to contest two citations issued to the Consolidation Coal Company (Consol) pursuant to section 104(a) of the Act and for review of civil penalties proposed by the Mine Safety

and Health Administration (MSHA), for those citations. The general issues before me are whether Consol violated the regulatory standard at 30 C.F.R. § 70.100(a) as alleged in the citations and, if so, whether those violations are "significant and substantial." Appropriate civil penalties must also be assessed for any violations found. Evidentiary hearings were held on these issues in Wheeling, West Virginia on June 29, 1982.

The cited regulatory standard, 30 C.F.R. § 70.100(a), provides as follows:

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

Citation No. 861816 reads as follows:

> Based on the results of 5 samples collected by the operator on the designated occupation, 044, shear operator, on the mechanized mining unit I.D. No. 041-0 and indicated on advisory No. 0022 dated October 7, 1981, the average concentrations of respirable dust was 2.5 mg/m^3. The operator shall take corrective action at once and then sample each production shift - 5 valid samples of respirable dust are taken as required under Section 70.201(d).

Citation No. 864582 reads as follows:

> Based on the results of 5 samples collected by the operator on the designated occupation, 036, continuous miner operator on the mechanized mining unit ID No. 020-0 and indicated on Advisory No. 0056 dated December 28, 1981, the average concentration of respirable dust was 2.7 mg/m^3. The operator shall take corrective action at once and then sample each production shift until 5 valid samples are taken as required under Section 70.201(d).

At hearing the operator admitted that it was in violation of the cited standard as charged and argued only that the violations were not "significant and substantial." In determining whether the violations were "significant and substantial", I must consider whether these violations could be a major cause of a danger to safety or health and whether there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). The test essentially involves two considerations, (1) the probability of resulting injury or illness and (2) the seriousness of the resulting injury or illness.

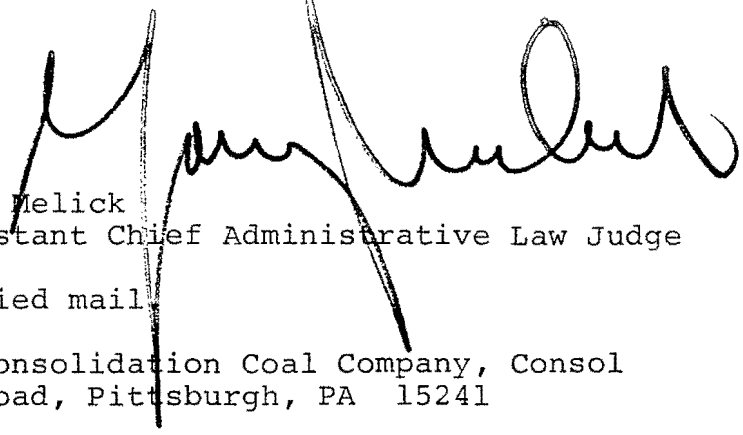
In this case MSHA inspector Barry Ryan, a college graduate in business administration and mining engineering but with no medical expertise, testified that exposure to any level of respirable dust would at some point in time result in the permanently disabling condition known as pneumoconiosis. He admitted that this was a personal opinion and that he had no facts to support it. Moreover Ryan was unable to testify as to the length of exposure at the levels of respirable dust such as cited here that would result in pneumoconiosis. He admitted that the subject had never been studied fully and accordingly he did not "believe anybody would attempt to make a guess on that." He further admitted that he was relying in his testimony and opinions about the correlation between respirable dust and pneumoconiosis upon some unidentified scientific studies performed in Great Britain relating to the medical effects of quartz-bearing dust. He was unable to identify the name or author of those studies and counsel for the Secretary conceded that the studies were in any event not relevant.

In the absence of any medical, scientific evidence correlating the exposure of miners to the level of respirable dust found in these cases to the medical condition known as pneumoconiosis, I am unable to assess the probability of the alleged resulting condition. This is not to say that such a correlation cannot be established with the proper evidence. My determination herein is limited to the credible evidence presented in these cases. Accordingly, I do not find that the Secretary has sustained his burden of proving that the violations were "significant and substantial."

Applying the same analysis I find that the Secretary has failed to establish that the violations were serious. However in light of repeated past violations of the standard here cited (two such violations at the Four States No. 20 Mine and five such violations at the Humphrey No. 7 Mine during the 24-month period preceding the issuance of the corresponding citations) I find that the operator failed to exercise reasonable care in preventing or correcting the violative conditions it should have known existed. Accordingly I find that the operator was negligent. Considering these factors in conjunction with the evidence that the operator is large in size, and that it apparently corrected the cited conditions in a timely manner leads me to the conclusion that the following penalties are appropriate: Citation No. 861816 (Four States No. 20 Mine) $75, Citation No. 864582 (Humphrey No. 7 Mine) $150.

ORDER

Citation Nos. 861816 and 864582 are affirmed, however the "significant and substantial" findings made therein are hereby stricken. The Consolidation Coal Company is ORDERED to pay civil penalties totalling $225 for the cited violations within 30 days of the date of this decision.



Gary Melick
Assistant Chief Administrative Law Judge

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Harrison B. Combs, Jr., Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, DC 20005

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AUG 18 1982

REPUBLIC STEEL CORPORATION, Contestant-Respondent	:	Contest of Citation
	:	Docket No. PENN 81-115-R
v.	:	Citation No. 1046699; 3/10/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent-Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 81-177
	:	A/O No. 36-00973-03079F
	:	Banning Mine

DECISION AND ORDER

On March 10, 1981, a shuttle car operator was killed due to the inadequacy of the field of vision provided under the protective canopy installed on his equipment. Because of the inadequacy of the field of vision, the miner stuck his head out around the canopy in order to see to position the mine cars he was loading. When the car spotter failed to function properly, the mine cars caught the shuttle car boom and swung the car in such a way that the miner's head was crushed against a post. The parties move to reduce the amount of the penalty initially proposed from $6,000 to $500 on the ground that the canopy was adequate to protect the miner from falls of the roof or rib which, they claim, is all the standard required.

I think the facts of this case demonstrate what I have been inveighing against for years with respect to canopies, namely that MSHA's failure to require the installation of canopies that provide a field of vision adequate to permit their safe use in the performance of a job renders many if not most "approved" canopies accidents waiting to happen. Despite this, MSHA is insistent on requiring canopies wherever the mining height permits, regardless of the hazards created by their use where the mining height does not permit an adequate field of vision. In this case, after the fatality MSHA and the operator tried to cure the hazard by painting stripes on the sides of the mine cars but made no adjustment in the canopy. Thus, any time a string of cars that are not painted comes along the same accident may occur. In my judgment if a canopy cannot be provided that permits the operator an adequate field of vision to perform his tasks safely, it should be removed and not required.

For these reasons, as well as MSHA's admission that "the canopy was totally adequate for normal operation of the shuttle car," 1/ I find the violation charged did not, in fact, occur.

1/ Where the facts so dramatically and fatally demonstrate that the canopy was not adequate to permit safe operation of the shuttle car, I find this view of the canopy requirement so at war with the safe operation of haulage equipment as to be breathtaking.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, DENIED and the matter DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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AUG 18 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 80-72
	:	A.C. No. 46-01459-03053
v.	:	
	:	Birch No. 2-A Mine
ISLAND CREEK COAL COMPANY, Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

This case is before me upon a petition for assessment of civil penalty under Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $610 to $ 200is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proferred settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $200 within 30 days of this order.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

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AUG 18 1982

ISLAND CREEK COAL COMPANY, Contestant	:	CONTESTS OF CITATIONS
v.	:	Docket No. WEVA 79-183-R
	:	Citation No. 635499; 5/7/79
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 79-184-R;
	:	Citation No. 635500; 5/7/79
	:	Birch 2A Mine

ORDER OF DISMISSAL

In light of the settlement agreement recently approved by the undersigned in Secretary v. Island Creek Coal Co., Docket No. WEVA 80-72 (Citation Nos. 635499 and 635500), it appears that the Contests herein of the same citations have been rendered moot. These cases are therefore dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

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AUG 19 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding	
	:	Docket Nos.	Assessment Control Nos.
	:	KENT 82-57	15-05209-03019
v.		KENT 82-70	15-05209-03021
		KENT 82-120	15-05209-03022
MITCH COAL COMPANY, INC., Respondent	:	No. 4E Mine	

DEFAULT DECISION

Counsel for the Secretary of Labor filed proposals for assessment of civil penalty in Docket Nos. KENT 82-57, KENT 82-70, and KENT 82-120 on March 5, 1982, April 22, 1982, and July 6, 1982, respectively. Respondent did not file answers to the proposals for assessment of civil penalty within the time required by section 2700.28 of the Commission's procedural rules, 29 C.F.R. § 2700.28. A show-cause order was issued on June 1, 1982, in Docket No. KENT 82-57 asking respondent to explain in writing why it should not be held in default for failure to file an answer. Respondent has not filed a reply to the show-cause order.

A prehearing order was issued on March 16, 1982, in three related cases in Docket Nos. KENT 82-15, KENT 82-26, and KENT 82-40 in which respondent had answered show-cause orders. Counsel for the Secretary thereafter filed on June 2, 1982, a motion requesting that the proposals for assessment of civil penalty in Docket Nos. KENT 82-57 and KENT 82-70 be consolidated for settlement negotiations so that, if a settlement could be achieved, all cases could be settled in a consolidated proceeding and, of course, if they could not be settled, all issues could be considered at a hearing to be held in all of the interrelated proceedings. An order was issued on June 15, 1982, granting the motion for consolidation. The order granting the motion for consolidation advised respondent that the consolidation did not excuse it from filing an answer to the show-cause order issued in Docket No. KENT 82-57 and advised it that an additional show-cause order would be issued in Docket No. KENT 82-70 if respondent did not soon answer the proposal for assessment of civil penalty which had been filed in that docket.

When respondent failed to file an answer to the proposal for assessment of civil penalty within the time required by section 2700.28, a show-cause order was issued on June 24, 1982, in Docket No. KENT 82-70 requiring respondent to explain in writing why it should not be found to be in default for failing to file an answer to the proposal for assessment of civil penalty filed in Docket No. KENT 82-70. No answer to that show-cause order has been filed by respondent.

A notice of hearing was issued on July 2, 1982, providing for a hearing to be held on August 26, 1982, in all of the cases hereinbefore mentioned. Subsequently, a sixth civil penalty case in Docket No. KENT 82-120, naming Mitch Coal Company, Inc., as the respondent, was assigned to me. A further order of consolidation was issued on July 22, 1982, providing for the hearing in the sixth case to be held in the same proceeding in which a hearing had been scheduled for the other five cases hereinbefore described.

The order of July 22, 1982, provided in paragraph (B) that respondent's right to a hearing in Docket Nos. KENT 82-57, KENT 82-70, and KENT 82-120 was subject to respondent's filing satisfactory answers to the show-cause orders issued in Docket Nos. KENT 82-57 and KENT 82-70 and to respondent's filing an answer to the proposal for assessment of civil penalty in Docket No. KENT 82-120. The body of the order and paragraph (C) of the order specifically warned respondent that it would be held in default and would be deprived of a hearing in Docket Nos. KENT 82-57, KENT 82-70, and KENT 82-120 if it failed to file answers to the show-cause orders issued in Docket Nos. KENT 82-57 and KENT 82-70 and failed to file an answer to show-cause paragraph (C) of the order of July 22, 1982, with respect to Docket No. KENT 82-120. There are return receipts in the official files showing that respondent received all of the show-cause orders and the other orders described in this decision. Respondent has, however, failed to reply to the prehearing order issued in this proceeding and has failed to reply to any of the show-cause orders or to the order of July 22, 1982.

The provisions of section 2700.63(a), which require that a show-cause order be issued before a party is found to be in default for failure to comply with a judge's order, have been followed. Respondent has received at least four different orders warning it that it would be held in default for failure to file answers to the orders issued in these proceedings, but no answer has been received. Therefore, I find respondent to be in default for failure to reply to the show-cause orders and to the order of July 22, 1982. Section 2700.63(b) provides that "[w]hen the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid."

WHEREFORE, it is ordered:

(A) The issues raised by the proposals for assessment of civil penalty filed in Docket Nos. KENT 82-57, KENT 82-70, and KENT 82-120 are severed from the issues raised by the proposals for assessment of civil penalty filed in Docket Nos. KENT 82-15, KENT 82-26, and KENT 82-40 and the hearing now scheduled to be held on August 26, 1982, in Docket Nos. KENT 82-15, KENT 82-26, and KENT 82-40 will be held in the last-named three dockets as previously scheduled by the notice of hearing issued July 2, 1982.

(B) Pursuant to section 2700.63(b) of the Commission's rules, respondent, having been found to be in default with respect to the proposals for

assessment of civil penalty filed in Docket Nos. KENT 82-57, KENT 82-70, and KENT 82-120, shall, within 30 days from the date of this decision, pay civil penalties totaling $476.00 which are allocated to the respective violations as follows:

Docket No. KENT 82-57

Citation No. 950085 6/29/81 § 70.508	$ 66.00
Citation No. 963081 10/15/81 § 70.208(a)	40.00
Total Civil Penalties in Docket No. KENT 82-57	$106.00

Docket No. KENT 82-70

Citation No. 961970 12/30/81 § 70.208(a)	$ 26.00
Citation No. 962524 12/30/81 § 75.400	140.00
Citation No. 962525 12/31/81 § 75.403	26.00
Citation No. 962526 12/31/81 § 75.1306	60.00
Citation No. 1196212 1/14/82 § 70.207(a)	52.00
Total Civil Penalties in Docket No. KENT 82-70	$304.00

Docket No. KENT 82-120

Citation No. 962527 1/8/82 § 75.316	$ 26.00
Citation No. 962538 2/12/82 § 70.208(a)	40.00
Total Civil Penalties in Docket No. KENT 82-120	$ 66.00
Total Civil Penalties in This Proceeding	$476.00

Richard C. Steffey

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. PENN 82-31 A.O. No. 36-02695-03011
v.	:	Doan Strip Mine
DOAN COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert Cohen, Attorney, U.S. Department of Labor, Arlington, Virginia, for the petitioner; Robert M. Hanak, Esquire, Reynoldsville, Pennsylvania, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding was docketed for hearing in Pittsburgh, Pennsylvania, July 1, 1982, and the case was called after the completion of the hearings in MSHA v. Doan Coal Company, and Austin Powder Company, Dockets PENN 82-33 and PENN 82-63. The parties proposed a settlement disposing of the two citations in issue and they were afforded an opportunity to present arguments in support of their joint proposal. The citations in question are as follows:

Citation No.	Date	30 CFR Section	Assessment	Settlement
1041336	8/27/81	77.410	$ 26	$ 20
1041337	8/31/81	77.410	26	20

Discussion

Both citations concern the lack of operable reverse warning devices on an endloader and bulldozer working in the mine pit area. Petitioner asserted that both citations were nonserious in that the citations did not result in any lost time injuries or accidents. One person may have been exposed to a hazard, but any injury was improbable. The bulldozer was operating in an isolated and remote area of the mine.

Petitioner asserted that the respondent took immediate action to repair the back-up alarms in question and exercised good faith abatement in this regard. The equipment was also immediately shut down when the conditions were cited.

Petitioner stated that the respondent should have been aware of the fact that the alarms were inoperable when the equipment in question was operated in reverse, and that its failure in this regard constitutes ordinary negligence.

With regard to the questions concerning the size of business and history of prior violations, the parties agreed that the evidence adduced in the prior case, PENN 82-33, regarding these issues are also applicable in this case. That evidence reflects that respondent is a small strip mine operator, with a total employment of approximately 40 individuals, and an annual production of approximately 150,000 tons. Respondent's history of prior citations reflects 40 paid assessments for citations issued during the period 1970 to 1981.

Findings and Conclusions

Respondent admits to the violations cited in the two citations issued in this case. Accordingly, they are AFFIRMED. In addition, I find that the citations were nonserious, that they resulted from ordinary negligence, and that the conditions cited were abated in good faith. I also conclude that respondent has a good safety record and that its history of prior violations is not such as to warrant any increase in the penalties assessed in this case.

Respondent stipulated that the penalties assessed for the citations in question will not adversely affect its ability to continue in business (Tr. 5), and I adopt this as my finding on this issue.

ORDER

In view of the foregoing discussion, findings and conclusions, I find that the settlement proposed by the parties in this case is reasonable and in the public interest. Accordingly, pursuant to 29 CFR 2700.30, it is APPROVED, and the respondent IS ORDERED to pay the civil penalties in the settlement amounts shown above within thirty (30) days of the date of this decision. Upon receipt of payment by the petitioner, this case is DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 20 1982

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST OF ORDER
v.	:	
	:	Docket No. WEVA 82-134-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 862499; 12/14/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRTATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 82-271 A.C. No. 46-01453-03153
v.	:	
	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania for Consolidation Coal Company;
Aaron Smith, Esq., Office of the Solicitor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to contest an order of withdrawal issued to the Consolidation Coal Company (Consol) pursuant to section 104(d)(1) of the Act 1/ and for review of a civil penalty proposed by the Mine Safety

1/ Section 104(d)(1) reads as follows: "If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violations do not cause imminent danger, such violation is of such nature as could

and Health Administration (MSHA), for the violation charged in that order. Since there is no dispute that a valid precedential section 104(d)(1) citation was issued within 90 days before the Order at bar, the general issues before me are limited to whether Consol violated the regulatory standard at 30 CFR § 75.403 as alleged in Order No. 862499 and, if so, whether the violation was caused by the "unwarrantable failure" of the operator to comply with the cited standard. Note 1/ supra. An appropriate civil penalty must also be assessed if a violation is found and a determination must be made as to whether that violation was "significant and substantial." Evidentiary hearings on these issues were held in Wheeling, West Virginia, on June 29, 1982.

The subject order, issued by MSHA inspector Paul Mitchell on December 14, 1981, reads as follows:

> The number three entry of the 4-East (041) section is not adequately rock dusted (also cross cuts), in that black coal dust, loose coal, and float coal dust is on the floor with no rock dust starting 6 feet outby stations spad no. 8606 for a distance of approximately 500 feet in length and 35 feet outby spad S.T.A.T. 9122 where power cables (miner and loader cables) are piled. This area was examined by Terry Monas (section foreman) and he said that he was looking up. In the Number 3 entry of the 4-East section, there were 3 samples taken of this area.

The cited regulatory standard, 30 CFR § 75.403 provides in relevant part as follows:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 percentum * * *.

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fn. 1 (continued)
significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

During the course of a regular inspection of the Humphrey No. 7 Mine on December 14, 1981, inspector Mitchell discovered an area in the No. 3 entry of the 4-East section with what appeared to be inadequate rock dusting. According to Mitchell, 500 feet of the floor of the 14- to 16-foot wide entry consisted of "pure coal". It contained black coal dust, loose coal, and float coal dust. As a result of these observations Mitchell collected three samples from the mine floor and sent them to the MSHA laboratory for analysis. The first sample was taken at the entry, the second sample 100 feet further down, and the third sample another 100 feet further down.

Eldon Haggerdorn, the general mine foreman, watched as Mitchell took his samples. Haggerdorn admitted that Mitchell obtained the samples across the width of the mine floor from rib to rib. The sampling technique, the chain of custody of the samples, and the analysis of the samples are not in dispute. The test results were as follows: Sample No. 1, 54% incombustible material, Sample No. 2, 37% incombustible material, and Sample No. 3, 32% incombustible material. Since the incombustible content of the samples was well below the 65 percentum required by the cited standard, it appears that the standard has been violated as charged.

Consol nevertheless attempts to defend on the grounds that the samples taken by Mitchell were not representative of the "average" conditions in the cited area. In evaluating this contention, I am mindful of the absence of any evidence that such complaints were made at the time Mitchell was collecting his samples. In any event, I find the proferred defense to be less than convincing. Even assuming, arguendo, that the "average" conditions of the mine floor were in compliance with the cited standard, that of course does not preclude the existence of the cited violation. I observe, moreover, that even Consol's section foreman, Terry Monas, conceded that when he "firebossed" the cited area at 8:40 that morning there were "a few bad places" where coal had sloughed off the ribs at the corners. He further recognized that conditions were "bad" in the area being set up for long wall operations. Shortly before the inspection, his men were setting up pan liners with the aid of a scoop. Monas conceded that the floor was "pretty well torn up" by the operation of the scoop.

In furtherance of its defense, Consol produced at hearing several samples purportedly taken from the cited mine floor. The samples were obtained out of the presence of Inspector Mitchell, suffered certain custodial deficiencies, and were not subjected to laboratory analysis for incombustibility. In any event, regardless of these potential deficiencies and regardless of the appearance of the samples, that evidence would not of course preclude the existence of the cited violation. Under all the circumstances, I find that the cited violation is proven as charged.

Whether that violation was "significant and substantial" depends on whether, based on the particular facts surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Secretary v. Cement

Division, National Gypsum Company, 3 FMSHRC 822 at 825. The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. In this case, it is not disputed that within the cited area, a panline was being set up for the longwall system. A battery powered scoop was also operating in the area, crushing the coal on the mine floor into a fine powder. According to Inspector Mitchell, these conditions were particularly dangerous since the longwall system was being erected over that loose material. It may reasonably be inferred that miners would be working with cutting and welding torches on the longwall system which could result in undetected fire. The dryness of the floor would have, according to Mitchell, contributed to the hazard of fire or explosion. While there is no dispute that there were no immediate ignition sources found when the order herein was issued and that regulations require the presence of fire extinguishers, water, and rock dust when torches are being used, I nevertheless find on the basis of the aforesaid evidence the existence of a reasonable likelihood of fire or explosion resulting in serious injuries or fatalities. Accordingly, the violation is "significant and substantial." For the same reasons, I find a high degree of gravity associated with the violation.

Whether the instant violation was the result of the "unwarrantable failure" of the operator to comply with the standard depends on whether the violative condition was one which the operator knew or should have known existed, or which the operator failed to correct through indifference or lack of reason able care. Zeigler Coal Company, 7 IBMA 280. For the reasons that follow, I find that MSHA has sustained its burden of proof in this regard. While it is true that union firebosses (who had presumably inspected the cited areas around 4 p.m. on the previous day and from 5:00 a.m. until 8:00 a.m. on the same day the order was issued) did not report the same conditions cited in the order by MSHA inspector Mitchell, it is apparent that conditions could have changed between the time of those inspections and the time of Mitchell's inspection around 10:25 that morning. Consol's section foreman, Terry Monas, also admitted that when he firebossed the cited area around 8:40 that morning, there were indeed "a few bad places" where coal had come off the ribs. Monas further conceded that the area of floor where the pan liner was being set up was torn up from the operation of the scoop. The fact that Monas told inspector Mitchell that he had examined only the top conditions in the section also indicates that Monas was negligent in his inspection. Finally, I accept the credible testimony of inspector Mitchell that the floor conditions were obviously deficient because of the black coloration of the cited area. This testimony is corroborated by the lab results showing a significantly low incombustible content. Under all the circumstances, I am convinced that the section foremen knew or should have known of the violative condition. The violation was therefore the result of "unwarrantable failure". The above analysis also suggests that the operator was negligent in allowing these conditions to exist.

The evidence shows that the operator abated the cited conditions in a timely manner. The operator is large in size and the mine at issue has a fairly substantial history of violations. Under all the circumstances, a civil penalty of $400 is appropriate.

ORDER

Order No. 862499 is affirmed and the contest of that order (Docket No. WEVA 82-134-R) is dismissed. The Consolidation Coal Company is ordered to pay a civil penalty of $400 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

Robert M. Vukas, Esq., Consolidation Coal Company, Consol Plaza, Pittsburgh, PA 15241

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 23 1982

SUNSHINE MINING COMPANY, Contestant,	CONTEST OF CITATION PROCEEDING
v.	DOCKET NO. WEST 81-197-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	MINE: Sunshine

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
	DOCKET NO. WEST 81-322-M
v.	MINE: Sunshine
SUNSHINE MINING COMPANY, Respondent.	

Appearances:

Daniel L. Poole, Esq.
Elam, Burke, Evans, Boyd & Koontz
Boise, Idaho
For Sunshine Mining Company

Frederick W. Moncrief, Esq., Office of the Solicitor
United States Department of Labor, Arlington, Virginia
For the Secretary of Labor

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges Sunshine Mining Company, (Sunshine), with violating Section 103(a) of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq (Supp III 1979).

Section 103(a) of the Act, now codified at 30 U.S.C. 813(a), provides as follows:

> Sec. 103 (a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose

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

After notice to the parties a hearing on the merits was held in Coeur d'Alene, Idaho on September 22, 1981.

The parties filed post trial briefs.

ISSUE

The issue is whether, during a PAR 1/ investigation, the Secretary may conduct private interviews of Sunshine's workers on the company's property and the company's time.

1/ Program of Accident Reduction.

SUMMARY OF THE EVIDENCE

The evidence is uncontroverted.

The acronym PAR designates a program sponsored and conducted by the Secretary of Labor. The PAR program seeks to reduce accidents in the mining industry. For an operator to be eligible for a PAR evaluation an audit must show that the operator's rate for injuries to its miners exceeds the national norm (Tr. 14, 15, 60, P1).

If the MSHA criteria dictates the selection of a mine operator then the company is contacted and advised of the program. When the Secretary undertakes his investigation special inspectors conduct an onsite study and interview management, supervisors, and workers (Tr. 104). The principle focus of PAR's attention is on the cause of accidents, rather than a physical inspection of the worksite (Tr. 21, 32). The PAR investigators do not seek out violations. But they would issue an imminent danger citation if the situation warranted (Tr. 48). After the completion of the study the company management receives the PAR team's recommendations (Tr. 14-15).

The sole point of contention here centers on MSHA's insistence that the PAR investigators interview the company's personnel on a one to one basis on the company time and on the company property (Tr. 20, 75, 92, 93, 138). MSHA's policy and guidelines require such a procedure (Tr. 20, 75).

Sunshine objects to the private interviews. The company recognizes its prior safety record was inadequate, and it blames a lack of communication between labor and management for the situation (Tr. 141, 142). To reverse its poor safety record Sunshine has recently encouraged direct and open communication between workers and management in safety matters (Tr. 162). As a result Sunshine finds its safety record improving and its absenteeism declining (Tr. 143-144). Sunshine feels that its plan of mutually responsive reaction and open communication cannot coexist with MSHA's private interview technique. Sunshine sees MSHA's approach as antagonistic and counterproductive (Tr. 162, 172).

When Sunshine refused to allow such private interviews of its workers MSHA issued a citation for the violation of Section 103(a) of the Act (Tr. 92-93, P5). A subsequent noncompliance order was issued (Tr. 95, P6).

DISCUSSION

At the outset it should be observed that if the Secretary has authority to conduct the private interviews as he seeks here then Sunshine's objections, no matter how well intended, must yield to the statutory mandate. The efficaciousness of the PAR program, a conclusion well documented here, is not an issue in this case (P9a, P9b).

Section 103(a) of the Act authorizes the Secretary to conduct frequent inspections and investigations in coal and other mines. Further, the Secretary has the right of entry upon any such coal or other mine.

The courts have on numerous occasions ruled that the scope of authority of an administrative agency is determimed by the applicable enabling legislation, and not by the agency's own interpretation of its powers. Civil Aeronautics Board v. Delta Airlines, Inc., 367 U.S. 316, 81 S. Ct. 1611, 6 L.Ed. 2d 869, (1961). Pentheny, Ltd v. Government of the Virgin Islands, 360 F. 2d 786, 790 (3rd Cir. 1966).

MSHA considers the private interview to be the cornerstone of PAR. But the statute is devoid of any mention of terms which would connote that Congress was conferring authority for MSHA to conduct such interviews. Terms such as "question privately", "one on one questioning", "private interview" or any phrase of similar import do not appear in the Act.

By comparson Congress, in enacting the Occupational Safety and Health Act, 29 U.S.C. 651, et seq. seven years before the Mine Safety Act, specifically authorized private interviews. Section 8(a) of the OSH Act, [29 U.S.C. 657(a)] provides as follows:

> Sec. 8(a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized -
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee. (Emphasis added).

Where Congress intends to confer certain authority it says so. Alaska Airlines v. Civil Aeronautics Board, 257 F. 2d 229 (D.C. Cir.), Cert. denied 79 S. Ct, 120, [230-231], (1958). Trans-Pacific Frgt Conf of Japan v. Federal Maritime Board, 302 F. 2d 875, (D.C. Cir., 1962).

The omission of the power to conduct private interviews is further heightened by the obvious parallel construction of the OSH Act and the Mine Safety Act.

These citations should be vacated because no statutory authority exists authorizing the interviews the Secretary seeks. Accordingly, it is not necessary to consider Sunshine's additional contentions that such private interviews violate the Fourth Amendment to the United States Constitution, that MSHA cannot rescind Sunshine's safety policy when such action is not authorized by statute. And finally, that a PAR interview is within the purview of Section 103(f) [30 U.S.C. 813(f)].

SECRETARY'S CONTENTIONS

The Secretary contends the Act authorizes the private interviews. And that Congress has approved PAR as a separate budget item. In addition, the Secretary asserts that Andrus v. Magma Copper Company, Civ 77-765, a United States District Court case in Arizona, clearly supports his view.

The Secretary initially contends that the authority to conduct investigations is grounded in the mandate of Section 103(a):

> frequent inspections and investigations in coal or other mines each hear for the frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information, relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines. ... (emphasis added).

And the Secretary declares that in discharging these responsibilities, he is granted a right of access to mines subject to the Act which is superior to the operators' privacy interests. Donovan v. Dewey ___ US _____, 69 L. Ed. 2d 262, 101 S. Ct. _____, 1981.

The thrust of the Secretary's argument is misdirected. No one questions his right to conduct investigations and to gain access to mines. In fact, the authority to investigate appears in prior mining legislation. The Federal Metal and Nonmetalic Mine Safety Act (Metal Act), 30 U.S.C. 721, et seq., as well as the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq (Coal Act) contain authority for the Secretary's "investigation". But the legislative histories of the statutory predecessors and of this Act are silent as to the precise meaning of the term. No legislative history supports the Secretary's argument that he may conduct private interviews on the company's time and premises. It is no doubt more convenient for the Secretary to conduct interviews in this fashion but mere convenience is not the test of a statutory grant of authority. No one questions the Secretary's power to interview workers off of the company's premises.

In the absence of statutory support and in the absence of any favorable legislative history I am unwilling to grant the Secretary the unfettered authority he seeks under the guise that he is conducting an "investigation."

The Secretary's second contention is that PAR bears the Congressional budget's stamp of approval. Specifically, the Secretary states that PAR is a separate line item in the budget. The Secretary declares that the budget description contains a narrative discription of PAR -- its purpose, effect, and resource commitment.

The Secretary's argument is not persuasive. There is no claim that the Congressional budget narrative recites that a portion of the funds are expended for private interviews of the nature requested here. The absence of that fact causes me to conclude that Congress did not approve, tacidly or otherwise, the expenditure of funds for that purpose. Then it not necessary to consider the effect of a Congressional budget resolution.

In support of his position the Secretary cites Andrus v. Magma Copper Company, Civ 77-765 Phx, an unpublished United States District Court case from the District of Arizona. (Complainant's post trial brief).

The history of the cited case: Cecil D. Andrus, the then Secretary of the Interior sued Magma Copper Company under the Federal Metal and Nonmetallic Mine Safety Act (1966 Act), 30 U.S.C. § 721-740. The original order of the Court and the subsequent contempt order were appended to the Secretary's post trial brief.

On January 16, 1978 the original order was issued by the trial court. That order contains no reference to the right of PAR investigators to conduct private interviews on company time and the company premises.

On August 2, 1978 the Court issued a two page order holding Magma Copper in contempt of Court for violating the prior injunction order. For the first time, in its order on the contempt proceedings, the Court refers to private interviews. The Court states:

> Defendant will permit its employees to be interviewed by agents conducting the PAR program outside the hearing and presence of other employees, agents or representatives of defendant.

No rationale pertaining to private interviews appears in either order. Under these circumstances this Judge does not consider Andrus v. Magma Copper Company as persuasive or controlling authority.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

Citations 350724 and 350726 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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UNITED MINE WORKERS OF AMERICA,	:	Complaint of Discharge,
	:	Discrimination, or Interference
On Behalf of	:	
JEFFREY LYNN SIMMONS,	:	Docket No. LAKE 82-74-D
Complainant	:	
v.	:	Meigs No. 1 Mine
	:	
SOUTHERN OHIO COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mary Lu Jordan, Esq., Washington, D.C., on behalf of Complainant;
D. Michael Miller, Esq., and Alvin J. McKenna, Esq., Alexander, Ebinger, Fisher, McAlister & Lawrence, Columbus, Ohio, on behalf of Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant was discharged on December 31, 1981, from the position he had with Respondent as a mechanic. He contends in this proceeding that his discharge resulted from his refusal to perform work, and that the refusal was protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c).

Pursuant to notice, the case was heard on the merits in Columbus, Ohio, on June 2, 1982. The Complainant, Jeffrey Lynn Simmons, testified on his own behalf. Roy Pierce, Michael Ryan, Arthur Fleischer, William Wooten, Rodney Butcher, Michael Buskirk, Robert E. Davis, Dan Silvers and David Baker testified on behalf of Respondent.

Both parties have filed posthearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the operator of the Meigs No. 1 Mine, located in Wilkesville, Ohio, the products of which mine enter interstate commerce.

2. Complainant Jeffrey Lynn Simmons was employed by Respondent as a miner from October 6, 1980, until his discharge on December 31, 1981.

3. Complainant worked for Simco Peabody Coal Company from January 1975 to August 1978. He first worked on the inside labor crew on a non production shift. His work included shovelling the belt line, rock dusting, setting concrete walls to control ventilation, and lubricating machinery. After about 1 year he became a belt mechanic. He received training in electricity and has an electrical card.

4. From August 1978 until June 1979, Complainant worked for Jeffrey/Dresser Mining Machinery as a Field Service Engineer or Field Service Technician. His duties included assembling and repairing defects in equipment sold by Jeffrey to mine operators. This equipment included continuous miners. Repairs were usually done on idle sections but occasionally on production sections.

5. Complainant was hired by Respondent as a mechanic. He worked originally in the "mule barn," an underground shop, where he repaired transportation equipment. He received 16 hours of safety training as a newly-employed experienced miner.

6. On about September 25, 1981, he was transferred to the job of section mechanic. As such he was required to inspect and make necessary repairs on mining equipment on the section, including the continuous miner. This work was usually performed at least one break outby the face, but on occasion was performed at the face and on a few occasions required that Complainant stand beside the miner operator while the miner was cutting coal.

7. When Complainant was assigned to the production section, the maintenance foreman, Dan Silvers, spent approximately 3 hours with him familiarizing him with the equipment, maintenance schedules, safety cautions and the general environment of the underground section. This procedure is referred to as a safety contact. On October 16, 1981, Complainant received 8 hours of electrical retraining and on October 23, 1981, he received 8 hours of annual refresher training in underground safety.

8. On one occasion while working on the section, Complainant told the maintenance foreman that he did not feel comfortable working under the head of a continuous miner.

9. Michael Ryan, the assistant shift foreman on the shift on which Complainant worked, stated that Complainant had the reputation that when he did not want to do a task, he said he did not know how.

10. When Complainant reported for work at midnight on December 31, 1981, he was assigned to the 009 section under foreman Roy Pierce. Complainant had never worked on the section or under Mr. Pierce previously. The crew was short-handed and bad top was encountered at the beginning of the shift. This caused a delay in production until about 4 or 4:30 a.m. The miner operator was off, and the continuous miner was being operated by the miner helper. He was assisted by a person classified as a general inside laborer.

11. At approximately 4:45 a.m., the shuttle car operator became ill and went home. Pierce assigned the person acting as miner helper to operate the shuttle car, and told Complainant to help on the miner. Complainant objected that he had never worked around a miner in production, and that he did not feel safe doing the job. Pierce told Complainant that he would train him and would "give you a safety contact slip and . . . even go up and even do the job for you, but I need somebody up there so I won't get a grievance filed on me." Complainant refused to go on the miner helper job and was sent out of the mine.

DISCUSSION

Pierce and Simmons disagree on two important aspects of the conversation they had involving Simmon's assignment to the miner helper job. Pierce asserts and Simmons denies that training was offered. Simmons asserts and Pierce denies that Simmons related his refusal to do the work to a concern for his safety. With respect to the first issue, I accept Pierce's testimony that training was offered. It seems to me inherently more probable than Simmons' testimony. It is also supported by the testimony of Mike Buskirk, personnel supervisor, and Rodney Butcher, chairman of the Local Union safety committee, both of whom testified that Complainant admitted in the first grievance meeting that Pierce had offered him training.

With respect to the second issue, I accept Complainant's testimony that he specifically related his refusal to take the job to a fear for his safety. This conclusion seems more in accord with the context of the conversation. It is also in accord with the testimony of Mr. Buskirk and Mr. Butcher as to what Complainant said at the first grievance meeting.

12. After Complainant's refusal to accept the assignment, but before he left the mine, Pierce asked mechanic Bob Porter to act as miner helper. Porter agreed and Complainant asked Pierce if he could remain and perform his mechanic duties. Pierce refused the request.

13. A miner helper is required to handle the cable, to keep it out of the way of the miner, check for methane, set temporary supports or roof jacks, to keep ventilation curtains up to within 10 feet of the face, and be alert for shuttle cars. An experienced miner who had not worked on a continuous mining machine could be trained for a miner helper job in about 30 minutes except for the task of moving the miner back across the section. It would require one shift to train an employee for the latter task. Pierce did not contemplate moving the miner back across the section during the shift in question.

14. It was common in the subject mine for mechanics to fill in on production jobs, and specifically on the job of miner helper.

15. The National Bituminous Coal Wage Agreement of 1981 in effect at the subject mine on December 31, 1981, prohibited any new inexperienced miner from working on or operating mining machines or mobile equipment until he completed at least 45 days of work underground. After 45 days, such an employee became eligible under the contract to bid on any vacant position.

16. After Complainant left the mine, Respondent decided to discharge him for insubordination and he received a written notice of "suspension subject to discharge" on December 31, 1981.

17. Complainant filed a grievance under the union contract. The grievance went to arbitration and the arbitrator upheld the discharge.

18. Complainant filed a complaint under the Mine Act within MSHA. After an investigation MSHA made a determination that a violation of the Act was not established.

STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner,

representative of miners, or applicant for employment . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

ISSUE

Whether Complainant's refusal to perform the job of miner helper on December 31, 1981, was protected activity under section 105(c) of the Act?

CONCLUSIONS OF LAW

1. Complainant and Respondent were subject to the provisions of the Mine Act at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. Complainant did not establish that his refusal to work on December 31, 1981, was activity protected under the Mine Act.

DISCUSSION

Refusal to perform work is protected under section 105(c)(1) of the Act, if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982). Further, the reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

GOOD FAITH

Although there is some evidence that Complainant was less than a model employee and that he was reputed to have avoided disagreeable tasks by claiming inability to perform them, this evidence is nebulous at best and there is no good reason to reject Complainant's testimony that he refused to work as a miner's helper because he feared for his safety. Therefore, I conclude that his refusal to work resulted from a good faith belief that it posed safety hazards. I have found above that he communicated the reason for his refusal to Respondent.

REASONABLE

The question remains whether Complainant's refusal to perform the work was "reasonable." See Secretary/Bennett v. Kaiser Aluminum and Chemical Corporation, 3 FMSHRC 1539 (1981). I conclude that it was not. As Judge Kennedy stated in a recent decision (Secretary/Bryant v. Clinchfield Coal Company, 4 FMSHRC _____ (1982)), "fear on the part of an otherwise healthy miner of performance of a risky or dangerous task regularly performed by other miners is not, standing alone, a protected justification for refusing to attempt to perform the task." Since I found that Respondent had offered to give Complainant training; since Complainant was an experienced miner; since the job which he refused was not more risky or dangerous per se than any other job in the mine; since it did not involve a violation of a health or safety standard; and since it was regularly performed by other miners, I conclude that Complainant's refusal to perform it was unreasonable. Therefore, under the Pasula - Robinette test, it was not protected under the Mine Act and the action of Respondent in discharging him did not violate the Act.

Section 105(c) was not designed to enable miners to avoid difficult or distasteful tasks even when the avoidance is based in good faith on a concern for safety. To be reasonable, the refusal to work must involve a condition or practice which creates a safety hazard beyond the hazards inherent in the mining industry or occupation itself. Going underground and working in low coal (the height of the seam involved in this case was 54 inches) can result in a good faith concern for safety in some people. For a person employed as a miner, refusal to work because of such a concern is not reasonable. Compare Victor McCoy v. Crescent Coal Company, 3 FMSHRC 2211 (1981).

ORDER

On the basis of the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution: By certified mail

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 82-10 A.O. No. 46-02558-03013H
v.	:	No. 1 Strip Mine
ROCKVILLE MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: Joseph T. Crawford, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for the petitioner; Neil A. Reed, Esquire, Kingwood, West Virginia, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a penalty assessment for an alleged violation of mandatory safety standard 30 CFR 77.1300.

Respondent filed a timely answer in the proceedings denying the alleged violation, and pursuant to notice a hearing was convened in Morgantown, West Virginia, on April 22, 1982, and the parties appeared and participated fully therein. The parties waived the filing of written post-hearing arguments, but were afforded an opportunity to make oral closing arguments on the record, and I have considered these arguments 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 proposal 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 violation 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) 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, 20 CFR 2700.1 et seq.

Discussion

The civil penalty proposal filed by the petitioner on November 18, 1981, seeks a civil penalty assessment of $1,200, for an alleged violation of mandatory safety standard 30 CFR 77.1300. The citation on which the penalty proposal is based, No. 855434, was issued by MSHA Inspector Ronald B. Marrara on June 8, 1981, and it is an imminent danger order issued pursuant to section 107(a) of the Act. The conditions or practices cited by the inspector are as follows:

> Explosives and detonators were not being handled, charged, fired, or otherwise used in accordance with provisions of 77.1301 through 77.1304 inclusively. Blasting operations were being conducted without ample warning given before blasts were fired and without persons cleared and removed or protected from concussion or flyrock in the blasting area (77.1301(h)).
>
> Safety fuses 12 inches long (approximately 45 second burntime) was being used in violation of 77.1303(c). The blasting area where charged holes were awaiting firing, were not guarded or barricaded and posted against unauthorized entry. In a pattern of approximately 17 holes with 15 holes charged the blasting foreman was "getting rid of the water in the holes" by dropping a fused capped Gulf Deta-GEL primer in them. The 4 men on the drill bench gathered, unprotected approximately 130 feet from the closest hole that was detonated. There were also 3 men and this inspector in the pit area below where such shots were fired. The inspector observed 2 such shots (holes) being detonated. It appears that numerous such shots have been fired this day and this is a common practice.

Stipulations

The parties stipulated to the following (Tr. 4-7):

1. Petitioner's exhibits P-1, P-3, P-4 and P-5, which are copies of the citation, a modification to the citation, a computer print-out of respondent's history of prior violations, and a previous section 104(d)(1) order issued on January 6, 1981, may all be admitted as part of the record in this case.

2. Payment of the maximum civil penalty assessment in this case will not adversely affect respondent's ability to remain in business.

3. Respondent's annual coal production in 1980 was 253,813 tons, and respondent has approximately 54 employees on its payroll.

4. Respondent is a small-to-medium sized mine operator.

Testimony and evidence adduced by the petitioner

MSHA Inspector Ronald B. Marrara testified that he has been employed as a surface coal mine inspector for approximately five years and that prior to that time, between 1974 and 1977, was employed as a foreman with the Comet Coal Company in Kingwood, West Virginia. During his tenure as an inspector, he has taken training courses in surface blasting and explosive techniques and safety. He confirmed that he was at the mine in question on June 8, 1981, to conduct a spot inspection and to abate a previously issued citation. He arrived at the site at approximately 9:45 a.m., and while on the road leading to the 7500 Pit, he encountered a bulldozer operator working on the road. He advised the worker that he was there to make an inspection, and at about the same time foreman Kermit Galloway approach him. He advised Mr. Galloway that he was there to make a spot inspection and to abate a previous citation, and Mr. Galloway told him to "go ahead", but that he did not have time to accompany him (Tr. 8-11).

Mr. Marrara stated that after leaving Mr. Galloway, he decided to walk into the site rather than to drive and disturb the dozer operator's road work. At approximately 9:54 while walking along the pit high wall area, he heard two explosions go off and material was thrown into the air. The explosions took place above the high wall on a drill bench area where holes were being drilled and shot. He was almost directly under the holes when they went off, and he then went back to his vehicle and drove to the pit. He arrived there at 10:00 a.m., and found four people working on the "drill bench". Mr. Donald Jordan, the blasting foreman, was supervising the work of two drill operators and one blasting helper. After arriving there, Mr. Jordan advised him that they "were getting rid of water in the holes by dropping a fused capped primer". The primer was a one-pound Gulf Deta-Gel primer with a safety fuse and cap. He

determined that the crew which was present were 145 feet from the furthest hole which had been detonated, and they were in front of a pump truck. Mr. Marrara observed approximately 17 holes in the area, 15 of which were charged and primed in some way, with electrical wires running out of the holes, and some of the holes were fully charged with AMFO, an ammonia nitrate fertilizer mixture which is used as an explosive. (Tr. 12-15). Mr. Jordan stated to him that he was using twelve inches of fuse, with an approximate burn time of 45 seconds (Tr. 12-15).

Mr. Marrara testified further that he observed no warning signs or barricades at the detonation site, heard no horns sounding a warning to persons that blasting was taking place, and no one was "cleared of the area". He therefore advised Mr. Jordan that he was issuing a section 107(a) imminent danger order because of what he observed, and he identified a copy of the order which he issued (Tr. 15-19). He believed that the fuses being used were too short because the law specifies that a fuse burn time should be a minimum of two minutes, and Mr. Jordan confirmed that the actual burn time for the fuses he was using was actually 40 seconds per foot. He should have been using a 36-inch fuse in order to comply with the required safety standard. Mr. Marrara believed that the operator was negligent and that Mr. Jordan was aware of the fact that he was in violation by placing his crew in such hazardous conditions (Tr. 20).

Mr. Marrara identified a copy of his inspector's statement (Exh. P-2), which he prepared at the time of the inspection. In regards to his notation on this form that "this type of violation occurs frequently", he explained that he had previously issued a January 6, 1981, unwarrantable failure citation to the respondent for a blasting violation (Exh. P-5), and at that time he had reviewed the blasting laws with Mr. Jordan. In addition, shortly after the imminent danger order issued, Mr. Galloway came to the scene and stated to him that "this was a common practice that was being conducted at this operation". The "common practice" being getting rid of water in the holes by blasting (Tr. 21-22).

Mr. Marrara stated that Mr. Jordan admitted that he did not look over the high wall prior to the blasting, and when he asked him whether he was aware of the fact that he was in violation and was exposing his men to a hazard, Mr. Jordan nodded his head affirmatively and stated "I guess so" (Tr. 25). Mr. Marrara also indicated that at the time he issued the previous citation he had a lengthy discussion with Mr. Jordan concerning the requirements of the standards dealing with blasting. He also discussed the regulations with the mine owners at that time (Tr. 26).

Mr. Marrara believed that the conditions he cited in his imminent danger order were serious in that he reasonably expected someone to be killed or injured "right in front of my eyes". He observed fine material being thrown into the air at the time of the explosions in question, and he was some 150 feet away. He believed that the three men in the pit area, as well as the four men on the drill bench, and himself, were all directly exposed to the hazardous conditions he cited. He was concerned

that the blasted materials thrown in the area could fall on someone, and they could also fall down the charged holes and set them off. In addition, a quick movement of air could generate static electricity and possibly set off the entire shot (Tr. 26-31).

Mr. Marrara stated that he determined through observation that some of the filled holes were charged, primed, and had filters in them. After the order issued at approximately 10:05 a.m., drilling operations ceased, and the men were assembled at a distance past the pump truck. He then discussed the violation and the applicable safety standards with the men, and also present were Mr. Jordan and Mr. Galloway. Mine Owner Darrell Tichnell arrived during the latter part of the discussion, and after warning signs were posted, Mr. Marrara abated the order at approximately 10:24 a.m., and the men went back to work. He confirmed that the order issued for a violation of section 77.1300, but that there were "three or four separate problems" (Tr. 32-36).

On cross-examination, Mr. Marrara confirmed that on June 8, 1981, he did not first stop at the mine office, as is his usual practice, prior to entering the mine premises. He also confirmed that the ground around the drill holes in the blasting area was "wet around the holes", but that no puddles of water were present. Based on these observations, he concluded that the water had come out of the holes. Mr. Marrara described the mining procedures, and confirmed that in a surface mining operation the top soil and overburden is removed, leaving an exposed cut-out area in the side of the hill. He confirmed that the detonations occurred in the high wall drill bench area and not down in the pit area where the coal is found, and he described the physical characteristics of the area in question (Tr. 36-44). In determining the depth of the holes he observed, Mr. Marrara stated that he did not test them, but simply concluded that they were about 45-to-50 feet deep. A normal charge for holes of this size would be about 800 pounds of explosive (Tr. 45). Assuming that the hole was 145 feet deep, and it was charged with 800 pounds of explosive, Mr. Marrara conceded that there would be no surface subsidence other than the material coming directly out of the hole. By the same token, using a one pound charge in that same hole, the most probable possibility is that water and loose rock material will come practically straight up out of the hole (Tr. 47-48).

With regard to the materials that he observed coming out of the holes which were detonated on June 8, Mr. Marrara conceded that from where he was standing 150 feet away all that he could see coming out of the holes was the mist from the water and the dust in general (Tr. 49). The workers in the pit area were also standing approximately 150 feet away, but those persons up on the bench were much closer, and he was unaware that any particles from the explosions touched them. No one complained that they had been touched by any materials coming from the holes, and no one was injured (Tr. 51).

Mr. Marrara confirmed that the blasting standards require the use of a 36-inch fuse with a two-minute burn time, regardless of whether a hole is loaded with 800 pounds of explosives or one pound. The purpose

of the burn time is to allow the person lighting the fuse sufficient time to get away from the area. He conceded that lighting such a fuse or explosive that is openly exposed on the surface is much more dangerous than dropping it down a 145 foot hole (Tr. 52). He also confirmed that on the day in question, a one-pound charge was being dropped down 45 foot holes for the purpose of blowing out the water at the bottom of the hole, and not for the purpose of disturbing the rock strata (Tr. 53).

Mr. Marrara conceded that misfiring of charges is critical, and that from a safety standpoint, an operator has to make certain that every charge goes off, rather that having misfired charges lying around (Tr. 53). He described the procedures used to load the holes for detonation, and confirmed that the operator wants to get water out of the hole because water used with AMFO will not explode, and it is common practice in the mining industry to try to get dry holes before blasting. However, Mr. Marrara stated that there are other explosives available which do not require the blasting of water out the hole. However, using the type of explosive that the operator in this case opted to use was not illegal, and he conceded that they must strive for a dry hole and that it is dangerous to leave explosives which had not been properly detonated at the bottom of a hole is dangerous (Tr. 54-57).

Mr. Marrara stated that on all occasions prior to June 8, the operator used a pump to pump the holes dry, but he denied that the pump was broken that day. In addition, he stated that Mr. Galloway told him that when the pumps were down, it was common practice to blast water from the holes, but that both Mr. Jordan and Mr. Galloway advised him later in the day that the pump was not broken. Since the citation issued, the operator no longer blasts water from holes, and uses the pumps exclusively for this task (Tr. 59). Although conceding that the water blasted from the holes on June 8, came back down to rest three to five feet from the holes, he still believed that the drill bench crew, standing 130 feet away, were still not a safe distance, even though he could not observe an debris coming out of the holes (Tr. 60).

Regarding his prior unwarrantable failure citation, Mr. Marrara confirmed that it concerned a pick-up truck with properly inflated tires running over a blasting cap placed in a charged hole and he conceded that there have been no similar incidents at the mine (Tr. 61). However, he indicated that he has no knowledge concerning the respondent's past safety record (Tr. 62).

In response to further questions, Mr. Marrara stated that it was his understanding that Mr. Jordan lit two 40-second fuses at a time, dropped the charges down the holes, and then ran over to the area where the other members of the crew were standing. He identified a sketch of the area (Exh. P-6), which basically describes and diagrams the scene as he observed it. He believed the procedure used to light the charges would contribute the the gravity of the violations, since Mr. Jordan could stumble while leaving the area, or he could become disoriented and drop the charge down a loaded hole which is not stemmed (Tr. 63-66).

In response to bench questions, Mr. Marrara stated that his principal concern on June 8, was the hazardous conditions which prevailed as a result of the method used to blow water out of the holes in question. He conceded that the practice of blowing water out of holes by means of permissible explosives is not per se a violation. Further, the use of AMFO as an explosive is likewise not a violation. However, he believed that a better way was to use pumps rather than explosives, and he reiterated that blasting water out of holes is not in and of itself a violation of any mandatory standard. His concern was over the fact that no warnings had been sounded and no barricades had been erected (Tr. 71-73). He was also influenced by the fact that Mr. Galloway stated that this was a "frequent practice" (Tr. 75). He also indicated that at the time he abated the prior unwarrantable citation, he went over all of the provisions of the blasting standards with Mr. Jordan (Tr. 79-80). At the time he observed the instant conditions on June 8, some of the holes were charged to break up the overburden, and while the holes were charged, he conceded that the charge wires were not connected to the blasting machine and were shunted. Even though they were shunted, he still believed that static electricity could have possibly set the charges off. He conceded that a sign indicating "blasting in progress" was posted at the site in question (Tr. 86). Even if a fuse longer than the one used was being used by Mr. Jordan, he would still be concerned over the fact that the crew would still be exposed to small flying materials (Tr. 88).

Mr. Marrara stated that he cited a violation of section 77.1300 on the face of his order, but that in his description of the conditions and practices, his intent was to charge the respondent for violations of sections 77.1301 through 77.1304, which section 77.1300 incorporates by reference. He stated that he discussed each condition cited with Mr. Jordan, as well as mine operator Darrell Titchnell. He conceded that he failed to cite a specific violation of section 77.1303(g) for lack of barricades, and he dismissed this as a "mistake" on his part. He also conceded that the "conditions or practices" recited in his order came from what he observed and from what Mr. Jordan and the crew told him (Tr. 88-94).

Mr. Marrara conceded that the possibility of material blasted from a hole with a one pound charge falling into a hole next to it and detonating it was improbable, and he has never known this to happen (Tr. 98). He also conceded that static electricity igniting properly charged holes was a very rare occasion (Tr. 98). He estimated that a safe distance for people to be in the event all of the holes in question were charged with 800 pounds of explosives each would be 2,000 feet if they were out in the open and unprotected (Tr. 100). However, in the event one shot was put off with one pound of explosive, 130 feet would be sufficient, assuming the men were protected by some structure (Tr. 102). In his view, if the men were under a piece of equipment, he would consider them to "be protected" under the safety standard (Tr. 103). He conceded that at no time did he ascertain that respondent's mine management or supervisors had instructed Mr. Jordan not to use a 36-inch fuse (Tr. 107).

Although signs were posted at the entrance to the property stating that the blasting was taking place, there were none posted at the actual blasting area where charged holes were awaiting fireing, nor were any barricades erected (Tr. 109). Section 77.1303(g) requires the posting of signs and the errection of barricades in the immediate area where the charged holes were located (Tr. 110). He did not consider Mr. Jordan's presence at the blasting site to be a suitable "guard" or barricade, nor did he consider the signs at the mine entrance to be a sufficient warning since anyone could drive directly up to the bench site where the charged holes and blasting was taking place (Tr. 112).

Testimony and evidence adduced by the respondent

Donald E. Jordan testified that he is employed by the respondent as a drill operator, but at the time the citation issued he was a shot foreman. He described the duties as a shot foreman, and stated that he served as an explosives supervisor for the respondent for some 11 years and has a blasting license issued by the State of Pennsylvania. A license is issued based on training and experience, and he confirmed that he was supervising the blasting operations on the day Mr. Marrara issued the citation in question. He identified a copy of the sketch of the scene (Exh. P-6), and agreed that it generally depicts the approximate positions of the holes being drilled that day. He explained the procedures he followed for detonating the holes, and indicated that all of them had been drilled 108 feet deep for the purpose of blasting up the overburden so that it could be removed. His intent was to blast the area in the rock strata immediately above the location of the coal. He was present when most of the holes were bored and loaded with explosives, and was in the process of loading the holes and stemming them when he first observed Mr. Marrara (Tr. 123-129).

Mr. Jordan explained that some of the holes contained underground rain water, and he explained how he attempted to remove that water by blasting. He confirmed that mine management had never instructed him as to the length of the fuses to be used, and confirmed that on the day in question he was using a fuse and a cap and a one pound stick of Delta Jell to blow the water out of the holes. He described the Delta Jell as two inches in diameter and eight inches long, and weighing one pound. The charge was dropped down the holes, which were five and five-eights inches in diameter, and they were dropped to the bottom of the holes where the water was located. He and his helper both lit the Delta Jell together, and each of them would go to two different holes located fifteen feet apart, drop them down the holes and then leave the area. The resulting blast would propel "muddy water" out of the holes, spreading it about six or eight feet around the holes (Tr. 130-137).

Mr. Jordan stated that at the time the holes in question were blasted, he believed his employees were at a safe distance away, and that after he and his helper dropped the charges down the holes they retreated

through an unobstructed path back to the truck. He and his helper made their way to the truck for a distance of 130 feet and "stood there awhile before it went off" (Tr. 139). The force of the blasts propelled water some 50 feet in the air from the surface, and it came straight down in a circumference of some six feet around the hole. He recalled seeing no other debris or rock, other than dust, being propelled out of the hole (Tr. 139-141). In his view, none of the one-pound explosives used in the 108 foot deep holes could have jarred or caused the other charged holes to explode, and his opinion in this regard was based on the fact that the primed and charged holes were fifteen feet apart (Tr. 143). Prior to the setting off of the charges, he would have signaled the men in some fashion, as is his usual practice, and his crew were all experienced miners. When he dropped the charges down the hole, he had no way of knowing that Inspector Marrara was on the premises, and in his view, he was not within any dangerous proximity of the one-pound charge (Tr. 146-147). However, his presence on the coal pit, had the entire shot of all the holes gone off, would have placed him in danger since he was directly below the shot. However, he did not see Mr. Marrara, and the other men in the pit were some 294 feet from where the water was shot out of the holes (Tr. 148).

Mr. Jordan stated that blasting shelters are sometimes used on the site, but that a common practice is to use vehicles for protection. In response to a question concerning any hazards, he stated as follows (Tr. 149):

> Q. Except for the length of the fuse that was used, by you and your helper, was there anything that you or your helper or anyone in the area did that considered a hazard to their own or other people's health and safety? Except Mr. Marrara. Not counting Mr. Marrara was there anybody there doing anything that was careless aside from the length of the fuse?
>
> A. Not to my knowledge.

Regarding the use of a pump to remove water from the holes, Mr. Jordan stated on the day in question it was either "broke down or plugged, I don't remember", and he made the decision to blast the water out (Tr. 154). He also indicated that it was an "acceptable practice" in the mining industry to use small explosive charges to remove water from a drill hole (Tr. 155). Although Mr. Marrara subsequently advised him that he could use this method as long as three foot fuses were used, other safety inspectors told the mine owners that water could not be blasted out of holes under any circumstances (Tr. 156). He could not recall Mr. Marrara discussing the length of fuses with him during the time he issued the previous citation for a pick-up running over a charged hole.

Mr. Jordan confirmed that he made the decision to use a one-foot fuse on June 8, 1981, because he believed this would allow him and his helper enough tolerance to get away from the hole once the charge was dropped in, and to his knowledge respondent has never had any industrial mining accidents, and he believes the company has a good safety record (Tr. 157-158). Mr. Jordan stated that before placing off the "big charge", he would have sounded a horn device, but that this is not normally done for small charges to dispel water from a hole because everyone within the proximity of the charge is within sight and would know that it was going to be shot (Tr. 168).

On cross-examination, Mr. Jordan could not recall the total number of holes, and doubted that half of them were filled with water. On the day in question, he believed that only two holes were blasted and these were the ones that the inspector heard. He confirmed that from where he was standing he did not see Mr. Marrara in the pit at the time the holes were blasted, and conceded that he did not look into the pit immediately prior to the blasting, nor did he give any warnings in the pit area. He also conceded that he used a foot-long fuse to set off the charges in question, and indicated that he was taught to use 12 inch fuses by Mr. Darwin Titchnell, one of the mine owners. Mr. Jordan also confirmed that he had received explosives training in Pennsylvania, that he holds a blaster's license from the State, but stated that his knowledge of the use of fuses is what he learned from Mr. Titchnell. Although Mr. Marrara discussed the use of proper fuses with him at the time the citation in question here was issued, Mr. Jordan could not recall Mr. Marrara discussing this with him on the prior occasion when he issued a citation (Tr. 168-175).

Mr. Jordan identified a copy of a sketch of the area where the blasting was taking place (Exh. P-6), and conceded that no signs were posted in the immediate area where the holes in question were drilled. He considered that to be the "shot area", and he indicated that signs have been posted in the past, and this would be on the road 300 or 400 feet away. On the day in question, he observed no large debris come out of the holes which were blasted. He confirmed that he is presently employed as a drill operator, which is a "step up" from a shot foreman, and he no longer supervises. He requested to be reassigned because of "the aggravation of that worrying about just having everything up to specifications. Meeting the law" (Tr. 182).

In response to further questions, Mr. Jordan stated that he did not believe that any debris from the blasted water holes could set off the other charged holes because they were stemmed and covered. In addition, since the cap wires were shunted, he considered them to be safe. He conceded that had a sign been posted at the "shot area", the inspector would be unable to see it until he was almost at the shot, and he also indicated that the inspector could not have seen it from where he was located prior to the time the shot went off. He also indicated that 12

inch fuses are not used to blast overburden because more time is required to get away from flying materials, but he does not believe that using such fuses to blast water out of a hole is dangerous, but conceded that a premature shot would be serious. He does not like using longer fuses for shooting water because the caps have longer to become wet and several misfires have occurred because of this. He conceded that had pumps been used, misfires would not be a problem and the citation probably would not have issued. However, the law does not require the use of pumps (Tr. 182-192).

Mr. Jordan stated further that since there was 15 feet of solid rock between in each loaded shot, and each hole was 108 feet deep, he did not believe the loaded holes could have been set off by the blast which occurred. He explained how he stemmed and covered the holes, and he did not believe that such a hole charged with 800 pounds of explosive could possibly have set all of the others off (Tr. 196).

Kermit Galloway, general superintendent, testified that he has observed the manner in which water was removed from holes by Mr. Jordan. He indicated that no one has ever been injured during any blasting at the mine, and safety is always of prime concern. He indicated that he usually accompanied the inspector during his rounds, and that he would stop by the office. Hoever, on the day in question he met him at the "backfill", and he did not first stop at the office. Had he stopped by the office, he could have radioed ahead to any areas where blasting was taking place to alert the crews that he was in their area. He indicated that it has always been a common practice to shoot water out of holes. The pumps were purchased in 1976, and on the day the citation was issued the pump was either broken down or plugged, but he could not recall. He has never been instructed as the length of fuse to use for small charges, and that the electronic method is used for major charges. The only time fuses are lit with matches is when water is blown out of a hole, and Mr. Marrara has never discussed this procedure with him. He still considers the practice to be safe, but since the citation issued, pumps are used exclusively to dispel water from holes (Tr. 201-215).

On cross-examination, Mr. Galloway confirmed that when he first encountered Mr. Marrara at the site, he did not ask him to report to the office, and simply told him to go where he had to but that he did not have the time to go with him (Tr. 221). Mr. Galloway knew that the holes were being cleared of water by blasting, but did not tell Mr. Marrara because he did not consider it dangerous. A sign was posted on a road, but the inspector came in by a different one (Tr. 222). He did not consider that Mr. Marrara was in any danger when he headed to the pit to check on an abatement for a citation issued on a broken windshield (Tr. 226).

Rebuttal witness

MSHA Inspector Charles J. Bush, testified that prior to his ten-year employment with MSHA, he was employed as a resident engineer by the Consolidation Coal Company. He testified as to his training regarding

safe explosive practices, and indicated that he holds an instructor's certificate in explosives and has taught courses in the subject (Tr. 244). In answer to a hypothetical question as to the probability or possibility of a one pound charge placed into a 108 deep hole detonating other fully charged holes located within 15 feet, Mr. Bush stated that "it is probable" (Tr. 249). He explained his answer, and indicated that it was possible for the other charged holes to be detonated by the concussion of the initial first one-pound charge, and he indicated that "the probability is there" (Tr. 252).

With regard to the actual distance of 130 feet that the men in question were standing from the two water holes which were blasted on the day the citation issued, and whether they were a safe distance, Mr. Bush candidly admitted that "I've got to say that was a pretty substantial distance, for those two bore holes in general" (Tr. 253). However, had the fully charged holes all gone off, the 130 feet would not be sufficient because there are to many variables. In his view, a half-mile distance would not be safe if a total of 4500 pounds of explosives were used (Tr. 255).

On cross-examination, Mr. Bush confirmed that wind conditions will effect the direction of any materials coming out of a blasted hole, and that anyone standing 130 feet from the hole which was charged to blast out the water would be at a safe distance (Tr. 258). Mr. Bush also confirmed that he has been at the mine site in question, but has not examined the rock strata at the location where the shots in question were fired, nor has he inspected the site since 1976 (Tr. 262). He confirmed that it was highly probable that one of the charged holes where the water was located could have detonated the other charged holes, and when asked why it didn't on the day in question, he answered "Lucky, this time" (Tr. 260).

Mr. Bush indicated that his prior experience includes ten years of demolition duty with the City of Pittsburgh, and stated that he has never lit a one pound charge with a fuse 12 inches or shorter, and that he has always used 36 inch fuses. He confirmed that he assisted in the drafting of the mandatory safety standard in issue in this case, and stated that he has never seen anyone shoot water out of holes in Preston County (Tr. 262).

In response to bench questions as how he would propose to dispel water from a hole, Mr. Bush stated that water gel slurries may be used, but they are expensive. He also indicated that MSHA's technical personnel can assist a mine operator if he has a water problem. He indicated that blasting water out of a hole with AMFO is not a violation of any mandatory standard per se, but that doing so with adjacent holes being charged adds to the gravity of the situation (Tr. 268). He also conceded that no one has determined precisely what a safe distance is when blasting holes, and while conceding that he had no knowledge of the rock strata at the blasting site, his prior opinion as to a safe distance was based on "past experience" (Tr. 269-270).

Mr. Bush stated that had he been in Inspector Marrara's position, and faced with the same conditions, he too would have issued an imminent danger order, and that his concern would have been over the safety of the men at the site in the event the rest of the holes were set off. Even if the other 15 charged holes were not present, he would still consider

it an imminent danger because the man lighting the short 12 inch fuse and dropping the charge in the hole would be in danger (Tr. 271-273). When asked whether the use of a 36-inch fuse would also be a hazard, he responded as follows (Tr. 272-274):

> JUDGE KOUTRAS: Simply dropping a one pound charge down a hole to dispel water with a thirty-six inch fuse would be a hazard?
>
> THE WITNESS: To me I think it would still be a hazard.
>
> JUDGE KOUTRAS: Well, wouldn't the operator be in compliance?
>
> THE WITNESS: Yes, sir, I know he would.
>
> JUDGE KOUTRAS: But, why then, with that thinking then the operator could never get rid of water by using a charge? Even using a thirty-six inch fuse.
>
> THE WITNESS: Most of your explosive manufacturers consider this as a bad practice, to get water out of a hole.
>
> JUDGE KOUTRAS: Then why doesn't MSHA promulgate a standard that says, thou shalt not get water out of a hole using any explosive device, period?
>
> THE WITNESS: We have on different instances submitted our memos and recommendations which MSHA has asked for, from all different districts, I think several different areas that it was brought about, in reference to Kentucky and Tennessee, these past couple months. It's hard to get something substantial to cover all phases of explosives.

Petitioner's arguments

At the close of the hearing, petitioner's counsel summed up his case by asserting that Inspector Marrara found a set of circumstances in connection with the blasting of water out of holes that violated certain specific standards under section 77.1300. A violation occurred when the respondent used fuses of improper length during the blasting, namely, 12 inch fuses rather than the required 36 inch fuses. In addition, failure by the respondent to give any warnings prior to the shots being detonated also constituted a violation, as well as the failure to post a sign at the blasting site (Tr. 281-282).

Respondent's arguments

With regard to the lack of any warnings, respondent argued that it is clear that warnings were given to everyone in close proximity to the explosive charge, since it is obvious that Mr. Jordan's crew was

participating in the blasting itself and were verbally warned. In addition, it is clear that signs were posted in accordance with the requirements of the standards (Tr. 283).

Concerning the use of the fuses in question, respondent's counsel conceded that the regulations specifically require the use of 36-inch fuses, and that Mr. Jordan was using 12-inch fuses. However, given all of the prevailing circumstances, counsel views this violation as a "technical" violation committed by Mr. Jordan, who by experience and judgment believed that the use of 12-inch fuses to blow water out of a hole was safe. He also pointed out that the men were at a safe distance from the two holes which detonated, and that MSHA's witness Bush agreed that this was the case (Tr. 284).

Respondent's counsel argued further that the only thing that makes this situation concerning the blasting of holes an "imminent danger" in the eyes of the inspector, is MSHA's "theory and speculation" as to the probabilities of the other charged holes being detonated by one charge. However, counsel points out that the practice utilized by Mr. Jordan to dispel water from a hole was designed to result in a complete, free, and unobstructed "straight-up" shot from a hole 108 feet deep. There is no credible evidence as to the rock formations, strata, or whether the pit area would have affected by any premature charge going off (Tr. 286).

With respect to Mr. Marrara's claims that he had previously advised the respondent about the requirement for using 36-inch fuses, counsel points out that Mr. Jordan testified that this conversation took place after the instant citation issued. Given all of the circumstances of this case, counsel maintained that the proposed civil penalty is excessive and exorbitant, and that a fine of $25 or $50 would be more appropriate (Tr. 287).

Findings and Conclusions

Fact of Violation

As stated earlier in this decision, Citation No. 855434 is an "imminent danger" order issued by the inspector pursuant to section 107(a) of the Act. The inspector subsequently modified the citation to show that it was also a citation issued pursuant to section 104(a). The validity of the order itself, that is, whether the inspector was correct in his judgment that the conditions he cited in fact constituted an imminent danger is not in issue in this case. Any hazard or danger connected with a violation of any mandatory safety standard will be dealt with in connection with my gravity findings.

Inspector Marrara conceded that the use of explosives to dispel water from drilled holes is not per se a violation of any mandatory safety standard. His concern was that the respondent did this as a "regular practice" and the inspector believed that a better way of drying out the holes was through the use of pumps. However, on the facts

presented in this case, the manner in which the respondent was drying out the holes is not a significant issue, unless of course the petitioner can establish that in the course of the blasting the respondent violated certain mandatory safety standards.

In its proposal for assessment of civil penalty filed in this case, the petitioner sought a civil penalty for "each alleged violation set forth in attached Exhibit A". Exhibit "A" is a copy of MSHA Form 1000-179, which is the proposed assessment served on the respondent. That form reflects that MSHA's Office of Assessments waived the normal assessment procedures found in Part 100, Title 30, Code of Federal Regulations, and "specially assessed" a civil penalty in the amount of $1200 for the citation in question. That "special assessment" was made on an alleged violation of mandatory safety standard section 77.1300, and the "narrative findings" of the assessment officer reflects that the civil penalty assessment levied by him was made on the basis of his "special findings" connected with an alleged violation of section 77.1300. In short, MSHA's Office of Assessments treated the conditions or practices described on the face of the citation as one violation of section 77.1300. However, during the hearing, Inspector Marrara testified that his intent was to charge the respondent with separate violations of sections 77.1301 through 77.1304, in addition to section 77.1300, a general standard which incorporates section 77.1301 through 77.1304 by reference. Under these circumstances, it is first necessary to determine precisely what the respondent has been charged with in this case.

The "conditions or practices" described by Inspector Marrara on the face of the citation which he issued contains a narrative of certain conditions and practices which he observed. The "part and section" of the law cited by Mr. Marrara on the face of the citation form is section 77.1300, and that is the section cited by the petitioner in its proposal for assessment of civil penalty. MSHA's initial assessment was made on the basis of an alleged violation of that section by the respondent. However, in the narrative description of the "conditions or practices" described by the inspector on the citation form, Mr. Marrara inserted references to mandatory standard sections 77.1303(h) and 77.1303(u), and these are shown as follows:

> Blasting of pit holes were being conducted without ample warning given before blasts were fired and without persons cleared and removed or protected from concussion or flyrock in the blasting area (77.1303(h)).
>
> Safety fuses 12 inches long (approximately 45 second burntime) was being used in violation of 77.1303(u).

In addition, the citation states that "the blasting area where charged holes were awaiting firing, were not guarded or barricaded and posted against unauthorized entry." Although Mr. Marrara did not include a reference to any specific safety standard, he testified that his intent was to charge the respondent with a violation of section 77.1303(g), and the omission of a reference to this section was a "mistake" on his part.

Section 77.1300, Title 30, Code of Federal Regulations, provides in pertinent part as follows:

> (a) No explosives, blasting agent, detonator, or any other related blasting device or material shall be stored, transported, carried, handled, charged, fired, destroyed, or otherwise used, employed or disposed of by any person at a coal mine except in accordance with the provisions of 77.1301 through 77.1304, inclusive.

Sections 77.1301 through 77.1304 of the standards dealing with blasting and explosives contain approximately four pages of detailed mandatory safety requirements dealing with explosives, magazines, vehicles used to transport explosives, explosives handling and use, and special provisions dealing with blasting agents. Under these circumstances, I believe that it is incumbent on the petitioner to specifically detail in its proposal for assessment of civil penalty the precise sections of the standards for which it seeks civil penalty assessments. In this case, the petitioner attached an exhibit which is an initial civil penalty assessment dealing with section 77.1300, for which an assessment of $1200 was levied. In short, it would appear from the pleadings that the petitioner had one violation in mind, while the inspector who issued the citation had two or three in mind when he issued the citation. Under these circumstances, it is necessary to determine whether the record here supports a conclusion that the respondent was put on notice as to what it was being charged with and whether it has had a fair opportunity to meet those charges.

Although the pleadings and citation issued in this case are not models of clarity, I believe that the record establishes that the respondent knew what it was being charged with and has had a full and fair opportunity to defend itself. While the proposal for assessment of civil penalty lists only section 77.1300 on "Exhibit A", the citation issued by the inspector was included as part of the pleadings, and the conditions or practices detailed in the citation was discussed by the assessment officer as part of his "Narrative Findings." In addition, respondent's answer to the proposal for assessment of civil penalty suggests that it was aware of the charges since respondent specifically entered a denial as to each of the essential allegations made by the inspector in the citation. Further, the inspector testified that he discussed each of the mandatory safety sections with Mr. Jordan and mine operator Tichnell (Tr. 93), the record here reflects that respondent has had a full opportunity to cross-examine the inspector and to present testimony and evidence in support of its defense, and the respondent has not claimed prejudice or surprise.

The fact that MSHA opted to treat the conditions and practices cited by the inspector as one violation rather than three for purposes of an assessment of civil penalty has not prejudiced the respondent. By the same token, since I am not bound by MSHA's penalty assessment procedures, I conclude that for purposes of my findings and decision in this case I may treat I may make findings concerning each of the standards cited by the inspector and render my decision accordingly. My findings and conclusions in this regard follow below.

30 CFR 77.1303(u)

Respondent does not dispute the fact that the use of the twelve inch fuses by Mr. Jordan during the blasting of water from the two holes which were shot on June 8, 1981, was contrary to, and in violation of section 77.1303(u), which required the use of 36-inch fuses. Petitioner has established a violation of this section by a preponderance of the evidence adduced in this case, and that portion of the citation charging a violation of section 77.1303(u) is AFFIRMED.

30 CFR 77.1303(g)

The citation asserts that "the blasting area where charged holes were awaiting firing, were not guarded or barricaded and posted against unauthorized entry". Section 77.1303(g) requires that "Areas in which charged holes are awaiting firing shall be guarded, or barricaded and posted, or flagged against unauthorized entry."

The term "blasting area" is defined by section 77.2(f) as "the area near blasting operations in which concussion or flying material can reasonably be expected to cause injury". The cited standard does not use the term "blasting area"; it simply refers to areas in which charged holes are awaiting firing. Shot foreman Jordan testified that while some of the drilled holes which constituted the "shot" were charged, the holes were stemmed and covered and that the cap wires were shunted. He believed that the immediate area where the drilled and charged holes were located constituted the "shot area", but that the posting of a sign at that location would be of no value since someone would be "on the shot area" before seeing any such sign.

Respondent has established that it had a sign posted on one of its mine roads indicating that blasting operations were taking place at the mine. While it is true that the inspector may have used another road to gain access to the mine, it is also true that he did not check into the mine office before proceeding to the pit area. Superintendent Galloway testified that had he done so he would have been alerted to his presence near any areas where blasting was to be done and he could have radioed the blasting crew to be alert to the fact that the inspector was near their operation. Since it was common practice to shoot water out of a drilled hole with a small charge, Mr. Galloway did not believe that the inspector was in any precarious position.

On the facts of this case it seems clear to me that the two "shots" which were fired caught the inspector off guard and surprised him. He probably would not have been so surprised had he checked into the mine office before proceeding to the pit area. Mr. Jordan testified that he first observed the inspector while he was in the process of loading and stemming the shot holes. Since two of the holes contained water, Mr. Jordan, following his usual practice, dropped a one-pound charge down the holes to dispel the water, and he obviously did not believe the inspector was in any jeopardy. The "shots" actually heard by the inspector were those fired off by Mr. Jordan to dispel water from the holes in question and were not the normal "shots" used to blast overburden.

Assuming that the only blasting operation taking place at the time the inspector arrived on the scene was the use of a one-pound charge to dispel water out of a hole, and assuming further that the term "area" used in section 77.1303(g) can be construed to mean "blasting area", then I would have to conclude that the posting of a sign or barricade was not required since the evidence here establishes that it was not reasonable to expect any injuries from concussion or flying material from a one pound charge. The evidence establishes that the only material dispelled from the holes in question was water and some dirt which was propelled vertically from the holes and fell in close proximity to the holes. However, since the standard in question requires guards, barricades, or posting in areas where charged holes are awaiting firing, the question presented is whether they were required in this case.

The facts of this case reflect that no signs, barricades, or guards were in fact errected at the immediate area where the charged holes were located. The intent of the standard in requiring such devices is not only to alert persons who may wander into the area that a shot will be fired, but also to allow anyone in close proximity to the shot to seek refuge or protection against any flying debris. Although respondent had established that a sign was posted along one of the roads leading into the mine, no signs or barricades or guards were posted in the immediate area where the charged holes were awaiting firing. Accordingly, I conclude and find that a violation of section 77.1303(g) occurred and that portion of the citation charging a violation of this mandatory safety standard is AFFIRMED.

30 CFR 77.1303(h)

The citation charges that blasting of pit holes was being conducted "without ample warning given before blasts were fired and without persons cleared and removed or protected from concussion or flyrock in the blasting area". Although petitioner cited section 77.1301 when it filed a typewritten copy of a "legible citation", the original citation, as confirmed by the inspector, cited section 77.1303(h). That section requires an ample warning to be given before blasts are fired. It also requires that all persons be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.

It is clear from the evidence established in this case that the charged "shot" was not fired or blasted at the time the inspector was on the scene. The only "shot" fired was the two one-pound explosions to dispel water from two drilled holes. Respondent had established that the blasting crew had been removed to a safe distance and were standing by some trucks which the inspector indicated would suffice as "suitable shelters". MSHA Inspector Bush testified that the men standing 130 feet from the water holes which were blasted were at a safe distance, and the facts reflect that the holes which were blasted only propelled water vertically out of the holes and that there was no flyrock or debris thrown out to endanger anyone nearby. As for any warnings, I accept the fact that the crew had been verbally instructed to remove themselves

to a safe distance from the water holes. Under these circumstances, I conclude and find that the respondent was in compliance and that the petitioner has not established a violation of section 77.1303(h). Accordingly, that portion of the citation is VACATED.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business.

The parties stipulated that the respondent is a small-to-medium operator and that the penalties assessed will not adversely affect its ability to continue in business. I adopt these stipulations as my findings on these issues.

History of Prior Violations

MSHA's computer print-out of prior paid civil penalty assessments reflects a total of 8 paid citations issued at the mine in question for the period June 9, 1979 through June 8, 1981. Considering the size and scope of respondent's mining operation, I consider this to be a good safety record not warranting an additional increase in any penalty assessments levied by me for the citations which I have affirmed.

Negligence

I conclude and find that the respondent should have been aware of the requirements of the cited safety standards, and that its failure to exercise reasonable care to prevent the violations in question constitutes ordinary negligence as to both citations which I have affirmed.

Good Faith Compliance

Since the violations resulted in a withdrawal order, good faith abatement is really not an issue. Abatement was apparently achieved by the inspector instructing the respondent on the proper blasting procedures. In any event, the inspector indicated that abatement was "normal", and I accept that fact.

Gravity

I conclude that on the facts of this case the failure to post a sign or otherwise guard the area where the charges were awaiting firing was a nonserious violation. Here, the shot foreman had the immediate control of his men, had pulled them back to a safe distance, and did all that was reasonable to assure that no one known to be in the area was in jeopardy as a result of the blasting of the two water holes in question.

With regard to the citation for the failure to use 36-inch fuses, I conclude and find that this was a serious violation in that it presented

a possible hazard and injury to the blasting foreman and his helper in that the use of so short a fuse in the event of a miscalculation on their part during the blasting process would have shortened the time for them to react and to retreat to a safe area.

Penalty Assessments

In view of the foregoing findings and conclusions, respondent is assessed civil penalties for the violations which have been affirmed as follows:

Citation No.	Date	30 CFR Sections	Assessment
855434	6/8/81	77.1303(g)	$ 25
		77.1303(u)	275
			$300

ORDER

Respondent IS ORDERED to pay the civil penalties assessed in this matter, in the amount shown above, within thirty (30) days of the date of this decision, and upon receipt of payment by the petitioner these proceedings are DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 25 1982

SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceedings
	:	Docket No. WEVA 80-516 AC No. 46-01436-03094
v.	:	
		Docket No. WEVA 80-517
CONSOLIDATION COAL COMPANY, Respondent	:	AC No. 46-01436-03095

DECISION

These cases were brought by the Secretary of Labor under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., for civil penalties for alleged violations of safety standards.

The cases were consolidated and heard in Pittsburgh, Pennsylvania.

Having considered the evidence and contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent operated Shoemaker mine, which produced coal for sale or use in or substantially affecting interstate commerce.

The Belt Fire Alarm System

2. On February 25, 1980, Federal Inspector Edwin Fetty, accompanied by Respondent's Maintenance Foreman, Gary Harvey, noticed that the monitoring light on the belt fire alarm system in the tailpiece 3 Left, 4 North, was not on, and tried to test the system by pushing the test button. This did not produce a warning signal, audible or visual.

3. The fire sensor system runs on AC power. When the AC power is turned off, the Ni-cd batteries in the control panel provide the power to monitor the system for another 4 hours. After 4 hours, the system goes into a "conservation mode," which conserves the batteries and makes the system inoperative until the AC power is turned on.

When the test was unsuccessful, Mr. Harvey told Inspector Fetty that the likely cause was either that the AC power was not on or that the dry cell battery in the alarm was dead.

Neither tested the system with the AC power on.

4. The inspector issued citation 627724, charging Consol with a violation of 30 CFR § 75.1103-1[1] and stating:

> The automatic fire warning device to provide both audible and visual warning when a fire occurs on or near the No. 2 conveyor belt from the 3 Left 4 North Section tailpiece transporting coal to the No. 1 conveyor belt is not maintained in an operative condition. When the proper test was performed the device would not give an audible or visual warning.

5. The next day, Mr. Harvey talked to the electrician assigned to abate the alleged violation and learned that there was in fact nothing wrong with the system once the power was turned on. The reason for the negative test was that Fetty and Harvey had failed to turn on the AC power.

6. Three Left, 4 North Section was idle from the day shift of February 22 until the afternoon of February 27.

Recorded Tests of Methane Monitors

7. On February 25, 1980, Federal Inspector John Phillips issued Citations 813295 and 813296 because 2 methane monitors were not recorded as having been calibrated within 31 days, as required by an MSHA policy memorandum to federal inspectors. These charged violations of 30 CFR § 75.313-1, which provides:

> The operator of any mine in which methane monitors are installed on any equipment shall establish and adopt a definite maintenance program designed to keep such monitors operative and a written description shall be available for inspection. At least once each month the methane monitors shall be checked for operating accuracy with a known methane-air mixture and shall be calibrated as necessary. A record of calibration tests shall be kept in a book approved by the Secretary.

Section § 75.1103-1 provides:

A fire sensor system shall be installed on each underground belt conveyor. Sensors so installed shall be of a type which will (a) give warning automatically when a fire occurs on or near such belt; (b) provide both audible and visual signals that permit rapid location of the fire.

Respondent's books reported the last test of the methane monitors on January 5, 1980.

8. On February 25, 1980, Inspector Fetty issued Citation 627721 because a methane monitor was not recorded as having been calibrated within 31 days.

DISCUSSION WITH FURTHER FINDINGS

The Belt Fire Alarm System

To establish a violation of 30 CFR § 75.1103-1, the Secretary must prove that the fire alarm system did not operate when properly tested. The Secretary concedes in his brief that if the AC power at the belt head had been off for more than 4 hours, the fire alarm equipment could not be properly tested without turning on the AC power. The evidence shows that the AC power had been off for far more than 4 hours, and that neither Fetty nor Harvey turned the AC power on to test the fire alarm system.

There is a conflict of testimony as to the reason for the inadequate test: The inspector recalled that he asked Harvey to turn on the AC power and Harvey left to do so, but Harvey recalled that he stayed with the Inspector and was not requested to turn on the power. I find that the evidence does not preponderate to resolve this conflict in favor of the inspector's recollection. The government therefore did not meet its burden of proving a proper test of the fire alarm system.

The evidence indicates that neither Inspector Fetty nor Mr. Harvey really understood the way the fire alarm system worked at the time the citation was written. Inspector Fetty had never seen this particular kind of system until February 25, 1980. Mr. Harvey was not very familiar with the system either, and in his testimony relied on discussions with the Electrical Foreman and on the manufacturer's instruction manual for knowledge of the system.

Since Inspector Fetty did not fully understand how the system worked, he wrote a citation on a piece of equipment that was in fact operable. Mr. Harvey did not protest the citation or show Inspector Fetty that the system was in fact in working condition, because he was not familiar enough with the system to recognize why it had not responded to the test.

Citations Involving Recorded Tests of Methane Monitors

These citations charge a violation of 30 CFR § 75.313-1 relating to the maintenance of methane monitors. The applicable part of the regulation reads: "(A)t least once each month the methane monitors shall be checked for operating accuracy with a known methane-air mixture and shall be calibrated as necessary. A record of calibrated tests shall be kept in a book approved by the Secretary."

The controlling question is whether the phrase "once each month" means each calendar month, as Respondent contends, or once every 31 days, as the Secretary contends.

In MSHA v. CR&I Steel Corporation, DENV 76-62-P (June 17, 1977), pp. 4-5, Judge Morehouse decided that the term "monthly" in 30 CFR § 77.502-2 contains an ambiugity "which, when combined with the severity of the possible sanction for violation of a mandatory health and safety standard, fails to satisfy specificity standards for penalty enforcement." In a similar case, Judge Mesch dismissed a citation in MSHA v. CF&I Steel Corporation, DENV 77-43-P, (November 18, 1977), when he found that "weekly" examinations meant once a week, and not an interval of 7 days. Support for these interpretations is found in the scheme of the regulations. The regulations usually specify when a period is to be counted in days rather than a calendar month or week. For example, 30 CFR § 75.305-1 specifies that once each week means at intervals not to exceed 7 days and § 57.21-65 specifies not more than 7 days.

I conclude that the phrase "once a month" in 30 CFR § 75.313-1 reasonably means once each calendar month. MSHA's policy memorandum is not binding on the operator, and stretches the meaning of the regulation beyond its plain meaning.

The recent holding of the Ninth Circuit, in Phelps Dodge Corporation v. Federal Mine Safety and Health Review Commission, et al., _____ F. 2d _____ (1982) applies here. There the court decided that a regulation was unenforceable as interpreted by MSHA because:

> The regulation inadequately expresses an intention to reach the activities to which MSHRC applied it. Therefore, we join in the observation: "If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." (citations omitted). Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 528 F. 2d 645, 649 (5th Cir. 1976).

The facts show that the methane monitors were tested on January 5, 1980, and the citations were issued February 25, 1980. Respondent still had 4 days to comply with the standard. In fact, before the end of February, the tests were made and recorded in Respondent's books. There was no violation.

Accordingly, the regulation cannot serve as the basis for issuance of the citation or for the levy of the fine.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding.

2. As to each of the citations involved, the Secretary failed to prove a violation.

Proposed findings and conclusions inconsistent with the above are rejected.

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

William Fauver
WILLIAM FAUVER, JUDGE

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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AUG 27 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. AMAX LEAD COMPANY OF MISSOURI, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. CENT 81-63-M MINE: Buick

FINAL ORDER

The parties have filed a proposed settlement agreement. The contested citations and their proposed disposition are as follows:

Citation No.	30 C.F.R. § Standards	Original Assessment	Proposed Disposition
544404	57.5-5	$40	$32
544405	57.5-5	40	32

The documentation filed herein presents facts required to be examined in assessing a civil penalty, 30 U.S.C. 820(i). I have analyzed this criteria and pursuant to 29 C.F.R. § 2700.30 I approve the proposed settlement and enter the following:

ORDER

1. Citation 544404 and the proposed penalty of $32 are affirmed.

2. Citation 544405 and the proposed penalty of $32 are affirmed.

3. The hearing scheduled for November 9, 1982 is cancelled.

John J. Morris
Administrative Law Judge

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