

AUGUST 1984

Commission Decisions

8-23-84	U.S. Steel Mining Co., Inc.	PENN 83-39	Pg. 1834
8-24-84	MSHA/Chester Jenkins v. Hecla-Day Mines Corporation	WEST 81-323-DM	Pg. 1842
8-28-84	Allied Chemical Corporation	WEST 79-165-M	Pg. 1854
8-28-84	U.S. Steel Mining Co., Inc.	PENN 83-63	Pg. 1866
8-29-84	Cathedral Bluffs Shale Oil Co.	WEST 81-186-M	Pg. 1871
8-29-84	Old Dominion Power Company	VA 81-40-R	Pg. 1886
8-30-84	United States Steel Corporation	LAKE 82-35-M	Pg. 1908

Administrative Law Judge Decisions

8-01-84	Eureka Mining Corporation	LAKE 84-68	Pg. 1919
8-03-84	UMWA/Jerry Moore v. Peabody Coal Co. and MSHA/Thomas Williams v. Peabody	KENT 82-105-D LAKE 83-69-D	Pg. 1920 Pg. 1920
8-03-84	Phelps Dodge Corporation	WEST 83-107-M	Pg. 1930
8-06-84	Medusa Cement Company	LAKE 83-74-M	Pg. 1939
8-06-84	MSHA v. Thomas E. Jones	WEST 81-326-M	Pg. 1952
8-06-84	Elk Creek Gold Mines Co.	WEST 84-21-M	Pg. 1959
8-07-84	Ross Island Sand & Gravel Co.	WEST 83-111-M	Pg. 1968
8-10-84	MSHA v. James L. Merchen	CENT 81-58-M	Pg. 1972
8-15-84	MSHA/John Cooley v. Ottawa Silica Co.	LAKE 81-163-DM	Pg. 1979
8-15-84	Jerry Blackburn v. U.S. Steel Mining	WEVA 83-242-D	Pg. 1990
8-20-84	Atlas Minerals	WEST 84-33-M	Pg. 1991
8-20-84	Westmoreland Coal Company	WEVA 84-10	Pg. 1993
8-21-84	West Virginia Rebel Coal Co., Inc.	KENT 83-209	Pg. 2015
8-21-84	Kennecott Minerals Company	WEST 81-342-M	Pg. 2017
8-21-84	Kennecott Minerals Company	WEST 82-155-M	Pg. 2023
8-21-84	Kennecott Minerals Company	WEST 83-5-M	Pg. 2033
8-23-84	Consolidation Coal Company	WEVA 84-2-R	Pg. 2038
8-24-84	Energy Coal Income Partnership	KENT 83-30-R	Pg. 2050
8-24-84	Gary Goff v. Youghiogeny & Ohio Coal	LAKE 84-86-D	Pg. 2055
8-29-84	U.S. Steel Mining Co., Inc.	PENN 83-70	Pg. 2058
8-29-84	Richard Bjers v. Consolidation Coal Co.	PENN 82-26-D	Pg. 2084

AUGUST 1984

The following cases were directed for review during the month of August:

Secretary of Labor, MSHA v. U.S. Steel Mining Company, Inc., Docket No. PENN 83-129. (Judge Koutras, July 11, 1984)

Robert Roland v. Secretary of Labor, MSHA, Docket No. WEST 84-46-DM(A). (Judge Melick, Interlocutory Review of July 3, 1984 order)

United Mine Workers of America on behalf of James Rowe, et al. v. Peabody Coal Company, Docket Nos. KENT 82-103-D, etc., and Secretary of Labor on behalf of Thomas Williams v. Peabody Coal Company, Docket No. LAKE 83-69-D. (Judge Merlin, July 11, 1984 and August 3, 1984)

Secretary of Labor on behalf of Paul Sedgmer and others v. Consolidation Coal Company, Docket No. LAKE 82-105-D. (Judge Moore, July 16, 1984)

Secretary of Labor, MSHA v. Pyro Mining Company, Docket No. KENT 84-151. (Judge Steffey, July 26, 1984)

United Mine Workers of America, Local 2274 v. Clinchfield Coal Company, Docket No. VA 83-55-C. (Judge Moore, July 23, 1984)

No cases were filed in which review was denied during the month of August.

COMMISSION DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 23, 1984

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. PENN 83-39
v. :
 :
U.S. STEEL MINING COMPANY, INC. :

DECISION

The issue presented here is whether a Commission administrative law judge correctly held that two violations of mandatory safety standards were "significant and substantial" within the meaning of 30 U.S.C. § 814(d)(1), section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). We affirm.

The facts of the case are as follows. In August 1982, Inspector Robert Newhouse of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to U.S. Steel Mining Company ("USSM") nine citations under section 104(a) of the Mine Act. 30 U.S.C. § 814(a). The citations were issued at USSM's Cumberland Mine located in Greene County, Pennsylvania. In addition to alleging a violation of a mandatory safety standard, each of the nine citations also alleged that the cited violation was significant and substantial ("S&S").

Thereafter, the Secretary of Labor filed with this independent Commission a proposal for assessment of civil penalties for the nine alleged violations. A hearing was held during which the S&S designations in two of the citations were deleted and a third citation was vacated by the Commission administrative law judge at the Secretary's request. USSM admitted the eight remaining violations, but contested the inspector's significant and substantial findings as to six of them, and the penalty amounts proposed by the Secretary. The judge then held that the six violations were significant and substantial and he assessed penalties. 5 FMSHRC 1728 (October 1983) (ALJ).

We subsequently granted USSM's petition for review of the judge's decision, but only for two of the violations found to be significant and substantial. One of the violations before us on review (citation 2012065) was established because unmarked trailing cable plugs were found to be connecting underground mine machinery to a power center. The other violation (citation 2012074) resulted from an oxygen cylinder and an acetylene

cylinder that were left unsecured, leaning against a rib in a shuttle car roadway. The primary issue as to each violation is whether substantial evidence supports the judge's significant and substantial findings. Preliminary to our addressing the merits of the case, we briefly set forth the interpretation that we have accorded the statutory term, significant and substantial.

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

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

30 U.S.C. § 814(d)(1) (emphasis added). Section 104(e) of the Act, 30 U.S.C. § 814(e), contains similar significant and substantial language.

The Commission first interpreted this statutory language in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981). There we held:

...[A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

3 FMSHRC at 825 (emphasis added). In Mathies Coal Company, 6 FMSHRC 1 (January 1984), we reaffirmed the analytical approach set forth in National Gypsum, and stated:

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

6 FMSHRC at 3-4 (footnote omitted). Accord Consolidation Coal Company, 6 FMSHRC 189, 193 (February 1984).

As to the four elements set forth in Mathies, we note that the reference to "hazard" in the second element is simply a recognition that the violation must be more than a mere technical violation -- i.e., that the violation present a measure of danger. See National Gypsum, supra, 3 FMSHRC at 827. We also note that our reference to hazard in the third element in Mathies contemplates the possibility of a subsequent event. This requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. The fourth element in Mathies requires that the potential injury be of a reasonably serious nature. Finally, in U.S. Steel Mining Co., Inc., PENN 82-336 (July 11, 1984), we recently reemphasized our holding in National Gypsum that the contribution of the violation to the cause and effect of a mine safety hazard is what must be significant and substantial.

Citation No. 2012065

On August 4, 1982, MSHA Inspector Newhouse issued a citation to USSM upon observing that the electrical plugs (also referred to as "disconnecting devices") for the trailing cables on a continuous mining machine and a shuttle car were not properly tagged, or otherwise identified, to correspond with the receptacles at the mine section's power center. The citation alleged a violation of 30 C.F.R. § 75.601, which provides in relevant part:

Disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified and such devices shall be equipped or designed in such a manner that it can be determined by visual observation that the power is disconnected.

At the time that the citation was issued, there were three pieces of mining equipment in the mine section -- the cited continuous mining machine and shuttle car, as well as a second shuttle car. The trailing cable plug to the second shuttle car was properly identified.

In finding the violation to be significant and substantial the judge stated, "The hazard resulting from the violation is that someone could contact an energized cable thinking it was disconnected, or could inadvertently plug in the wrong cable." 5 FMSHRC at 1731. The judge reasoned that although the trailing cable plugs to the continuous mining machine and the shuttle car were "very different in size and appearance and could not be confused with one another," 1/ the unmarked shuttle car trailing cable plug could be confused with the trailing cable of the other shuttle car that was on the section when the citation was issued. Id. In addition, the judge noted that although the power center into which the trailing cables are plugged has a keying system that physically prevents a plug from being inserted into the wrong receptacle, "the keys are often taken off the cables, and it is not known whether the keys were present on the day the citation was issued." 5 FMSHRC at 1731.

1/ The trailing cable plug to the shuttle car is square, while the trailing cable plug to the continuous mining machine is round. Also, the plug to the continuous mining machine is larger.

On review, USSM does not argue that any injury occurring as a result of a trailing cable accident would not be of a reasonably serious nature. It argues only that the record does not support the judge's implicit holding that there was a reasonable likelihood of such an electrical incident and resulting injury occurring. National Gypsum, supra. We disagree.

The electrical hazard is presented because a miner could mistake the unmarked shuttle car trailing cable plug for the plug of another shuttle car or for a similar looking plug of a different piece of equipment and insert that plug into the power center. Inspector Newhouse described the hazard as the "[p]ossibility of somebody coming in contact with the energized cables, either through repair of a cable or whatever reason; somebody inadvertently plugging in the wrong cable." Tr. 57. The inspector described the scenario as follows:

[S]ay you have the shuttle car; say there is electrical problems with it. An electrician comes in and he is in a hurry and he gets in the cable. He just unplugs it because he has to check something. You know, somebody else may be fooling around with a fan cable, or whatever; and somebody is told to go up and put the power on. They see that cable and they plug it in. The man is in a hot circuit.

Tr. 80. In fact, a fatal accident had occurred at the Cumberland Mine in January 1979, involving trailing cables. At that time two crews of mechanics were working on two shuttle cars that were down for repairs on the same mine section. One of the mechanics was electrocuted when the crews mixed up the two trailing cables and a miner, believing that he was plugging in the repaired shuttle car cable, plugged in the cable to the other (unrepaired) shuttle car instead. The miner electrocuted was working on the bare power wires of the cable that was plugged into the power center. 2/

As to the likelihood of such an occurrence, the inspector stated, "It's very probable it could occur with the number of cables and the number of power conductors in that mine." Tr. 63 (emphasis added). 3/ Moreover, as

2/ USSM argued that the events resulting in the January 1979 fatal accident could not reoccur because of the subsequent addition to the electrical system of a device referred to as a "FEMCO" unit. Robert Bohack, a USSM safety engineer, testified that the FEMCO unit is a tamper-proof device that prevents the by-passing of the trailing cable's ground continuity system (apparently a major cause of the January 1979 fatal accident). Although Inspector Newhouse appeared to take issue with Bohack's testimony regarding the FEMCO unit, the judge made no specific finding on this point. Nevertheless, relying on the testimony of Bohack, the judge stated, "If a break occurs in a power lead, the power would be cut by the ground continuity check. However, it is possible to have a bare wire not cut, without interrupting the continuity." 5 FMSHRC at 1731.

3/ Bohack, the USSM safety engineer, also testified that "there are other plugs that are the same size as the shuttle car plug." Tr. 84.

noted previously, there were two shuttle cars on the cited mine section at the time that the citation was issued thus increasing the likelihood of a trailing cable mix-up. Inspector Newhouse indicated that it would not be unusual for two shuttle cars on the same mine section to be down for repairs at the same time. He estimated that such an event could occur about twice a month. The inspector also testified that a trailing cable mix-up could occur in the event of an emergency, such as a cable fire. In that case, the inspector stated, a miner would not have enough time to determine to which piece of machinery the unmarked trailing cable plug belonged.

USSM safety engineer Bohack testified that it was not reasonably likely that the trailing cable plug violation would result in an accident and injury. He stated, "I thought that someone would have to go out of their way to cause an injury under the circumstances. They would really have to go out of their way and I really don't see how that could have happened with the ground continuous checks on this system." Tr. 83. The operator argues that because only one of the two shuttle car plugs was unmarked, "a simple process of elimination" would enable a person to know the identity of the cables. Br. at 3. We cannot agree with this argument or with the further contention "If someone mixed up the plugs, they [sic] [would] obviously not [have been] interested in taking elementary steps to identify what they were working with and presumably would [have] ignore[d] the tag had it been there." Br. at 4. This argument ignores the reality, demonstrated by the accident in 1979, that miners in a hurry may easily fail to verify which cable is which unless all cables are "plainly marked." 4/

In addition, Bohack did not effectively dispute the inspector's testimony that the keying system used at the mine to prevent the trailing cable plugs from being inserted into other than their assigned receptacle was relatively unreliable. Inspector Newhouse questioned the reliability of that keying system, noting that it was not uncommon for miners at the Cumberland Mine to modify the system when a receptacle is needed. He described the possibility of such an occurrence as being "highly possible" and "probable." Tr. 77. Although USSM safety engineer Bohack testified that it is "more likely" that the key will be on the plug, he also testified that "it's possible for the key to be taken off." Tr. 87. Neither the MSHA inspector nor the company safety engineer was able to recall whether the cited trailing cable plugs were equipped with keys when the citation was issued.

In sum, we conclude that the record evidence provides substantial support for the judge's finding that the trailing cable plug violation was significant and substantial.

Citation No. 2012074

MSHA Inspector Newhouse issued this citation to USSM on August 9, 1982, upon observing an unsecured oxygen cylinder and an unsecured acetylene cylinder leaning against a rib in an underground shuttle car roadway. The inspector charged a violation of 30 C.F.R. § 75.1106-4(g), a mandatory safety standard that provides:

4/ Cf. Great Western Electric Company, 5 FMSHRC 840, 842 (May 1983) (relying on skill and attentiveness of miners to prevent injury "ignores the inherent vagaries of human behavior").

Liquefied and non-liquefied compressed gas cylinders shall be located no less than 10 feet from the worksite, and where the height of the coal seam permits, they shall be placed in an upright position and chained or otherwise secured against falling. [Emphasis added.]

Each of the unsecured gas cylinders weighed approximately 120 pounds. The gas cylinders had been used in repairing a continuous mining machine during the previous, non-production, midnight shift and coal production on the day shift had not yet begun when the citation was issued.

The issues before the Commission administrative law judge as to this citation were whether the violation was S&S and the penalty to be assessed. The judge upheld the S&S designation, noting that the mine section was preparing to begin a new shift and that the compressed gas cylinders could have been knocked over by a shuttle car, or other force, and could have ruptured. In the judge's view, "the valve could be broken or the cylinders ruptured, releasing the compressed gas causing the cylinders to become as missiles." 5 FMSHRC at 1732.

The issue on review is whether the record supports the judge's implicit holding that there was a reasonable likelihood that an accident, and resulting injury, would occur involving the unsecured gas cylinders. Again, USSM does not contend that any injury occurring would not be of a reasonably serious nature. ^{5/} Although our task is made more difficult by the brevity of the judge's discussion of the record and the basis for his decision, we hold that substantial evidence supports the judge's significant and substantial finding.

The inspector testified that shuttle cars making a left-hand turn from the roadway where the gas cylinders were located into the nearby No. 3 entry were likely to strike and to damage the unsecured cylinders. The shuttle cars were described as being approximately 8 to 10 feet in width and 15 to 18 feet in length. The inspector testified, "By making a left-hand turn and swinging in that direction, the back end of the buggy would have been in close proximity to these tanks." Tr. 165. The inspector added that the operator of an "off standard" shuttle car might not see the cylinders because he would be on the other side of the car. In the inspector's view, whether a shuttle car operator hit the cylinders "would really depend on how conscientious your operator is, how much confusion is involved," and that such an event occurring was a "probable possibility." Tr. 174.

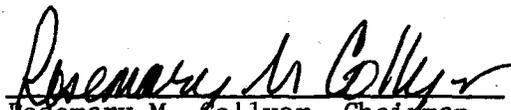
^{5/} To the extent that USSM's brief on review can be read as challenging the judge's finding of a violation, the challenge is rejected. First, the fact of a violation was conceded before the judge. 5 FMSHRC at 1728. Second, no issue as to the merits of the violation was raised in USSM's petition for review. See 30 U.S.C. § 823(d)(2)(A)(iii) (absent good cause showing, issues may not be raised for the first time on review).

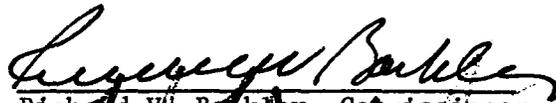
According to the inspector, the gas cylinders posed two discrete hazards should they be struck by a shuttle car: breaking the neck (i.e., the valve) of the oxygen cylinder (the neck of the acetylene cylinder was recessed and did not pose this specific hazard); and puncturing the sides of either or both cylinders. The inspector testified that should either the valve be broken off the oxygen cylinder or the cylinders' sides be punctured, the unsecured, compressed gas cylinders would be transformed into missiles that could strike the miners working on the section or could strike the section's power center and cause a fire.

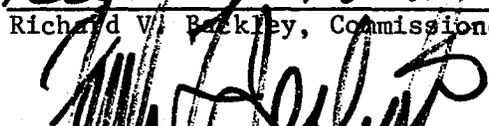
The USSM section foreman who accompanied Inspector Newhouse testified that when the shuttle cars made their left-hand turn from the roadway into the No. 3 entry, there would be an approximate clearance between the shuttle car and the gas cylinders of 3 to 5 feet. The operator also relies on the fact that shuttle cars were not running on the mine section at the time the citation was issued and that the cylinders were in plastic bags awaiting shipment off the section. However, the section foreman "could not definitely say" when the cylinders were expected to be transported from the area. Tr. 186. He admitted that, "They were preparing to operate on the day shift." Tr. 169.

We cannot agree that the clearance of, at best, five feet between a turning shuttle car and these unsecured cylinders is enough to disturb on review the judge's conclusion that the violation was significant and substantial. Driving habits and mining conditions are too variable. In addition, given the size of the shuttle cars that use the roadway, we are not prepared to say that the record does not support the judge's conclusion that the cylinders could have ruptured. Thus, we hold that substantial evidence of record supports the judge's holding that an incident involving the unsecured, compressed gas cylinders was reasonably likely to occur.

Accordingly we affirm the judge's significant and substantial findings as they relate to citations 2012065 and 2012074. USSM additionally argued on review that the sole appropriate penalty for a violation that is not significant and substantial is \$20. See 30 C.F.R. § 100.4 ("Determination of penalty; single penalty assessment.") Although it is unnecessary to reach that issue here, we recently have rejected that same argument in U.S. Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984).


Rosemary M. Collyer, Chairman

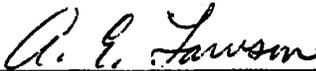

Richard V. Barkley, Commissioner


Frank M. Jestrab, Commissioner


L. Clair Nelson, Commissioner

Commissioner Lawson concurring:

On the basis of the criteria set forth in my separate opinion in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), I concur in finding the violations in this case to be significant and substantial within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1).


A. E. Lawson, Commissioner

Distribution

Louise Q. Symons, Esq.
U.S. Steel Mining Company, Inc.
600 Grant Street, Room 1580
Pittsburgh, PA 15230

Barry F. Wisor, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge James A. Broderick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 24, 1984

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEST 81-323-DM
: :
on behalf of CHESTER "SAM" :
JENKINS :
: :
v. :
: :
HECLA-DAY MINES CORPORATION :

DECISION

This case involves a complaint of discrimination filed by the Secretary of Labor with this independent Commission pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). The complaint alleged that the operator violated section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), in connection with three incidents involving the complaining miner, Chester "Sam" Jenkins: (1) the posting on the mine bulletin board of a letter that Jenkins had written; (2) the failure to reassign Jenkins to work on a particular stope; and (3) the suspension of Jenkins without pay. A Commission administrative law judge dismissed the complaint in its entirety. 5 FMSHRC 489 (March 1983) (ALJ). We subsequently granted petitions for discretionary review filed by both Jenkins and the Secretary of Labor and heard oral argument. We affirm the judge in part and reverse in part. We conclude that the suspension of Jenkins without pay violated the Mine Act, and remand so that the judge may make an appropriate back pay award.

I.

In the middle of 1979, Jenkins began working for Day Mines at its Republic Unit Mine, a gold and silver mine located near Republic, Washington. Day Mines operated the Republic Unit Mine during the relevant time period although Hecla-Day Mines Corporation ("Hecla-Day") took over Day Mines before the case came to trial. The Republic Unit Mine is a contract mine worked by pairs of miners assigned to stopes, and Jenkins was a contract miner. Stopes are excavations from which ore is mined in a series of cuts called steps. After completion of a mining cycle that involves drilling, blasting, and removal of muck, miners are transferred to another area while the mined area is "back-filled" with sand. Thereafter, another mining cycle may be initiated in the stope.

Contract miners at the Republic Unit Mine are paid an hourly wage plus a fee for each cubic foot of rock broken. The fees depend upon the nature of the stopes. Smaller stopes are more difficult to mine and are assigned a higher fee rate. Jenkins testified that despite the pay difference, miners made more money working in larger stopes. Ron Short, the manager of the Republic Unit Mine and responsible for setting the incentive rates in the stopes, testified that miners made more money in the smaller stopes.

On December 11, 1980, Jenkins finished a mining cycle in stope 4114, in which he had previously completed another mining cycle. On December 12, 1980, Jenkins and his partner, Don Vilardi, were assigned to work in stope 4222. Stope 4222 was a smaller stope than stope 4114 and therefore had a higher fee rate per cubic foot of rock broken.

On December 24, 1980, a miner died in an accident at the Republic Unit Mine. Concerned by the accident, on the following day Jenkins prepared a four-page letter to Keith Droste, the general manager, and W. M. Calhoun, the president of Day Mines. The letter described several alleged safety problems at the mine, including misconduct on the part of some miners. Jenkins did not immediately mail the letter. He later added to the letter a postscript signed by four other miners who stated their agreement with Jenkins. On December 29, 1980, the first working day following the fatality, a safety meeting was called by management of the mine. At that meeting Jenkins raised several of the same complaints regarding safety that he had included in his letter. Jenkins later mailed his letter, dated December 25, 1980, to Calhoun and Droste. Pet. Exh. 1. Droste responded to each of Jenkins' complaints in a letter that was received by Jenkins on January 14, 1981. Res. Exh. 2.

On December 30, 1980, Jenkins put a notice on the mine bulletin board requesting nominations for a mine safety committee. This notice upset William Hamilton, the mine superintendent. The letter was quickly removed from the board. On January 2, 1981, Jenkins circulated a petition among fellow miners concerning a cut-off of power to the main hoist on December 24, 1980, the day of the fatal accident. The power had been turned off for three hours, creating what Jenkins considered a safety problem. Jenkins had mentioned this problem in his December 25 letter and at the safety meeting on December 29, 1980. Forty-four miners signed Jenkins' petition concerning the cut-off of power. On January 7, 1981, the petition was delivered to mine superintendent Hamilton.

On January 7, 1981, Ron Short, the mine manager, spoke with Jenkins and his partner Vilardi in the mine office. Several times Short asked whether Jenkins and Vilardi, who had also signed Jenkins' December 25 letter, had any objection to the posting of the letter on the mine bulletin board. Neither Jenkins nor Vilardi objected, and Short posted the letter. After the posting of the letter, a miner threatened Jenkins with bodily harm. Another miner, David Hamilton, the son of the mine superintendent, accused Jenkins, in the presence of others, of being an agitator and troublemaker. The following day, a threat was made to Jenkins' 7-year old son while he was at school.

Following these threats Jenkins did not go to work on January 8, 1981, but instead consulted an attorney. On her advice, he went to the local sheriff's office to file a complaint. Jenkins' wife telephoned the mine and informed mine personnel of the threats against her husband and son. On January 9, 1981, Ron Short telephoned Jenkins and told him that if he returned to work, Short would guarantee his safety while on company property. Jenkins had made an appointment to speak with a mine inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") in Spokane, Washington, to discuss the events at the mine and the threats. The round trip to Spokane would take approximately six hours, and Jenkins explained that he could not return in time for work. Jenkins returned to work on January 10, 1981.

On January 11, 1981, a meeting involving a small number of miners was held at the home of Cassel "Duke" Koepke, a miner at the Republic Unit Mine. At the meeting Jenkins raised safety concerns regarding the mine. On January 14, 1981, a letter was sent to MSHA indicating that Jenkins and Koepke had been elected as representatives of the production shift miners at the mine. The letter was signed by Duke Koepke and two other miners, Jim Lindsey and Jim Montoya. On January 29, 1981, a copy of this letter was sent to Droste and Short at Day Mines. A general meeting of miners was not held to elect representatives prior to the drafting and mailing of the letter.

Jenkins was absent from work January 15 through January 25, 1981, to attend the funeral of his father. While he was gone, the sand-fill operation was completed in stope 4114 and miners John Holden and Tom Rice were assigned to begin a new mining cycle in that stope. On January 31, 1981, Jenkins' partner Vilardi was transferred out of stope 4222 and Terry Koepke, son of Duke Koepke, was assigned as Jenkins' partner. Except for the period of his suspension discussed below, Jenkins continued to work in stope 4222 until February 17, 1981, when the mining cycle was completed.

On February 2, 1981, shift boss Tom Bradley conducted a miners' safety meeting at which various safety matters were discussed. Jenkins was the only miner who spoke up and pointed out safety matters. The following day, February 3, 1981, three petitions were circulated among the miners at the mine. One was signed by 43 miners and stated that the miners did not wish to work with Jenkins. A similar petition with 28 signatures stated that the miners did not wish to work with Duke Koepke. A third petition with 52 signatures stated that Jenkins and Koepke did not represent the miners at the Republic Unit Mine. The three petitions were delivered to mine management.

On February 4, 1981, Jenkins was informed by Short that he was suspended for an indefinite period of time because of complaints about his allegedly disruptive behavior. (Management took no action against Duke Koepke.) The following day Jenkins received a letter advising him that his suspension was without pay. On February 5, Jenkins met with Short and signed an agreement to the effect that he would improve his relationship with other employees by refraining from any dialogue concerning complaints or problems except as absolutely necessary. Jenkins was then allowed to return to work.

On July 6, 1981, the Secretary of Labor filed this discrimination complaint on behalf of Jenkins against Day Mines. From July 22, 1981, through August 14, 1981, Jenkins was the victim of numerous acts of harassment and vandalism at the mine. These acts included the placing of human waste and other substances in Jenkins' boots and other articles of his clothing, the pouring of drill oil over his lunch bucket, and the setting up of a suggestion box asking for "ways to get rid of Sam." On July 23, 1981, Short posted a memorandum on the mine bulletin board threatening employees with discipline, up to and including discharge, for involvement in acts of harassment or vandalism. Short also instructed the two shift foremen to have meetings with miners to advise them that they would be disciplined for such acts. The shift foremen testified that they had such meetings.

Following the evidentiary hearing in this case, the Commission's administrative law judge issued a decision dismissing the discrimination complaint in its entirety. The judge first examined Short's posting of Jenkins' December 25 letter, which included among its complaints references to misconduct by other miners. Jenkins argued that management's purpose in posting the letter was to identify him as a troublemaker. Jenkins asserted that the foreseeable and intended effect of the posting was to expose him to the hostility of other miners. Hecla-Day pointed out that Short had asked Jenkins several times whether he objected to the letter being posted and that Jenkins had raised no objection. Hecla-Day argued that management had a legitimate business justification for posting the letter--Short was concerned over serious allegations in the letter of alcohol use at the mine and believed he would discover whether there was any truth to them by having the letter posted. The judge found Short's explanation for posting the letter credible. The judge concluded, "[T]he evidence does not support the contention by Jenkins that posting the letter was intended to be a discriminatory act against him and such allegation is rejected." 5 FMSHRC at 499.

The judge next examined whether the failure to reassign Jenkins to stope 4114 when it became available again in January 1981 was discriminatory. Jenkins argued that it had been the usual practice in the mine to return the same mining crew to the stope they had previously worked when the sand-fill operation was completed and the stope was ready for another mining cycle. Hecla-Day contended that stope assignments were not rigid, and that Jenkins' assignment was made in accordance with the mine's existing policies. The judge found that a miner was not necessarily entitled to be returned to a stope in which he had previously worked. He also found that because Jenkins was not finished mining in stope 4222 when stope 4114 became available again, and other miners were available at that time to work in stope 4114, the assignment of the other mining team to stope 4114 accorded with the operator's normal business policies. The judge concluded that neither adverse action nor discrimination had occurred in connection with the stope assignments.

With regard to Jenkins' suspension without pay in February 1981, the judge found that Jenkins had engaged in protected activity prior to his suspension and that the suspension was motivated in part by his protected activity. The judge found, however, that Hecla-Day had affirmatively defended against Jenkins' prima facie case of discrimination. The judge concluded, "After a careful review of all the evidence and on the basis

of the Commission's directives regarding this issue, I conclude that [the operator's] business justification for suspending Jenkins for two days was not pretextual and the reasons for doing so were both credible and plausible enough to prompt management to take this adverse action." 5 FMSHRC at 503.

Finally, the judge addressed the harassment of Jenkins that had occurred in July and August after the filing of the discrimination complaint. At the outset of the hearing, the Secretary moved to amend the complaint to include allegations that these acts constituted a continuing pattern of harassment condoned by mine officials. Although the judge denied the motion, he allowed the introduction of evidence concerning the events of July and August. The judge concluded, "I find that the evidence fails to show that [the operator] was involved directly or indirectly in any of the acts of vandalism or harassment ... inflicted on Jenkins following the filing of his complaint of discrimination." 5 FMSHRC at 504. The judge thus dismissed the discrimination complaint.

Jenkins' petition for discretionary review raises several assignments of error. His main contention is that the operator discriminated against him by posting his December 25 letter, by failing to reassign him to stop 4114 in January 1981, and by indefinitely suspending him without pay on February 4, 1981. Jenkins also asserts that the judge erred in certain evidentiary rulings and in refusing to allow amendment of his complaint to include the acts of harassment against him in July and August 1981. On review the Secretary contends only that Jenkins' suspension without pay was discriminatory. We conclude that the suspension without pay violated the Mine Act, but reject Jenkins' other assertions of error.

II.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); and Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed. 2d 667 (1983).

It is undisputed that Jenkins engaged in protected activities--indeed, insofar as relevant to the issues in this case, only protected activities--during the period December 1980 through February 1981. These activities included his communication of safety complaints to management in his December 25 letter, his circulation of the petition in January complaining of the cut-off of power to the main hoist, his efforts to elect miners' representatives and to serve as one himself, and his voicing of safety complaints at the meetings conducted at the mine on December 29, 1980, and February 2, 1981. The crucial issue in this case is whether management took adverse actions against Jenkins because of his protected activities. We turn first to the posting of his December 25 letter and the January stoppage assignments.

The posting of Jenkins' December 25 letter

The judge ultimately found that Short's posting of Jenkins' letter was not a "discriminatory act." 5 FMSHRC at 499. The judge rested his dismissal of this portion of Jenkins' discrimination complaint on his crediting of Short's testimony concerning the business reasons for the posting. 5 FMSHRC at 498-99. Although the judge did not explicitly phrase his conclusion in terms of the Pasula-Robinette framework, it is apparent from his ultimate findings that he determined that Jenkins did not prove the second element of a prima facie case and therefore failed to establish a prima facie case. We agree. 1/

A showing that an adverse action occurred is a component of the second element of a prima facie case. In general, an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment

1/ Certain aspects of the judge's legal analysis of the letter-posting issue require clarification, although they do not affect his correct determination that Jenkins failed to establish a prima facie case. Cf. Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 996-97 n. 6 (June 1983). When viewed in the Pasula-Robinette context, the judge's ultimate finding that the posting was not a discriminatory act can only mean that he concluded there was no improper intent behind the posting. This reading of the judge's decision is reinforced by his summary of conclusions in which he stated, "Jenkins has failed to establish a case of discriminatory conduct ... in regards to [the] posting...." 5 FMSHRC at 509. Thus, in light of the judge's ultimate findings, we interpret his comment that Short's posting was, in part, "motivated" by Jenkins' protected activity (5 FMSHRC at 498) as a recognition that Jenkins' protected writing of the letter was a necessary precondition to its posting. We reject any suggestion that partially discriminatory motivation was present as being inconsistent both with the judge's ultimate findings and conclusions, and with our own determinations on review.

relationship. ^{2/} An adverse action may or may not be discriminatorily motivated. Here, however, the posting of Jenkins' letter was not a self-evident form of adverse action, like discharge or suspension. Therefore, we must examine closely the surrounding circumstances to determine the nature of this action.

Hecla-Day's explanation that the letter was posted in an effort to uncover the truth concerning Jenkins' allegations is credible. Jenkins sent this letter to management in the aftermath of a fatal accident. The letter leveled a number of serious safety complaints, for example, that drinking by some miners was a major problem at the mine and had been a contributing factor in the accident. ^{3/} As the judge found, there is every indication on this record that mine management was concerned by Jenkins' charges and was determined, in good faith, to ascertain whether they had any basis.

In a letter dated January 5, 1981, General Manager Droste acknowledged receipt of Jenkins' letter and stated:

The observations and accusations contained therein are of a most serious nature. I have informed Mr. Calhoun [the president of Day Mines], and am hereby advising you, that all items mentioned by you will be investigated and will be treated in a written response to you.

Res. Exh. 1. Management subsequently undertook an investigation of Jenkins' complaints. The investigation resulted in Droste's detailed letter of January 14, 1981, responding to and denying Jenkins' charges.

While this internal investigation was going on, Short met with Jenkins and Vilardi on January 7, 1981, to seek their permission to post the letter. Short testified that he asked for their permission several times, and that neither Jenkins nor Vilardi raised any objection to the posting. The judge specifically credited Short's testimony explaining his reasons for the posting:

Well, in reading the letter, of course, it brought out a lot of questions to my mind. Being in my position, I am aware that not everyone is going to

^{2/} This case does not require us to develop a more detailed inventory of what is covered by the term adverse action. We recognize that discrimination may manifest itself in subtle or indirect forms of adverse action. See generally Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1478 (August 1982). We also borrow the apt words of the Court of Claims, writing in a related context, that an adverse action "does not mean any action which an employee does not like." Fucik v. United States, 655 F.2d 1089, 1096 (Ct. Cl. 1981). Determinations as to whether an adverse action was taken must be made on a case-by-case basis.

^{3/} The truth of Jenkins' various complaints was not specifically tried in this proceeding and is not relevant to the discrimination issues presented on review.

talk to me with the freedom that they would someone else and so I thought that there may be a chance that the things that Sam had mentioned in his letter, there may be some truth to parts of it. I didn't actually believe that there was, but I felt that I had to find out if these allegations were true. I felt that by posting the letter that I would find out one or two things: either there was some truth to it and a group of miners, either who signed the letter or who also agreed with Sam and did not sign the letter, would come forth to me on posting the letter and say, "yeah, this is true," or I would get a negative response in the sense that no one would come forward and that this would also indicate to me that there was no truth to what he was saying.

Tr. 214-15. Short further testified that if Jenkins had not agreed to posting the letter, he would not have done so. Short stated that he had not threatened Jenkins and that their meeting was conducted without animosity.

In attacking the judge's crediting of this testimony, Jenkins argues that the foreseeable and intended consequence of the posting was to expose him to the hostility of other miners--and, presumably, to subject him to intolerable working conditions. The posting of Jenkins' letter did provoke an angry and threatening response by other miners. However, prior to the posting, Jenkins had secured the signatures of four other miners to his letter, had raised some of the same complaints at the December 29, 1980, safety meeting, and had circulated a petition signed by 44 miners complaining of the power cut-off to the main hoist, a subject also mentioned in his letter. Therefore, there was demonstrated support among other miners for at least some of Jenkins' complaints. We are not persuaded on this record that when Jenkins agreed to the posting, the foreseeable and unavoidable consequence--in either his contemplation or that of management--was the arousal of widespread antipathy towards Jenkins. Furthermore, as the judge emphasized, "These acts by Jenkins indicate an attempt on his part to publish his views as to what he considered was wrong at the Republic Unit [Mine]." 5 FMSHRC at 499.

In summary, the judge credited Short's testimony that he posted the letter with Jenkins' uncoerced consent solely for legitimate business reasons. Jenkins has not persuaded us on review to upset this credibility resolution. In view of the foregoing considerations, we cannot treat the posting as an adverse action or a form of discrimination motivated in any part by Jenkins' protected activity. We therefore conclude that substantial evidence supports the judge's dismissal of this aspect of Jenkins' complaint.

The January stope assignments

The judge's findings and credibility resolutions on this issue are straightforward, detailed, and amply supported by the evidence. 5 FMSHRC at 499-501. He concluded that the failure to reassign Jenkins to stope 4114, when it became available again after back-filling in January 1981,

was neither an adverse action nor a discriminatory act. The judge further concluded that even if partially discriminatory motivation could be inferred regarding the stope assignment, Hecla-Day affirmatively defended against a prima facie case.

The judge carefully reviewed the conflicting evidence on how stope assignments were made. He found that there was not an existing policy at the mine that expressly guaranteed permanent stope assignments to miners. He also determined that the reason Jenkins was not reassigned to stope 4114 was that he and his partner were not finished mining in stope 4222 when the assignment needed to be made, and another crew was available. The judge stated:

I find that the weight of the evidence supports [the operator's] contention that their actions in this instance were motivated by the time schedules as to the availability of miners and stopes and the requirements for continued production in the mine. Stope 4114 became available for mining on January 23, 1981 and Jenkins was not finished in 4222 until February 17, 1981 which would cause measurable loss of production if the stope was to remain idle during that time.

5 FMSHRC at 501.

The judge based these findings on his resolutions of conflicting evidence. He specifically credited the testimony of Short that production needs and the availability of miners were key factors to be weighed in making stope assignments. Short's testimony was corroborated by that of two experienced shift bosses. The judge also found reliable a detailed 41-page list of stope assignments over time (Res. Exh. 7), which bore out Short's testimony that miners did not have entitlements to permanent assignments in any particular stope.

Substantial evidence clearly supports the judge's determination that reassignment of miners to stopes they had previously worked was not guaranteed, and that production needs and the availability of miners were overriding factors in making the assignments. We have carefully reviewed the record and discern no reason to disturb the judge's findings. We affirm his conclusion that the failure to reassign Jenkins was based solely on legitimate business reasons in accord with existing policies. We also agree that even had management's actions been tainted in part by discriminatory animus, the same assignments would have been made in any event for these business reasons alone.

The suspension of Jenkins without pay

When Jenkins was initially suspended for an indefinite period on February 4, 1981, considerable turmoil had arisen at the mine centering around Jenkins' various safety complaints and his attempts to represent miners for safety purposes. Management had just received a petition signed by 43 miners stating they were "tired of Chester (Sam) Jenkins[']

agitating and disruptive accusations and do not wish to work with him." Pet. Exh. 4. The judge found that the suspension of Jenkins "was the culmination of various events recited earlier herein, such as, the December 25th letter, his efforts to elect miner's representatives, and safety complaints made by petition and at safety meetings." 5 FMSHRC at 502. He concluded that the suspension of Jenkins was motivated in part by the effects of his protected activity:

The evidence also shows there was animus on the part of Day Mines's management towards Jenkins because of these activities which caused tension amongst the miners, was disruptive to the operation of the mine, and reflected badly upon supervisors. From all of these circumstances, I conclude that Jenkins has established, by a preponderance of the evidence, a prima facie case under the test set forth by the Commission in Pasula-Robinette, supra.

Id. (Emphasis added.) We affirm the judge's conclusion that management suspended Jenkins without pay because of his protected activity. On the facts presented in this case, however, we disagree with his further conclusion that Hecla-Day affirmatively defended against Jenkins' prima facie case.

The essence of the Pasula-Robinette affirmative defense is a showing that the adverse action would have been taken in any event wholly apart from considerations based on the miner's protected activities. As discussed below, we find no evidence that Jenkins engaged in misconduct. It also appears that less drastic alternatives were available to management for handling the situation. We cannot conclude that absent his protected activities Jenkins would have been suspended without pay.

We recognize that the asserted focus of managerial concern was on the effects of Jenkins' protected activities, not his actions themselves. A miner's exercise of protected activity may not always prove popular and may generate negative, even disruptive, reactions. However, if miners could be subjected to discipline merely because their protected activity became unpalatable to others, the exercise of protected rights could be chilled.

The judge found no misconduct on Jenkins' part. He also found that Jenkins had not "forced himself" on other miners. 5 FMSHRC at 503. The evidence supports these findings. No other miners were subjected to adverse action because of the turmoil in the mine. There was no posting of a general disciplinary notice warning against continued disruption. If, as a matter of last resort, it was deemed necessary to take action against Jenkins, and no other miners, no reason appears why he could not have been briefly suspended without penalties and with pay. 4/ However, we are left with the

4/ The operator permitted Jenkins to return to work after a two-day hiatus following his agreement to refrain from any discussion of complaints or problems except as absolutely necessary. Although this return to work limits the operator's back pay liability to two days, we emphasize that an operator may not condition a miner's continued employment on a pledge to refrain from activities protected by the Mine Act.

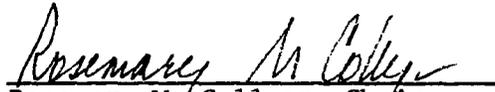
fact that Jenkins alone was suspended without pay and suffered a financial detriment because of his protected activity. Such a result cannot be squared with the broad scope of protection afforded by section 105(c)(1) of the Mine Act. Cf. Sioux Products, Inc. v. NLRB, 684 F.2d 1251, 1257-59 (7th Cir. 1982) (the discharge of only a union supporter because of unrest stemming from protected activities held to be discriminatory). Accordingly, we reverse and remand so that the judge may make an appropriate back pay award.

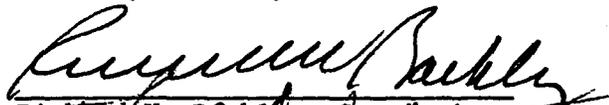
Jenkins' other assertions of error

Jenkins' other assertions of error lack merit and do not require extended comment. Jenkins argues that the judge erred in refusing to allow amendment of the discrimination complaint to include the acts of harassment against him in July and August 1981. The judge nevertheless allowed the introduction of evidence on this subject, and thus afforded Jenkins the opportunity to be heard on these issues. The judge found that the operator had not been involved in these acts, and had taken steps to stop them. These findings are supported by substantial evidence and we affirm them. We have reviewed Jenkins' remaining evidentiary objections, and conclude that the judge committed no legal error or abuse of discretion in his evidentiary rulings.

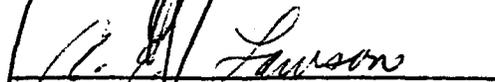
III.

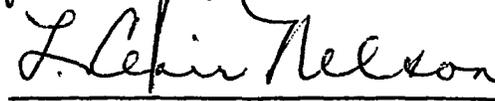
For the foregoing reasons, we affirm the judge in all respects except for his conclusion that the suspension without pay did not violate the Mine Act. On that issue, we reverse and remand so that the judge may make an appropriate and expeditious back pay award.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank J. Jastrab, Commissioner


A. E. Lawson, Commissioner


L. Clair Nelson, Commissioner

Distribution

Barry F. Wisor, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Mr. Chester Jenkins
P.O. Box 625
Republic, Washington 99166

Bruce C. Menk, Esq.
Hale & Evans
2900 Energy Center
717 Seventeenth St.
Denver, Colorado 80202

Robert Mullen, Esq.
Day Mines, Inc.
5061 1/2 Cedar
Wallace, Idaho 83873

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 28, 1984

ALLIED CHEMICAL CORPORATION :
 :
 v. :
 :
 SECRETARY OF LABOR, : Docket No. WEST 79-165-M
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :

DECISION

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), presents issues involving longwall mining operations. A Commission administrative law judge found that the cited condition, missing bolts in longwall roof support units, constituted a violation of 30 C.F.R. § 57.9-2. 1/ We granted the petition for discretionary review filed by the operator, Allied Chemical Corporation ("Allied"). We conclude that substantial evidence supports the judge's decision and, accordingly, we affirm.

At its Alchem Trona Mine, located near Green River, Wyoming, Allied employs a longwall mining unit. Mining is conducted in longwall panel entries some 400 feet in width and considerably greater in length. The Allied longwall mining machine consists of a cutting device known as a shearer, a face conveyor on which the shearer rides, and a line of large roof support units called chocks. The chocks are located behind the face conveyor. Each chock is composed of an overhead canopy placed directly against the mine roof, a hydraulic ram at the base of the unit, and hydraulic legs (or jacks) between the base and canopy. The legs, approximately six inches in diameter, support the canopy and are used to raise or lower the canopy. The canopy is hinged in the middle, with a large back portion and two parallel front arms. One leg supports each of the front arms of the canopy and four legs support the back portion of the canopy.

1/ Section 57.9-2 provides:

Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

During the extraction process, the shearer makes continuous lateral passes across the mining face to cut the trona ore. The ore is deposited in the face conveyor below the shearer and transported by the conveyor belt away from the face. As the shearer makes cuts at the face, the chocks are moved forward by the hydraulic rams to support the newly created roof. A 400-foot face requires some 125 chocks for roof support. When all the chock units are side-by-side, parallel to the face, they form a continuous chock line. As mining progresses and the chock line is snaked forward, the roof is allowed to collapse behind the chocks.

The bolts that are the subject of this proceeding are made of soft steel and are three-quarters of an inch in diameter and approximately eight inches long. One bolt is inserted through each chock leg. The attachment point is near the top of the leg just below a two to three-inch cup in the canopy in which the leg is positioned. The bolt is not intended to provide direct roof support. Because of the stresses generated in the operation of the chock equipment, the bolt will shear off at some point during its use. However, the bolt serves two important functions: preventing the legs from twisting beyond their design limits, especially when the ram moves the chock forward, and holding the legs in proper position in the canopy cups when the legs are raised or lowered. Hydraulic lines are attached to each leg near the point where the bolt is placed. As discussed below, if the leg twists due to a missing bolt, the hydraulic lines could be torn off or ruptured. Such twisting could also damage or destroy the hydraulic packing inside the leg.

The events leading to the citation at issue began on January 26, 1979, when inspectors from the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted a methane spot inspection of the Allied mine pursuant to section 103(i) of the Mine Act. 30 U.S.C. § 813(i). The inspectors determined that the panel in which the longwall miner was located contained amounts of methane in excess of applicable standards and issued an order withdrawing miners from the longwall mining area. On January 29, 1979, MSHA inspectors conducted an abatement inspection of the longwall area. During the course of this inspection, the inspectors walked down the chock line and noticed two bolts missing from legs on chocks No. 105 and 106. One of the inspectors issued a citation alleging a violation of section 57.9-2. The citation stated that the absence of the bolts "would create a hazard to persons working under these chocks." On the accompanying "Inspector's Statement," the inspector asserted that the missing bolts would adversely affect the chocks' roof-supporting capabilities. During the same inspection, the inspectors also issued three other citations alleging electrical violations in connection with a flag switch box located on a conveyor frame.

The record reflects no disagreement that the condition of the chocks and their leg bolts observed in the mine by the inspectors on January 29 had not changed since January 26 when the withdrawal order was issued. During the three-day interim the only miners permitted in the affected area were fire bosses performing ventilation abatement tasks. At the time the withdrawal order was issued on January 26, the longwall unit had been de-energized and the shearer was not operating. The chocks were, however, supporting the roof.

Following an evidentiary hearing and the submission of post-trial depositions, the Commission's administrative law judge issued his decision concluding that Allied had violated section 57.9-2. 4 FMSHRC 503 (March 1982) (ALJ). Before the judge, Allied contended that section 57.9-2 did not apply to roof support equipment like the chocks because the standards in section 57.9 are grouped under the heading "Loading, hauling, dumping"--subjects that do not pertain to roof support. The judge rejected this argument, relying on canons of construction, the general purpose and structure of the Part 57 regulations, and the plain language of the standard itself. 4 FMSHRC at 507-08. Applying the elements of the standard to the evidence, the judge found that the missing bolts were "equipment defects affecting safety," and that, within the meaning of the standard, the defects had not been corrected before the equipment was used. 4 FMSHRC at 505-06, 508. Finally, the judge rejected Allied's defense that the chocks were being repaired at the time the withdrawal order was issued on January 26. 4 FMSHRC at 506. 2/

In urging reversal, Allied repeats the arguments it raised below: that the cited standard does not apply to its longwall roof support equipment, that the various elements of the standard necessary to a finding of violation are not satisfied by the evidence, and that the bolts were in the process of being replaced when the withdrawal order was issued on January 26. These arguments are rejected.

We turn first to the coverage of the standard. Allied asserts that the heading of 30 C.F.R. § 57.9--"Loading, hauling, dumping" -- bars application of section 57.9-2 in the longwall roof support context. However, it is evident from the structure and the content of Part 57, Safety and Health Standards--Metal and Nonmetal Underground Mines, that the headings used in that Part are designed for organizational convenience to supply short-hand characterizations of the general subject matter involved in the standards. The only stated limitations on the scope of the standards contained in Part 57 are distinctions between those standards applicable to underground operations, those applicable to surface operations of underground mines, and those applicable to both areas of operation. The plain words of section 57.9-2 broadly refer to the correction of "equipment defects" without any limitations as to the types of equipment covered. While headings may sometimes provide an intrinsic aid to construction, they do not control over the plain words of a legislative text. In cases of conflict, precedence must be

2/ The judge vacated the three electrical citations based on his finding that an Allied electrician was repairing the cited switch box when the withdrawal order was issued. The Secretary of Labor has not sought review of this aspect of the judge's decision.

given to the words in the body of a provision over those in the caption. See, for example, Brotherhood of Railroad Trainmen v. Baltimore & Ohio RR, 331 U.S. 519, 528-29 (1947); U.S. v. Roemer, 514 F.2d 1377, 1380 (2d Cir. 1975); 2A C.D. Sands, Sutherland Statutory Construction § 47.14 (pp. 93-97) (4th ed. 1973).

Moreover, we are not persuaded that any conflict exists between the heading of section 57.9 and the body of section 57.9-2 as applied to the distinctive longwall operations involved in this case. The cited longwall unit is a single integrated equipment system. The chocks are an integral and essential component of the longwall unit, which is primarily used to cut ore and to load and transport it away from the face. These latter functions are within the scope of the heading of section 57.9, and they cannot be performed without the roof support integrally provided by the chocks. For the foregoing reasons, we conclude that section 57.9-2 was properly applied to the chock components of the Allied longwall unit.

The major issues regarding the judge's findings that Allied violated section 57.9-2 mirror the elements of the standard: (1) whether the missing bolts constituted an "equipment defect"; (2) if so, whether this defect was one "affecting safety"; and (3) whether the operator failed to correct the defect before the equipment was used.

Allied does not directly press an "equipment defect" argument on review, although some of its contentions imply that no defect was present. In both ordinary and mining industry usage, a "defect" is a fault, a deficiency, or a condition impairing the usefulness of an object or a part. Webster's Third New International Dictionary (Unabridged) 591 (1971); U.S. Department of Interior, Bureau of Mines, A Dictionary of Mining, Mineral, and Related Terms 307 (1968). Substantial evidence supports the judge's finding that the utility of a chock is impaired by the absence of a leg bolt. The chock's function as a means of roof support depends in part upon the successful operation of the legs that support and raise and lower the canopy. Each leg includes a bolt at the top to hold and guide the leg in the canopy cup. The record is replete with evidence that without the bolt the leg may twist excessively, resulting in damage to the hydraulic hoses attached to the leg or to the hydraulic packing inside the leg. A missing bolt may also be a causal factor in a leg coming completely out of a canopy cup. In either case, the chock would not perform its roof support function as effectively and, ultimately, the bolt would have to be replaced. Thus, the absence of a bolt is an "equipment defect" within the meaning of section 57.9-2. 3/

3/ In reaching this result, we do not approve the judge's statement that an equipment defect automatically arises "when equipment is not maintained in the manner in which it is received from the manufacturer." 4 FMSHRC at 506. Although a manufacturer's design specifications may be relevant in analysis of alleged violations under this standard, we are not inclined to adopt any form of per se rule in this regard.

The judge further found that the absence of the two bolts in this case affected safety. We agree. Although the effect on safety of two missing leg bolts in a hydraulic chock line of some 125 units could be viewed as inconsequential and beyond the standard's purview, we are not prepared to dispute the judge's findings as to the adverse impact on safety occasioned by the two missing bolts.

The starting point for analysis is the broad language of the standard, "affecting safety." That phrase is neither modified nor limited. Although this case does not require us to describe the minimal effect on safety cognizable under the standard, it is clear that the standard has a wide reach. The safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach.

Substantial evidence supports the judge's finding that the missing bolts affected safety. ^{4/} There is no dispute on this record that without the bolts legs could twist excessively, severing the attached hydraulic hoses or damaging the internal hydraulic packing. The inspectors involved in issuance of the citation credibly testified that any such failure in the integrity of the hydraulic support system could cause a loss of hydraulic pressure in the affected legs and a consequent and unintended drop of the canopy or one of its hinged portions. The area along the chock line under the front canopy arms was a travelway used by miners. A drop of any portion of the extremely heavy canopy could pose a hazard to miners in the area. An unintended lowering of the canopy would also lessen the continuity of the available roof support and could increase the risk of roof falls.

Allied argues that in the event of damage to hydraulic lines or packing, hydraulic pressure in the affected legs normally would be maintained by safety stop valves in the equipment. We are not persuaded. As the judge found (4 FMSHRC at 505), if the stop valves were activated, the affected chocks would have to be "bled off" and the canopies lowered. In turn, the lowering of the canopies could adversely affect the safety of the roof support.

As noted below (n.4), it is not clear which legs on chocks No. 105 and 106 were lacking bolts. Allied argues that, as to the rear portion of each canopy, all four legs and the stop valve system would have to fail before any lowering in the rear of the canopy occurred. While we agree that the immediacy of the effect is greater if one of the single

^{4/} We note that the record does not clearly indicate which legs on chocks No. 105 and 106 were lacking bolts. Because there was testimony that the front arms of the chocks in question were tipped down at the time of the citation (Tr. 119), it appears that one of the front legs of each chock was involved. However, as discussed in the text, our decision would be the same regardless of which legs were involved.

legs supporting a front arm fails, any missing bolt is potentially serious. If even one bolt is missing, the possibility of a hydraulic failure occurring in the affected chock unit is increased. Allied correctly points out that because of the stresses under which the chock equipment operates these soft steel bolts are designed, and are expected, to shear off. However, this design feature does not relieve Allied of the duty continually to maintain the chocks with a full complement of inserted bolts. Furthermore, a missing bolt may also cause the leg of a chock to fail to reset in the canopy cup during movement of the chock or canopy. Should this happen, the canopy would be compromised and roof support could be adversely affected. In this case, the judge credited the testimony of the MSHA inspector that the citation was issued, in part, because one of the legs was out of the canopy cup at the time. 4 FMSHRC at 505.

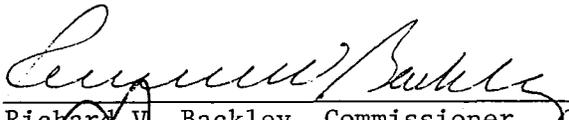
The judge also rejected Allied's argument that a violation did not occur because there was no evidence that the bolts were missing before the chock line was put in use, the chock line was pre-shift inspected, and the bolts were supposed to be replaced every eight hours. In evaluating Allied's contentions, the unique features of the longwall roof support system must be taken into account. As Allied recognizes, the chocks are in use continuously from the time they are raised to support the roof. Petition for Discretionary Review 17. Even if the longwall miner is de-energized and the shearer is not operating, the hydraulic chocks still support the roof. The record indicates that the chocks were supporting the roof on January 26 when the withdrawal order was issued.

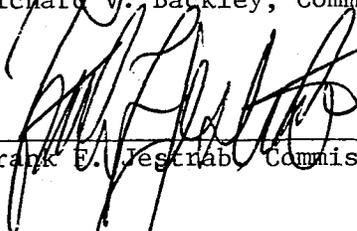
In Ideal Basic Industries, Cement Division, 3 FMSHRC 843 (April 1981), we held that use of a piece of equipment containing a defective component capable of being operated and which, if operated, could affect safety, constituted a violation of 30 C.F.R. § 56.9-2, the identical safety standard for sand and gravel mining operations. 3 FMSHRC at 844-45. In Solar Fuel Company, 3 FMSHRC 1384 (June 1981), we held that electrical equipment in impermissible condition and habitually used or intended for use in by the last open crosscut could be cited for violation of 30 C.F.R. § 75.503, even if the equipment was located outby the last open crosscut at the time of citation. 3 FMSHRC at 1385-86. In both decisions, we interpreted the standards in light of their broad purposes. The result was to assure greater safety in equipment use.

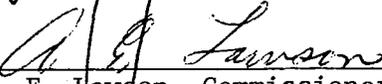
A similar application of the standard cited in this case is warranted. Defects affecting safety in equipment continuously in operation, including those occurring during the course of operation, must be corrected before the equipment is used any further. The contrary approach urged by Allied could result in such defects not being repaired for substantial periods of time, thus needlessly increasing safety risks.

Finally, Allied asserts that on January 26, chocks No. 105 and 106 were under repair, thereby establishing a complete defense against any finding of violation. The judge found that proof was lacking to demonstrate that, when the withdrawal order issued on January 26, the missing bolts were being replaced. Allied produced no evidence that miners were actually repairing the condition. The Allied longwall supervisor testified that "he could not remember" the name of the panel mechanic he claimed to have assigned January 26 to inspect the chocks. Tr. 193. The judge credited the inspector's testimony that no tools were present and no one claimed maintenance was being done in the area of chocks No. 105 and 106 on January 26. On review, Allied has not persuaded us that the judge erred in his credibility resolution or in his ultimate findings on this issue. Moreover, we concur with the judge's observation that assigning a miner to do work is not equivalent to having completed the work.

Thus, we conclude that the missing bolts constituted an "equipment defect affecting safety" that was not corrected before use of the equipment. On the foregoing bases, we affirm the judge's decision. 5/


Richard V. Backley, Commissioner


Frank E. Jestrab, Commissioner


A. E. Lawson, Commissioner

5/ Commissioner Nelson did not participate in the consideration or disposition of this case.

Collyer, Chairman, dissenting:

I must dissent from my colleagues' erroneous stretching of a regulation specifically designed for one purpose to cover a completely separate circumstance. While there may have been a citable violation on the facts of this case, a question which the record here is insufficient to answer, any violation was not of the standard cited by the Secretary and relied upon by the majority.

As acknowledged by the majority, the chocks of Allied's longwall mining system "function as a means of roof support." Dec. at 4. The fact that each of two separate chocks was missing one bolt from one unidentified leg allegedly created a roof control hazard. But the citation issued by the inspector and upheld by the majority alleges a violation of a standard relating to loading, hauling and dumping, not to roof support. I cannot understand how this condition fits within the scope of the selected standard and would hold that the Secretary failed to prove a violation.

The inspector cited a violation of 30 C.F.R. 57.9-2. Subpart 9 of Part 57 applies on its face to "Loading, hauling, dumping." While I agree with the general concept behind the majority's opinion that too much can be made of a statutory or regulatory heading, that principle is stretched too far here. If applied as the majority chooses, the cited standard becomes redundant with other standards in Part 57 and could well introduce a general-duty concept to Mine Act enforcement. Such a result is inimical to the intent of the Act, the regulatory scheme of Part 57, and the legislative history.

It must first be noted that the Mine Act is a statute that provides for liability without fault, commonly called strict liability. Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-894 (5th Cir. 1982). Ignorance of a violative condition does not relieve an operator of liability although it may reduce an assessed penalty. Therefore, the entire scheme of 30 C.F.R. in general, and of Part 57 in particular, must be read in a manner that provides clear notice of which standards are applicable to various mining situations.

The overall organization of the regulations attempts to do just this. Different Parts of 30 C.F.R. contain safety and health standards applying to metal and nonmetal open pit mines (Part 55); to sand, gravel and crushed stone operations (Part 56); to metal and nonmetal underground mines (Part 57); and to coal mines (Parts 70-90). Within each Part, different Subparts apply to different activities at those mines: Part 57 applies to metal and nonmetal underground mines and is divided into various Subparts for standards generally applicable to ground control, explosives, drilling, electricity, and illumination,

among others. 30 C.F.R. §§ 57.3, 57.6, 57.7, 57.12, 57.17. Within each Subpart, the individual standards are further divided into sections containing those standards applicable to both surface and underground areas of underground mines, those applicable only to surface areas and those applicable only to underground areas.

Nor was this organization accidental. Part 57 was promulgated by the Secretary of the Interior on July 31, 1969. 34 Fed. Reg. 12517. The preamble to that promulgation notes that one of the changes made in the final standards from the earlier proposal was the combination of certain related subparts. It also explains that Parts 55, 56 and 57 will have parallel organization, stating (emphasis supplied):

Sections which deal with a given subject will have identical decimal numbers in the three sets of regulations which deal with open pit mines, sand, gravel, and crushed stone operations, and underground mines. Thus, the standards on drilling in the three sets of regulations will appear in Sections 55.7, 56.7 and 57.7, respectively; and standards on materials handling and storage will appear in Sections 55.16, 56.16, and 57.16.

By the same token, it seems to me obvious that the ground control standards found in subparts 55.3, 56.3, and 57.3 are those to which a metal-nonmetal or sand and gravel operator should be able to look to determine whether its roof and ground control system complies with relevant federal requirements.

In fact, 30 C.F.R. 57.3-22 states (emphasis supplied):

Miners shall examine and test the base, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

If it is MSHA's position that the missing bolts rendered the chocks inadequate to support the roof at Allied's trona mine, it could have issued a citation under this standard saying so. It makes no sense to try to bootstrap an alleged roof control deficiency into the cited loading, hauling, and dumping standard.

Furthermore, if Section 57.9-2 is given the broad interpretation that the majority uses, it would be redundant with a number of analogous standards in other subparts of Part 57. For example, 30 C.F.R. 57.7-2, under the heading "Drilling," is identical to the standard cited in this case: "Equipment defects affecting safety shall be corrected before the equipment is used." If either standard were intended to be applicable to all equipment in underground metal and nonmetal mines, there would be no need for two identical standards. A number of additional standards in Part 57, although not containing wording identical to that in Section 57.9-2, provide similar prohibitions against the use of defective equipment. See, e.g., 30 C.F.R. 57.3-8, 57.10-3, 57.12-30, 57.14-26, 57.19-120. Under the majority's interpretation of Section 57.9-2, the need for these standards would be obviated.

For similar reasons, I also cannot agree with the majority's conclusion that the roof support chocks may be considered loading, hauling and dumping equipment within the scope of section 57.9. The basis for this holding is that "[t]he chocks are an integral and essential component of the longwall unit, which is primarily used to cut ore and to load and transport it away from the face." Dec. at 4. However, the primary purpose of any mining system is "to cut ore and load and transport it away from the face." In underground mines, roof support is essential to this process and roof control is therefore an integral part of any underground mining cycle. The fact that there is some physical, rather than only functional, connection between the various components of a longwall system cannot be used to transform a roof support chock into a piece of haulage equipment.

Of equal importance, the broad application of 57.9-2 adopted by the majority also converts that standard into a general duty standard, contrary to the express intent of Congress in enacting the Mine Act. House and Senate Conferees explicitly removed a general duty clause contained in the Senate version of the Mine Act before passage. The Conference Report explained:

The Senate bill contained a "general duty" clause which required operators to furnish safe and healthful working conditions free from recognized hazards likely to cause death or harm to miners and to comply with rules, regulations and orders promulgated under the Act. This provision would have permitted the issuance of citations or the assessment of civil penalties based on violations of the general duty. The House amendment had no general duty clause.

The conference substitute conforms to the House amendment.

S. Conf. Rep. No. 461, 95th Cong., 1st Sess. 38-39, 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 1316-1317 (1978). The report further explained Congress' belief that the imminent danger provision of Section 107(a), 30 U.S.C. 817(a), was sufficient to protect miners' health and safety where dangers outside the scope of the specific standards existed. Id. The scheme adopted by Congress provides this protection to miners without a general duty clause that would subject operators to mandatory civil penalties for conditions which are not prohibited by specific standards.

By its decision, however, the majority introduces into the cited standard a "general duty" concept applicable well beyond loading, hauling and dumping. The decision ignores the nature of underground mining systems and turns identical or similar standards within other Subparts into surplusage. It ignores the clear legislative history declining to adopt a general duty concept. It also ignores the relevant roof control standard which is applicable.

I dissent.


ROSEMARY M. COLLYER, Chairman

Allied Chemical,
Collyer →
Strict. liab.
But knowledge bears on
penalty -
∴ article is critical

Distribution

Douglas L. Davies, Esq.
Van Cott, Bagley, Cornwall & McCarthy
Suite 1600
50 South Main Street
Salt Lake City, Utah 84144

Anna L. Wolgast, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge John Morris
Federal Mine Safety & Health Review Commission
333 West Colfax Avenue, Suite 400
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 28, 1984

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : DOCKET NO. PENN 83-63
 :
U. S. STEEL MINING CO., INC. :

DECISION

The issue in this civil penalty case is whether a cited violation of a regulation relating to permissible electric equipment was properly designated "significant and substantial," as that term is used in the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act").

The case involves a violation of mandatory safety standard 30 C.F.R. § 75.503, which requires coal mine operators to "maintain in permissible condition all electric face equipment required . . . to be permissible . . ." ^{1/} Here, one of four bolts required to attach the lens to the headlight assembly of a shuttle car was loose, compromising the explosion-proof nature of the headlight compartment. In a civil penalty proceeding before an administrative law judge of this independent Commission, U. S. Steel Mining Co. ("U.S. Steel Mining") conceded that it had violated the standard, but argued that the violation should not have been designated significant and substantial under the Commission's decision in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981).

At the hearing before the judge, the MSHA inspector who issued the citation was the only witness to testify about the violation in this case. He explained that he had issued the citation at 10:30 a.m. on January 4, 1982. Shortly before, at 9:20 a.m., the inspector had also issued a citation for excessive coal accumulations in an entry and crosscut about 320 feet

^{1/} Relevant permissibility standards are set forth in 30 C.F.R. Part 18, including § 18.46(a), requiring that headlights "be constructed as explosion-proof enclosures." "Explosion-proof enclosure" is defined in § 18.2.

from the subsequently cited shuttle car. He said that the crew had stopped mining activities in order to clean up the cited accumulation. 2/ The cleanup was still in progress when the inspector issued the shuttle car citation.

The MSHA inspector testified that the purpose of requiring that headlights "be constructed as explosion-proof enclosures," 30 C.F.R. 18.46(a), is to ensure that any ignition that may occur inside the headlight will not escape into the mine atmosphere. He explained that the atmosphere inside the enclosure expands and contracts as the headlight is turned on and off. When the headlight is turned off, the atmosphere inside the enclosure cools, contracting and drawing in outside air which may contain methane. Sparks in the headlight compartment could cause a methane ignition inside the compartment. The inspector testified that, if such an ignition occurred, "[w]ith the one bolt loose like that, the pressures that are built up, you could have distortion or even breakage of some of the other bolts that would allow the flame from an ignition inside the compartment to escape to the outside atmosphere." Tr. 81. In that event, a larger explosion could then occur, injuring or killing the shuttle car operator or any other nearby miners.

The inspector testified that he designated the violation significant and substantial because he believed that an explosion of this type was "a reasonable thing that could happen." He noted that an explosion "in either Colorado or Utah" that had recently killed 15 people "was directly attributed to an opening" in a headlight compartment. Tr. 82. He also testified that Maple Creek #2 is a gassy mine that liberates over one million cubic feet of methane in a 24-hour period and noted that the shuttle car was on the same section where he had just cited U. S. Steel Mining for excessive coal accumulations.

Based on this testimony the judge affirmed both the citation and the inspector's significant and substantial finding. 5 FMSHRC 1873 (October 1983) (ALJ). He assessed a civil penalty of \$100 for the violation, 3/ and U. S. Steel Mining petitioned for discretionary review.

2/ A U. S. Steel Mining witness testified, in reference to the accumulation violation, that no mining had yet started on that shift, because the company was aware that the cleanup had to be completed before mining could be resumed. The judge did not make a specific finding on this issue.

3/ The Secretary had proposed a penalty of \$206.

On review, U. S. Steel Mining, conceding that it violated the standard, argues that the likelihood of the violation contributing to a methane explosion was so remote that the violation may not be designated significant and substantial. Specifically, it argues that the judge's "premise" that sparking occurs within a headlight is "unsupported in fact or by the record." (Br. 3) It further claims that an explosive concentration of methane would not have occurred in the area of the violation and that neither the inspector nor the judge properly applied the Commission's National Gypsum test in determining that the violation should be designated significant and substantial.

We hold first that substantial evidence supports the judge's conclusion that sparking occurs within the headlight. We note again that the inspector who issued the citation was the only witness to testify about the violation. He testified that, although sparking within the headlight is not "normal," it is "frequent" and can be caused by any of a number of factors. Tr. 85, 89. Since U. S. Steel Mining presented no contrary evidence, we reject its assertion that the judge erred in finding that sparking occurs within the headlight.

As to the contention that any hazard posed by the violation was too remote to justify a significant and substantial designation, we have previously held that a violation should be designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, supra, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) we explained:

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

We have further explained that the third element of the Mathies formulation "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U. S. Steel Mining Co., 6 FMSHRC _____ (Docket No. PENN 83-39, slip op. at 3)(August 1984). In our decisions we have emphasized that, in line with the language of Section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial.

Applying these principles to the instant case, we affirm the judge's holding that the cited violation was properly designated significant and substantial. In doing so we reject U. S. Steel Mining's contention that because mining was not taking place at the precise moment the citation was issued, the violation posed no hazard. Mining was scheduled to resume as soon as the nearby accumulation was cleaned up, and there was no suggestion that U. S. Steel Mining, in the normal course of events, would have discovered and corrected the violation before that time.

Similarly, the fact that the mine's ventilation was adequate at the time the citation was issued did not diminish the possibility that the violation would result in a serious mine hazard. The Maple Creek #2 mine is classified as gassy and has a history of methane ignitions. Additionally, there was an excessive accumulation of coal not far from the cited shuttle car. U. S. Steel Mining offered no evidence to rebut the testimony of the inspector that it was reasonably likely that the violation would contribute to a methane explosion. Under these circumstances we believe that the violation was properly designated significant and substantial.

For the foregoing reasons we affirm the decision of the administrative law judge.



Rosemary M. Collyer, Chairman



Richard V. Buckley, Commissioner



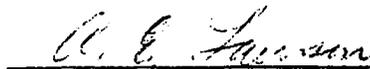
Frank J. Jestrab, Commissioner



H. Clair Nelson, Commissioner

Commissioner Lawson concurring:

On the basis of the criteria set forth in my separate opinion in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), I concur in finding the violation in this case to be significant and substantial within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1).



A. E. Lawson, Commissioner

Distribution

Louise Q. Symons, Esq.
U.S. Steel Mining Co., Inc.
600 Grant Street, Room 1580
Pittsburgh, PA 15230

Linda L. Leasure, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge James Broderick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 29, 1984

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEST 81-186-M
v. :
CATHEDRAL BLUFFS SHALE OIL COMPANY :

DECISION

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). At issue is whether a Commission administrative law judge erred in dismissing a citation issued to Cathedral Bluffs Shale Oil Company for a violation arising from the work activities of an independent contractor. 4 FMSHRC 902 (May 1982) (ALJ). We affirm the judge's dismissal of the citation, but for the reasons detailed below.

Cathedral Bluffs is a Colorado partnership between Occidental Oil Shale, Inc. and Tenneco Shale Oil Company. Occidental is the partnership's operating partner and, for purposes of this case, is referred to as the "production-operator" of the Cathedral Bluffs mine. On February 8, 1978, Occidental contracted with Gilbert Corporation for the development of three underground vertical shafts at the Cathedral Bluffs site at Rio Blanco, Colorado. On September 4, 1980, a Department of Labor Mine Safety and Health Administration (MSHA) inspector conducted an inspection of the ventilation and escapeway shaft, the "V&E" shaft, then under development by Gilbert. At the time of the inspection this vertical shaft descended about 1125 feet. Landings, or stations, were cut horizontally into the shaft walls at predetermined levels. The MSHA inspector observed that, contrary to the requirements of 30 C.F.R. § 57.19-100, the 1050 landing was not equipped with substantial safety gates constructed so that material would not go through or under them. 1/ Instead, a chain was hung across the landing which could not prevent objects from falling down the shaft. The inspector issued citations alleging a violation of section 57.19-100 to both Gilbert and Occidental.

1/ 30 C.F.R. § 57.19-100 provides:

Mandatory. Shaft landings shall be equipped with substantial safety gates so constructed that materials will not go through or under them; gates shall be closed except when loading or unloading shaft conveyances.

The violative condition was abated promptly by the erection of a conforming safety gate. Gilbert did not contest the citation issued to it by the inspector, and accordingly, that citation became a final order by operation of law. 30 U.S.C. § 815(a). Occidental, however, did contest the citation issued to it and the penalty proposed by the Secretary of Labor. It is the propriety of the issuance of the citation to Occidental, under these circumstances, that is before us.

The Commission's administrative law judge held that our decision in Phillips Uranium Corporation, 4 FMSHRC 549 (April 1982), was "dispositive", and "on the authority of Phillips" he vacated the citation. The judge read Phillips as establishing a per se rule that:

liability for a violation may not be imposed against an owner-operator where the owner has retained an independent company with experience and expertise in the activity being undertaken and where the owner's exposed employees do not perform any other work other than to observe the progress of the contractor's activities to assure compliance with quality control and contract specifications.

4 FMSHRC at 902. Finding that the facts of the present case fell within this perceived rule, the citation was vacated.

On review the Secretary argues that the judge erred in applying Phillips as controlling precedent. The Secretary asserts that the citations at issue in Phillips were issued under MSHA's former "interim" policy of citing only owner-operators for independent contractor violations. Since then, however, new independent contractor identification regulations have been adopted and were in effect at the time the citation was issued to Occidental. 44 Fed. Reg. 44494 (July 1, 1980) (adopting new 30 C.F.R. Part 45). Moreover, the Secretary argues that in issuing the citation, the inspector relied upon and correctly applied the enforcement guidelines formally published by the Secretary in the Federal Register as an appendix to the independent contractor identification regulations. 44 Fed. Reg. 44497. Accordingly, the Secretary submits that Phillips is not controlling and that the citation issued to Occidental for the violation committed by its independent contractor must be upheld as a proper exercise of his enforcement authority.

We agree with the Secretary that the judge read Phillips too broadly and misapplied it as directly controlling the disposition of this case. Contrary to the Secretary's assertions, however, we find that under a proper application of governing legal principles, and in light of relevant factual findings by the judge and the record considered as a whole, the judge's dismissal of the citation must be affirmed.

The present case stands in a procedural posture different in a crucial respect than that presented to us in Phillips. In Phillips the Secretary had instituted proceedings solely against the production-operator for violations committed by an independent contractor. He had done so, well after our admonition in Old Ben Coal Co., 1 FMSHRC 1480 (October 1979), aff'd, No. 79-2367, D.C. Cir. (January 6, 1981), that his interim "owners-only" citation policy placed administrative convenience

ahead of miner safety. He had refused to proceed against the culpable contractor even after he had adopted regulations and enforcement guidelines articulating a policy of holding contractors responsible for violations committed by them. Accordingly, we held that the Secretary's decision to proceed against Phillips, and not against the contractor, had totally negated the intended effect of the Act's provisions requiring the imposition of cumulative sanctions against independent contractors, and that the Secretary had so acted simply because it was administratively convenient for him to seek penalties from the production-operator. For these reasons, the citations were vacated.

In contrast to the procedural posture of Phillips, the violation at issue in this case occurred subsequent to the Secretary's adoption of his new independent contractor regulations and enforcement guidelines. Through these vehicles the Secretary abandoned his interim "owners-only" policy and established a new, formal policy governing the issuance of citations to independent contractors. Purportedly in accordance with this new policy, in the present case the Secretary cited Occidental as well as its contractor for the contractor's failure to guard the shaft landing. Therefore, the rationale we relied on to vacate the citation at issue in Phillips is not relevant here. Rather, the appropriate inquiry is whether the record reflects proper application of the Secretary's new independent contractor enforcement policy. As explained below, we hold that it does not.

The Secretary's formally adopted policy regarding the issuance of citations for violations of the Act committed by independent contractors provides:

Enforcement action against production-operators for violations involving independent contractors is ordinarily appropriate in those situations where the production-operator has contributed to the existence of a violation, or the production-operator's miners are exposed to the hazard, or the production-operator has control over the existence of the hazard. Accordingly, as a general rule, a production-operator may be properly cited for a violation involving an independent contractor: (1) when the production-operator has contributed by either an act or omission to the occurrence of a violation in the course of an independent contractor's work, or (2) when the production operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement.

44 Fed. Reg. 44497 (July 1980). 2/

2/ In his brief, the Secretary stresses the rulemaking process he followed in adopting the independent contractor regulations and the

(Footnote continued)

Throughout this proceeding the Secretary has relied on criteria (3) and (4) as the basis for sustaining the citation issued to Occidental. We conclude that the Secretary has failed to establish in the record the requisite support to conclude that these criteria were met in the present case.

According to the Secretary's third criterion, a production-operator appropriately may be cited for a violation committed by an independent contractor when the production-operator's employees are exposed to the hazard created by the violation. Viewed as a whole, the record before us is devoid of substantial probative evidence of such exposure. The MSHA inspector testified that at the time that he observed the lack of a safety gate at the 1050 landing, the lowest landing then developed, no miners were below the landing. He further testified that he had never seen Occidental employees at the bottom of the shaft.^{3/} No other evidence by the Secretary specifically places any Occidental employee at the bottom of the shaft at any point during the indeterminate period that the 1050 landing lacked safety gates. There is general testimony in the record to the effect that "quality control" inspectors and "safety inspectors" employed by Occidental observed Gilbert's work as it progressed. There is no convincing, specific testimony, however, concerning the frequency and duration of such visits, or whether any such Occidental employee in fact was exposed to the hazard posed by the improperly guarded 1050 landing. Although there is testimony that an employee of Occidental took gas samples in the shaft, including the bottom area, at unspecified intervals, the extent of this employee's presence in the shaft cannot be determined and no evidence establishes that he was at the shaft bottom at a time when the 1050 landing lacked guards. Thus, a finding of exposure of any Occidental employee to the cited hazard can only be based on a large amount of inference and conjecture, rather than on probative record

Fn. 2/ continued

corresponding enforcement guidelines. Sec. Brief at 15-18. He emphasizes that "the Secretary decided to develop his prosecutorial policy through the public procedure of rulemaking" (Brief at 16 n. 12), and that "these formally published guidelines give clear public notice of the Secretary's policy in exercising his discretionary policy." Brief at 17. We agree with the Secretary that his independent contractor enforcement guidelines are distinguishable from the provisions of his internal Inspector's Manual which were found to be without legal effect in King Knob Coal Co., 3 FMSHRC 417 (June 1981).

^{3/} The inspector did state that during his inspection of the shaft certain Occidental employees accompanied him to the shaft bottom. The presence of these employees at the shaft bottom cannot be relied on to support a finding of exposure. Section 103(f) of the Act provides miners and operators with the right to designate representatives to accompany inspectors "for the purpose of aiding such inspection." 30 U.S.C. § 813(f). Any suggestion that exercise of this "walkaround" right, which is intended to advance mine safety and health, can be relied on as a basis to impose liability on an operator or increase the gravity of a violation must be rejected.

evidence. Although circumstantial evidence can be relied on in appropriate circumstances to establish a violation under the Mine Act, the degree of inference and speculation necessary to be indulged in here to support a finding of exposure, would require us to ignore the Secretary's obligation to prove the existence of a violation. This we will not do.

Assuming arguendo that the record could be viewed as supporting a reasonable conclusion that Occidental's quality control and safety inspectors were, to some extent, exposed to the violative condition, we would nonetheless conclude that such incidental exposure could not support the citation issued to Occidental. If sufficient exposure were to be found on these facts, the Secretary's much-heralded independent contractor citation policy effectively would be reduced to a "paper tiger" lacking any substantive or practical effect. Independent contractors are engaged by mine operators because of their expertise in specialized tasks. The relationship between production-operators and independent contractors is, by definition, governed by contract. ^{4/} That relationship also is defined to provide a contractor freedom from the production-operator's control in the actual performance of the task it is hired to accomplish. Equally endemic to such a contractual relationship is the right of the production-operator to determine if the services or goods contracted for have, in fact, been satisfactorily provided. This necessitates, to varying degrees, a monitoring and inspection of the progress of the work being performed and an inspection and acceptance of the work once completed.

The present case presents a typical contractual relationship. See Exh. R-1. Occidental contracted with Gilbert Corporation for the development of three vertical underground shafts. As we observed in Phillips, supra, "the hiring of contractors to perform the specialized task of shaft construction is common in the mining industry." 4 FMSHRC at 553. Because Gilbert was retained for its expertise in shaft sinking, it necessarily was given control over the performance of this specialized work. In fact, no Occidental employee was permitted to enter the shaft unless accompanied by a Gilbert employee. In accordance with contractual and industrial reality, however, Occidental necessarily retained the right to monitor the work being performed to determine if the contract were being discharged properly. The frequency and duration of the visits by Occidental personnel to the shaft is impossible to determine from the record. It is clear, however, that Occidental's presence in the shaft was no more than reasonably can be expected in any such contractual relationship and did not involve the production-operator in the particulars of the work being performed. It is certainly clear that, contrary to the statement in the

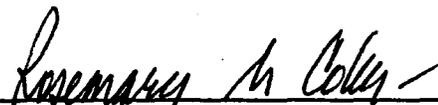
^{4/} As generally used at law, the term "independent contractor" describes a party that "contracts with another to do something ... but who is not controlled by the other nor subject to the other's right to control with respect to his ... conduct in the performance of the undertaking." Restatement (Second) of Agency § 2 (1958).

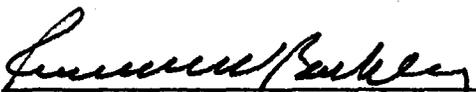
Secretary's brief, the record does not establish "constant Occidental employee exposure" to the hazard posed by the unguarded landing. Sec. brief at 20. We cannot conclude that the limited access of Occidental's employees to the work activities of its contractor, as demonstrated by this record, satisfies the exposure criterion in the Secretary's enforcement guidelines without rendering the guidelines meaningless.

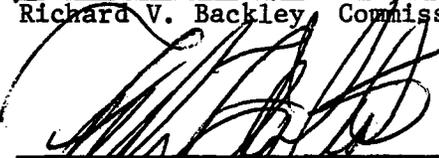
We also must reject the Secretary's assertion that the present facts satisfy the fourth criterion in his enforcement guidelines for citing production-operators for contractor violations, i.e., "control over the condition that needs abatement." As discussed above, it is true that Occidental reserved certain rights in its contract with Gilbert, including the right to monitor and inspect work provided and the right to terminate the contract in whole or in part if Gilbert "persistently disregard[ed]" applicable laws, including the Mine Act. (Exh. R-1, paragraphs 7 and 20.) The Secretary points to these contractual provisions as proof that in this case Occidental had "control over the condition that needs abatement" within the purview of his fourth criterion. We find this assertion unpersuasive. The rights reserved by Occidental are basic contractual rights universally reserved in well-drafted contracts in this industry and others. To hold that the mere presence of such language in contracts between production-operators and independent contractors satisfies the criterion of "control" under the Secretary's independent contractor enforcement guidelines, would vitiate the very essence of the guidelines. The plain fact is that if the contractual provisions in this case constitute "control" for citation purposes, every production-operator could be cited for every contractor violation. This result has long been criticized as ineffective enforcement of mine safety statutes and was ostensibly abandoned by the Secretary upon the adoption of his new policy. See, e.g., Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 863 (D.C. Cir. 1978); Phillips Uranium, supra; and Old Ben, supra, (majority and dissenting opinions).

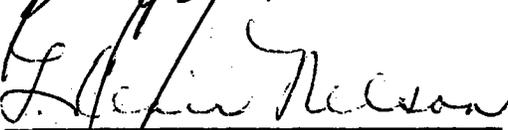
We hold that before a production-operator can be deemed to "control" a contractor's activities sufficient to justify the issuance of a citation to it for a contractor's violation, some functional nexus, beyond the contractual nexus reflected here, must be demonstrated linking the production-operator's involvement with the contractor's violation. We emphasize that in this case an independent contractor with a continuing presence at the mine site was cited for a violation it committed in the course of its specialized work; the contractor did not contest the citation; and the hazardous condition was abated promptly. Given these facts and the lack of any demonstrated exposure of Occidental employees or control by the production-operator other than routine verification of work performed, we believe that harm, rather than good, would be done to the goal of achieving maximum mine safety and health if such a strained interpretation and application of the Secretary's enforcement policy were upheld. Therefore, we decline to interpret the Secretary's regulations and guidelines to require precisely what their adoption was intended to avoid.

Accordingly, as modified by this decision, the administrative law judge's dismissal of the citation issued to Occidental is affirmed.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank P. McGrath, Commissioner


L. Clair Nelson, Commissioner

Commissioner Lawson dissenting:

The principles established in Old Ben Coal Co., 1 FMSHRC 1480 (1979) ("Old Ben"), in conformity with the legislative intent and express endorsement of Bituminous Coal Operators' Association, Inc., 547 F.2d 240 (4th Cir. 1977) ("BCOA"), 1/ continue to be eroded by this Commission majority. In Old Ben the Commission stated:

It was not the intention of Congress to limit the number of persons who are responsible for the health and safety of the miner, nor to dilute or weaken the obligation imposed on those persons ... When a mine operator engages a contractor to perform construction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators ... Arguably, one operator may be in a better position to prevent the violation. However, as we read the statute ... Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation.

1 FMSHRC at 1483. In Phillips Uranium Corp., 4 FMSHRC 549 (1982) ("Phillips"), the Commission backtracked by selectively quoting Old Ben:

We previously have observed that "[i]n many circumstances... it should be evident to an inspector at the time that he issues a citation or order that an identifiable contractor created a violative condition and is in the best position to eliminate the hazard and prevent it from recurring."
1 FMSHRC at 1486.

4 FMSHRC at 553. No longer relying on statutory support, but instead criticizing the Secretary's adherence to "administrative convenience," 2/ id, the Commission vacated the citations, orders, and petitions for assessment of civil penalty issued to the owner-operator.

In this case, where Occidental's own employees were exposed to the hazard cited and where Occidental has impermissibly delegated its safety responsibilities via contractual assignment to Gilbert, the Commission has backtracked further. Having heeded the admonition in Phillips against proceeding only against the owner-operator but not the culpable independent contractor, the Secretary is now barred from proceeding against both. Apparently, now the Secretary cannot guess correctly against whom he may proceed. Borrowing an analogy used in other safety and health litigation by the U.S. District Court for the District of

1/ The principles of BCOA were subsequently reaffirmed by the U.S. Court of Appeals for the Fourth Circuit in Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1971), and endorsed by the U.S. Court of Appeals for the Ninth Circuit in Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1119-20 (9th Cir. 1981), quoting Republic Steel Corp., 1 FMSHRC 5 (1979).

2/ The criticism was directed towards the Secretary's then-existing policy to proceed only against an owner-operator.

Columbia in National Congress of Hispanic American Citizens v. Marshall, No. 2142-73 (D.C.D.C. Oct. 30, 1981), 1981 CCH OSHD ¶25,750 at 32,163, the Commission's development of the law in this area is reminiscent of Alice in Wonderland: each step forward brings us two steps backward.

My colleagues rely on the Secretary's enforcement policy to preclude enforcement against this owner-operator. Again they use selective quotation. Preceding the material from the guidelines cited by the majority is the following statement in the preamble to these regulations:

However, as was fully discussed in the preambles to the draft and proposed rules, the legislative history to the revised definition and the case law makes it clear that the production-operator remains ultimately responsible for the safety and health of persons working at the mine.

45 Fed. Reg. 44494 (1980). ^{3/} Further, and included in that enforcement policy itself, is the following:

MSHA's general enforcement policy regarding independent contractors does not change the basic compliance responsibilities of production-operators. Production-operators are subject to all provisions of the Act, standards and regulations which are applicable to their mining operation. This overall compliance responsibility of production-operators includes assuring compliance with the standards and regulations which apply to the work being performed by independent contractors at the mine. As a result, independent contractors and production-operators both are responsible for compliance with the provisions of the Act, standards and regulations applicable to the work being performed by independent contractors. [Emphasis added.]

45 Fed.Reg. 44497 (1980).

It is beyond dispute that under the 1977 Act, owner-operators are jointly and severally liable for violations involving independent contractors at their mines. As noted in Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981),

[T]he addition of "independent contractors" to Section 3(d) [of the 1977 Mine Act] did not require the Secretary to cite only the independent contractor. The addition permitted the Secretary to cite the independent contractor, the owner or both. [Emphasis in original]

* * *

^{3/} Of course, what existing case law and the Act's legislative history made clear was that both owner-operators and independent contractors were liable for violations of the Mine Act.

In addition, mine owners are strictly liable for the actions of the independent contractor violations under the Coal Act and the present Act.

664 F.2d at 1119 (citations omitted). The regulations at 30 C.F.R. Part 45 provide the mechanism for implementing independent contractor liability under the statute. It is clear from the preamble, as well as the policy statement, that production-operators are no less liable today than was the case prior to their issuance. However, the Secretary's guidelines are now being used by the majority to preclude enforcement. In Old Ben, the Commission stated that the proper standard for reviewing Secretarial enforcement decisions "is for the Commission to determine whether the Secretary's decision to proceed against an owner for a contractor's violation was made for reasons consistent with the purpose and policy of the 1977 Act." 1 FMSHRC at 1485. In this case, it is the decision of the Secretary that is consistent with the purpose and policy of the 1977 Act, not the decision of the Commission majority.

MSHA's policy indicated that enforcement actions against production operators is "ordinarily appropriate," as a "general rule," under the following circumstances:

- (1) When the production-operator has contributed by either an act or an omission to the occurrence of a violation in the course of an independent contractor's work, or
- (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or
- (3) when the production-operator's miners are exposed to the hazard, or
- (4) when the production-operator has control over the condition that needs abatement.

The Secretary maintains, on the basis of record evidence, that this enforcement action against Occidental is consistent with the Act and the published guideline criteria. He makes specific reference to criteria 3 and 4 establishing exposure and control, with ample supporting citation to record testimony and exhibits. I agree that the record supports the Secretary on both grounds, but need go no further than criteria 3.

The contract between Occidental and Gilbert provided:

Contractor understands that operator and/or other contractors will be working in and around areas where work is to be performed under this contract.

(Exh. R-1 at 4). The evidence establishes not only that Occidental employees in fact regularly worked in the shafts under construction, but that Occidental ignored its statutory obligations to these same miners. Occidental's manager of health, safety and security testified as follows:

Q. Mr. McClung, I'm not sure my notes are correct, so what I do is make sure they are either correct or you will correct me. I have you down as saying in your testimony ... that you had no power to control safety underground.

A. That's right, other than contractually.

Q. Which you mean to say, you have every right to do under the contract?

A. Under the contract, I can go to Occidental management should a situation warrant.

Q. Now, as I read this contract, Occidental had employees under the ground; isn't that true?

A. They have shaft inspectors, true.

Q. So your testimony, that while they were underground, even though they were Occidental employees, you abdicated all responsibility for safety?

A. It is part of the Gilbert contract.

Q. That is not what I'm asking whether or not it was the contract. I just asked you what you did.

A. We did not actively inspect the shaft.

Q. Did you have a responsibility for safety then when they were underground?

A. For their's?

Q. Yes.

A. If you are speaking of the safety inspectors, they were under the full control of Gilbert.

Q. The shaft inspectors?

A. Yes.

Q. Do you assume their responsibility whatsoever for the safety of your employees while they are underground; is that your testimony?

A. Yes, we have got to do it that way.

Q. You did that pursuant to contract?

A. Correct.

Q. Irrespective of what the statutes might have said?

A. (No response.)

Q. It must be your testimony, that under the contract you had no rights, regardless of what the statutes said, to do anything to protect the safety of your employees; is that true?

A. If that is a question, if they were in imminent danger situation, I would expect them to get out of the shaft.

Q. That was your expectation?

A. Yes.

Q. If they thought they were in imminent danger situations?

A. Yes.

Q. Now, the people that were down there were safety inspectors to inspect the quality of workmanship, they weren't trained safety individuals, were they?

A. No.

Q. So whether or not they were in a hazardous situation may or may not be apparent to them because they weren't trained; isn't that true?

A. That is the responsibility of Gilbert.

- Q. I didn't ask you whether or not it was the responsibility.
A. Of course, they weren't trained to recognize it.
Q. Whether or not they were trained for it though, you abdicated [sic] your responsibility, even though they weren't trained to work underground; isn't that true?
A. I don't believe that you are describing that correctly.
Q. Tell me how I am wrong.
A. They had to be accompanied by Gilbert employees to be there.
Q. Do they have to be accompanied by Gilbert safety officers?
A. The management of Gilbert's supervision has got to assume safety.
Q. Under the contract, as I understand it, Occidental had people down there to inspect materials furnished by Gilbert; isn't that true?
A. I believe that is a portion of their job.
Q. They had to inspect the workmanship performed by Gilbert?
A. That is true.
Q. They had the right to conduct inspections and they make test of the work performed by Gilbert?
A. That is true.

Tr. 60-63. The majority inexplicably finds this evidence regarding exposure of Occidental's quality inspectors inconclusive, notwithstanding McClung's acknowledgement that they were in the shaft and that responsibility for their safety was contractually assigned to Gilbert. McClung's testimony is corroborated by Occidental safety inspector Inman who testified that he had been "down the shaft" and that he had seen a shaft inspector in the V&E shaft "on the day that the citation was issued." Tr. 38. 4/ In addition, the MSHA inspector testified that he was told by miner Dyer, a quality inspector employed by Occidental, that "he spent everyday in the shaft ... wherever they [Gilbert employees] were working." Tr. 20-21. It is clear beyond peradventure that Occidental's miners were exposed to the hazards of this mine, and Gilbert's shaft sinking operations.

The majority also asserts, assuming arguendo that exposure to mine hazards by Occidental's shaft inspectors was established, that the Secretary's guidelines would be meaningless if "incidental" exposure (slip op. at 5) by Occidental's inspectors, for the purpose of monitoring Gilbert's work performance, was held to be sufficient to satisfy the exposure criterion. My colleagues would also find persuasive the fact that the relationship between Gilbert and Occidental is governed by contract. There is, of course, no statutory or other support for the suggestion that operator Occidental's statutory duty to maintain safe working conditions depends on the job classification of the exposed miner. Nor is there any suggestion in the preamble to Part 45, or in the enforcement policy itself, that degrees of exposure are even relevant. As to the majority's reliance on the contract between Occidental and Gilbert, it is elementary that a private agreement between parties cannot

4/ Since Inman himself was the shaft inspector who accompanied the MSHA Inspector, this evidence of exposure cannot relate to an Occidental representative exercising section 103(f) walkaround rights. See slip op. at 4 n.3.

control or alter statutory duties. An operator may not delegate this statutory duty to prevent safety and health hazards, nor may this Commission properly endorse contractual shifting of the strict liabilities established by the Act, Congress, and the Courts. See Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1119-20 (9th Cir. 1981), quoting Republic Steel Corp., 1 FMSHRC 5, 11 (1979); Central of Georgia Railroad Company v. OSHRC, 576 F.2d 620, 624-5 (5th Cir. 1978); Frohlick Crane Service, Inc. v. OSHRC, 521 F.2d 628, 631 (10th Cir. 1975).

In addition to rejecting this evidence establishing the exposure by Occidental's inspector miners to the hazards of the mine, the majority also rejects record evidence establishing exposure to at least one other Occidental employee whose job it was to take gas samples in the shaft. Again, McClung's testimony is revealing:

- Q. What occasion would he have to go underground?
A. He [miner Parker] would go underground to--since we were declared gassy in January of 1980, he would take gas samples and random gas samples.
Q. When you say we were classified as gassy?
A. The Cb tract, the Cathedral Bluffs.
Q. When you say Cb, you mean Cathedral Bluffs?
A. Yes.
Q. What then would be his duties after that shaft was classified as gassy?
A. What would be his duties?
Q. Yes.
A. Because we wrote the petition for the ventilation program, he would have to assure that we had proper ventilation through the area in the mine.
Q. Now, at the time the citation was issued, the Cb tract had been declared gassy, had it not?
A. Yes.
Q. But at that time, you have just three development shafts; is that correct?
A. That is correct.
Q. So I assume that he would inspecting for methane, the accumulation in the shaft and in the stub landing also?
A. Basically he checked return air and ventilation at the bottom of the shaft.
Q. And he was doing that prior to September of 1980?
A. Yes, his job is basically that.

Tr. 48-9. In sum, the job of Occidental's employee was to take gas samples and check the ventilation system at the bottom of the shaft pursuant to the ventilation plan adopted by Occidental after this mine was declared gassy by MSHA. His job function was therefore unrelated to contractor Gilbert's work. Nevertheless, the Commission majority again finds insufficient evidence of this employee's exposure and whether he was at the shaft bottom at a time when the cited landing lacked guards.

The record does not contain the ventilation plan that Occidental followed. However, the mandatory ventilation standards applicable to gassy metal and nonmetal underground mines, codified at 30 C.F.R. § 57.21-20 through 57.21-74, supplies at least the minimum examination requirements that must be followed.

§ 57.21 Gassy mines

Gassy mines shall ... be operated in accordance with the mandatory standards in this section.

* * *

VENTILATION

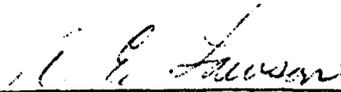
* * *

57-21-59 Mandatory. Preshift examinations shall be made of all working areas by qualified persons within 3 hours before any workmen, other than the examiners, enter the mine.

Gilbert had begun the shaft sinking operation in 1978 and had a continuing presence at the mine since that time. At the time of citation the shaft had been excavated by Gilbert to a level approximately 70 to 80 feet below the 1050 landing. The record does not indicate how long it had taken Gilbert to excavate from the 1050 level to that lower level or how long the cited landing had been unguarded. It is self-evident, however, that all of it could not have been accomplished since the last ventilation system preshift examination was conducted by Occidental's employee. There is no basis in this record to assume that Occidental had failed to meet its obligation to take regular "gas samples and random gas samples" in this gassy mine. Nor does this record suggest that under continued normal mining conditions the violation would have been abated before Occidental's employee performed additional ventilation checks and methane sampling. See U.S. Steel Mining Co., Inc., PENN 83-336 (July 11, 1984); U. S. Steel Mining Co., Inc., PENN 83-63 (August 28, 1984).

Accordingly, based on the testimonial and documentary evidence of record, there is substantial evidence to support the Secretary's assertion that Occidental's employees were constantly exposed to the cited hazard. This enforcement action against Occidental is consistent with controlling precedent, the statute, the legislative history, the regulations and policy statement, and the facts before us.

I therefore dissent.



A. E. Lawson, Commissioner

Distribution

Barry F. Wisor, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

James M. Day, Esq.
Cotten, Day & Doyle
12th Floor
1899 L Street, N.W.
Washington, D.C. 20036

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 29, 1984

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
 :
 :
v. : Docket Nos. VA 81-40-R
 : VA 81-65
OLD DOMINION POWER COMPANY :

DECISION

This consolidated proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). The major issue on review concerns whether the Department of Labor's Mine Safety and Health Administration ("MSHA") properly charged Old Dominion Power Company ("Old Dominion") with a violation of the Mine Act. A Commission administrative law judge answered this question in the affirmative. 3 FMSHRC 2721 (November 1981) (ALJ). For the reasons that follow, we agree, but conclude that a penalty lower than that assessed by the judge is appropriate.

On January 22, 1980, a fatal accident occurred at an electrical substation located on property leased by Westmoreland Coal Company ("Westmoreland") from Penn-Virginia Resources. The electrical substation is an open air facility enclosed by a wire fence, and is adjacent to a mine access road. Westmoreland paid for the construction of the substation, which is comprised of utility poles, power lines, transformers, an electric meter, and a meter box. Electricity is transmitted on incoming lines to the substation, where it is stepped-down, or reduced, and then transmitted to a coal mine operated by Elro Coal Company ("Elro"), which leases the mine from Westmoreland. The electricity is used to power Elro's coal producing equipment. Elro sells all the coal it extracts to Westmoreland for resale to other customers.

Electricity at the mine site is provided by Old Dominion Power Company, a public utility doing business in southwest Virginia. Old Dominion transmits, distributes, and sells electricity. Although most of its customers are non-commercial, it sells electricity to some commercial and industrial customers. Old Dominion meters the electricity sold to its customers. Old Dominion installs, owns, and maintains all such meters which are regularly read by Old Dominion employees. Customers are billed on the basis of kilowatt hours used. In conformance with this practice, Old Dominion meters Westmoreland's substation. On a monthly basis an Old Dominion meter reader arrives at the substation, reads the meter, and visually inspects it. If any of the substation's components needs attention, Old Dominion's metering department is informed and an employee is sent to the substation to correct any problem. Old Dominion also owns and maintains five transformers at the substation. Old Dominion has its own key to the substation to allow access by its employees.

In his decision the Commission's administrative law judge succinctly summarized the events giving rise to this litigation:

The substation was first energized about 5 or 6 p.m. on January 21, 1980, by Westmoreland's electrical foreman, Terry Mullins. The next day, January 22, about 8:15 a.m., Mullins talked to [Old Dominion's] superintendent of meters, Jack Carr, on the telephone and expressed to Carr his doubts as to whether Old Dominion's meter at the substation was working properly because no light was visible in the meter and because the disk in the meter was turning counterclockwise. In Carr's opinion, the disk was supposed to turn counterclockwise, but, to make certain that there was nothing wrong with the meter, he sent two employees to the substation to check the meter. The two employees were James Harlow, a substation technician, and Leonard Lambert, a meter man, first class. Harlow had helped install the ... transformers and meter at the substation. Lambert would normally have participated in the installation, but he was on vacation when the equipment was originally installed sometime in December 1979. Lambert had, however, gone to the substation on January 21 and had installed a replacement meter.

When Harlow and Lambert arrived at the substation, Harlow, who was on the side of the van nearest to the substation, jumped out and looked at the fuse disconnects... . He was used to seeing the type of fuse link which is installed inside a tube. It was foggy and he did not see any tube or wire between the fuse holders or hanging down from the bottom holder, so he concluded that the substation was deenergized. [1/] Lambert took Harlow's word for the fact that the substation was deenergized. They did not at first go inside the fence around the substation to look at the meter because they concluded that the meter could not be checked while no power was flowing through it. Although the substation was energized and there was a hum coming from the transformers, they apparently did not hear the hum because of noise coming from a nearby generator.

^{1/} Old Dominion's general manager described the weather that day as "extremely bad ... [i]t was raining and fog was coming and going." Tr. 60.

Harlow and Lambert returned to their van, started the engine, and were ready to leave when it occurred to them that the GE transformers they had installed were of a new type and might have a rating of 5 KW instead of the 15 KW which they should have had. They decided to check the nameplate on the transformers to determine their classification. Harlow put on climbing equipment and went up the pole to examine the nameplate. He could not see the plate clearly because of water on it. He reached out with one hand to rub the water off the nameplate and was immediately electrocuted when his hand touched the energized transformer.

3 FMSHRC at 2724-25 (transcript citations omitted).

MSHA investigated the accident and determined that there had been a violation of 30 C.F.R. § 77.704, a mandatory mine safety standard. 2/ Thereafter, MSHA issued to Old Dominion a citation alleging a violation of that standard. 3/ Old Dominion contested the citation and a hearing was held. The administrative law judge concluded that Old Dominion was cited properly, affirmed the citation, and assessed a penalty of \$3,000 for the violation. We granted Old Dominion's petition for discretionary review and heard oral argument. 4/

The primary issue before us is whether, on the facts of this case, Old Dominion properly was found to be subject to the Mine Act. That determination must be made through interpretation and application of sections 3(d), 3(h)(1) and (2), and 4 of the Act. 30 U.S.C. §§ 802(d), (h)(1) and (2), and 803. For ease of reference we set forth the sections below:

2/ The standard states in part: "High voltage lines shall be deenergized and grounded before work is performed on them." There is no dispute that the terms of the standard were violated by the conduct of Old Dominion's employees.

3/ As stated by the judge, "[c]onfusion arose as to which entity should be cited for the violation because Elro Coal Corporation was using the power received at the substation, Westmoreland owned and operated the substation, and [Old Dominion's] employees did the work which caused the fatal accident." 3 FMSHRC at 2726 (transcript citation omitted). MSHA originally cited Elro. In April 1980, however, the citation was modified to name Westmoreland as the responsible operator. Finally, in January 1981, the citation was again modified to charge Old Dominion for the violation. The Department of Labor's Occupational Safety and Health Administration ("OSHA") also investigated the accident but took no enforcement action.

4/ In view of the nature of the issue presented, we requested additional industry and labor viewpoints to assist us in our deliberations. The Edison Electric Institute ("EEI") thereafter participated as an amicus curiae. The arguments of EEI, in its brief and at oral argument, have been most helpful to us in considering the important issues in this case.

Sec. 3. For the purposes of this Act, the term -

* * *

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

* * *

(h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(h)(2). For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

* * *

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

We first address whether the site of the alleged violation, the substation, was a "coal mine" or part of a "coal mine" as that term is defined by the Mine Act. Old Dominion attempts to differentiate portions of the geographic tract of land leased by Westmoreland Coal Company into "mine" and "non-mine" areas. It asserts that that portion of land at which coal is actually extracted from the ground is a "mine," whereas other areas somewhat removed in distance from the specific extraction locale, including the area of land on which the substation is located, should not be interpreted as being a mine or a part thereof. This narrow view of what constitutes a mine conflicts with the Act's expansive definition set forth above. Sections 3(h)(1) and (2)'s broad definition of coal mine undoubtedly covers a portion of a geographic tract of land leased to a coal operator on which is located an electrical substation providing power for mining operators on that same tract of land. The substation certainly qualifies as an "area of land," or a "structure," "facility," "machinery," "equipment," or "property" on such land, "used in ... the work of extracting coal." See S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 ("Legis. Hist."). ("[I]t is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of the Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.") See Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984), and cases cited therein. We therefore conclude that the substation is part of a coal mine and that the Mine Act and its standards can be applied to regulate working conditions at that site.

Because it is not disputed that a violation of the cited MSHA standard occurred in the course of work performed by Old Dominion employees, our next inquiry is whether Old Dominion was properly cited under the Mine Act for this violation. Section 4 of the Mine Act places the responsibility for compliance on mine "operators." Therefore, Old Dominion can be cited for a violation only if, on the facts of this case, it is an "operator." Section 3(d) defines an operator as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." We conclude that, on the facts of this case, Old Dominion was an independent contractor performing services or construction at the mine and, therefore, was properly cited for the violation committed by its employees.

As part of the 1977 amendments to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1969) (amended 1977) ("Coal Act"), the phrase "any independent contractor performing services or construction at such mine" was added to the Coal Act's definition of operator. The amendment was intended "to settle an uncertainty that arose under the Coal Act, i.e., whether certain contractors are 'operators' within the meaning of the Act," and "to clearly reflect Congress' desire to subject contractors to direct enforcement of the Act." Old Ben Coal Co., 1 FMSHRC 1480, 1481, 1486 (October 1979). Accord, Phillips Uranium Corp., 4 FMSHRC 549, 552 (April 1982).

Generally, the term "independent contractor" describes a party who "contracts with another to do something ... but who is not controlled by the other nor subject to the other's right to control with respect to

his ... conduct in the performance of the undertaking." Restatement (Second) of Agency § 2 (1958). Insofar as its relationship with Westmoreland Coal Company is concerned, we have no difficulty in concluding that Old Dominion is an "independent contractor" as that term is commonly used at law. Pursuant to contract Old Dominion is granted an easement to construct and maintain electric power and transmission lines on and over the mine operator's property. Substations on the property and "other points to be later designated" are to be provided power by Old Dominion. The mine operator has the contractual right "to connect any additional electric power or transmission lines, from time to time, with any line or lines of [Old Dominion]." In order to determine the amount of electricity used by the mine operator and the payment due, Old Dominion "has the privilege of metering each delivery point," and it does so on a monthly basis. In order to perform such metering, Old Dominion has access to mine property and its own key to the substation. Thus, it is clear that Old Dominion has a contractual obligation with Westmoreland and the requisite freedom from control in performing its obligation, and was serving as an independent contractor.

By its terms, however, the Mine Act is applicable to independent contractors "performing services or construction" at a mine. Old Dominion urges that this language limits the reach of the Mine Act to less than all "independent contractors," and that it is beyond that limit. We next examine whether Old Dominion was "performing services or construction" within the meaning of section 3(d). "Service" has been defined to include: "the performance of work commanded or paid for by another"; "an act done for the benefit or at the command of another"; and "useful labor that does not produce a tangible commodity." Webster's Third New International Dictionary (Unabridged) 2075 (1971). Pursuant to its contract with the mine operator, Old Dominion provided electricity at a suitable voltage and metered its consumption for billing. Old Dominion also provided labor to maintain the electrical system, including its meters and transformers as well as equipment owned by the mine operator, in proper and safe working condition. Old Dominion's employees had helped install the transformers at the substation, and had installed a replacement meter. 3 FMSHRC at 2424. At the time of the events at issue, Old Dominion was at the mine site at the behest of the mine operator to check the equipment to determine whether it was functioning properly and, if necessary, to replace any defective components. In our view, the work performed by Old Dominion constitutes the performance of a service and places it within the literal terms of section 3(d). 5/

We find it unnecessary to decide in this case whether "there may be a point ... at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services are being performed." National Industrial Sand Assoc. v. Marshall, 601 F.2d 689, 701 (3d Cir. 1979). See also Legis. Hist., supra at 602, 1315. Rather, we conclude that, if there is a point at which the literal reach of section 3(d) must be tempered, that point is not reached under

5/ Based on our conclusion that Old Dominion was performing services, we need not inquire further as to whether Old Dominion's work also qualifies as "construction" under section 3(d).

these facts. Here, Old Dominion's employees were at mine property at the request of the mine operator. The request for Old Dominion's services was made, and responded to, in accordance with a longstanding, and regularly maintained, business relationship defined by a written contract entered into in 1952 as well as custom and practice. The services or work to be rendered by Old Dominion included examination of an electrical facility providing power to the mine and the performance of any necessary repairs, services essential to the mine's operation. Old Dominion's assistance to Westmoreland in installing, maintaining, repairing, and replacing electrical equipment had been rendered in the past, was being rendered at the time of the events at issue, and was to be anticipated in the future. The extent of Old Dominion's contact with the mining process cannot be viewed as de minimis. Accordingly, we conclude that in these circumstances, Old Dominion is properly subject to MSHA standards regulating safe performance of electrical work on mine sites.

We emphasize that by citing Old Dominion for the violation committed by its employees, the Secretary has acted in accordance with the Commission's longstanding view that the purpose of the Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed. Old Ben, supra; Phillips Uranium, supra. By citing the operator with direct control over the working conditions at issue, effective abatement often can be achieved most expeditiously. Id. Citation of Old Dominion is also consistent with the Secretary's conclusion, after rulemaking, that "the interest of miner safety and health will best be served by placing responsibility for compliance ... upon each independent contractor." 45 Fed. Reg. 44494, 44495 (July 1, 1980).

Old Dominion argues that its work activities, whether on or off a mine site, should be regulated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1982) ("OSHAct"). The Secretary of Labor enforces both the Mine Act and the OSHAct and has considerable administrative discretion in determining which of the two statutes should be applied in circumstances where either reasonably could be applied. In the present case, the Secretary has made the determination that compliance with the standards promulgated under the Mine Act is preferable, and this determination is entitled to deference. Nor does the Secretary's decision to proceed under the Mine Act run counter to the dictates of the OSHAct, which anticipates the potential for overlapping agency jurisdiction and eliminates the potential conflict by providing that the OSHAct shall not apply to "working conditions of employees with respect to which other federal agencies ... exercise statutory authority to prescribe or enforce standards ... affecting occupational safety and health." 29 U.S.C. § 653(b)(1). Here, MSHA has statutory authority and has exercised that authority under the Mine Act.

We note that amicus curiae EEI has initiated discussions with the Secretary concerning whether regulation by OSHA of the work activities of electrical utilities on mine sites, rather than by MSHA, is more appropriate. We encourage these discussions. Because of the Secretary's discretion in this area, such discussions are a necessary first step in addressing the concerns articulated by EEI on behalf of the electrical utilities that it represents. We will observe with interest the progress of these discussions.

In sum, we conclude that the Secretary's decision in this case to hold Old Dominion responsible for the violative act committed by its employees is within his statutory authority, is consistent with the purposes and policies of the Act, and should not be disturbed.

We address three other challenges raised by Old Dominion to the legality of the Secretary's issuance of the citation. Old Dominion argues that the Secretary's definition of "independent contractor" at 30 C.F.R. § 45.2(c) has been applied to it in an arbitrary and capricious manner, and that proper application would not result in its designation as an independent contractor. ^{6/} We disagree. On its face the regulation simply incorporates the definition of "person" in section 3(f) of the Mine Act, 30 U.S.C. § 802(f), with the definition of "operator" in section 3(d). As such, the regulation does not differ substantively from the terms of the Act itself, and the reach of the regulation is coextensive with the Mine Act.

Old Dominion also argues that the language of a continuing resolution on appropriations, enacted on December 15, 1981, sheds light on the question of the Mine Act's coverage of its activities. H.J. Res. 370, 95 Stat. 1183 (1981), provided funding for a portion of fiscal year 1982 to various federal agencies and departments. In part, the resolution prohibited MSHA from enforcing the Mine Act "with respect to any independent construction contractor who is engaged by an operator for the construction, repair or alteration of structures, facilities, utilities ... located on (or appurtenant to) the surface areas of any coal or other mine, and whose employees work in a specifically demarcated area, separate from actual mining or extraction activities." H.J. Res. 370, § 132, 95 Stat. 1199 (1981). We conclude that this provision has no bearing on the question before us. The violation, the Secretary's citation of Old Dominion, the hearing below, and the administrative law judge's decision all preceded the enactment of the continuing resolution. "Resolution 370 did not otherwise vitiate the force of the original authorization. Mine operators subject to the Act remained under the same substantive legal obligations, the implementing standards and regulations promulgated under the Act remained in force; and the statutory basis for enforcement litigation remained in effect." Carolina Stalite Co., 734 F.2d at 1558. See also Secretary on behalf of Cooley, 6 FMSHRC 516, 525 n. 3 (March 1984). Also, "[w]hatever enforcement powers it took from MSHA were returned to the agency when Res. 370 was superseded seven months later by a supplemental appropriations bill. H. R. 6685, § 204, 96 Stat. 180, 192 (1982)." Carolina Stalite, 734 F.2d at 1557 n. 15.

^{6/} 30 C.F.R. § 45.2(c) provides:

"Independent contractor" means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine.

Old Dominion's final challenge to the validity of the citation is that the citation must be dismissed because it was not issued to Old Dominion with "reasonable promptness" after the occurrence of the violation. As previously set forth in note 3, although the violation occurred in January 1980, a citation was not issued to Old Dominion until January 1981. Section 104(a) of the Mine Act requires that "[i]f ... the Secretary ... believes that an operator ... has violated this Act, or any mandatory ... standard, ... he shall, with reasonable promptness, issue a citation to the operator." 30 U.S.C. § 814(a). Old Dominion asserts that the one-year delay before it was cited violates section 104(a)'s mandate. This argument ignores the effect of the last sentence of section 104(a): "The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." The Mine Act's legislative history explains:

There may be occasions where a citation will be delayed because of the complexity of issues raised by the violations, because of a protract[ed] accident investigation, or for other legitimate reasons. For this reason, section [104(a)] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action.

Legis. Hist. at 618. The administrative law judge accurately described the development of the case law concerning independent contractor liability and the course of MSHA's rulemaking activities during the time of the events at issue. See 44 Fed. Reg. at 44494. The legal issue posed here concededly is novel. Most important, however, Old Dominion has not shown that it was prejudiced by the delay. Indeed, Old Dominion was aware from the time of its employee's fatal accident that an investigation involving its actions was being conducted by MSHA, and it has been given a full and fair opportunity to participate in all stages of this proceeding. Accordingly, we affirm the judge's rejection of Old Dominion's argument that the citation must be dismissed because of the delay in its ultimate issuance to Old Dominion.

Old Dominion's final argument is that, even if it was cited properly for the violation, no penalty for the violation should be assessed because the employees' violative actions were beyond its control and could not have been foreseen. In particular, Old Dominion argues that the judge's findings concerning its negligence are not supported by the record. We reject Old Dominion's argument that no penalty should be assessed. "[B]oth the text and legislative history of section 110 [of the Mine Act] make clear that the Secretary must propose a penalty assessment for each alleged violation and that the Commission and its judges must assess some penalty for each violation found." Tazco, Inc., 3 FMSHRC 1895, 1897 (August 1981). We conclude, however, that the record does not support the judge's findings concerning Old Dominion's negligence and that a penalty lower than that assessed by the judge is appropriate.

Section 110(i) of the Mine Act requires that in assessing civil penalties the Commission "shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i). Only the judge's findings regarding negligence are at issue on review.

The MSHA inspector who issued the citation found that the violation "could not have been known or predicted, or occurred due to circumstances beyond the operator's control." The inspector further remarked that "the employees were told the substation was energized before they left their duty station." Exh. 3 (Inspector's Statement). Yet, the judge proceeded to find the operator negligent. This finding was based primarily on two conclusions he drew from the evidence: (1) Old Dominion failed to instruct the employees properly before they were dispatched to the substation; and (2) Old Dominion knew or should have known that the deceased employee "had a proclivity for cutting corners [and] disobeying safety regulations." 3 FMSHRC at 2743. We conclude that these findings are not supported by substantial evidence of record.

The surviving employee, Lambert, testified that Old Dominion's meter superintendent, Jack Carr, told him on the morning of January 22 that Westmoreland's electrical foreman had informed Carr that he thought a light was out in the substation's meter and that a transformer might be bad. Lambert also testified that Carr told him that the substation had been energized. Old Dominion's general manager testified that Harlow and Lambert had been told before going to the substation that it was energized. Thus, the record establishes that Harlow and Lambert were told specifically that the substation was energized, the meter might not be functioning properly, and a transformer might be bad.

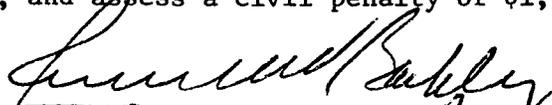
We have held previously, for purposes of considering the section 110(i) penalty criteria, that when a rank-and-file employee's actions violate the Act, "the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." Southern Ohio Coal Co. 4 FMSHRC at 1459, 1463-64 (August 1982) (emphasis in original); A.H. Smith Stone Co., 5 FMSHRC 13, 15 (January 1983). The Secretary elicited no evidence that Old Dominion's supervision, training or disciplining of its employees was inadequate. Nor did he attempt to further demonstrate what Old Dominion should have done to meet its duty of care. There is, for example, no testimony concerning Old Dominion's customary procedures in such a situation or analogous procedures in the industry. The MSHA inspector's testimony was restricted to the negligent actions of the employees themselves. Meter superintendent Carr neither testified nor was deposed. The only testimony regarding Old Dominion's safety procedures was given by Old Dominion's general manager who testified as to the comprehensiveness of the company's program, the experience of Harlow and Lambert, and the specific safety directive which prohibits Old Dominion employees from working on energized, ungrounded high voltage wires. The judge seems to have overlooked the evidence of record and simply inferred Old Dominion's negligence from the fact of the violation. We hold that this was error

and that substantial evidence of record does not support a finding that the instructions of management, or lack thereof, contributed directly or indirectly to the violation at issue. See Southern Ohio Coal Co., 4 FMSHRC at 1465; Nacco Mining Co., 3 FMSHRC 848 (March 1981).

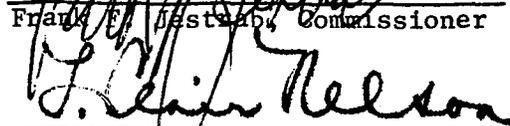
The judge's further finding that Old Dominion should have known Harlow had a proclivity for unsafe acts also lacks adequate evidentiary support. The judge based his finding upon events which occurred the day of the accident, after Harlow had left management's direct supervision. The appropriate question is whether management reasonably could have foreseen Harlow's negligent conduct. The record contains no evidence of past unsafe conduct by Harlow or of a careless attitude on his part. In fact, the only evidence of Harlow's conduct before the fatal accident suggests that Old Dominion had reason to believe Harlow was concerned with safety. Old Dominion's general manager described Harlow as a "very capable" and "safety conscious" employee, who had missed only three safety meetings in the past 10 years. Tr. 66, 69-70. Lambert described him as "one of the most safety conscious men we had." Tr. 91. We therefore conclude that substantial evidence does not support the judge's finding that Old Dominion knew or should have known that Harlow would act in an unsafe manner while engaged in the work which resulted in a fatal accident.

Because, based on the above, we conclude that substantial evidence of record does not support the judge's finding that Old Dominion was negligent, we must modify the penalty assessed by the judge. Southern Ohio Coal Co., 4 FMSHRC at 1465. Old Dominion has not contested the judge's findings that it is a large operation; that payment of civil penalties under the Act will not affect its ability to continue in business; that it has no history of prior violations; that a good faith effort to achieve abatement was made; and that the gravity of the violation was extremely serious. Given these findings and our conclusion that negligence was not established, we find that a penalty of \$1,000 is appropriate and consistent with the Act.

Accordingly, we affirm the judge's conclusion that, on the facts of this case, Old Dominion is an independent contractor and an operator within the meaning of section 3(d) of the Mine Act, and was properly cited for the violation of 30 C.F.R. § 77.704. We vacate the judge's finding of negligence and his assessment of a \$3,000 penalty, and assess a civil penalty of \$1,000.


Richard V. Backley, Commissioner


Frank F. Best, Commissioner


L. Clair Nelson, Commissioner

Commissioner Lawson concurring and dissenting:

The Commission is in agreement that Old Dominion is an independent contractor and an operator within the meaning of the Act. There is also no dispute that Old Dominion violated the Act and that such violation resulted in the death of miner James Harlow. However, as in Southern Ohio Coal Co., 4 FMSHRC 1459 (August 1982) and U.S. Steel Corp., 6 FMSHRC 1423 (June 1984), I dissent from my colleagues' reduction of the penalty imposed. Here, as there, the majority finds, without explanation, "...that a penalty lower than that assessed by the judge is appropriate." Going beyond even the generous dispensations granted the violative operator in those cases, they have reduced by two-thirds the exceedingly moderate penalty set by the judge below. And, once more, the majority has failed to provide a reasoned analysis to support reducing the penalty to \$1000 for the miner killed as a consequence of this violation.

Old Dominion's employee was electrocuted because he concluded erroneously that the substation was not energized. He reached this conclusion because he looked for but did not see the barrel fuse disconnect that was customarily used when energizing substations. His fellow miner, William Lambert, also looked and failed to observe the anticipated disconnect. Because of this, they were unaware that the substation was energized, since Westmoreland's electrical foreman had installed a different type fuse link when he energized the substation the day before this fatality took place. It is undisputed that Harlow and Lambert were told at the time they were given their work assignment that the substation was energized. It is also undisputed that Old Dominion had never energized a substation without the use of a barrel fuse. However, Old Dominion did not energize this substation, Westmoreland did. 1/

The testimony of Old Dominion's General Manager, H. E. Armsey, is revealing:

Q. Would you explain what the investigation revealed that Mr. Harlow thought or saw when he looked at these?
A. Yes, sir. In our operation there is a barrel that would fit between these two termination points that would include a fuse link. And if there is no connection between the upper terminal and the lower terminal, then it is thought that the facility is de-energized and that there is an air gap there. But during the investigation it would [sic] found that there was a physical connection through the utilization of a fuse link rather than the fuse barrel.

* * *

1/ These miners' confusion was understandably enhanced because the transformer at the substation was the first of its type that Old Dominion had purchased and installed.

Q. And inside that would be a fuse, or a conductor which contains little fuses down here?

A. Yes, sir.

Q. And they would be enclosed inside a barrel, like that.

A. That is correct.

Q. And these barrels were all gone? There were none there? There were just none there?

A. That is correct.

Q. But your investigation determined that just the little wire which normally is inside it had been wired across?

A. That is correct.

Q. So when Mr. Harlow looked up there, he didn't see this....the barrel because it wasn't there and he didn't see this but it was there?

A. That is correct.

Tr. at 53-4

Q. So the best that you can determine is, the cause of Mr. Harlow's death is because he thought there was no energy because this is missing?

A. He was looking for a big barrel and he didn't see it and didn't recognize the fact that there was a jumper across what ordinarily would be a path used here. And he said that the substation was de-energized, even though he had been told before they left the storeroom that the substation was energized.

Tr. at 61-2 (emphasis added).

The corporate negligence of Old Dominion is thus directly established in this case because of its failure to ascertain the type of installation at the assigned worksite before its employees were dispatched to "check our equipment" (Tr. 82). This failure to instruct Harlow and Lambert as to the equipment and conditions they would encounter resulted in the death of miner Harlow, as the judge below found. As noted in my dissenting opinion in Southern Ohio Coal Co., "[w]hile 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." 4 FMSHRC at 1471 (emphasis in original).

Old Dominion argues that the violative conduct of its employees was unforeseeable and beyond its control. To the contrary, Old Dominion failed to determine the type of fuse connection used by Westmoreland at this mine site. Harlow and Lambert thus looked for and did not see the barrel disconnect that Old Dominion had--without exception--installed in all of its other substations, one with which they were familiar. It was therefore certainly foreseeable that they would, as both did, assume that this station was not energized. To find Old Dominion free of any negligence

in this instance is thus to reward the same self-induced ignorance and see-no-evil approach to safety recently disavowed by the majority in Roy Glenn, Agent of Climax Molybdenum Co., FMSHRQ Docket No. WEST 80-158-M (July 17, 1984). As in that case, where my colleagues did not dispute my enunciation of management's statutory duty to maintain safe and healthful working conditions, the exercise of forethought is required from those in positions of supervisory responsibility. This operator failed to meet that responsibility, which does not terminate merely because the employee is out of sight. Having failed to ascertain before these miners were dispatched to this substation to work on a 12,000 volt system whether the fuse connection installed by Westmoreland was of the standard configuration with which its employees were familiar, Old Dominion cannot now be permitted to escape the consequence of its negligent inaction. The combination of supervisory and non-supervisory negligence in this case proved disastrous.

15

My colleagues reject the bases for the judge's finding of negligence, the only challenged aspect of the judge's analyses of the statutory penalty assessment criteria set forth in section 110(i) of the Act. They then substantially reduce the penalty imposed. ^{2/} However, the decision below does not suggest, much less state, that any dollar, percentage, or other numerical value is assigned to the "negligence" criteria. The judge's conclusion that the violation was extremely serious, a gravity determination that is not disputed, would itself support the judge's penalty assessment. Nevertheless, the majority does not independently evaluate Old Dominion's negligence on the basis of record evidence or cure what it views as deficiencies in the judge's opinion by itself assigning numerical or other objective indicia to the penalty assessment factors. Rather, my colleagues' opinion is entirely silent as to the dollar amounts to be assigned to five of the section 110(i) criteria, although it does not dispute the gravity of the violation--obviously maximum in view of the death of miner Harlow. No future guidance is therefore furnished to mine operators or the Secretary. Conclusorily glossing over the two-thirds penalty reduction falls far short of being statutorily satisfactory or in accord with the Act.

The Act establishes a standard of strict liability for violations thereof, i.e., no fault or negligence is required to establish a violation. Here, however, it is unquestionable that there was a violation of the Act, and both supervisory as well as non-supervisory miner negligence. It is a truism that a corporation can only act through its employees, and nowhere in the Act, the legislative history, or our precedents is there any suggestion that operator negligence is to be disregarded if attributable in part to a non-supervisory miner. To artificially allocate penalty dollars between an operator and its employee miners provides a ready avenue for an operator to escape penalties and their intended deterrent effect. The operator which structures its operation 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 and with the mandatory penalty assessment processes required by the Act.

^{2/} The majority in this case goes out of its way to reduce the penalty set by the judge below, notwithstanding the fact that the operator's petition for review presented only the contention that no penalty should have been assessed, a contention clearly without merit under this Act. Section 110(a). Indeed, counsel for Old Dominion on oral argument made no mention of the penalty imposed.

Providing a means for the avoidance or drastic reduction of penalties undercuts compliance by weakening the strict liability and stringent penalty scheme established by the Mine Act. The majority's importing of a tort standard of liability into the penalty sections of the Act, with all its concomitant complexities, is to graft on to our statute concepts never envisioned by its drafters. Although my conclusion regarding Old Dominion's negligence in this matter is based on considerations somewhat different than those utilized by the judge, the result is the same. For the reasons set forth above, and as the judge below found, the majority's assertion that substantial evidence does not support a finding that the directions of management, or lack thereof, contributed to the violation at issue, is thus in error. 3/

The penalty assessed by the judge, based in major part on the high gravity of the violation, is in accord with the congressional intent expressed in the Mine Act's legislative history. Legis. Hist. at 603, 628-30. As the Senate Committee Report notes:

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.

* * *

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...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.

S. Rep. No. 95-181, Legis. Hist. at 629 (emphasis added).

3/ Overturning substantial evidence has been unsuccessfully attempted by this Commission before, to its subsequent embarrassment. As the Court of Appeals for the District of Columbia Circuit stated:

[T]he Commission is statutorily bound to uphold an ALJ's factual determinations that are supported by substantial evidence.

Donovan v. Phelps Dodge Corp., 709 F.2d 86, 90 (D.C. Cir. 1984), see Nacco Mining Co., 3 FMSHRC 848 (April 1981).

The Commission has stated,

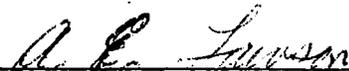
The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. Cf. Long Manufacturing Co. v. OSHRC, supra, 554 F.2d [903] at 908 [8th Cir. 1977]. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme.

Sellersburg Stone Co., 5 FMSHRC 287, 294 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). As in Sellersburg,

Although the penalties assessed by the judge far exceed those proposed by the Secretary before hearing, based on the facts developed in the adjudicative record [I] cannot say that the penalties assessed are inconsistent with the statutory criteria and the deterrent purpose behind the Act's provision for penalties. Hence, [I] find that the judge's penalty assessments do not constitute an abuse of discretion.

Id. at 295, quoted in part, 736 F.2d at 1153.

I therefore dissent to the reduction of the penalties imposed.



A. E. Lawson, Commissioner

Collyer, Chairman, dissenting:

My colleagues and I agree that the fatal accident which led to this litigation occurred at the site of a mine. Therefore, regulations of the Mine Safety and Health Administration of the Department of Labor properly cover all activities at the Elro substation. While amicus curiae Edison Electric Institute has raised very serious questions about application of MSHA standards to high voltage power lines, such questions must be resolved in the first instance between the industry and the Department.

However, my colleagues also decide today that a power company's metering of electrical usage by a mine is sufficient to turn the power company itself into an operator under the Mine Act. By the adoption of this decision, the majority implicitly holds that every vendor who approaches mine property is a mine operator subject to all of the requirements of the Act. This, I am sure, will be news to all public utilities, to other mine vendors - and to the Congress of the United States. I dissent.

My colleagues have glossed over the facts of Old Dominion's relationship with Westmoreland because those facts hamper the ease with which they reach their result. However, on the facts contained in this record, I conclude that Old Dominion acted as a vendor of electricity, not a provider of services at the Elro substation. The contrary decision of the majority is reached on the basis of conjecture and a stretching of the record testimony with which I cannot agree.

The facts are undisputed. Westmoreland Coal Company leased part of its land holdings to Elro Coal Company to mine coal at a new mine. The mined coal was to be sold by Elro to Westmoreland. In preparation for the new mine, Elro contracted with the Vanderpool Electric Corporation to build transmission lines from Old Dominion's high power lines to Westmoreland property where a substation could be built. Old Dominion had nothing to do with building the transmission lines to the substation. Westmoreland then built the Elro substation to reduce the incoming power to the proper voltage for use in the mine. The reduction in power was accomplished by large transformers. Old Dominion had nothing to do with the ownership or construction of the substation. In December 1979, when the substation was completed, Old Dominion installed metering equipment - and only metering equipment - at the substation for its billing purposes, so that it could measure the amount of electricity used by Westmoreland and Elro. The metering equipment required five smaller transformers to

reduce the power to a measurable level. Thereafter, Old Dominion would only visit the substation to read the meter on a monthly basis. The substation had been energized for one day at the time of the accident, which occurred when Old Dominion employees came to the site to check the operation of the meter.

On these bare facts, the majority erroneously concludes that Old Dominion was providing the requisite services under Section 3(d) of the Mine Act to transform the public utility into a mine operator.

I cannot agree that Old Dominion was "providing services" for Westmoreland or Elro at this substation. The power company metered electricity usage for its own billing purposes, not for any purposes of the production operators. All the ownership, construction, maintenance, operation and repair of the substation were solely under Westmoreland's control. Old Dominion installed its meter not to "provide services" to the mine, but solely in order to measure the quantity of electricity that it, as a vendor, sold to the mine.

The majority opinion skips over these crucial distinctions by concluding:

The services or work to be rendered by Old Dominion included examination of an electrical facility providing power to the mine and the performance of any necessary repairs, services essential to the mine's operation. Old Dominion's assistance to Westmoreland in installing, maintaining, repairing, and replacing electrical equipment had been rendered in the past, was being rendered at the time of the events at issue, and could be anticipated in the future.

Dec. at 7. The totality of evidence relating to the "examination" of this substation by Old Dominion does not support the majority's conclusion and, in fact, underscores that Old Dominion's sole interest at the substation was in its own metering equipment.

Q. Would [a meter reader on the monthly visit] perform any inspection or services over the other five articles?

A. Only visual and only by probably a meter reader that is not a meter man. He might check the general appearance of the equipment to see if there was anything that he saw that was out of line or might need attention.

Tr. 36 (emphasis in original). My colleagues turn this limited testimony about a visual inspection of "five articles" into a service performed for Westmoreland. This is not an accurate reading of the record. As prior testimony makes clear, the

"five articles" referred to in the question were the small transformers installed by Old Dominion so that electricity could pass through the meter without damage to the meter. Any "examination" that would occur would be only a visual check of Old Dominion's own equipment, used exclusively to meter the mine's use of electricity. Such an "examination" would not provide any service to the mine operator, but only to the vendor.

Uncontradicted testimony consistently limited the power company's role at the Elro substation to its metering equipment. Old Dominion General Manager H. E. Armsey testified that Old Dominion would not be involved in repair and restoration of power at the substation after an industrial accident or weather damage unless there were a problem involving the metering equipment. If the Elro mine lost power, Elro would call Westmoreland because Westmoreland has the inhouse expertise. While Armsey agreed that if Westmoreland had questions itself, it would be "logical" for it to call Old Dominion, that was because "if the meter doesn't run, we don't sell electricity." Tr. 38. I cannot agree with the apparent conclusion of my colleagues that an unspecified occasion of major difficulty with the substation at some time in the future, which may lead Westmoreland to seek advice from Old Dominion, and which advice the power company may provide in order to continue to sell electricity, is sufficient provision of services to turn Old Dominion into a mine operator.

The limited involvement of Old Dominion with the Elro substation was clearly explained in uncontradicted testimony by General Manager Armsey:

Q. And at this substation what facilities or what properties did Old Dominion have there?

A. Our only facilities were the metering equipment which measures the energy that would be used at this location.

* * *

Q. Who has the responsibility to maintain this substation and the transmission lines in and lines out?

A. Someone other than Old Dominion Power Company. We weren't involved with the transmission line and substation.

Tr. 27. This degree of presence by Old Dominion at the substation would be less than that of a service representative from Xerox Corporation, who would install, maintain, repair and replace defective dry copier equipment in the mine office used for

mine plans, shift assignments and the like. By its decision, and the expansive terms it adopts, the majority has declared that Xerox is also a mine operator. I cannot believe that Congress intended this result.

To the contrary, Congress clearly excepted vendors such as Old Dominion from the reach of the definition of "operator." As even the Secretary of Labor recognized throughout most of the tortuous history of his independent contractor regulations, Congress intended that the only mine contractors who could be held liable as operators were those having some continuing presence at a mine site. In the Supplementary Information accompanying MSHA's initial independent contractor proposed rule, the Secretary specifically noted that:

Congress' intention that the Act be enforced against independent contractors that have a continuing presence at a mine is explicitly stated in the legislative history. The Conference Report provides that inclusion of independent contractors in the definition of operator was intended to permit enforcement of the Act against independent contractors "who may have a continuing presence at the mine." S. Rep. No. 95-461, 95th Cong., 1st Sess. 37 (1977).

44 Fed. Reg. 47746, 47748 (Aug. 14, 1978) (emphasis added). As the Secretary additionally recognized, limiting the statutory term "operator" to those independent contractors who have a significant degree of involvement in mine operations is also consistent with judicial constructions of the Mine Act. For example, the Third Circuit has pointed out:

The reference made in the statute only to independent contractors who "perform services or construction" may be understood as indicating, however, that not all independent contractors are to be considered operators. There may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed. Such a reading of the statute is given color by the fact that other persons deemed operators must "operate[], control[], or supervise[]" a mine. Designation of such other persons as operators thus requires substantial participation in the running of the mine; the statutory text may be taken to suggest that a similar degree of involvement in mining activities is required of independent contractors before they are designated operators.

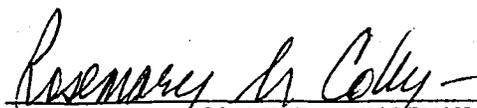
National Industrial Sand Association v. Marshall, 601 F.2d 689, 701 (1977) (emphasis added). See also, Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853, 861-862 (D.C. Cir. 1978); Bituminous Coal Operators Association v. Secretary of the Interior, 547 F.2d 240, 246-247 (4th Cir. 1977).

In his final rule, however, the Secretary appears to have abandoned the requirement that an independent contractor have a continuing presence at a mine in order to be considered an operator. In the preamble to the final rule, the Secretary stated that "as a general rule, MSHA will issue citations . . . to independent contractors for violations . . . committed by them and their employees." 45 Fed. Reg. 44494 (July 1, 1980). In support of this broad statement, the Secretary said that "MSHA has concluded that a regulation that would distinguish some contractors from others in formulating a comprehensive enforcement scheme could, at this time, be overly complex, imprecise and lead to arbitrary decisions . . ." 45 Fed. Reg. at 44495. To the extent that the final rule is not reconciled by the Department of Labor and this Commission with the express Congressional intention that only those contractors with a "continuing presence" at a mine site be considered operators, it reflects an erroneous and over-reaching reading of the Act.

Whatever the merit to the Secretary's decision that it would be less complex and, thus, more administratively convenient to consider all independent contractors as operators, that convenience cannot legally override Congress' express distinction between those contractors who can be cited as operators (contractors "providing services or construction" with a "continuing presence") and those who cannot (all others).

By its definition of services ("an act done for the benefit or at the command of another"), the majority includes the apocryphal Coca Cola man coming onto mine property to refill the Coke machine in the office. While I was once confident that the majority would, if asked directly, agree that the Coca Cola Company and the Xerox Corporation are merely vendors, not mine operators, the majority decision fails to provide any basis for such a distinction and, in fact, negates the Congressional directive. In order to include this power company within the statutory definition, the majority has had to stretch the definition so far that it will now encompass every vendor approaching mine property.

I would hold that the Secretary erroneously cited a non-operator and would vacate the citation and penalty. I dissent from the majority's failure to do so.


ROSEMARY M. COLLYER, CHAIRMAN

Distribution

Stephen C. Yohay, Esq.
Barbara L. Neilson, Esq.
McGuiness & Williams
1015 15th St., N.W.
Washington, D.C. 20005

Anna Wolgast, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

William D. Lambert, Esq.
Ogden, Robertson & Marshall
1200 One Riverfront Plaza
Louisville, Kentucky 40202

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 30, 1984

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket Nos. LAKE 82-35-M
UNITED STATES STEEL CORPORATION : LAKE 82-6-RM

DECISION

This consolidated proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982), involves the interpretation and application of 30 C.F.R. § 55.15-5, a mandatory personal protection standard. ^{1/} The Commission's administrative law judge concluded that U.S. Steel Corporation ("U.S. Steel") violated the standard and assessed a civil penalty. 4 FMSHRC 1104 (June 1982)(ALJ). For the reasons that follow, we affirm the judge in part and reverse and remand in part.

The events at issue in this proceeding occurred at U.S. Steel's Minntac Mine iron ore preparation plant in Mountain Iron, Minnesota. At this plant U.S. Steel produces taconite pellets, a high grade iron ore concentrate used in making steel. After iron ore concentrate is formed into marble-sized taconite pellets during the agglomeration phase of the preparation process, the pellets are discharged into a cooler. A cooler is a large doughnut-shaped installation, about 56 feet in diameter, where the hot taconite pellets are cooled on a circular conveyor consisting of a series of metal grates, called pallets. Each pallet is about 8 feet long and widens from about 5 feet at its inner end near the center of the cooler to just under 7 feet at its outer end.

When the cooling cycle is almost complete a pallet pivots open to an upright position and tips the cooled pellets into a storage bin 18 feet below the pallet. There is only one opening to the storage bin, so each pallet pivots open in turn when it is in position over the opening. When a pallet is in the open position it creates two openings on either side of its axis, one of which is large enough for a person to fall through. There is an entrance into the cooler located about 4 to 4-1/2 feet above the pallet conveyor floor in the vicinity of the opening to the storage bin.

^{1/} 30 C.F.R. § 55.15-5 provides:

Mandatory. Safety belts and lines shall be worn when men work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

On September 10, 1981, during a regular inspection of the preparation plant, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") observed a maintenance foreman, who was not wearing a safety line, climbing out of a cooler after performing a repair. While exiting, the foreman was in the immediate vicinity of the opening to the storage bin. The cooler was not operating at the time. During the repair work, a pallet was in the upright position over the storage bin. Plywood panels had been placed over the openings created by the raised pallet. Before climbing out of the cooler, the foreman handed up the plywood panels.

After investigating the situation, the inspector concluded that there was a danger of falling 18 feet to the storage bin through the large opening created by the raised pallet, and that the foreman's failure to wear a safety line was in violation of 30 C.F.R. § 55.15-5. The inspector also found that the violation was significant and substantial and caused by the operator's "unwarrantable failure" to comply with the standard, and he cited the violation in a withdrawal order issued pursuant to section 104(d)(2) of the Mine Act. 30 U.S.C. § 814(d)(2). 2/

2/ Section 104(d) of the Mine Act provides:

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

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

30 U.S.C. § 814(d)(1) & (2).

U.S. Steel filed a notice of contest of the order, and the Secretary of Labor filed a petition for the assessment of a civil penalty. At the consolidated hearing before the Commission's administrative law judge, U.S. Steel argued that the standard was too vague to be enforced. In his decision the judge disagreed. He concluded that the standard's phrase, "danger of falling," did not extend to de minimis situations, i.e., possible falls of only a few inches or feet, and was sufficient to apprise "reasonably prudent operators" when safety belts are to be worn. 4 FMSHRC at 1109. Finding that an "ordinary working person" would have recognized a danger of falling through the large opening created by the raised pallet in the cooler, the judge concluded that, on the facts present in the case, the foreman's exit from the cooler amounted to a violation of section 55.15-5. 4 FMSHRC at 1109-10.

The judge also concluded that the inspector had issued a valid withdrawal order under section 104(d)(2) of the Mine Act. The judge held that to sustain a section 104(d)(2) withdrawal order, the Secretary of Labor has the burden of proving the absence of an intervening clean inspection of the entire mine and that the violation was caused by an unwarrantable failure to comply with a mandatory standard. The judge relied on CF&I Steel Corporation, 2 FMSHRC 3459 (December 1980), in which we approved an identical allocation of evidentiary burdens under the analogous provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977). Although acknowledging that the evidence was "skimpy" and "possibly conflicting," the judge held that the Secretary had made out a prima facie case establishing the absence of an intervening clean inspection. 4 FMSHRC at 1107-09.

Finally, relying on the definition of unwarrantable failure announced under the 1969 Coal Act by the Department of the Interior's Board of Mine Operations Appeals in Zeigler Coal Company, 7 IBMA 280 (1977), the judge held that the violation was unwarrantable because it was committed by a foreman, a representative of management, who "should have known of the hazard and should have taken steps to avoid it." 4 FMSHRC at 1110.

We turn first to U.S. Steel's challenge that the standard is too vague to be enforced. The standard's requirement that safety belts and lines shall be worn by miners where there is a danger of falling is the kind of regulatory mandate "made simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). We have held previously that application of such a broad standard to particular factual contexts does not offend due process if the operator's allegedly violative conduct is judged with reference to the objective test of what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, relevant facts, and protective purpose of the standard. U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982). Subsequent to the granting of review in this case, we applied this construction to the

identical personal protection standard dealing with safety lines contained at 30 C.F.R. § 57.15-5. Great Western Electric Company, 5 FMSHRC 840, 841-42 (May 1983). U.S. Steel has presented no arguments that would lead us to reconsider that holding. The judge's application of the standard in this case, while differing in some minor respects from the Great Western formulation, was sufficiently similar to our approach in that case to pass muster on review. We therefore reject U.S. Steel's vagueness challenge.

U.S. Steel's petition for discretionary review frames the issue with respect to the judge's conclusion of a violation only in terms of a generalized vagueness challenge. Nevertheless, the operator's brief contains some discussion that can be read as a challenge to the judge's specific findings that U.S. Steel violated the standard. We must emphasize the procedural bar against a party attempting in its brief to enlarge upon the issues raised in its petition for discretionary review. See 30 U.S.C. § 823(d)(2)(A)(iii)&(B); Commission Procedural Rules 70(f) & 71, 29 C.F.R. §§ 2700.70(f) & 71. We wish to make clear, however, that the judge's findings are supported by substantial evidence.

There was no dispute that the foreman, when climbing out of the cooler, did not wear a safety belt. The judge evaluated the foreman's testimony describing his exit from the cooler, and concluded that a danger of falling should have been recognized under the circumstances. 4 FMSHRC at 1109-10. The exit from the cooler was at least four feet above the pallet conveyor floor. The foreman testified that he pulled himself out by grabbing a gate bar located at the exit while bracing his knee against the cooler wall for balance. As noted above, the foreman had already handed up the plywood panels used to cover the openings over the storage bin and his exit was performed in the immediate vicinity of the openings. An 18-foot drop would have occurred if the foreman had fallen through the large opening over the storage bin. We conclude that substantial evidence, evaluated in the light of our Great Western Electric test, supports the judge's conclusion that U.S. Steel violated the standard.

We next examine the judge's findings concerning the validity of the section 104(d)(2) withdrawal order. The plain language of section 104(d)(2) of the Mine Act (n. 2 supra) establishes three general prerequisites for the issuance of an initial section 104(d)(2) withdrawal order: (1) a valid underlying section 104(d)(1) withdrawal order; (2) a violation of a mandatory safety or health standard "similar to [the violation] that resulted in the issuance of the withdrawal order under [section 104(d)(1)];" and (3) the absence of an intervening "inspection of such mine disclos[ing] no similar violations."

Our resolution of the issue raised in this case turns on the third element -- the intervening clean inspection. Recently, we reaffirmed the rationale of CF&I, supra, and extended the prior consistent interpretation of "clean inspection" under the 1969 Coal Act to the 1977 Mine Act. Kitt Energy Corp., 6 FMSHRC 1596, 1598-1601 (July 1984), petition for review filed sub nom. United Mine Workers of America v. FMSHRC, No. 84-1428 (D.C. Cir. August 17, 1984). We held in Kitt Energy that to establish the validity of a section 104(d)(2) withdrawal order under the 1977 Mine Act, the Secretary of Labor must prove the absence of an intervening clean inspection of the entire mine. We further held that such an intervening clean inspection is not limited solely to a complete regularly scheduled inspection, but may be composed of a combination of inspections, so long as taken together they constitute an inspection of the mine in its entirety. Thus, the judge appropriately relied on CF&I in addressing the clean inspection issue raised here. We conclude, however, that substantial evidence does not support the judge's factual finding that the Secretary established the absence of an intervening clean inspection. The entire testimony on the issue is limited and we quote it in full.

Initially, on direct examination the inspector testified:

- Q. [By counsel for the Secretary] Now, when you decided to issue your particular 104(d)[(2)] ... order, were you aware that there was a prior 104(d)(1) order in effect at the Minntac plant?
- A. Yes, I issued it.
- Q. You said you were the inspector who issued the prior 104(d)(1) order?
- A. I was.
- Q. Could you tell us what standard was cited in the prior 104(d)(1) order?
- A. That was also a 15-5 safety belt standard.
- Q. Now, when you decided to issue the--the 104(d)(2) order, did you know whether there was a prior intervening clean inspection that had taken place since your issuance of the 104(d)(1) order?
- A. There was not no clean inspection, no.

Q. And how do you know that?

A. Cuz I was the inspector. I issued the last one.

Tr. 27-28 (emphasis added).

In response to questions on cross-examination, the inspector also testified:

Q. [By counsel for U.S. Steel] Okay. Now did you inspect Minntac operations between March 3rd, 1981 -- March 31, 1981 and September 10th, 1981?

A. Oh, sure.

Q. Were you there everyday?

A. No, not every day.

Q. Were you there regularly?

A. Just about.

Q. And did you cover the entire facility?

A. Um, I have covered the entire facility, yes.

Q. The entire Minntac plant?

A. The entire I.D. No. 820, yes. [I.D. No. 820 refers to the Minntac plant.]

Q. So between March 3rd, 1981 -- March 31, 1981, and September 10, 1981, you had been entirely through the Minntac Plant?

A. Are you talking about a complete thorough inspection?

Q. I'm asking you if you went to every area in the Minntac Plant between March 31st, 1981, and September 10th, 1981.

A. This was a different inspection on -- in March. That one was completed.

Q. Between -

A. Then we started another inspection.

Q. But between March 31st, 1981, and September 10th, 1981, you had gone through the entire Minntac plant?

A. Well, that's possible I went through there.

Tr. 53-54 (emphasis added).

As noted, these exchanges represent the entire testimony concerning intervening clean inspection. The judge quoted these exchanges and acknowledged the "skimpy" and "possibly conflicting" nature of the testimony. The judge provided no analysis of this evidence and concluded, "[B]ased on the above testimony, ... MSHA established prima facie that there was not an intervening clean inspection between the section [104](d)(1) and (d)(2) orders. U.S. Steel did not offer any evidence to rebut the prima facie showing." 4 FMSHRC at 1109. We respectfully disagree.

During direct examination, the inspector appeared to give clear testimony that "There was not no clean inspection, no." Tr. 28. Presumably, however, the inspector's view of what constitutes a clean inspection agrees with that argued by the Secretary: that only a regular quarterly inspection without similar violations lifts the section 104(d) chain. Our presumption is strengthened by the inspector's testimony on cross-examination, when he tried to distinguish regular inspections he had conducted between March 31 and September 10, 1981. As noted above, we have held that any combination of regular or other inspections that covers the entire mine can constitute an intervening clean inspection. The inspector testified that he was at the Minntac Mine regularly and that between March 31 and September 10, 1981, "I have covered the entire facility, yes. ... The entire I.D. No. 820, yes." Tr. 53-54. The inspector's final word on the subject only compounded the confusion between his initial testimony and his later testimony: "Well, that's possible I went through there." Tr. 54.

Precisely the same kind of concession of a "possible" intervening clean inspection composed of a series of spot inspections covering the entire mine led the Commission in CF&I to conclude that a prima facie case of the absence of an intervening clean inspection had not been established. 2 FMSHRC at 3460-61. We also are mindful that the judge himself characterized the inspector's testimony in this proceeding as "skimpy" and "possibly conflicting." Our responsibility on review is to examine the entire record, and the totality of the inspector's testimony on direct examination and cross-examination is entirely too vague and uncertain to establish a prima facie case of the absence of an intervening clean inspection. We cannot treat this contradictory evidence as affording substantial evidentiary support to the judge's finding that there was an absence of an intervening clean inspection. Accordingly, because a prerequisite to issuance of a valid section 104(d)(2) withdrawal order is lacking, we vacate the order.

However, allegations of violation and any section 104(d) special findings associated with the violation survive the vacation of orders in which they are contained. Consolidation Coal Co., 4 FMSHRC 1791, 1793-97 (October 1982); Island Creek Coal Co., 2 FMSHRC 279, 280 (February 1980). In Consolidation Coal, *supra*, we vacated a procedurally defective section 104(d)(1) withdrawal order that contained special findings that the violation was significant and substantial and caused by an unwarrantable failure to comply. We held that an absolute vacation of the order and dismissal would allow a serious violation to fall outside the statutory sanction expressly designed for it--the section 104(d) sequence of citations and orders. 4 FMSHRC at 1793-94. Thus, under the circumstances present in that case, we affirmed the judge's modification of the defective order to a section 104(d)(1) citation. 4 FMSHRC at 1793-97. In a related vein, we have also held recently that special findings may be included in a citation issued pursuant to section 104(a) of the Mine Act. Consolidation Coal Co., 6 FMSHRC 189, 191-92 (February 1984).

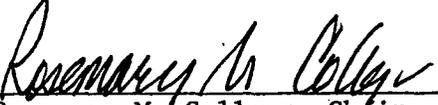
In this case, the inspector cited the violation as being significant and substantial and caused by an unwarrantable failure to comply. The requisite special findings therefore are present to support a possible modification of the section 104(d)(2) order to the appropriate section 104(d)(1) order or citation. Because the section 104(d)(2) order cannot stand, we remand to the judge to determine the appropriate modification. 3/

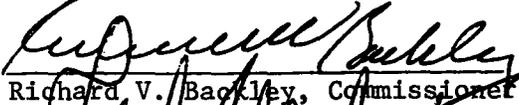
The final issue in this case is whether the judge erred in concluding that the violation was caused by the unwarrantable failure of the operator to comply with the standard. As just noted, this finding bears on the appropriate modification. The judge summarily concluded, "The violation was committed by a foreman, a representative of management. He should have known of the hazard and should have taken steps to avoid it." 4 FMSHRC at 1110. U.S. Steel contends that the judge

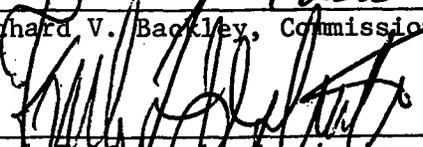
3/ We note that for a section 104(d)(1) withdrawal order to issue validly, the violation must have been caused by an unwarrantable failure to comply with the standard, and the order must have been issued within the same inspection or any subsequent inspection within 90 days after the issuance of the original 104(d)(1) citation. If this violation did occur within the 90-day limit, then it may be cited within a section 104(d)(1) order if it also occurred as a result of the unwarrantable failure of the operator to comply with the standard--the final issue discussed below in this decision. If, however, the violation occurred outside the 90-day period, the invalid order could still possibly be modified to a section 104(d)(1) citation if the violation was both significant and substantial and unwarrantable. (If the judge needs to decide whether the violation here was significant and substantial, he shall afford the parties the opportunity to submit additional argument on the subject, if they desire.) If on remand, the judge determines that modification to a section 104(d)(1) order or citation is not possible then the violation should be reduced to a section 104(a) citation. /

improperly applied a per se rule that merely because the foreman was a representative of management his violative conduct constituted an unwarrantable failure to comply. We find the judge's conclusion on this issue to be insufficiently explained. Consequently, we are unable to exercise meaningful review as to whether the conclusion is legally proper and supported by substantial evidence. See The Anaconda Company, 3 FMSHRC 299, 299-302 (February 1981). Accordingly, we remand this question to the judge. In the interests of procedural fairness, the judge should allow the parties to reargue their positions concerning unwarrantability, if they desire. After considering any such argument, the judge should articulate fully the reasons for his ruling on this issue.

Accordingly, we affirm the judge's conclusion that U.S. Steel violated section 55.15-5. Because we reverse his finding concerning the absence of an intervening clean inspection, we vacate the section 104(d)(2) withdrawal order and remand for proper modification of the order as discussed above. We also remand for reconsideration of the issue of unwarrantable failure and, if necessary, the question of whether the violation was significant and substantial (see n. 3, supra). 4/


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank P. Vestrab, Commissioner


L. Clair Nelson, Commissioner

4/ The Secretary also argues that U.S. Steel violated Commission Procedural Rules 20(c) and 28, 29 C.F.R. §§ 2700.20(c) & .28, by not specifically pleading its reliance on the issue of the intervening clean inspection, and that the judge erred in excusing that failure. The issue of the absence of an intervening clean inspection was part of the Secretary's prima facie case. The Secretary was required to prove all those elements of the prima facie case that had not been admitted or waived. In this instance, U.S. Steel generally denied "all other allegations of fact and law" in its answer, and did not concede the absence of an intervening clean inspection. Moreover, it would have been permissible for the judge to allow liberal amendment to the pleadings by U.S. Steel at the hearing. Cf. Fed. R. Civ. P. 15(b). Under these circumstances, the judge properly proceeded to rule on the merits of the intervening clean inspection issue.

Commissioner Lawson dissenting in part:

The judge's conclusion that U. S. Steel violated section 55.15-5 is clearly correct, supported by substantial evidence, and was challenged by this operator only in terms of a generalized vagueness assertion, as the majority acknowledges. My colleagues, however, have chosen to discount the substantial evidence found by the judge below to have established that MSHA did not carry out a complete (clean) inspection of this mine during the applicable period. Finding of Fact 7; Conclusion of Law 3.

The decision below has been found wanting by the majority because the judge "summarily concluded" that this violation was caused by the unwarrantable failure of the operator to comply with the standard, and his conclusion was "insufficiently explained." As they note, "we are unable to exercise meaningful review as to whether the conclusion is legally proper and supported by substantial evidence ... Accordingly, we remand this question to the judge." Slip op. at 9 (citation omitted).

However, a different standard of review is applied to the "clean inspection" question. The majority here, too, finds that "the judge provided no analysis of this [intervening clean inspection] evidence." Slip op. at 7. Although I would not disagree that the judge's ruling would be significantly more satisfactory had it included an expanded explanation for its bases, I am not prepared so readily to overturn his clear holding that MSHA "established prima facie that there was not an intervening clean inspection," 4 FMSHRC at 1109, and, as the majority acknowledges, "U.S. Steel did not offer any evidence to rebut the prima facie showing." Id.

As the judge acknowledged, the testimony below was "skimpy" and "possibly conflicting." The judge, performing his fact-finding duty, resolved that conflict. His reasons may have included an evaluation of the witness' demeanor, evidence that MSHA inspector Wasley had a continuous presence at this mine, and, of most significance, his clear testimony that: "There was not no clean inspection, no." Slip op. at 5, Tr. 27-28. 1/ (Emphasis added). The Commission should be loath to overturn the judge's determination and substitute a differing view of the facts absent any rationale other than disagreement with the fact-finder's resolution of the conflicting evidence and speculation regarding its meaning (see note 1, supra).

My colleagues' failure to remand this issue for necessary clarification is thus internally inconsistent. In lieu of affirmation of the judge on this issue, which would appear to me supportable on this record, I would remand for clarification on this issue as well. See The Anaconda Company, 3 FMSHRC 299 (1981). Whatever may transpire in the future in this case will be better accomplished with such judicial clarification.



A. E. Lawson, Commissioner

1/ The majority's assertion that, "Presumably ... the inspector's view of what constitutes a clean inspection agrees with that argued by the Secretary ...," slip op. at 7, lacks record support and is mere speculation.

Distribution

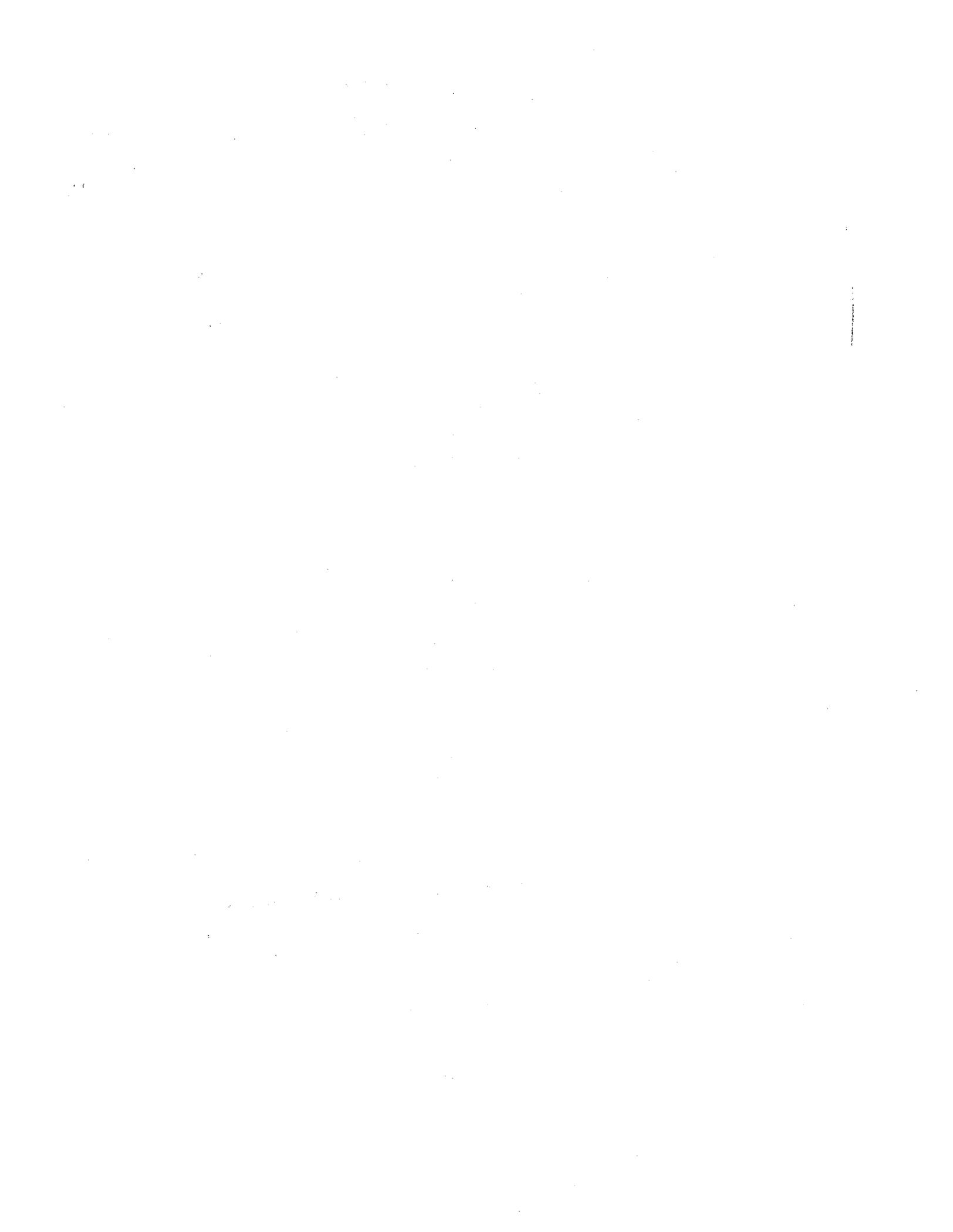
Louise Q. Symons
United States Steel Corporation
600 Grant Street, Room 1580
Pittsburgh, PA 15230

Clifford Kesanen, Safety Chairman
United Mine Workers of America
Local 1938
307 First Street North
Virginia, Minnesota 55792

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

Administrative Law Judge James Broderick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

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

AUG 1 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 84-68
Petitioner : A.C. No. 12-01818-03507
v. :
: Patmore Mine
EUREKA MINING CORPORATION, :
Respondent :

DECISION

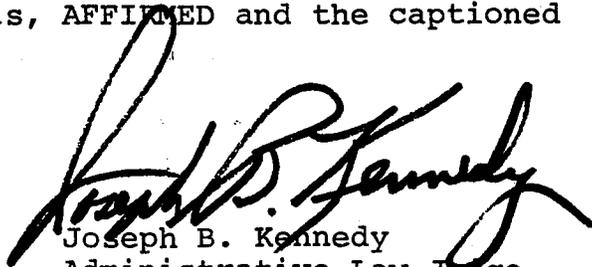
Appearances: Rafael Alvarez, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois,
for Petitioner;
Barbara Reeves, Eureka Mining Corporation,
Morgantown, Kentucky, for Respondent.

Before: Judge Kennedy

This matter came on for an evidentiary hearing in Owensboro, Kentucky on Thursday, July 26, 1984. At the conclusion of the hearing the parties conferred and moved for approval of a settlement of the two violations charged in the amount of \$50.

Based on an independent evaluation and de novo review of the circumstances as set forth in the transcript of the hearing, I found the settlement proposed was in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the decision approving settlement be, and hereby is, AFFIRMED and the captioned matter DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn St., 8th Fl., Chicago, IL 60604 (Certified Mail)

Ms. Barbara Reeves, Eureka Mining Corporation, P.O. Box 277, Morgantown, KY 42261 (Certified Mail)

/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 3, 1984

UNITED MINE WORKERS OF : DISCRIMINATION PROCEEDINGS
AMERICA (UMWA), :
ON BEHALF OF : Docket No. KENT 82-105-D
JERRY D. MOORE, : MADI CD 82-05
: :
LARRY D. KESSINGER, : Docket No. KENT 82-106-D
: MADI CD 82-04
: :
Complainants :
v. : Eastern Division Operations
: :
PEABODY COAL COMPANY, :
Respondents :
: :
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
ON BEHALF OF :
THOMAS L. WILLIAMS, : Docket No. LAKE 83-69-D
Complainant : VINC CD 83-04
v. :
: Eastern Division Operations
PEABODY COAL COMPANY, :
Respondent :

ORDER AWARDING DAMAGES
ORDER AWARDING ATTORNEYS FEES
ORDER ASSESSING CIVIL PENALTIES

Appearances: Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C. on behalf of Complainants Jerry D. Moore and Larry D. Kessinger;
Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Complainant, Thomas L. Williams;
Michael O. McKown, Esq., Peabody Coal Company, St. Louis, Missouri, for Respondent.

Before: Judge Merlin

On July 11, 1984, a decision was issued with respect to the operator's liability in these cases. The parties have set forth their positions with respect to damages, attorneys fees, and civil penalties so that determinations now may be made with respect to these matters.

Lake 83-69-D

The operator and the Solicitor have stipulated that the total back pay and interest through July 23, 1984, to which Complainant, Thomas L. Williams, is entitled under the July 11 decision is \$29,301.61.

In addition, the Solicitor seeks recovery of unreimbursed medical expenses, the amount of which the parties agree is \$710. Reimbursement is also sought for the cost of obtaining recertification as an electrician. The parties agree that Complainant worked in the mines as an electrician before his lay off (Hearing, July 27, 1984, p. 6-7). The operator concedes that under the July 11 decision Complainant is entitled to medical expenses and recertification (Hearing July 27, 1984, p. 5, 7-8).

Complainant further seeks money damages for losses he incurred in real estate and business ventures after he was laid off. By letter to the Solicitor dated May 5, 1984, Complainant's private attorney, Mr. Clyde Collins, alleges realty losses of \$58,380. Mr. Collins' letter sets forth the following: In June 1982 Complainant purchased a residential property and a rental property for \$58,000 (\$20,000 for residential and \$38,000 for rental); the purchase was financed through a first mortgage to The Peoples National Bank, New Lexington, Ohio, of \$50,000 and a second mortgage to the sellers of \$8,000; Complainant was unable to make the mortgage payments in the first half of 1983 and the bank foreclosed on the mortgages, which foreclosure became final January 13, 1984; both properties were sold at a Sheriff's sale from which deficiency judgments against Complainant total \$41,380; the properties were worth \$75,000 and Complainant's loss of equity is \$17,000; the combined damages from the deficiency judgments and the equity loss are \$58,380.

The Solicitor and operator's counsel agree that with additional interest through July 23, 1984, the claimed realty loss as of this date is \$62,018.36 (Stipulation No. 6).

In addition, Complainant claims money damages arising from business losses. In this respect the attorney's letter sets forth the following: In December 1982, Complainant leased the real estate and equipment of a restaurant business for six months; Complainant borrowed \$2,500 from the City Loan in New Lexington to be used as capital in connection with the restaurant; during the first four months of 1983, when Complainant's mortgages became delinquent, he also became delinquent in the payment of the \$1,500 per month lease rental of the restaurant; the same bank which held Complainant's mortgages also held the mortgage on the

restaurant; the owners of the restaurant were also in default on the mortgage held by the bank on the restaurant property; in April 1983, Complainant reached an agreement with the owners of the restaurant for a new three year lease, but the bank refused to consent to the lease due to arrearages already existing on Complainant's residential mortgages with the bank; Complainant attempted a Chapter 13 bankruptcy, but a feasible plan could not be worked out since the liabilities had reached the point where the necessary payment into the plan was beyond Complainant's ability; Complainant returned possession of the restaurant premises to the owners at the conclusion of the initial lease period; the financial loss from this venture was \$12,809.16.

Finally, the attorney's letter states that Complainant incurred attorneys fees arising out of the matters detailed above in the amount of \$7,235 and job hunting expenses of \$1418.64.

Section 105(c)(2) of the Act, pursuant to which the Solicitor filed this action on Complainant's behalf, provides as follows with respect to the relief that can be given:

* * * The Commission shall afford an opportunity for a hearing; (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. * * * [Emphasis supplied.]

The Senate Report states with respect to relief in section 105 cases as follows:

It is the Committee's intention that the Secretary propose, and the Commission require, all relief that is necessary to make the complaining party whole and to

remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

S. REP. NO. 95-181, 95th Cong., 1st Sess. 37 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess., at 625 (1978).

The Act specifically provides for back pay and interest. Accordingly, the Complainant is entitled to \$29,301.61 plus additional interest from July 23, 1984 to the date of payment computed in accordance with applicable Commission precedent.

In addition, it must be determined whether the additional special damages which Complainant seeks may be awarded as "other appropriate relief" under section 105(c)(2), supra. In the words of the Senate Report quoted, supra, such damages are awarded when they are sustained "as a result of" the discrimination. The right to recover such amounts under the Mine Act has not been decided. Reference may be made, however, to general principles of law. It has been held that in order to be recoverable, damages must be proved to be the proximate result of the complained wrong. Classic Bowl, Inc. v. AMF Pinspotter, Inc., 403 F.2d 463 (7th Cir. 1968). The legal concept of proximity is applicable to ascertain and measure damages. The necessary and appropriate limits of judicial inquiry are served by disregarding consequential and remote effects. Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, 225 F. Supp. 332 (N.D. Ill. 1963). The usual monetary measure of damages for wrongful discharge at common law, under the National Labor Relations Act and under the Equal Opportunity Act is back pay less interim earnings. St. Clair v. Local Union 515, 422 F.2d 128 (6th Cir. 1969). An employee discharged in violation of the Railway Labor Act was held entitled in addition to reinstatement only to an award of back pay. Brady v. Trans-World Airlines, Inc., 244 F. Supp. 820 (D. Del. 1965).

In this case the wrongful layoff of Complainant by the operator cannot be held the proximate cause of Complainant's monetary losses from real estate and business activities. To put it in terms of the Senate Report, quoted above, these damages were not sustained as a result of the discrimination. It is clear from the letter of Complainant's attorney that Complainant engaged in a series of highly speculative and

risky ventures. 1/ He bought \$58,000 worth of real estate with no equity down and obligated himself under a \$50,000 first mortgage and an \$8,000 second mortgage, both at a 16.5% interest rate (Hearing July 27, 1984, p. 13). Even where the individual did not engage in such activities, recovery for his loss of a home to the mortgage holder has been denied. St. Clair v. Local Union No. 515, supra. Moreover, just a few months after Complainant undertook the sizeable real estate debts just described and after he had been laid off, he went into the restaurant business, again without any equity of his own and borrowing additional cash from a loan company and obligating himself to monthly payments of \$1500 under a six months lease. It is little wonder that the bank which held the mortgages on Complainant's realty and the mortgage on the restaurant refused to consent to a new lease on the restaurant. It must also be noted that it appears from the attorney's letter that the owners of the restaurant had no other assets because they immediately went into default when Complainant could not pay them. In sum therefore, many intervening factors, and not the wrongful layoff, are responsible for Complainant's damages in real estate and business. The principal and precipitating factor in Complainant's financial debacle has been his own business and financial judgment, or lack thereof. Under such circumstances, award of special damages would not be appropriate under the Act and such relief is denied.

The same considerations apply with respect to the attorney's fees and related expenses which were incurred by Complainant as a result of his real estate and business activities. Recovery of damages for these items is also denied.

1/ None of the real estate and business figures given by Complainant's private attorney have been verified. Many appear highly questionable. For example, the value of the real estate is given as \$75,000 although Complainant paid only \$58,000 for it with no down payment. At the foreclosure sale, the properties were sold for \$26,666 which, according to the Order of Sale furnished by the Solicitor, was at least 2/3 of the appraised value. Accordingly, the appraisal value could not have been more than \$40,000. For the reasons set forth herein, it is not necessary for present purposes to determine the true extent of Complainant's losses in these matters.

As set forth above, the letter from Complainant's attorney alleged expenses of \$1,418.64 related to seeking employment. The Solicitor's brief cited no case law to support an award of such damages. The Solicitor advised that he knew of no precedent to support such an award and indeed stated that decisions under the National Labor Relations Act indicated such an award would not be made (Hearing July 27, 1984, p. 16). The claim of damages for these amounts is, therefore, denied.

Two other items remain for consideration. As previously stated, the parties agree that the unreimbursed medical expenses are \$710. Operator's counsel advised that no objection exists with respect to this item (Hearing July 27, 1984, p.5). So too, the operator does not object to payment for the Complainant's recertification as an electrician (Hearing July 27, 1984, p. 7-8). It should be noted that an award of damages in these two instances would be appropriate under the principles set forth herein. The medical expenses would have been paid for by health insurance if Complainant had been working and the electrical certification would not have expired if Complainant had not been laid off. The layoff was the proximate cause of these particular losses.

Finally, careful consideration has been given to the decision in Secretary of Labor on behalf of Noland v. Luck Quarries, Inc., 2 FMSHRC 954 (1980). In that case, recovery was allowed under section 105(c)(2) for lost equity in a truck. The miner there had been a truck driver who hauled rock in his own truck for the company which had wrongfully discharged him. Because of earnings lost due to the discharge, the Complainant lost the truck. In order for the miner in Noland to return to his former work hauling rock, he needed a truck. It was therefore not enough in that case to order reinstatement with back pay and interest. The analogous item in the instant case is the cost of recertification as an electrician which has been allowed and which would permit Complainant to resume his former position in the mines as an electrician. The decision in Noland is not precedent for an award in this case of special damages arising from real estate and business losses unrelated to Complainant's ability to return to his former position and caused by many factors other than the discriminatory layoff.

KENT 82-105-D

KENT 82-106-D

The operator and the United Mine Workers have agreed that under the July 11 decision, total back pay and interest through July 23, 1984, payable to Mr. Kessinger is \$43,320.12 and to Mr. Moore is \$59,294.25.

Section 105(c)(3) of the Act, pursuant to which the union brought these actions on behalf of Complainants Kessinger and Moore, provides for relief in terms like those of section 105(c)(2) already considered with respect to the suit brought by the Solicitor. Section 105(c)(3) provides in pertinent part as follows:

* * * The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the Complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.
* * * [Emphasis supplied.]

Since the Act specifically provides for back pay and interest, Complainant Moore is entitled to \$59,294.45 plus interest after July 23, 1984, and Complainant Kessinger is entitled to \$43,320.12 plus interest after July 23, 1984. Interest is computed in accordance with applicable Commission precedent.

These cases present the additional issue of attorneys fees. Counsel for the union has filed a petition for attorneys fees detailing 127.75 hours spent on these cases and stating that the market rate for attorney's services is

\$100 per hour. The total fee sought is \$12,628.50. ^{2/} The operator did not object to the number of hours claimed or to the market rate given by the union (Hearing July 27, 1984, p. 4).

It has been decided that attorneys fees may be awarded in discrimination cases brought under the Mine Safety Act by the union on behalf of miners. In Munsey v. Federal Mine Health and Safety Review Commission, 701 F.2d 976 (D.C. Cir. 1983), the Court of Appeals for the District of Columbia held in this respect as follows:

* * * This circuit has recognized that unions and union attorneys are entitled to costs and attorney fees for representation of union members. Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury, 656 F.2d 848 (D.C. Cir. 1981). If attorney fees are awarded to the union itself rather than its attorney, the union can only recoup the expenses it incurred in supplying services to the client; above-cost fees to the union itself would be inappropriate. Id. at 853. If attorney fees are awarded to the attorney alone (and not for the union's general treasury), the attorney is entitled to receive the market value of the services rendered. The mere fact that an attorney is a salaried employee of the union should not affect the size of the fee to which he is entitled. Id. at 850. "Reasonableness, in terms of market value of the services rendered, is the sole limit on fee awards to organizationally-hired lawyers when the fees are to be paid to the lawyers alone." Id. at 852-853.

On remand, the Commission should determine the amount to be awarded in accordance with the standards set forth in Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury, supra. ^{1/}

^{1/} We note that in past cases we have required salaried attorneys recovering the market value of their services from defendants to reimburse their employers for the kinds of expenses the employers incurred that would normally be included in an attorney's fee, including the salaries of the lawyers and their adjunct staff. * * *

^{2/} Four hours representing work performed by an attorney who is no longer with the UMW legal staff and who has waived her right to any attorney fees were billed at the union's cost of \$60 per hour. Parking expenses were \$13.50.

The hours and market rate claimed are reasonable in light of the nature of the cases and all that has transpired in them. Accordingly, a total fee of \$12,628.50 is awarded. The representation that the union's cost is \$60 per hour is accepted. Accordingly, \$7,678.50 of the total fee is awarded to the union and the balance of \$4,950 is awarded to union counsel.

The statutory scheme of health and safety in the mines expressed in the Mine Safety Act provides throughout for meaningful participation by miner representatives. By bringing these actions, the union has fulfilled its intended role and demonstrated the value of the opportunity to participate.

Assessment of Civil Penalties

The Solicitor has filed a petition seeking the assessment of a civil penalty of \$1000 in each of the three cases. The parties agreed with respect to the six criteria set forth in section 110(i) of the Act (Hearing July 27, 1984, p. 25-27). The operator waived its right to file an answer and had no objection to payment of these amounts (Hearing July 27, 1984, p. 24). The proposed penalties are consistent with the Act and will advance its purposes. Accordingly, civil penalties totalling \$3,000 are assessed.

Order

It is Ordered that the operator pay Complainant Thomas L. Williams \$29,301.61 and \$710 plus interest from July 23, 1984, to the date of payment.

It is further Ordered that when Complainant Thomas L. William is recalled, the operator either pay necessary and reasonable costs of electrical recertification or provide the instruction necessary for such recertification.

It is further Ordered that all other claims of Complainant Thomas L. Williams for damages are Denied.

It is further Ordered that the operator pay Complainant Jerry D. Moore \$59,294.45 plus interest from July 23, 1984, to the date of payment.

It is further Ordered that the operator pay Complainant Larry D. Kessinger \$43,320.13 plus interest from July 23, 1984, to the date of payment.

It is further Ordered that the operator pay attorneys fees of \$7,678.50 to the United Mine Workers of America.

It is further Ordered that the operator pay attorneys fees of \$4,950 to Ms. Mary Lu Jordan, Esq.

It is Ordered the operator pay civil penalties of \$3,000. If no appeal is taken, payment of civil penalties shall be made within 30 days of the expiration of the appeal period.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive style with a large, sweeping initial "P" and a long, horizontal stroke extending to the right.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Michael O. McKown, Esq., P.O. Box 235, St. Louis, MO 63166
(Certified Mail)

Mary Lu Jordan, Esq., United Mine Workers of America, 900
15th Street, N.W., Washington, DC 20005 (Certified Mail)

Frederick Moncrief, Esq., Office of the Solicitor, U.S. De-
partment of Labor, 4015 Wilson Boulevard, Arlington, VA
22203 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 3, 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-107-M
Petitioner	:	A.C. No. 02-00156-05501
v.	:	
	:	Docket No. WEST 84-55-M
PHELPS DODGE CORPORATION,	:	A.C. No. 02-00854-05503
Respondent	:	
	:	New Cornelia Branch Mine

DECISION

Appearances: John C. Nangle, Esq., Associate Regional Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner; Stephen W. Pogson, Esq., Evans, Kitchel & Jenckes, P.C., Phoenix, Arizona, for Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against Phelps Dodge Corporation. The hearing was held as scheduled on May 30, 1984.

By agreement of the parties, these cases were consolidated for hearing and decision (Tr. 5). At the hearing, the parties agreed to the following stipulations (Tr. 4, 6):

1. The operator is the owner and operator of the subject mine.
2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The administrative law judge has jurisdiction.
4. The inspectors who issued the subject citations were duly authorized representatives of the Secretary.
5. True and correct copies of the subject citations were properly served upon the operator.

6. Copies of the subject citations and terminations are authentic and may be admitted into evidence for the purpose of establishing their issuance but not for the purpose of establishing the truth or relevancy of any statement asserted therein.
7. Imposition of penalties herein will not affect the operator's ability to continue in business.
8. All the alleged violations were abated in good faith.
9. The operator's previous history of violations is average. 1/
10. The operator's size is large.
11. Violations occurred in citations Nos. 2086972 and 2086671.

Citation No. 2086972

Section 55.14-1 of the mandatory standards, 30 C.F.R. § 55.14-1, provides as follows:

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

The citation describes the condition or practice as follows:

There was no guard to prevent a person from contacting the auxilliary (sic) rope starter on the 10 h.p. gasoline engine for the air compressor located on the bed of M-41 GMC service truck. The rope starter was about 5 feet above the ground and faced out from the truck bed. It was in motion when the motor was running and was next to the electric starter switch.

1/ The operator's brief errs in stating that the parties stipulated that the operator's history was better than average. The Solicitor stated it would be "better" to stipulate to an average history, not that the history was better than average (Tr. 181).

As set forth in stipulation No. 11, supra, the violation is admitted. The inspector explained that the rope starter in question was an auxiliary to the automatic starter, primarily used to start up the air compressor which pumped air into tires (Tr. 8, 26). The inspector further testified that the air compressor mounted on a truck was used on uneven ground or on ground covered with broken rock (Tr. 27-28). I accept this testimony over contrary testimony from the operator's safety supervisor (Tr. 51). I further accept the inspector's testimony that an individual could slip and lose his footing thereby coming into contact with the moving part of the machine. An injury would result (Tr. 28, 30). Accordingly, I conclude the violation was serious. I reject the argument that because the men operating the starter were familiar with it, an accident would not happen (Tr. 45). The history of mining is replete with knowledgeable people becoming involved in serious accidents either through their own misconduct or through events over which they had no control. The starter should not have been left uncovered. The operator was guilty of ordinary negligence.

Finally, I believe the violation was significant and substantial. The operator of the air compressor as well as others whose equipment was being serviced are routinely in the area and could stumble on the uneven ground and become caught. Any injury would be severe. The reasonable likelihood tests of the Commission are satisfied. U.S. Steel Corp., --- FMSHRC --- (July 11, 1984), Consolidation Coal Company, 6 FMSHRC 34 (1984), Consolidation Coal Company, 6 FMSHRC 189 (1984).

A penalty of \$75 is imposed.

Citation No. 2086667

Section 55.11-1 of the mandatory standard, 30 C.F.R. § 55.11-1, provides as follows:

Safe means of access shall be provided and maintained to all working places.

The citation describes the condition or practice as follows:

An employee was observed crossing the No. 1 primary pan feeder dump to and from the dump operator's control room. By the use of the solid railroad bed, a safe access

was not provided, due to the opening on both sides of the track, use [sic] for dumping ore cars. This was not a regular travel area, company had an access on east side of the ore dump.

The operator concedes that under Commission precedent the trestle was a means of access and that it was required to be safe. Hanna Mining Company, 3 FMSHRC 2045 (1981). The operator argues, however, that MSHA failed to show that the trestle was not safe. This argument cannot be accepted. The trestle was eight feet wide with five feet between the rails. It was approximately 50 feet long. The trestle spanned a chasm, 14 to 15 feet deep, which was the dumping point. Trains moved along the rails and dumped onto a pan feeder. There was a danger of falling into the pan feeder if an individual were to trip (Tr. 81). The locomotive engineer and the dump operator, who brought the materials onto the trestle to be dumped, were required by the operator to rope themselves off. They were to place a lanyard in such a way that if they fell, they would be caught and prevented from falling into the chasm (Tr. 86). Thus, the operator itself recognized the danger of being on the trestle.

Based upon the foregoing, I conclude a violation existed and that it was serious. I further determine that the operator was negligent in not preventing use of the unsafe trestle by the workers. Finally, the violation was significant and substantial. It was reasonably likely that use of the trestle would result in a reasonably serious injury. U.S. Steel, --- FMSHRC --- (July 11, 1984), Consolidation Coal Company, 6 FMSHRC 34 (1984).

A penalty of \$125 is assessed.

Citation No. 2086671

Section 55.9-7 of the mandatory standards, 30 C.F.R. § 55.9-7, provides as follows:

Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

The citation describes the condition or practice as follows:

The first idle roller (about three feet) from the tail pulley of the No. 2, 42 inch wide conveyor was exposed to contact. Approximately four (4) feet from floor level and next

to about three (3) foot wide walkway, an emergency stop cord was mounted up front from the idle roller to where a person could not reach it if he or she had needed it in an emergency. Exposure would be about one person, one time on daily basis.

As set forth in Stipulation No. 11, supra, the violation in this instance was admitted. The evidence demonstrates that the stop cord was missing for a relatively short distance running from the angle iron back to the tail pulley ("C" to "D", MSHA Exh. No. 11) (Tr. 119-121). The inspector and the operator's safety inspector were in conflict over whether an individual would be seriously injured if they became caught at a pinch point where there was no emergency cord (Tr. 124-125, 135-140, 154). I find the inspector's testimony more persuasive in this regard and accept it. Maintenance personnel and repairmen were in this area in the performance of their usual duties and the conveyor could be running although this would be rare (149-150). The violation was serious. I accept the inspector's evaluation that negligence was low (Tr. 124). The violation was significant and substantial because it was reasonably likely that an individual who became caught would suffer a reasonably serious injury.

A penalty of \$70 is assessed.

Citation No. 2086672

Section 55.11-1 of the mandatory standard 30 C.F.R. § 55.11-1, provides as follows:

Safe means of access shall be provided and maintained to all working places.

The citation described the condition or practice as follows:

The entire length (sic), and both sides of No. 2 conveyor had accumulations of muck with rocks up to about 8 (eight) inches in diameter in the walkways, also piles of muck up to about (three) 3 feet high. Possible tripping and/or fall hazard.

The inspector's description in the citation of the accumulation along the walkway is uncontradicted and I accept it. The operator admits that there was muck and rock

on the walkway but argues nevertheless that it was a safe means of access (Operator's Brief P. 7). The inspector testified that the risk was of someone tripping and falling (Tr. 115). I find the inspector's testimony persuasive and accept it. The operator's witness first indicated that maintenance people, when making their rounds, merely shine a flashlight down the walkway rather than traveling down it (Tr. 131-132, 150-151, 152) but later he admitted that sometimes they might travel down the walkway to check it (Tr. 151, 153). I find that maintenance and repair personnel were required to travel along the walkway in performance of their regular duties. A violation existed and it was serious. The operator was plainly negligent. Finally the violation was significant and substantial because traveling along this walkway presented a reasonable likelihood of a reasonably serious injury.

A penalty of \$100 is assessed.

Citation No. 2086674

Section 55.14-1 of the mandatory standards, 30 C.F.R. § 55.14-1, provides as follows:

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

The citation describes the condition or practice as follows:

The guards on the two oil pumps did not extend around the back side of the "v" belts, leaving an opening to where a person could make contact with the pinchpoint, both motors had about 4 inch pulley and about 10" pulley on the pumps. High point was about three (3) feet above floor level and about three (3) from the wall of the enclosure, energized and subject to start, located in the No. 2 primary gyrator oil pump house.

There is no dispute that guards were present on the two oil pumps involved in the subject citation. However, the inspector testified that there was no guard at the pinch

points where the belts met the pulleys (points "A" on MSHA Exh. No. 13) (Tr. 157-158). In the inspector's opinion, an individual's hand could become caught at this point (Tr. 160, 161, 164-166). However, the operator's witnesses testified that it was highly unlikely if not impossible for an individual to become caught at the pinchpoints in question (Tr. 175-176). Based upon the photographic evidence introduced by the Solicitor (MSHA Exh. Nos. 12 and 13), I find the testimony of the inspector more persuasive and conclude that a violation existed. Since injury could result, the violation was serious. The operator was negligent in not adequately guarding the machinery. Maintenance people were required to be in the area in the performance of their regular duties. The violation was significant and substantial because it was reasonably likely that a slipping or falling accident would expose miners near the machinery to a reasonably serious injury.

A penalty of \$75 is assessed.

Citation No. 2086888

Section 55.16-6 of the mandatory standards, 30 C.F.R. § 55.16-6, provides as follows:

Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use.

The citation describes the condition or practice as follows:

The acetylene and oxygen cylinders were observed in the walkway between No. 10 and 11 mills. The gauges were mounted on the cylinders which were in an "off" position and secured in a hand cart in an upright position. This area was traveled hourly. Also an overhead crane was in use. The cutting rig was not assigned to anyone in the area. 1100 hour to 0700 hour shift may have used them.

There is no dispute with respect to the facts. The inspector found two acetylene and oxygen cylinders in the walkway between the No. 10 and No. 11 mills. The gauges were in an "off" position (Tr. 197-198). The inspector

questioned miners in the area but no one admitted to using the cylinders (Tr. 199-200). The inspector concluded that the cylinders had been left by someone on the prior shift (Tr. 200, 205). The issue presented is whether the situation is covered by the mandatory standard. The workers in the area to whom the inspector spoke said they were not assigned to work with the cylinders (Tr. 199-200). According to the inspector the mill foreman said the cylinders might have been used on the prior shift (Tr. 200). One individual the inspector spoke to said they were going to take the cylinders back to the repair bay area (Tr. 201). The inspector concluded that on the present shift, no one was assigned to the tanks which were going to be taken to the bay area (Tr. 201). The inspector concluded that the cylinders were stored and that a violation existed because they were not protected by covers.

In Secretary of Labor v. FMC Corporation, -- FMSHRC -- (July 2, 1984), the Commission defined "storage" as follows: "In ordinary usage, the term storage, 'the act of storing or the state of being stored', covers a wide variety of meanings, including to accumulate, to supply, to amass, or to keep for future use." The Commission decided that the term was sufficiently broad to include short-term, long-term, and semi-permanent storage. In FMC, a blasting agent was improperly left in a supply yard for over an hour and some of it had not been moved for more than six hours. In this case, the shift had started at 7:00 a.m. and the inspector saw the cylinders just before 9:00 a.m. He was justified in concluding that they had been left from the prior shift. The interval in this case falls within the time frame held by the Commission to constitute "storage" under a comparable mandatory standard. Therefore, I conclude that the cylinders were being stored temporarily or semi-permanently before being transported to the bay area. Due to the lack of covers on the cylinders, a violation existed.

The inspector testified that the cylinders could become airborne projectiles if the valve stem broke while the cylinder was tipped (Tr. 202-203). I find this could easily happen since the area was traveled hourly and hoses were present on which a person could trip (Tr. 206). The violation was serious. I further find the operator was negligent. Both the foreman on the prior shift and the foreman on the shift in progress had ample time and opportunity to discover this condition and correct it. I reject the inspector's excuse for failing to cite this violation as significant and substantial, because he did not actually see anybody walking by who would cause the cylinders to be knocked over (Tr. 231). People frequently pass by this area

and could easily knock over one of the unguarded cylinders, creating a reasonable likelihood of very serious injury. Leaving potentially lethal items such as these cylinders lying about must be discouraged. Deterrence will not result from a \$20 penalty such as the Solicitor proposed here.

A penalty of \$250 is assessed.

ORDER

The operator is Ordered to pay the following amounts within 30 days from the date of this decision:

<u>Citation No.</u>	<u>Amount</u>
2086972	\$ 75
2086667	125
2086671	70
2086672	100
2086674	75
2086888	250
Total	<u>\$695</u>



Paul Merlin
Chief Administrative Law Judge

Distribution:

John C. Nangle, Esq., Associate Regional Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Stephen W. Pogson, Esq., Evans, Kitchel & Jenckes, P.C., 2600 North Central Avenue, Suite 1900, Phoenix, AZ 85004 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 6 1984

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.
MEDUSA CEMENT COMPANY,
Respondent

: CIVIL PENALTY PROCEEDINGS
:
: Docket No. LAKE 83-74-M
: A.C. No. 20-02514-05501
:
: Docket No. LAKE 83-75-M
: A.C. No. 20-00038-05501
:
: Docket No. LAKE 83-76-M
: A.C. No. 20-00038-05502
:
: Docket No. LAKE 83-77-M
: A.C. No. 20-00038-05503
:
: Docket No. LAKE 83-80-M
: A.C. No. 20-00038-05504
:
: Docket No. LAKE 83-81-M
: A.C. No. 20-02514-05502
:
: Medusa Cement Company Plant

DECISION

Appearances: Rafael Alvarez, Esq., Office of the
Solicitor, U.S. Department of Labor,
Chicago, Illinois, for Petitioner;
Ralph M. Richie, Safety Director, Medusa
Cement Company, Cleveland, Ohio, for
Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The above cases involve 48 alleged violations of mandatory safety standards cited during inspections in April and May, 1983. Respondent contested the penalties assessed by MSHA and the Solicitor filed proposals for penalty which were docketed in the Review Commission. Subsequently, the parties agreed to settle the violations for the amount originally assessed and motions for approval of the settlement

agreements were submitted. The Chief Administrative Law Judge denied the settlement proposals and assigned the cases to me.

Pursuant to notice, the cases were heard in Charlevoix, Michigan, on June 21, 1984. During an on the record discussion between the representatives of both parties, including the taking of testimony from Federal Mine Inspectors Ronald J. Baril and Clyde C. Brown for Petitioner and Plant Safety Director William Nall and Safety Committee member Richard Putman for Respondent, the parties agreed to settle the violations for the penalties listed herein. I stated on the record that I would approve the settlement agreements.

FINDINGS AND CONCLUSIONS APPLICABLE TO ALL VIOLATIONS

1. Respondent owns and operates a mill in Charlevoix County, Michigan, which produces cement. It is a subsidiary of the Crane Company and is a relatively large operator. It operates the subject mill on a seasonal basis.

2. Respondent has a modest history of prior violations.

3. The penalties assessed herein will not affect Respondent's ability to continue in business.

4. Respondent admits the violations charged in the citations involved herein.

5. All of the violations involved in these proceedings were abated promptly and in good faith.

DOCKET NO. LAKE 83-74-M

Citation No. 2088977

This citation charged a violation of 30 C.F.R. § 56.16-6 because of the failure to place covers over the stems of oxygen and acetylene tanks. The inspector testified that this was a technical violation and no hazard was presented. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I accepted the representations made at the hearing and approved the proposed settlement.

Citation No. 2088978

This citation charged a violation of 30 C.F.R. § 56.9-2, because a rear view mirror was missing from a haul truck. The violation was originally assessed at \$20 and the parties proposed to settle for \$50. I approved the proposed settlement.

Citation No. 2088979

This citation charged a violation of 30 C.F.R. § 56.4-24(d), because of a defective fire extinguisher on a drill. The inspector testified that this was a significant and substantial violation. The violation was originally assessed at \$39, and the parties proposed to settle for \$100. I approved the proposed settlement.

Citation No. 2088980

This citation charged a violation of 30 C.F.R. § 56.9-2, because a rear view mirror was missing from a haul truck. The violation was originally assessed at \$20 and the parties proposed to settle for \$50. I approved the proposed settlement.

Citation No. 2088994

This citation charged a violation of 30 C.F.R. § 56.12-25 because a portable extension cord light was not grounded. The cord was used only for lighting purposes and did not present any hazard to employees. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the settlement.

Citation No. 2088995

This citation charged a violation of 30 C.F.R. § 56.12-14, because an employee was moving a power shovel cable without proper protective equipment. The equipment was provided by Respondent, and the employees were instructed to use it, but the employee in question failed to use it. The violation was originally assessed at \$68 and the parties proposed to settle for \$68. I approved the settlement.

Citation No. 2088996

This citation charged a violation of 30 C.F.R. § 56.12-32 because of Respondent's failure to have a cover plate on a switch box. The violation was originally assessed at \$20 and the parties proposed to settle for \$50. I approved the settlement.

Citation No. 2089061

This citation charged a violation of 30 C.F.R. § 56.12-25 because of the failure to ground an extension cord to a water softener. The violation was originally assessed at \$39 and the parties proposed to settle for \$39. I approved the proposed settlement.

Citation No. 2089062

This citation charged a violation of 30 C.F.R. § 56.12-8 because of failure to provide a bushing for a wire entering the drive motor of the crusher pan feeder. No bare wires were involved and the violation was in an area not accessible to employees. The violation was originally assessed at \$20 and the parties agreed to settle for \$20. I approved the proposed settlement.

Citation No. 2089065

This citation charged a violation of 30 C.F.R. § 56.14-6 because a guard over a pinch point had been removed while the machine was operating. The violation was originally assessed at \$30 and the parties proposed to settle for \$50. I approved the proposed settlement.

Citation No. 2089066

This citation also charged a violation of 30 C.F.R. § 56.14-6 because of the same condition as in the prior citation. The violation was originally assessed at \$30 and the parties proposed to settle for \$50. I approved the proposed settlement.

DOCKET NO. LAKE 83-75

Citation No. 2088998

This citation charged a violation of 30 C.F.R. § 56.14-6 because of failure to have guarding on the tail pulley of the conveyor belt. The tail pulley would only be approached during greasing operations when the machine is shut down. The pinch area is guarded by location. The violation was originally assessed at \$20 and the parties proposed to settle for \$30. I approved the proposed settlement.

Citation No. 2088999

This citation charged a violation of 30 C.F.R. § 56.14-1 because of failure to provide guarding for a conveyor belt head pulley. The guard had been removed and the employee failed to replace it. The area is isolated and would be visited only for maintenance. The violation was originally assessed at \$112, and the parties proposed to settle for \$112. I approved the proposed settlement.

Citation No. 2089067

This citation charged a violation of 30 C.F.R. § 56.12-16 because Respondent put drive belts on a drive motor without locking out the system. Respondent has a written lock out procedure and all employees are provided with locks. The employee involved was aware of the procedure. The violation was originally assessed at \$54, and the parties proposed to settle for \$54. I approved the proposed settlement.

Citation No. 2089068

This citation charged a violation of 30 C.F.R. § 56.4-24(d) because of Respondent's failure to service fire extinguishers. The contractor who serviced the fire extinguishers for Respondent has since been replaced. The violation was originally assessed at \$85 and the parties proposed to settle for \$100. I approved the proposed settlement.

Citation No. 2089069

This citation charged a violation of 30 C.F.R. § 56.11-3 because of the use of an 8 foot stepladder in bad repair. The ladder had been discarded by Respondent and placed in a refuse pile. An employee took it from the refuse pile and used it. The violation was originally assessed at \$39 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089070

This citation charged a violation of 30 C.F.R. § 56.14-6 because of a defect in the guard for the take up pulley and counterweight. Employees are not normally in the area, and the defect had apparently just occurred. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089074

This citation charged a violation of 30 C.F.R. § 56.11-2 because of a missing section on a handrail on a walkway. Maintenance has just been performed in the area and the top section of the handrail had been removed in order to perform the work. Supervisory personnel were not aware that the handrail had not been replaced. The violation was originally assessed at \$68 and the parties proposed to settle for \$68. I approved the proposed settlement.

Citation No. 2089075

This citation charged a violation of 30 C.F.R. § 56.11-12 because of an opening above a conveyor through which a person could fall. The plant had just gone into production for the season and the area had not been taken care of. The violation was originally assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

Citation No. 2089076

This citation charged a violation of 30 C.F.R. § 56.12-34 because of a portable light bulb hanging in the "shoot" without being guarded. The violation was originally assessed at \$68 and the parties proposed to settle for \$68. I approved the proposed settlement.

Citation No. 2089077

This citation charged a violation of 30 C.F.R. § 56.11-1 because of a material build-up on a walkway. Again, the plant had just started operating, and the company had not yet completed cleaning its many walkways. The violation was originally assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

Citation No. 2089078

This citation charged a violation of 30 C.F.R. § 56.14-6 because of a missing guard on a tail pulley. The guard had been removed for clean up purposes and was not replaced. The violation was originally assessed at \$112 and the parties proposed to settle for \$112. I approved the proposed settlement.

Citation No. 2089079

This citation charged a violation of 30 C.F.R. § 56.11-2 because of a missing section of toeboard on a deck area. There was adequate handrailing - including a top rail and a midrail. The area was not active at the time. There was no loose material on the deck. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089043

This citation charged a violation of 30 C.F.R. § 56.14-6 because of an unguarded pinch point. The violation was originally assessed at \$112 and the parties proposed to settle for \$112. I approved the proposed settlement.

Citation No. 2089044

This citation charged a violation of 30 C.F.R. § 56.16-5 because compressed gas cylinders were not properly secured. The cylinders had just been used and the employees neglected to chain them up. The violation was originally assessed at \$68 and the parties proposed to settle for \$68. I approved the proposed settlement.

Citation No. 2089045

This citation charged a violation of 30 C.F.R. § 56.12-34 because a portable extension cord with exposed wires and a broken light bulb in its socket was plugged in and lying on the floor. The cord had just been used by an employee and was left on the floor. The violation was originally assessed at \$136 and the parties proposed to settle for \$136. I approved the proposed settlement.

Citation No. 2089047

This citation charged a violation of 30 C.F.R. § 56.14-7 because a guard on the V-belt drive was in bad repair, exposing pinch points. The area was a restricted walkway. The violation was originally assessed at \$112 and the parties proposed to settle for \$112. I approved the proposed settlement.

Citation No. 2089048

This citation charged a violation of 30 C.F.R. § 56.11-3 because of a defective ladder. Respondent asserts that the ladder belonged to construction personnel and had been left by them on the premises. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I accepted the proposed settlement.

Citation No. 2089051

This citation charged a violation of 30 C.F.R. § 56.11-1 because of stored material on a walkway. The violation was originally assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

Citation No. 2089081

This citation charged a violation of 30 C.F.R. § 56.12-34 because of failure to provide guarding for an extension cord light close to a walkway. Only one employee - the supervisor making an onshift examination - normally uses the walkway. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089082

This citation charged a violation of 30 C.F.R. § 56.12-8 because a power cable lacked a restraining clamp. The cable was grounded and there was little likelihood of any employee receiving an electrical shock or other injury. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

DOCKET NO. LAKE 83-76-M

Citation No. 2089083

This citation charged a violation of 30 C.F.R. § 56.11-1 because of a buildup of cement on the stairway and the walkway at the bottom of the transfer elevator. The buildup was of loose material and was not large. The violation was originally assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

Citation No. 2089085

This citation charged a violation of 30 C.F.R. § 56.11-12 because of the absence of a cover plate for a fuel oil pump pit. This was not a travelway but was out in a field and any employee travelling in the area would be looking for the pit. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

DOCKET NO. LAKE 83-77-M

Citation No. 2089071

This citation charged a violation of 30 C.F.R. § 56.9-7 because the emergency stop cord on a conveyor was not properly located. The discussion brought out that the cord was within 12 inches of the pinch point and this conforms to present MSHA District policy. I determined that no violation was shown and vacated the citation.

Citation No. 2089072

This citation charged a violation of 30 C.F.R. § 56.9-7 because an accessible stop cord was not present along the entire length of the conveyor. Here the stop cord was 21 inches from the pinch point. The violation was originally assessed at \$20 and the parties proposed to settle for \$100. I approved the proposed settlement.

Citation No. 2089000

This citation charged a violation of 30 C.F.R. § 56.9-7 because emergency stop devices on both sides of a conveyor belt were 21 inches from the pinch points. The violation was originally assessed at \$20 and the parties proposed to settle for \$100. I approved the proposed settlement.

Citation No. 2089041

This citation charged a violation of 30 C.F.R. § 56.14-6 because the drive chain of an elevator was unguarded. The guard had been removed for repairs. The area had been roped off but was still accessible to employees. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089042

This citation charged a violation of 30 C.F.R. § 56.9-11 because of a shattered windshield on a front-end loader. The damaged had occurred on the same shift as the inspection. The violation was originally assessed at \$136 and the parties proposed to settle for \$136. I approved the proposed settlement.

Citation No. 2089046

This citation charged a violation of 30 C.F.R. § 56.14-6 because of a missing guard on a rotary feed drive. The violation was originally assessed at \$112 and the parties proposed to settle for \$112. I approved the proposed settlement.

Citation No. 2089049

This citation charged a violation of 30 C.F.R. § 56.11-12 because a section of a wall had fallen and was not cleaned up. Employees did not travel in the area. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089050

This citation charged a violation of 30 C.F.R. § 56.20-3(a) because of material spilled on a walkway. This was hardened material and had apparently been present for some time. The violation was originally assessed at \$119 and the parties proposed to settle for \$119. I approved the proposed settlement.

Citation No. 2089080

This citation charged a violation of 30 C.F.R. § 56.20-3(a) because of equipment being present on walkways presenting tripping hazards. The violation was originally assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

Citation No. 2089084

This citation charged a violation of 30 C.F.R. § 56.12-8 because power cables were out of restraining clamps. The cables were in good condition and were

grounded. Employees do not travel the area. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089086

This citation charged a violation of 30 C.F.R. § 56.9-7 because the emergency stop devices on a conveyor belt were not operating. The violation was originally assessed at \$119 and the parties proposed to settle for \$119. I approved the proposed settlement.

DOCKET NO. LAKE 83-80-M

Citation No. 2089073

This citation charged a violation of 30 C.F.R. § 56.16-6 because of failure to cover the stems of compressed gas cylinders in a truck. The violation was originally assessed at \$39 and the parties proposed to settle for \$56. I approved the proposed settlement.

DOCKET NO. LAKE 83-81-M

Citation No. 2088997

This citation charged a violation of 30 C.F.R. § 56.14-1 because of the failure to provide guarding for the counterweight wheel at the No. 2 shaker stream. This was not a normal travelway and the only employees who would go in the area would be a supervisor for onshift examinations and an employee to do greasing. The machine would be deenergized for greasing. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089063

This citation charged a violation of 30 C.F.R. § 56.4-24(d) because of failure to properly maintain and service a fire extinguisher. The violation was originally assessed at \$39 and the parties proposed to settle for \$100. I approved the proposed settlement.

Citation No. 2089064

This citation charged a violation of 30 C.F.R. § 56.11-1 because of material spilled along the walkway at the conveyor. Clean up had begun of this area. The

violation was originally assessed at \$39 and the parties proposed to settle for \$39. I approved the proposed settlement.

ORDER

I have considered and approved the proposed settlements in the light of the criteria in section 110(i) of the Act. Respondent is ORDERED to pay within 30 days of the date of this decision the following civil penalties:

<u>CITATION NO.</u>	<u>PENALTY</u>
2088977	\$ 20
2088978	50
2088979	100
2088980	50
2088994	20
2088995	68
2088996	50
2089061	39
2089062	20
2089065	50
2089066	50
2088998	30
2088999	112
2089067	54
2089068	100
2089069	20
2089070	20
2089074	68
2089075	85
2089076	68
2089077	85
2089078	112
2089079	20
2089043	112
2089044	68
2089045	136
2089047	112
2089048	20
2089051	85
2089081	20
2089082	20
2089083	85
2089085	20
2089071	vacated 0
2089072	100

2089000	100
2089041	20
2089042	136
2089046	112
2089049	20
2089050	119
2089080	85
2089084	20
2089086	119
2089073	56
2088997	20
2089063	100
2089064	39
Total	<u>\$3,015</u>

James A. Broderick
 James A. Broderick
 Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S.
 Department of Labor, 230 South Dearborn Street, Chicago, IL
 60604 (Certified Mail)

Ralph M. Richie, Director of Safety and Office Services,
 Medusa Cement Company, Box 5668, Cleveland, OH 44101
 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 6 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 81-326-M
Petitioner : A.C. No. 48-00155-05076 A
 :
v. : Alchem Trona Mine
 :
THOMAS E. JONES, :
Respondent :

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
John A. Snow, Esq. VanCott, Bagley, Cornwall &
McCarthy, Salt Lake City, Utah,
for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

This a civil penalty proceeding under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq. (the Act). ^{1/} The Secretary seeks a civil penalty against respondent, Thomas E. Jones (Jones), a mine maintenance foreman at the Alchem Trona Mine operated by Allied Chemical Corporation (Allied) near Green River, Wyoming.

Jones is charged with knowingly authorizing, ordering, or carrying out as an agent, the corporate mine operator's violation of the mandatory safety standard 30 C.F.R. § 57.21-12 which provides as follows:

Immediately before and continuously during welding or cutting with an arc or open flame or soldering with an open flame, in other than fresh air, or in places where methane is present, or may enter the air current, a competent person shall test for methane with a device approved by the Secretary for detecting methane.

^{1/} Whenever a corporate operator violates a mandatory health or safety standard ... , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation ... shall be subject to the same civil penalties, fines, ... that may be imposed upon a person under subsections (a) and (d).

The corporate mine operator's violation was cited in a 104(d)(1) type Citation No. 576827 issued on April 2, 1980, and alleged as follows:

In Room No. 3 of JME Panel there was a person welding with an arc on No. 3 miner head in the last open cross-cut. There was no person testing for methane with a methane detecting device. The content of methane in the air at the miner head was .0%. Less than 20 feet away, the methane content was from .2% to .5%. The readings were taken with CSE Model 102 methane detector, the charge was checked after the readings and was found to be 3.8. The detector was last calibrated 0015 hours 4/2/80. The panel foreman was aware that his men were welding at this location.

Jones denied the allegation.

After notice to the parties, a hearing on the merits was held in Green River, Wyoming. Post-hearing briefs have been filed by both parties. Based on the evidence presented at the hearing and the contentions of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

STIPULATIONS

At the hearing, the parties agreed to the following stipulations which were accepted (Transcript at 5).

1. Federal Mine Safety and Health Review Commission (Commission) has jurisdiction over the matter at issue here.
2. Allied Chemical Corporation is, in fact, a corporation.
3. Thomas E. Jones is an agent of Allied Chemical Corporation.

FINDINGS OF FACT

1. On April 1, 1980, Melvin R. Jacobson received a telephone call from a Thomas C. Dean. Jacobson is the supervisor in the Green River, Wyoming, Mine Safety and Health Administration (MSHA) field office. Dean is a miner and employee of Allied Chemical Corporation at their Alchem Trona Mine. Dean stated that during the graveyard shift on March 31, 1980, Tom Jones, a supervisor, allowed a piece of schedule 24 equipment (lube truck) to be parked and operated in and beyond the last open cross-cut in the south area of the mine. Also, that welding

was being performed during this time in and beyond the last open cross-cut. Dean further stated that methane monitoring was not being conducted during the welding operation (Tr. at 10 and Exhibit P-1).

2. As a result this complaint, Jacobson sent MSHA inspectors William W. Potter and Robert Kinterknecht to the Alchem Trona Mine to conduct an investigation.

3. On April 1, 1980, Dean had arrived at the No. 3 room of J.M.E. panel of the Alchem Trona Mine at approximately 12:30 a.m. to commence work on the graveyard shift. Dean's job was to use an acetylene torch to cut out the bit holders on the cutting head of the continuous miner. Thomas E. Jones, the foreman, had made a methane check at 12:30 or 1:00 a.m. on the graveyard shift (Tr. at 24). No other methane test was conducted by Jones during the graveyard shift at the location of the continuous miner where Dean was working (Tr. at 26).

4. During the lunch hour on the graveyard shift on April 1, 1980, Dean and Bernie Caldwell told Jones that they should not be welding in the last open cross-cut. Jones didn't answer the miners (Tr. at 32 and Exh. P-3).

5. On April 2, 1980, at approximately 1:00 a.m., Jones again made a pre-shift examination for methane in the J.M.E. panel (Tr. at 38). MSHA inspectors Potter and Kinterknecht arrived at the mine at 1:45 a.m. on April 2, 1980, to investigate Dean's complaint of welding in the last open cross-cut of the J.M.E. panel. The two inspectors proceeded underground and met with Jones at approximately 2:25 a.m. The group then proceeded to the J.M.E. panel arriving at approximately 2:40 a.m. Potter observed a miner welding in the last open cross-cut and saw no one monitoring for methane (Tr. at 89). Potter issued Citation No. 576827 (Exh. P-2).

6. At the time the citation was issued, the No. 3 continuous miner was parked in the last open cross-cut of the J.M.E. panel with the head in the drift or No. 3 room (Exh. R-1 and Tr. at 91). Potter took 10 methane readings in the area with a methanometer. The first test was at the point where welding was being performed and the reading was .0%. The next test was at a location just inside the cross-cut towards the face. The reading was .02%, and a few feet nearer the face, a reading was registered at .05%. As Potter progressed towards the face of the drift, the readings were from .04% to a .6% at the face (Tr. at 93 and Exh. P-4). The Alchem Trona Mine is considered a very gassy mine and is subject to a MSHA five day inspection schedule (Tr. at 95).

7. Citation No. 576827 was terminated soon after it was issued when Jones gave Caldwell his methanometer to check for methane where the welding was being done (Tr. at 101).

ISSUES

The issues in this proceeding are:

1. Whether Jones, as an agent of the corporate operator, knowingly authorized, ordered, or carried out a violation of 30 C.F.R. § 57.21-12?

2. If so, the appropriate civil penalty that should be assessed against Jones for the said violation of the Act.

DISCUSSION

Jones admits in his testimony that on April 2, 1980, as maintenance foreman, he was assigned the task of having certain maintenance work performed in the J.M.E. panel of Allied's Alchem Trona Mine. This included repairs to a continuous miner located in said panel. After Jones received his assignment, and fire-bossed the J.M.E. panel at 1:00 a.m., he assigned miners of his crew to various jobs. Two miners were assigned specifically to perform work which involved welding on the continuous miner (Tr. at 171-173).

Jones further admitted that the continuous miner had been moved earlier to the last open cross-cut of the panel but could not be taken further from the face area because of various obstructions, so repairs were made while the miner was in the last open cross-cut (Tr. at 177-183).

Jones further testified that the last open cross-cut in the J.M.E. panel is not a return air corridor, as in other mines, but contains fresh air (Tr. at 236). For ventilation purposes, Allied uses a system of tubing designed to remove dirty air (air that may contain methane) from the face. Jones also admits in his brief, that although the continuous miner was in fresh air, under Allied's safety practices, when welding is done in the last open cross-cut, continuous monitoring for methane is required (Resp's brief at p. 3). Jones further admits that he knew about a memorandum issued by Allied on March 4, 1976 which stated such a requirement. (Exh. P-5).

On April 2, 1982, all of Allied's continuous methane monitors were under repair and not available to Jones for use during the work being performed on the continuous miner (Tr. at 172, 173). However, he contends that he had been instructed by his supervisor that while the continuous methane monitors were not working, he could monitor the methane conditions at the location of the continuous miner by using a regular hand held

methane monitor every 15 minutes (Tr. at 171-173 and Resp's brief at p. 4). Jones contends that he specifically followed this procedure on April 2, 1980. One methane reading was taken when the miners were setting up their equipment to start welding and the second reading approximately 15 minutes later. It was at this time he was called to leave the area and met the MSHA inspectors (Tr. 190-191).

Randy Dutton, safety engineer for Allied, testified that in the later part of March, 1980, the maintenance mine superintendent inquired if work could be done in the last open cross-cut using hand-held methane monitors as the continuous monitors were not working. Dutton said he did not know and would find out. He stated that he called the MSHA district office and told M.R. Jacobson, the supervisor, that the continuous monitors were not working and inquired whether it was permissible to do some welding beyond the last open cross-cut using hand held monitors. Dutton claims Jacobson said they could if they monitor and test for methane every ten to fifteen minutes. This information was passed on to the maintenance supervisor of the mine (Tr. at 224, 225).

Jacobson denied that he had a telephone conversation with Dutton in March of 1980, and in fact, was not well acquainted with him. Jacobson checked a telephone log which he maintains at the MSHA office of all calls he receives and found no calls from Dutton for the period of time involved here. Jacobson did find in his log that on May 4, 1980, Dutton had called in to report an accident (Tr. at 260, 261). However, Jacobson did receive a call from Dutton, in the spring of 1981, after Dutton became Safety Director, involving a proposed regulation to cover checking methane in the last open cross-cut (Tr. at 262).

From the conflicting testimony regarding this issue, I find that the testimony of Jacobson more persuasive than that of Dutton. Jacobson was able to produce his telephone logs to support his statements that the alleged conversation never took place. There was no written evidence or corroboration by Dutton that he had this conversation and received approval from Jacobson for monitoring every 15 minutes as he alleged.

Even assuming, however, that Jones was told by a supervisor that he could monitor every 15 minutes for methane in the last open cross-cut when welding, his defense must fail. The credible evidence in this regard clearly demonstrates that Jones took only

the one test at the beginning of the graveyard shift on both April 1, and April 2, 1980, and did not test after that. Dean testified that he observed Jones make this one check each day (Tr. at 23, 24 and 36, 37). However, both Dean and Caldwell testified that they did not observe Jones make any further checks for methane on either day. It was after a discussion in the lunchroom on April 1, 1980, that welding in the last open cross-cut without methane monitoring was dangerous and receiving no apparent response from Jones, that Dean telephoned the MSHA office and reported the matter. The seriousness of taking such action by Dean gives credence to his concern about the practice and supports his contention that no monitoring was going on. The evidence does not show that Dean was a complainer or raised safety complaints often. Also, his testimony was corroborated by the other miner Caldwell who was able to observe whether Jones made such methane checks as Jones claimed. There was testimony on behalf of Jones that due to welding glasses and mask, the miners could not observe the tests being made. I do not believe this to be valid as both men should have seen one or more tests performed during a whole shift, if they were being done as claimed by Jones. Also, not one miner or witness of his whole crew testified that the tests were conducted during the dates involved.

Based upon the entire record in this case, I find that Jones was aware of the requirement to check continuously for methane when welding in the last open cross-cut. Also, that he ordered Caldwell and Dean to perform welding work in this area on April 1 and 2, 1980, and did not monitor for methane but once during the entire shift. I find this is a violation of Section 57.21-12.

It was also shown by the evidence that the corporate operator, Allied was found to have violated § 57.21-12 involving the same citation No. 576827 and paid a penalty assessment of \$500.00. See Secretary of Labor v. Allied Chemical Corporation, (1981) Docket No. WEST 80-478-M, 3 FMSHRC 2387 (ALJ) and Exhibit P-7.

PENALTY

I find the failure on the part of Jones to check for methane or to not supply the miners with methane checking devices and instruct them to make the necessary continuous test is gross negligence. As a supervisor, he was aware of the company memorandum requiring such tests. Also, assuming arguendo that Jones

was given instructions by his supervisor to do so every 15 minutes, the credible evidence shows that no tests were made after the initial one at the beginning of the shift.

As to gravity, I find that such failure to test by Jones to be very serious. The Alchem Trona Mine is considered a very gassy mine and should methane gas enter the area where welding was being done, an explosion could occur causing serious injury or death to the several miners working in the area. Although this was a fresh air area, it was admitted that a roof fall could occur which would allow methane to enter the area where the miners were working.

In regards to Jones, he has no record or history of previous violations under the Act. The violation was abated in good faith by Jones giving one of the miners his methane monitor. There was no evidence presented in this case as to Jones financial condition or ability to pay a reasonable penalty if one is assessed against him. I find based upon the above that \$250 is a reasonable penalty in this case.

ORDER

Based upon the above findings of fact and conclusions of law, respondent Jones is ORDERED to pay the sum of \$250 within 40 days of the date of this decision for the violation found herein to have occurred.



Virgil E. Vail
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, Virginia 22203
(Certified Mail)

John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, 50 S. Main, Suite 1600, Salt Lake City, Utah 84110-3400
(Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 3 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. WEST 84-21-M
v. : A.C. No. 05-03890-05501
: Mackey No. 444 Mine
ELK CREEK GOLD MINES CO., :
Respondent :

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Mr. Lowell E. Jarratt, President, Elk Creek Gold
Mines Co., Lakewood, Colorado, pro se,
for Respondent.

Before: Judge Carlson

GENERAL STATEMENT

This case arose out of the inspection of an underground gold and silver mine near Black Hawk, Colorado, owned by Elk Creek Gold Mines Co. (Elk Creek). A hearing on the merits was held on May 23, 1984 in Denver, Colorado under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act). The Secretary seeks civil penalties for four alleged violations of standards promulgated under the Act.

The parties waived the filing of post-hearing briefs.

ISSUES

The essential questions to be decided are:

- (1) Whether respondent operator was responsible under the Act for any or all of the violations alleged, or whether the liability, if any, lay with an independent contractor.
- (2) To the extent that respondent may have been responsible, whether the alleged violations occurred, and, if so, what civil penalties are appropriate.

REVIEW AND DISCUSSION OF THE EVIDENCE

Background

On September 22 and 23, 1983, Inspector Arnold P. Kerber, the Secretary's sole witness, visited the site of the Mackey No. 444 Mine, where this case arose. The evidence shows that a report from a State of Colorado mine inspector prompted the Mackey's federal inspection. It further shows that at the time of inspection the mine, closed for many years, was being re-opened by Elk Creek Gold Mines Co., the respondent. This small corporation had been formed to take over the Mackey and restore production. Mr. Lowell E. Jarratt, respondent's only witness at the hearing, is president of the company and general manager of the mine.

On the date of Kerber's inspection, shaft driving was the only activity at the site. (The original shaft had collapsed many years before.)

Kerber's four citations involved respondent's failure to register the mine as required by the Secretary's standards; failure to post warning signs near the explosives magazine; failure to post warnings near a fuel tank, and a failure to provide a berm at the edge of a dump site.

The Contractor Defense

It is undisputed that Elk Creek had entered into a written agreement with a Ted Anderson to drive the new 300 foot shaft (respondent's exhibit 1). Signed on June 10, 1983, the contract provided that Anderson would provide the miners, pay them, and provide certain tools and personal equipment to be used by them.

No one disputes that the fuel tank and explosive magazine were owned by Elk Creek, as was the small front-end loader used to remove muck from the shaft.

On the two successive days of his inspection, Inspector Kerber observed two miners blasting in the shaft and removing muck with Elk Creek's front-end loader. These men told Kerber that neither was in charge, but that both were working for Ted Anderson. Kerber saw these men dumping muck over an embankment, the edge of which was not protected by a berm.

The other men were seen by the inspector at various times attempting to start a scoop tram. Both identified themselves as Elk Creek shareholders.

At the time of the inspection, Ted Anderson was not at the mine site. Mr. Jarratt acknowledged at the hearing that Anderson was in Florida during most of the shaft driving operation, and that Elk Creek was greatly displeased with Anderson's performance on the contract.

With respect to the magazine, fuel tank, and the berm citations, Elk Creek contends that the full responsibility for compliance lay with Anderson as an independent contractor. As Mr. Jarratt put it: "I wasn't watching those things because it was his [Anderson's] responsibility, so I'm asking that these charges be dismissed." (Transcript at 35.)

The relationship between Elk Creek and Anderson had the earmarks of an agreement between an owner and an independent contractor. The Act is enforceable against mine "operators." By definition, independent contractors are "operators," 30 U.S.C. § 802(d). The Secretary of Labor has promulgated a regulation which provides guidelines to his inspectors as to when to cite the owner-operator, when to cite an independent contractor, or when to cite both. 30 C.F.R. § 45, Appendix A. The guidelines are lengthy, but generally give weight to such matters as which party contributed to the creation of a violation, whose employees are exposed to the hazards flowing from a violative condition, and who had control over the conditions that needed abatement. In Phillips Uranium Corporation, 4 FMSHRC 549 (1982), the Commission majority took the position that citations issued against owners may be dismissed where the Secretary's decision to proceed against the owner, rather than a contractor, was not consistent with the purposes and policies of the Act. The Act, according to the majority, mandates that contractors who created violative conditions and who are in the best position to eliminate the attendant hazards and to prevent their recurrence, should be the subject of the Secretary's enforcement efforts.

In the present case it is clear that the duty to post warning signs at the powder magazines was that of the owner, Elk Creek. It owned the magazine and supplied the powder. Moreover, the two shareholders working outside the portal were plainly "miners" under the broad definitions of the Act, and must be considered Elk Creek's employees since they were not Anderson's. An explosion of the magazine would have endangered them as well as Anderson's two miners at the site. For these reasons, the citation was properly issued to Elk Creek.

Liability for failure to post proper warning signs at the fuel storage area would likewise fall upon Elk Creek, as owner of the tank. A party to a venture who agrees to provide a facility for use of a contractor must surely comply with any regulations pertaining to warning signs or placards required for safe use of the facility. Here, too, Elk Creek was the proper recipient of the citation.

As to the berm citation, only shaft workers paid by Anderson were apparently involved in dumping muck down the unprotected embankment. The alleged violation was unrelated to the condition of the machine or machines furnished by Elk Creek. Whether the berm should be furnished by Elk Creek or its contractor is at least arguable. In this case, however, the evidence showed that Anderson, the contractor, had virtually abandoned his responsibility in managing or supervising the shaft operation. Rather plainly, this included safety aspects of the project. Neither of the two Anderson men had any supervisory authority, and the blasting and mucking were proceeding willy-nilly, with no apparent direction from anyone. Elk Creek knew of this unfortunate state of affairs, and although displeased, permitted it to continue. The owner-operator has overall responsibility for safety compliance, and may not divest itself of that responsibility by engaging a contractor who fails to exert any effort toward safety. When it became clear, as it did before the inspection, that Anderson was not at the site and that no one else was exerting any true authority over shaft operations, the full safety responsibility reverted to Elk Creek. No other result is consistent with the intent of the Act. The berm citation was properly issued to Elk Creek.

Violations

We now turn to a consideration of whether the violations occurred.

Citation 2098576 - The Magazine

During his inspection, Mr. Kerber noted that Elk Creek's magazine, which contained explosives, had no warning signs indicating that it was a magazine. This testimony was not disputed. He cited the company with a violation of the standard published at 30 C.F.R. § 57.6-20(i), which provides that magazines shall be:

[p]osted with suitable danger signs so located that a bullet passing through the face of the sign will not strike the magazine.

The violation is established.

Citation 2098578 - The Fuel Area

According to Inspector Kerber, a fuel storage area with a large tank and several fuel barrels displayed no warning signs against smoking or open flames. This area was used to refuel vehicles at the mine, he testified. This evidence, too, was undisputed by Elk Creek. The inspector cited the company for a violation of 30 C.F.R. § 57.4-2. That standard provides:

Signs warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist.

That motor fuels offer an explosion hazard is beyond cavil. The violation is established.

Citation 2098579 - The Berm

Inspector Kerber watched as one of the miners driving the new shaft steered a small, diesel powered front-end loader to the brink of a steep bank to dump muck from the bucket. The drop, he testified, was about 100 feet. No berm (protective ridge) or other barrier had been built at the edge of the bank to protect vehicles from slipping over. The bucket of the loader extended past the edge during dumping. Should the vehicle go over the edge, Kerber believed, the driver could suffer fatal injuries. He therefore cited Elk Creek with a violation of 30 C.F.R. § 57.9-54. That standard provides:

Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.

The truth of the inspector's testimony was uncontested. The violation is established.

Citation 2099781 - Notification of Legal Identity

The Secretary's regulation published at 30 C.F.R. § 41.11 requires that all mine operators file written notification of their "legal identity" with the district manager for the Mine Safety and Health Administration in the district where the mine is located. The notice must be filed within 30 days of the opening of a new mine and, for a corporate operator, must provide extensive information.

The inspector found no record of a filing by Elk Creek, and therefore issued a citation for a failure to register under the regulation.

Elk Creek acknowledges that it failed to file a formal notification. It defends, however, on the basis that Mr. Jarratt personally visited the MSHA district manager on or about June 10, 1983 to inquire about requirements under the Act. The manager provided certain materials to him, but at no time mentioned the notification requirement.

Although Mr. Jarratt's visit to the manager's office demonstrated an admirable desire to comply with the government rules, it cannot serve as the basis for an outright dismissal of the citation. There is no evidence that the manager deliberately misled Jarratt. The requirement of the notification rule is absolute, and constitutes an essential element of the entire enforcement scheme under the Act.

Additionally, the evidence indicates that more than 30 days had elapsed since work at the mine site had begun. Arrangements for the reopening had begun in June, and by the time of the inspector's visit the shaft had progressed some 230 feet with only a two-man crew working.

The violation is established. Elk Creek's manifest good faith is a favorable factor to be weighed in assessing penalty.

Significant and Substantial Charge

The Secretary classified the violation involving the lack of a berm at the edge of the dump area as "significant and substantial" under section 104(d) of the Act. In Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), the Commission defined such a violation as one where "... there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."

The evidence presented in this case shows that the Secretary's classification was correct. The absence of a berm or similar barrier at the brink of the embankment created a realistic possibility that a miscalculation or moment of inadvertance could cause a front-end loader to go over the edge while dumping muck. Were that to happen, the equipment operator could quite clearly suffer serious injury or even death, since the un rebutted testimony showed that the bank was too steep for brakes to hold the vehicle, and the fall could be as far as 100 feet. The violation described in citation 2098579 was "significant and substantial."

Penalties

The Secretary seeks a civil penalty of \$20.00 for each of the violations in this case, except for the berm violation, for which \$54.00 is proposed. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to continue in business, and the gravity of the violation itself.

Virtually all these factors weigh heavily in Elk Creek's favor. The operation is quite small. Management's belief that its contractor bore the responsibility for most of the areas in which the violations arose, though in error, was held in obvious good faith. For that reason I consider the level of negligence relatively low. The record showed that the company achieved prompt abatement of all infractions. The mine had no history of prior violations. Only the violation involving the lack of a berm presents any appreciable degree of gravity.

I must note, though, that the Secretary obviously considered these mitigating factors since the penalties proposed are conservative. Also, there is no evidence that the imposition of these modest penalties would interfere with Elk Creek's ability to continue in business.

Having weighed the evidence, I must hold that \$20.00 is the appropriate penalty for the failure to post warning signs at the magazine (citation 2098576), and that \$20.00 is likewise appropriate for the lack of warning signs in the fueling area (citation 2098578). Because of the greater gravity of the berm violation, (citation 2098579), the proposed penalty of \$54.00 is appropriate.

Owing to the exemplary efforts made by Elk Creek to learn of the government's requirements upon reopening a mine, only the most minimal penalty is warranted for the failure to file a formal notification. I conclude that a sum of \$5.00 is warranted.

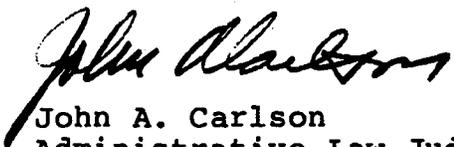
CONCLUSIONS OF LAW

Upon the entire record, and in conformity with the factual findings embodied in the narrative portion of this decision, it is concluded:

- (1) That the Commission has jurisdiction to decide the matter.
- (2) That respondent Elk Creek was the proper recipient of the citations issued by the Secretary.
- (3) That Elk Creek violated the standard published at 30 C.F.R. § 57.6-20(i) as charged in citation 2098576, and that \$20.00 is the appropriate penalty for the violation.
- (4) That Elk Creek violated the standard published at 30 C.F.R. § 57.4-2 as charged in citation 2098578, and that \$20.00 is an appropriate penalty for the violation.
- (5) That Elk Creek violated the standard published at 30 C.F.R. § 57.9-54 as charged in citation 2098579; that the violation was "significant and substantial"; and that \$54.00 is the appropriate penalty for the violation.
- (6) That Elk Creek violated the rule published at 30 C.F.R. § 41.11 as charged in citation 2099781, and that \$5.00 is an appropriate penalty for the violation.

ORDER

Accordingly, the four citations in this case are ORDERED affirmed, and Elk Creek is ORDERED to pay a total civil penalty of \$99.00 within 30 days of the date of this decision.


John A. Carlson
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Mr. Lowell E. Jarratt, Elk Creek Gold Mines Company, 815 Kendall Street, Lakewood, Colorado 80214 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 7 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-111-M
Petitioner	:	A.C. No. 35-00540-05501
	:	
v.	:	Ross Island Plant
	:	
ROSS ISLAND SAND & GRAVEL	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Robert A. Friel, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner; Mr. R.G. Tuttle, Corporate Director, Ross Island Sand and Gravel, Portland, Oregon, appearing Pro Se.

Before: Judge Vail

STATEMENT OF THE CASE

In the above proceeding, the Secretary of Labor on behalf of Mine Safety and Health Administration (MSHA), seeks civil penalties against the respondent for two alleged violations of mandatory safety standards. The violations were charged in two citations issued on June 1, 1983, which violations were not considered significant and substantial, and penalty assessment of \$20.00 each was proposed. The respondent initially contested the citations.

On September 6, 1983, respondent wrote the Secretary proffering a check in the sum of \$40.00 to settle the above matter. On September 19, 1983, the Secretary submitted a Motion to Approve Settlement to the Commission proposing that the \$40.00 be accepted in full settlement. The motion was denied and an order was issued to the parties to submit additional information. Additional information was submitted and again the settlement proposal was denied. The case was then assigned to this writer for hearing.

A further supplemental petition for settlement was submitted on May 10, 1984, which was denied by order dated May 10, 1984.

The case was heard on the merits on June 22, 1984. Robert W. Funk, MSHA inspector testified on behalf of petitioner. Paul T. Godsil testified on behalf of respondent. Post hearing briefs were waived.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Respondent is a medium sized operator. It employes approximately 15 miners at its Ross Island Plant. Payment of a reasonable penalty will not impair respondent's ability to continue in business. Respondent demonstrated good faith in correcting the two cited conditions (Transcript at 13, 14). In the previous 24 months, respondent had no citations.

Respondent admits that the two violations cited on June 1, 1983, in citation Nos. 2225917 and 2225918 existed. However, it contests the negligence and gravity of conditions involved in the violations (Tr. at 14).

Citation No. 2225917

On June 1, 1983, a citation was issued to the respondent alleging a violation of 30 C.F.R. § 56.11-1. Respondent was cited for a work deck area behind the scalper screen being littered with wood and other debris.

In respondent's mining process, material is dredged from a lagoon, loaded on barges and clam-bucketed onto a hopper. The scalper screen is at the top of a hopper and collects debris in the material where it starts to be processed. A miner (stick picker) stands on a platform and picks wood and debris from this screen as it accumulates. The wood and debris is laid in a pile on the platform where the stick picker works. The platform on which the miner works is also a walkway approximately 8 feet wide. Only one person, the stick picker, is on this platform and exposed to the danger of tripping and falling if debris or wood accumulates. The inspector testified that from the size of the pile, he estimated it to be an accumulation of two days work. An injury from tripping could cause lost workdays or restricted duty.

Respondent admitted the violation but contends that the pile of wood and debris is usually cleaned up at a point half way through the shift. It is argued that removing the debris in this manner is preferred over throwing the material over the side of the platform to the ground 40 to 50 feet below.

I find, based on the facts, that there is only one employee exposed to injury at this location at a given time and the injury would be from tripping and falling and would in likelihood not be serious or fatal. Based on a consideration of the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$20.00.

Citation No. 2225918

On June 1, 1983, Citation No. 2225918 was issued to respondent alleging a violation of 30 C.F.R. § 56.16-5 due to an acetylene bottle located in the welding bay not being secured. Funk testified that he observed one acetylene bottle in respondent's welding bay area which was not in the rack supplied for storing such bottles. The risk to such a condition is that if the bottle were to fall over, acetone in the bottle can get into the valve causing it to deteriorate leaking into the hose and cause an explosion. Funk admitted that it was unlikely that an accident would occur.

Respondent admitted the above facts but contends that the bottle was empty. Also, that hoses attached to acetylene bottles have flashback arresters to eliminate the danger of flashing back and causing a fire. Based on a consideration of the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$20.00

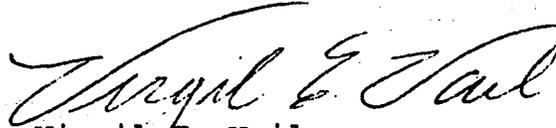
CONCLUSION

My assessment of the penalties herein is as follows:

1. Respondent is a medium sized operator.
2. Respondent was negligent in permitting each of the violations to occur.
3. A penalty will have no effect on respondent's ability to continue in business.
4. Respondent had no prior citations in the past 24 months.
5. The violations are not serious.
6. Respondent showed good faith in achieving rapid compliance.

ORDER

Based upon the above findings of fact and conclusions of law, respondent is ORDERED to pay the total sum of \$40.00 for the two violations found herein to have occurred. I understand respondent has previously submitted payment of the \$40.00 in this case in satisfaction thereof, and the above captioned matter is DISMISSED.


Virgil E. Vail
Administrative Law Judge

Distribution:

Robert A. Friel, Esq. Office of the Solicitor, U.S. Department of Labor, 8003 Federal Building, Seattle, Washington 98174
(Certified Mail)

Mr. R. G. Tuttle, Corporate Director, Ross Island Sand & Gravel Company, 4315 S. E. McLoughlin Boulevard, P.O. Box 02219, Portland, Oregon 97202 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 10 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 81-58-M
Petitioner	:	A.C. No. 39-00055-05042 A
	:	
v.	:	Homestake Mine
	:	
JAMES L. MERCHEN,	:	
Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Robert A. Amundson, Esq., Amundson & Fuller, Lead, South Dakota, for Respondent.

Before: Judge Morris

The Secretary of Labor of the United States, the individual charged with the statutory duty of enforcing the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), charges James L. Merchen with violating Section 110(c) of the Act.

Section 110(c), now codified at 30 U.S.C. § 820(c), provides, in part, as follows:

Whenever a corporate operator violates a mandatory health or safety standard ... any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation ... shall be subject to the same civil penalties, fine, and imprisonment that may be imposed upon a person under subsections (a) and (d).

After notice to the parties a hearing on the merits was held in Lead, South Dakota on September 28, 1983.

The parties filed post trial briefs.

Issues

The issues are whether respondent violated the Act, and, if so, what penalty is appropriate.

Stipulations

The parties stipulated that Homestake Mining Company was cited for violating 30 C.F.R. 57.6-107.^{1/} Further, Homestake Mining Company did not contest the citation and paid the penalty. In addition, it was agreed that this case arises from the same incident (Transcript at page 48).

Summary of the Evidence

MSHA witnesses included William Donely, Rick Tinnell, Dallas Tinnell, Wayne Lundstrom and Richard Fischer.

MSHA's evidence shows that Homestake Mining Company, a corporation, mines gold that is shipped in interstate commerce (Tr. 7, 8; Exhibit P1).

On the day shift of January 24, 1980 miners had drilled 25 holes to a depth of 10 feet in a drift round. The following shift included miners Rick Tinnell and his partner, Ward Sperry. Tinnell and Sperry drilled 10 to 12 more holes and blasted the round. When they inspected at the face they saw two misfired holes (Tr. 15; P3).

Rick Tinnell discussed the misfires with James Merchen, his supervisor, who was serving as the acting boss of the night shift. Merchen told them to fire the holes. At the end of the shift Sperry didn't explode the misfires because he could not locate any powder (Tr. 8, 116). Tinnell was unsuccessful in reblasting and washing out the explosives (Tr. 41, 66-67). The day shift was advised of the condition (Tr. 16).

When the miners returned the next night they found the day shift had drilled two holes, cut a "V", and blasted. But the misfires remained (Tr. 16). Merchen suggested Tinnell and Sperry bar out the misfires (Tr. 16).

Merchen further told the miners to drill two holes parallel to the misfired holes. He pointed to the area where he wanted the holes drilled. The area was four to six inches from the misfired holes (Tr. 17, 38). Tinnell and Sperry both thought

^{1/} The standard provides:

57.6-107 Mandatory. Holes shall not be drilled where there is danger of intersecting a charged or misfired hole.

that drilling this close was unsafe. They discussed it with Merchen. Tinnell suggested the use of a remote drill but Merchen refused to use this procedure (Tr. 18, 39, 40).

Rick Tinnell had never been instructed to drill that close to misfired holes. He felt it was dangerous because the steel could wander and hit the cap (Tr. 75, 77).

Following Merchen's instructions Tinnell drilled two holes approximately 2 1/2 feet deep. The holes were loaded and shot. This eliminated the misfired holes (Tr. 17, 18).

At the end of the shift Tinnell and Sperry filled out their time slips for 4 hours at the contract rate and 4 hours at the day's pay rate (Tr. 62). The miners refused Merchen's request to change the time slips to 8 hours contract rate (Tr. 62).

Dallas Tinnell, father of Rick Tinnell and the president of the local union, expressed the view that drilling even 12 inches from misfired holes can be dangerous. When collaring a hole the new drill could jump and go into the previous hole (Tr. 86, 87).

Homestake Mining Company's rules in its safety book suggest precautions to be taken when miners drill into misfired holes (Tr. 88-92; Exhibit P7).

Richard Fischer, MSHA's expert, stated it was a violation of 30 C.F.R. 57.6-107 to drill within 12 inches of two misfired holes (Tr. 100-107; P9). A definite danger of intersecting the prior holes existed. Merchen should also have used a manifold (Tr. 108, 111). A fatality could result if the one and a half pounds of explosives were ignited (Tr. 112).

Respondent's witnesses were James Merchen, Audrey Merchen and Joel Waterland.

On January 24, 1980 James Merchen was the relief shift boss supervising 15 miners (Tr. 124).

Merchen saw the misfires in the center of the round (Tr. 126). He told Sperry to blast them but the following day the two holes remained (Tr. 127). Unsuccessful efforts to remove the misfires included plastering, blasting, and washing them. Also the prior shift had cut a "V" in an effort to remove the misfires.

Merchen told Tinnell and Sperry to drill two holes 10 to 12 inches on either side of the misfires (Tr. 128, 129). The men were instructed to drill parallel to the misfires. Merchen had used this method before. Tinnell and Sperry suggested drilling

the misfires from the manifold. Merchen denied there was any discussion with Tinnell or Sperry to the effect that Merchen's proposal was dangerous (Tr. 129-131, 138).

At the end of the shift a heated discussion took place between Merchen, Tinnell and Sperry about the pay for the shift. The miners refused to change their daily reports. A grievance was later filed over this issue (Tr. 133, 134). There was no discussion about blasting the misfires when the three men argued over the daily reports (Tr. 134).

Merchen was aware of MSHA's regulations. He didn't knowingly tell the miners to violate them (Tr. 137).

Merchen, financially "poor", now earns approximately \$10 per hour from Homestake Mining Company. He has a partnership in the farm but it is "in the red" (Tr. 135, 136, 146).

Audrey Merchen, respondent's sister-in-law, indicated that at one time after this incident Ricky Tinnell said he "got at Merchen" (Tr. 163, 165).

Joel Waterland, an expert witness for respondent and a Homestake employee, indicated that Merchen did all he could under the circumstances. The wires had been checked and the cap was found to be dead. The miners were unsuccessful in washing out the misfire, in plaster blasting it, in "V" cutting it (Tr. 147, 151-153, 158). In Waterland's opinion no violation of the regulations occurred. If you drill straight into the face two feet from a misfire the wall will not break when it is exploded (Tr. 151-153, 156).

Discussion

The Commission has ruled that the proper legal inquiry for the purpose of determining corporate agent liability under Section 110(c) is whether the corporate agent "knew or had reason to know" of the violative condition. Secretary v. Kenny Richardson, 3 FMSHRC 8, 16 (January, 1981), aff'd, 689 F. 2d 623 (6th Cir. 1982), cert. denied, 77 L.Ed. 2d (1983). There the Commission held:

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

For the reasons hereafter noted I credit the Secretary's evidence on the credibility issues in the case.

The facts here establish that Merchen was the acting shift boss. The two misfires were brought to his attention. He then "directed" Tinnell and Sperry, relatively inexperienced miners, to drill parallel to the misfires. By his own admission the drilling was to be within 10 to 12 inches to each side of the misfires (Tr. 128, 129).

The regulation, 30 C.F.R. § 57.6-107, prohibits drilling where there is a "danger of intersecting a charged or misfired hole." The danger is especially present here because of the shattered area behind the face. Merchen relies on his instruction to the miners to drill parallel to the holes. But since the previous shift had drilled 25 of the 35 or 37 holes Merchen would have no way of knowing the angle of any of the holes drilled by the previous shift.

Merchen knew of MSHA's regulation and there was a clear danger that Tinnell and Sperry could intersect the misfired holes.

A conflict exists in the testimony of MSHA's expert, Richard Fischer, and respondent's witness Joel Waterland. I credit Fischer's testimony. He has a greater degree of expertise than Waterland (Tr. 102, Exhibit P9). In addition, Homestake's safety rules support Fischer's testimony. The rules have the following relevant directives concerning "Drilling":

1. Ground must be closely examined before drilling to prevent drilling into a "misfired hole" (a hole with all or part of its explosive charge left in it) which might explode and kill the driller and nearby workmen.

A "missed hole" found in a working place should be handled as follows:

- (a) If possible put in a new primer and blast the hole before proceeding with any other work unless it can be blasted at the end of the shift.
- (b) If this cannot be done, wash the explosive out of the hole with a stream of water.
- (c) If neither of the above procedures is possible nor practical, mark the hole plainly with chalk or crayon and advise your boss of its location. Work may then proceed under the following restrictions:
 - (i) In stopes, do not drill within five feet of the "missed hole."
 - (ii) In drifts, crosscuts, or raises, consult your boss about how to handle the hole. If it is practical, he may tell you to blast out the hole by drill-

ing and blasting another hole at an angle to it. In such a case, the collar of the new hole should be at least two feet from the collar of the "missed hole." The hole should be collared manually, then drilled out by a drill with an automatic feed. Then the driller will retire from the face and turn the drill off from the airline valve located at the hose connection to the air pipeline, or from a valve still further back in the airline if the pipeline end is too close to the face.

Emphasis added, Exhibit P7, pages 71-72.

The most restrictive circumstances in Homestake's safety rules require drilling at least two feet from the misfired holes. Merchen directed the drilling, by his own admission, at a point 10 to 12 inches from the misfires (Tr. 128, 129).

In his post trial brief respondent raises several issues. He initially asserts MSHA, with this inexplicit regulation, must prove the holes were drilled in a location where there was a danger of intersecting a charged or misfired hole.

The Secretary's expert witness establishes this evidence. He indicated that drilling within 12 inches is hazardous (Tr. 107). It was hard to determine how much the drill might wander but the danger is definite, in part, due to the underlying fracture (Tr. 108).

Respondent's post trial brief further asserts that this case is a classic example of a shotgun approach to "get even" with a supervisor on the part of a miner and his father's union (Brief, page 14). I am not persuaded by this argument. There is such a paucity of evidence on the issue that it would be totally speculative to rest a decision on that facet of the case. Further, I do not find there was such motivation on the part of Rick Tinnell and Sperry. If there was such a motivation it would surely have been mentioned when the three men had a "heated argument" about the pay for the shift.

A good portion of respondent's brief must be denominated as an assertion that 30 C.F.R. § 57.6-107 is unconstitutionally vague.

I agree this standard is not detailed but the Commission has previously observed, in a similar context, that "many standards must be 'simple and brief in order to be broadly adaptable to myriad circumstances.'" Alabama By-Products Corp., 4 FMSHRC 2128, at 2129 (1982). The Commission has measured similar regulations against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to

the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. See, e.g. Voegele Co., Inc. v. OSHRC, 625 F. 2d 1075, (3d Cir. 1980). By applying this test to the facts of this case due process problems stemming from the respondent's asserted lack of notice are avoided. Cf, United States Steel Corporation, 5 FMSHRC 3, (1983).

For the above reasons the Secretary's petition alleging a violation of Section 110(c) of the Act should be affirmed.

CIVIL PENALTY

The Secretary proposes a civil penalty of \$500 against respondent for this violation. The Secretary's narrative findings for a special assessment do not consider respondent's history nor his financial status.

Considering the statutory criteria, 30 U.S.C. 820(i), I believe a civil penalty of \$250 is appropriate for this violation.

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

ORDER

1. Petitioner's petition for assessment of a civil penalty against respondent James L. Merchen is affirmed.
2. A civil penalty of \$250 is assessed for the foregoing violation.


John J. Morris
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, Virginia 22203 (Certified Mail)

Robert A. Amundson, Esq., Amundson & Fuller, 215 West Main, P.O. Box 875, Lead, South Dakota 57754 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 15 1984

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 81-163-DM
ON BEHALF OF	:	
JOHN COOLEY,	:	Michigan Division Quarry
Complainant	:	
v.	:	
	:	
OTTAWA SILICA COMPANY,	:	
Respondent	:	

ORDER

On March 30, 1984, the Commission issued its decision in this matter reaffirming my decision that the complainant John Cooley was discriminated against in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977. However, the Commission vacated my findings concerning the back pay and other benefits due the complainant, and remanded the case for a recomputation of the amount due the complainant.

In response to my Order of April 16, 1984, the parties have now filed a stipulation concerning the amount due to the complainant. Upon review and consideration of this stipulation, I conclude and find that it complies with the Commission's remand order, and a copy of the stipulation is attached hereto and incorporated by reference. However, I take note of two typographical errors in the materials attached as part of the stipulation, and they are as follows:

Exhibit B - Back Pay 2nd Quarter 1980 - Should read \$2,168.08, rather than \$21.68.08.

Exhibit B - Back Pay 3rd Quarter 1980 \$3,542.98. The amount shown as \$3,542.98, rather than \$4,032.05, should be shown as the actual multiplier for each of the computations made for the periods reflected as the interest due the complainant.

Having noted the aforesaid typographical errors, the corrections noted are incorporated herein by reference, and the stipulations, as corrected, are herein entered as my final

order in this matter, and the respondent IS ORDERED to make payment to Mr. Cooley in the amounts shown, and to reinstate him as provided in my decision.


George A. Koutras
Administrative Law Judge

Attachment

Distribution:

David F. Wightman, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

Frank X. Fortescue, Esq., Brown, McGlynn & Fortescue, 500 North Woodward, Suite 320, Bloomfield Hills, MI 48013 (Certified Mail)

/ejp

RECEIVED
MAY 8 1984
FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

UNITED STATES DEPARTMENT OF LABOR
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION
(MSHA)

on behalf of John Cooley

v.

OTTAWA SILICA COMPANY

Docket No. LAKE 81-163 DM

STIPULATION OF PARTIES ON REMAND

Now comes the parties, by their respective attorneys and, in response to the March 30, 1984 Decision of the Federal Mine Safety and Health Review Commission remanding this matter to Administrative Law Judge George Koutras for a reformulation of the remedial order, enter into the following stipulations.

1. Administrative Law Judge George Koutras' June 3, 1982 Decision ordered defendant to reinstate John Cooley with back pay from May 5, 1980.
2. John Cooley has not been reinstated.
3. Had John Cooley been reinstated on May 5, 1980, he would have been furloughed by defendant due to lack of work beginning April 19, 1982.
4. John Cooley's furlough would have continued through at

least April 20, 1984. Pursuant to the collective bargaining agreement between the Michigan Division of the Ottawa Silica Company and Teamster's Local Union No. 283 (hereinafter Labor Agreement), a furlough of more than two years breaks the employee's seniority and terminates his right to recall with defendant.

5. For the perior May 5, 1980 through April 19, 1982, John Cooley's wages as a laborer, would have totaled \$28,738.08.

6. For the period May 5, 1980 through April 19, 1982, John Cooley's vacation pay would have totaled \$618.40.

7. Pursuant to the Labor Agreement, for the period May 5, 1980 through April 19, 1982, defendant shall make pension contributions on behalf of John Cooley to the Central States Southeast and Southwest Areas Pension Fund.

8. For the period May 5, 1980 through April 19, 1982, the total of John Cooley's back wages listed in paragraphs 5 through 7. herein is \$29,356.48 and is broken down by calendar quarters in the attached Exhibit A.

9. Under the formula provided in Bailey v Arkansas-Carbona Co. & Weller, 3 MSHC 1152 (Dec. 1983), interest on the \$33,053.17 in back wages through June 30, 1984 is \$13,226.45. The interest computations are contained in the attached sheets labeled as Exhibit B.

10. Interest will continue to accumulate under the Arkansas-

Carbona formula until such time as the back wages and accumulated interest are paid in full.

OTTAWA SILICA COMPANY

By: Frank X. Fortescue
FRANK X. FORTESCUE, ESQ.
Brown, McGlynn & Fortescue
500 N. Woodward, Suite 320
Bloomfield Hills, MI. 48013

Respectfully submitted,

FRANCIS X. LILLY
Solicitor of Labor

JOHN H. SECARAS
Regional Solicitor

David Wightman
DAVID WIGHTMAN
Attorney

Attorneys for Raymond J. Donovan,
Secretary of Labor, United States
Department of Labor

EXHIBIT A

<u>Period</u>	<u>Wages</u>	<u>Vacation</u>	<u>Total</u>
4/1/80-6/30/80	2,168.08 2,168.08		2,168.08
7/1/80-9/30/80	3,490.08	8 hrs. x 6.61 \$52.88	3,542.96
10/1/80-12/31/80	3,694.96 3,694.96		3,694.96
1/1/81-3/31/81	3,742.72		3,742.72
4/1/81-6/30/81	3,801.20 3,801.20		3,801.20
7/1/81-9/30/81	3,859.68	16 hrs. x 7.31 \$116.96	3,976.64
10/1/81-12/31/81	4,072.48		4,072.48
1/1/82-3/31/82	3,075.84		3,075.84
4/1/82-6/30/82	833.04	56 hrs. x 8.01 \$448.56	1,281.60
TOTAL	<u>28,738.08</u>	<u>\$618.40</u>	<u>\$29,356.48</u>

EXHIBIT B

Back Pay 2nd Quarter 1980 \$21.68.08

3rd Quarter 80	2,168.08 x 91 days x .0003333	=	65.758516
4th Quarter 80	2,168.08 x 90 days x .0003333	=	65.035895
1st Quarter 81	2,168.08 x 90 days x .0003333	=	65.035895
2nd Quarter 81	2,168.08 x 90 days x .0003333	=	65.035895
3rd Quarter 81	2,168.08 x 90 days x .0003333	=	65.035895
4th Quarter 81	2,168.08 x 90 days x .0003333	=	65.035895
1st Quarter 82	2,168.08 x 90 days x .0005555	=	108.393159
2nd Quarter 82	2,168.08 x 90 days x .0005555	=	108.393159
3rd Quarter 82	2,168.08 x 90 days x .0005555	=	108.393159

TOTAL

716.12

Back Pay 3rd Quarter 1980 3542.96

4th Quarter 80	4,032.05 x 91 days x .0003333	=	107.45903
1st Quarter 81	4,032.05 x 90 days x .0003333	=	106.27817
2nd Quarter 81	4,032.05 x 90 days x .0003333	=	106.27817
3rd Quarter 81	4,032.05 x 90 days x .0003333	=	106.27817
4th Quarter 81	4,032.05 x 90 days x .0003333	=	106.27817
1st Quarter 82	4,032.05 x 90 days x .0005555	=	177.13028
2nd Quarter 82	4,032.05 x 90 days x .0005555	=	177.13028
3rd Quarter 82	4,032.05 x 90 days x .0005555	=	177.13028

TOTAL

1063.96

Back Pay 4th Quarter 1980 \$3,694.96

1st Quarter 81	3,694.96 x 91 days x .0003333	=	112.06924
2nd Quarter 81	3,694.96 x 90 days x .0003333	=	110.83771
3rd Quarter 81	3,694.96 x 90 days x .0003333	=	110.83771
4th Quarter 81	3,694.96 x 90 days x .0003333	=	110.83771
1st Quarter 82	3,694.96 x 90 days x .0005555	=	184.72952
2nd Quarter 82	3,694.96 x 90 days x .0005555	=	184.72952
3rd Quarter 82	3,694.96 x 90 days x .0005555	=	184.72952

TOTAL

998.77

Back Pay 1st Quarter 1981 \$3,742.72

2nd Quarter 81	3,742.72 x 91 days x .0003333	=	113.51782
3rd Quarter 81	3,742.72 x 90 days x .0003333	=	112.27037
4th Quarter 81	3,742.72 x 90 days x .0003333	=	112.27037
1st Quarter 82	3,742.72 x 90 days x .0005555	=	187.11728
2nd Quarter 82	3,742.72 x 90 days x .0005555	=	187.11728
3rd Quarter 82	3,742.72 x 90 days x .0005555	=	187.11728

TOTAL

899.41

Back Pay 2nd Quarter 1981 \$3801.20

3rd Quarter 81	3,801.20 x 91 days x .0003333 =	115.29153
4th Quarter 81	3,801.20 x 90 days x .0003333 =	114.02459
1st Quarter 82	3,801.20 x 90 days x .0005555 =	190.04099
2nd Quarter 82	3,801.20 x 90 days x .0005555 =	190.04099
3rd Quarter 82	3,801.20 x 90 days x .0005555 =	190.04099
TOTAL		<u>799.44</u>

Back Pay 3rd Quarter 1981 \$3,976.64

4th Quarter 81	3,976.64 x 91 days x .0003333 =	120.61268
1st Quarter 82	3,976.64 x 90 days x .0005555 =	198.81211
2nd Quarter 82	3,976.64 x 90 days x .0005555 =	198.81211
3rd Quarter 82	3,976.64 x 90 days x .0005555 =	198.81211
TOTAL		<u>717.05</u>

Back Pay 4th Quarter 1981 \$4,072.48

1st Quarter 82	4,072.48 x 91 days x .0005555 =	205.86590
2nd Quarter 82	4,072.48 x 90 days x .0005555 =	203.60363
3rd Quarter 82	4,072.48 x 90 days x .0005555 =	203.60363
TOTAL		<u>613.07</u>

Back Pay 1st Quarter 1982 \$3,075.84

2nd Quarter 82	3,075.84 x 91 days x .0005555	=	155.48524
3rd Quarter 82	3,075.84 x 90 days x .0005555	=	153.77662
TOTAL			<u>309.26</u>

Back Pay 2nd Quarter 1982 \$1,281.60

3rd Quarter 82	1,281.60 x 91 days x .0005555	=	64.78
----------------	-------------------------------	---	-------

Back Pay \$29,356.48

4th Quarter 82	29,356.48 x 90 days x .0005555	=	1,467.6772
1st Quarter 83	29,356.48 x 90 days x .0004444	=	1,174.1417
2nd Quarter 83	29,356.48 x 90 days x .0004444	=	1,174.1417
3rd Quarter 83	29,356.48 x 90 days x .0003055	=	807.1564
4th Quarter 83	29,356.48 x 90 days x .0003055	=	807.1564
1st Quarter 84	29,356.48 x 90 days x .0003055	=	807.1564
2nd Quarter 84	29,356.48 x 90 days x .0003055	=	807.1564
TOTAL			<u>7,044.59</u>

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

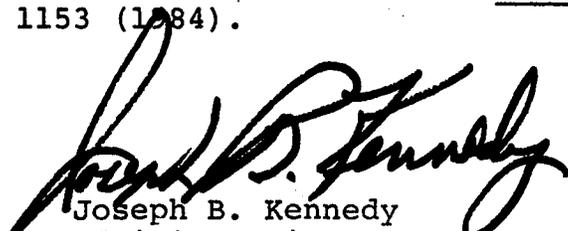
AUG 15 1984

JERRY L. BLACKBURN, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEVA 83-242-D
: :
U.S. STEEL MINING CO., INC., : HOPE CD-83-18
Respondent :
: :
UNITED MINE WORKERS OF :
AMERICA, :
Intervenors :

ORDER OF DISMISSAL

Before: Judge Kennedy

For good cause shown, it is ORDERED that complainant's motion to withdraw the captioned discrimination complaint be, and hereby is, GRANTED and the case DISMISSED. U.S. Steel Mining Co., Inc., 6 FMSHRC 1153 (1984).


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Mr. Jerry L. Blackburn, P.O. Box 10, Wolf Pen, WV 24896
(Certified Mail)

Louise Q. Symons, Esq., U.S. Steel Mining Co., Inc., 600 Grant
St., Pittsburgh, PA 15230 (Certified Mail)

Mary Lu Jordan, Esq., UMWA, 900 15th St., NW, Washington, DC
20005 (Certified Mail)

/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 20 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 84-33-M
Petitioner : A.C. No. 42-00800-05504
 :
v. : Moab Mill
 :
ATLAS MINERALS, :
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: James H. Barkley, Esq., Robert J. Lesnick, Esq., and Peggy Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;

James A. Holtkamp, Esq., and John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Respondent.

Before: Judge Morris

This is a civil penalty proceeding initiated by the petitioner against the respondent in accordance with Section 110(a) of Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The civil penalty is for the alleged violation of a mandatory safety standard promulgated pursuant to the Act.

At a hearing in Moab, Utah on August 23, 1984, in related cases the parties advised the judge that they had reached an amicable settlement. The parties now seek approval of their proposed settlement.

Citation 2008174 alleges a violation of 30 C.F.R. § 57.9-88(a). The citation proposed an original penalty of \$300. The parties now seek to amend the citation by changing its designation from "104-d-1" to "104-a." The parties agree the original penalty should be assessed.

Discussion

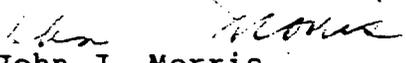
In support of the motion petitioner states he agrees with and relies on the assessment made by his Office of Assessments in evaluating the statutory criteria for assessing the penalty.

I find the proposed settlement is reasonable and it should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement agreement is approved.
2. The citation is amended to change the designation from "104-d-1" to "104-a."
3. Citation 2008174 and the penalty of \$300 are affirmed.
4. Respondent is ordered to pay the sum of \$300 within 40 days of the date of this order.


John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Robert J. Lesnick, Esq., and Peggy Miller, Esq., Office of the Solicitor, U.S. Department of Labor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

James A. Holtkamp, Esq., and John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, 50 South Main, Suite 1600, Salt Lake City, Utah 84144 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 20 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 84-10
Petitioner : A. C. No. 46-01283-03526
: :
v. : Hampton No. 3 Mine
: :
WESTMORELAND COAL COMPANY, :
Respondent :

DECISION

Appearances: Kevin C. McCormick, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for Petitioner;
F. Thomas Rubenstein, Esq., Big Stone Gap, Virginia,
for Respondent.

Before: Judge Steffey

A hearing in the above-entitled proceeding was held on June 12, 1984, in Beckley, West Virginia, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977. At the conclusion of presentation of evidence by both parties, I rendered a bench decision.

Before the transcript of the hearing had been received, counsel for respondent filed on June 22, 1984, a motion for reconsideration of the bench decision. A copy of the motion for reconsideration was served on counsel for the Secretary of Labor. The Secretary's counsel filed on August 8, 1984, a letter in which he stated that he did not intend to submit a reply to respondent's motion for reconsideration.

The substance of my bench decision is first set forth below (Tr. 274-289). Thereafter, respondent's motion for reconsideration is denied for the reasons given.

This proceeding involves a petition for assessment of civil penalty, alleging a violation of 30 C.F.R. § 75.200 by Westmoreland Coal Company. The issues in a civil penalty case are whether the violation occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Before I form a conclusion regarding the question of whether a violation occurred, I shall make some findings of fact which will be set forth in enumerated paragraphs.

1. Inspector Baisden went to the Hampton No. 3 Mine on September 16, 1982. On his inspection he was accompanied by the chairman of the safety committee, Charles Egnor. The mine foreman was also with the inspector and Egnor when they began their inspection, but the mine foreman had to check into a malfunction of the tailpiece on the conveyor belt. Consequently, the inspector and Egnor went to the face area unaccompanied by the mine foreman.

2. When the inspector and Egnor were close to the face of the No. 3 entry, the inspector noticed that there was no curtain in the crosscut to the right of No. 3 entry. The inspector investigated the absence of the curtain and found that there was a hole on the right side at the face of the crosscut, and he concluded that that made the need for installation of a curtain unnecessary. But while he was examining that aspect of the ventilation, he noticed that the crosscut had been developed for a distance which appeared to be greater than could have been cut with a continuous-mining machine without the machine's operator having proceeded inby permanent supports.

3. The inspector determined that a measurement of the area should be made in order for him to ascertain whether the operator of the continuous-mining machine had proceeded inby permanent supports. Therefore, he tied a hammer to the cloth tape measuring device that he carried with him and he tossed the hammer through the hole at the end of the crosscut and he asked Egnor to go to the No. 4 entry, into which the hole extended, and retrieve the hammer, and thereby enable the inspector to make an accurate measurement. Egnor was cautioned to make sure he did not go out from under permanent supports.

4. Egnor proceeded outby the No. 3 entry through the crosscut outby the one in which the measurement was made and proceeded into the No. 4 entry and came to the place where the hole had been made near the face of the No. 4 entry. Egnor held the tape and it was determined that the distance from the last permanent support in the crosscut through the hole in the end of the crosscut was 23 feet, but the inspector wanted to get a measurement only to the most inby place in the crosscut from which coal had been extracted by the continuous-mining machine. Therefore, he withdrew the tape after Egnor had untied it from the hammer, and when the tape came out of the hole and fell on the mine floor, the inspector made a determination that the distance from the face of the crosscut to the second roof bolt from the right of the crosscut was 22 feet. The inspector believed that the second bolt from the right rib in the crosscut was in line with the other three bolts in that same line of bolts and therefore did not take additional measurements.

5. The operator's roof-control plan provides, "Continuous miner runs are made on alternate sides until the face has been advanced a maximum distance which will permit the miner operator to remain under bolted roof and not advance the controls of the miner inby the last row of bolts." Therefore, the inspector wrote Order No. 2037676, which is exhibit 2 in this proceeding. The condition or practice stated in Order No. 2037676 is as follows:

The last open crosscut between No. 3 entry and No. 4 entry has been mined 22 feet deep. From cutter head to the controls measures 19 1/2 feet, putting the controls of the miner inby the last row of permanent support. This crosscut was mined on 2nd shift, 9/15/82. The Onshift and Daily Report Book indicates Roger McMicken as section foreman on said shift. See page 19, line 1 of approved plan or Drawing 1, page 17 of approved plan.

6. Raymond Watts was the operator of the continuous-mining machine on the second shift, that is, 4:00 p.m. to midnight on September 15, 1982, when the condition described by the inspector occurred. Watts had previously been working in 1979 when a roof fall occurred in the Hampton No. 3 Mine, at which time two miners were killed and Watts narrowly escaped being killed himself. The occurrence was so unsettling that Watts was unable to work for approximately 14 months. Therefore, he testified in this proceeding that it was not his practice or intention ever to do his job in a manner which would expose him or anyone else to possible injury. He testified that when he advanced the continuous-mining machine into the crosscut here at issue, he found that it was off center and that it was necessary for him to move his continuous-mining machine at an angle to the right rib in order to straighten the crosscut. He stated that it was his practice to look through a screen at the front of the canopy under which he sits and that when he saw the last roof bolt, or the roof bolt in the last row of permanent supports come into view in that screen, that he stopped running the continuous-mining machine because that way he knew he would not go inby the last row of supports. He testified that that was what he recalled having done on the night of September 15. He did recall that when he finished cleaning up the entry and backed his continuous-mining machine out of the crosscut he did see a hole in the face of the crosscut.

7. When Watts came to work on the following day he learned from the superintendent of the mine that a withdrawal order had been written on the day shift because of his having advanced the controls of the miner inby the last row of permanent supports.

Watts was very much surprised at hearing he had been charged with having done that and expressed his doubt that it was so. The roof-control plan was read to him and it was explained that the company was considerably upset about whether he had gone inby the last row of permanent supports.

8. Roger Bias was also working on the evening shift on September 15 and on that particular evening he acted as the helper for the operator of the continuous-mining machine. He has no specific recollection of whether the mining machine went inby the last row of permanent supports, but he said that one of his duties was to help the operator of the continuous-mining machine in order to see that he did not go inby the last row of supports and, so far as he could recall, Watts did not go inby the last row of permanent supports. He also recalls that there was a hole at the face of the crosscut, but he did not see it until after Watts had cleaned up the crosscut and had backed out the continuous-mining machine.

9. Roger McMicken was the section foreman on the evening of September 15, 1982. He testified that he saw a hole at the face of the crosscut when he was making his last check of the section, but he did not notice anything unusual other than that. He was not aware that a charge had been made against Watts for going inby the last row of permanent supports until he reported for work the following day and also was advised by the mine superintendent that the withdrawal order had been written. One of the actions McMicken made was to go into the section and measure the distance between the last row of bolts and the face of the crosscut and his measurements showed that the distance was 19 feet from all of the bolts, except the first and second bolts from the right rib. He found the distance from the second bolt from the right rib to the face to be 22 feet, the same distance measured by the inspector, but he said that he did not think that the second bolt was in line with the others and that he believed it was outby the others by a considerable distance. That misalignment, together with the hole at the face of the crosscut, in McMicken's opinion, accounted for the fact that that particular measurement was 22 feet. The distance from the first bolt from the right rib to the face was measured by McMicken as being 20 feet (Exh. B).

10. Richard Sparks was the operator of a scoop on the day shift on September 16, 1982. He testified that he was operating the scoop to clean up the No. 4 entry and that he was so engaged at the time that Egnor came into the No. 4 entry and went up to the face of the No. 4 entry in order to assist the inspector in the measurement which the inspector made prior to issuing his withdrawal order. Sparks claims that he saw Egnor put his hand on the rib and reach clear through the hole in the end of the crosscut in order to retrieve something, but he did

not know exactly what Egnor was doing and did not see the hammer in Egnor's hand and did not know what had transpired until he was later advised that Egnor had been at the face of the No. 4 entry in order to assist the inspector in the measurement. Sparks also testified that Jake Henry was a continuous-miner helper on the day shift and it is claimed that Henry was in the crosscut when the inspector made his 22-foot measurement and that Henry observed Egnor reach through the hole in the end of the crosscut. Sparks did not see Egnor walk past him in the No. 4 entry and only observed him, he says, after he was already situated at the hole on the left side of the No. 4 entry. Sparks accounted for his failure to see Egnor walk past him by stating that he has to move back and forth in the entry in his process of cleaning with the scoop. Egnor testified on rebuttal that no one was in the No. 4 entry when he went there to assist the inspector and that he would have remembered it if anyone had been running a scoop because he would have had to have flagged down the scoop operator in order to go past him.

11. Jim Kiser is the manager of Westmoreland's health and safety program and he, among other duties, conducts accident investigations of all serious violations which are alleged by any of MSHA's inspectors. Kiser considered the withdrawal order here issued to be a serious one because it was written under the unwarrantable-failure provisions of the Act and is, therefore, considered to be more serious than an ordinary citation might be. His investigation of the matter took a couple of weeks to complete and resulted in a conclusion by Kiser that Westmoreland's personnel were not at fault in the occurrence and consequently did not recommend that any of the people involved be disciplined, although it is Westmoreland's practice to discipline people who do violate the mandatory safety standards if the investigation shows that violations occurred.

Counsel for the Secretary and Westmoreland made concluding arguments and they both stressed the fact that there are credibility problems involved in the testimony.

The Secretary's counsel emphasized the fact that the inspector has no particular reason to cite a violation he has not actually seen, that the chairman of the safety committee has no reason to be biased against the company for which he works, and that their testimony should be given greater weight than that of Westmoreland's witnesses who were obviously aware of the fact that they might receive some discipline if they were considered to be at fault in the issuance of Order No. 2037676.

Westmoreland's counsel stressed the fact that Watts is an individual who has an excellent reputation in the company and the fact that the section foreman has not previously known him

to violate any provisions of the roof-control plan and that Watts, having just nearly escaped death himself in a roof fall, would not be one who would have knowingly violated the roof-control plan. Counsel for Westmoreland also stressed the fact that Egnor, despite his position as chairman of the safety committee, still went to the face of the No. 4 entry and necessarily was in by the last permanent support in assisting the inspector to obtain his desired measurement, and that the inspector set a very bad example by asking Egnor to participate in such a fashion in making the measurement.

I agree with Westmoreland's counsel that the way the measurement was made seems to have left something to be desired in the way of safety and I hope that similar acts will not occur in the future so that one person is perhaps endangered while proving that someone else was in a hazardous position. Even Egnor admitted in his testimony that once a hole is made in a coal face, which is only about a foot thick, that additional coal may slough off and that it's not a very safe place to be. Of course, both Egnor and the inspector denied that Egnor was at anytime in any danger.

One of the duties which a judge has is making credibility determinations and one of the ways a judge does that is based on the demeanor of the witnesses as well as the consistency of their testimony. Based on the demeanor of the witnesses in this case, I believe that the inspector and Egnor have an edge on credibility. I found a number of questions answered by Westmoreland's witnesses with qualifications that they were not sure of the facts and with the assertion that it has been almost 2 years since this matter occurred. Even the section foreman stated that he thinks that the crucial bolt from which measurements were made was out of line.

I believe that the credible evidence requires me to find that there was a distance of 22 feet from the face of the crosscut back to the last row of permanent supports. Since exhibit 5 in this proceeding shows that the distance from the head of the continuous-mining machine back to the controls is 19-1/2 feet, then necessarily the continuous-mining machine operator would have had to go in by the last row of bolts in order to have made a cut of 22 feet.

I am taking into consideration the fact that it has been alleged that the continuous-mining machine operator was trying to straighten the crosscut by cutting at an angle, but I am also taking into consideration the fact that Egnor has had over 11 years of experience as an operator of a continuous-mining machine and I am relying upon his and the inspector's conclusions and certainty that there was no evidence to show that the crosscut had been cut at an angle so as to confirm or corroborate Watts' testimony to that effect.

Based upon the above considerations, I find that a violation of section 75.200 did occur as alleged in Order No. 2037676.

Having found that a violation occurred, I am required to consider the six criteria in assessing a civil penalty. The parties stipulated that Westmoreland is subject to the Act, that it is a large operator, that payment of a penalty would not cause it to discontinue in business, and that Westmoreland showed a good-faith effort to achieve rapid compliance once the violation was cited. Those stipulations take care of three of the six criteria.

The fourth one is the history of previous violations. Exhibit No. 7 is a computer printout which indicates that Westmoreland, at the Hampton No. 3 Mine here involved, has paid penalties for 29 violations of section 75.200 in the 24 months preceding the occurrence of the violation here involved. Counsel for Westmoreland pointed out that those violations were relatively minor in that they were alleged in citations issued under section 104(a) of the Act, except for one imminent-danger order and one unwarrantable-failure order. He also said that a check had been made of those 29 previous violations and that none of them involved an allegation that anyone had proceeded in by permanent roof support.

It appears to me that 29 previous violations in a 24-month period is a large number of violations and one reason I am troubled by that many is that when the Act was amended in 1977, one of the things that concerned Congress in its discussions of the need to modify the Act to make it stronger in its provisions was that in the Scotia mine the company had previously violated the ventilation provisions and yet the company had not been assessed increasingly large penalties based on those repeated violations. Congress thought that the Act was not being properly administered, or each succeeding violation would have received a higher civil penalty than the one before it. 1/

I am inclined to temper my consideration in this instance because normally a judge does not get any information at all about the type of previous violations; he simply is presented with a number and he has no way to get a perception of the kind of violation involved. In this proceeding, however, there are statements that a check has been made of the previous violations and that they do not seem to be serious, or at least there is not a previous violation of having gone beyond permanent support. For that reason, I shall not make a severe increase in the penalty under the criterion of history of previous

1/ S. REP. NO. 95-181, 95th Cong. 1st Sess. 42-43 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 630-631 (1978).

violations, but I do think that some indication should be made that that is a rather large number of previous violations. Consequently, under that criterion I shall assess a penalty of \$200.

The fifth criterion to be considered is negligence. Counsel for the Secretary has stressed the fact that the company should have made certain that its personnel did not violate the roof-control plan and that the company should be held to be guilty of a high degree of negligence for the fact that this violation did occur at all. Westmoreland's counsel, on the other hand, has taken the very same set of circumstances and facts and argued that the company should not be held to be guilty of a high degree of negligence because it has made very strenuous efforts to acquaint its personnel with the roof-control conditions and that it has made every effort that it can make to get its miners to proceed in a safe and lawful fashion.

There is a considerable body of testimony showing that Watts was a person who was safety minded and I believe in this instance that he did intend to mine in a safe manner and he did intend to stop before going in by the last row of permanent supports. It is possible for anyone to make a mistake and I believe that Watts did inadvertently cut farther than he intended. For that reason, and the fact that there is a lot of testimony showing that Westmoreland is trying to operate a safe mine and to make its employees safety conscious, I find that a very small degree of negligence should be attributed to management in this case.

I might point out that there are precedents for my finding here as to negligence. In Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), the Commission held that the operator was not liable for negligence for the acts of the rank and file miner when it comes to assessing a civil penalty, but that the operator is liable for the acts of the rank and file miner, when it comes to the finding of a violation, because a company, under the Act, is liable without fault for violations which occur in its mine. U. S. Steel Corp., 1 FMSHRC 1306 (1979). The testimony shows that Westmoreland has tried to instruct its miners in proper safety procedures and all witnesses who work for the company so testified. For the aforesaid reason I am not assessing any portion of the penalty under the criterion of negligence.

The final criterion to be evaluated is gravity. There is a great deal of testimony by the roof-control specialist, Inspector Eddie White, and by the inspector who wrote the order to the effect that a large number of fatalities each

year result from roof falls and from failure to comply with roof-control plans. Respondent's witnesses also testified that going beyond permanent roof supports is a serious violation. Consequently, the preponderance of the evidence supports a finding that this was a serious violation. It is true that the operator of the continuous-mining machine was under a canopy, and canopies undoubtedly do help protect operators from death. But as the inspectors testified, a slate roof is involved here and when such roofs fall, they are inclined to break up so that portions of rock can fall in on the operator, even though he is protected by a canopy because the canopies do not have sides on them to prevent such encroachments. Also the helper to the continuous-mining-machine operator testified that he works close to the operator and that makes him vulnerable to injury, if a roof fall should occur, because the fall will not necessarily terminate right at the canopy of the operator who is running the continuous-mining machine.

The discussion above shows that the violation must be rated as being very serious under the criterion of gravity. Based on that criterion, and the fact that a large operator is involved, I believe that the gravity of the violation warrants a penalty of \$800. When the \$200 portion of the penalty assessed under the criterion of history of previous violations is added, a total penalty of \$1,000 will be assessed, as hereinafter ordered.

THE MOTION FOR RECONSIDERATION

Occurrence of a Violation

As indicated on page 1 of this decision, counsel for Westmoreland filed on June 22, 1984, a motion for reconsideration of the bench decision rendered at the conclusion of the hearing. A judge's bench decision is not a final decision until it has been issued after receipt of the transcript and given a date by the Commission's Executive Director in accordance with 29 C.F.R. § 2700.65. Therefore, Westmoreland's counsel is not precluded under the Commission's procedural rules from filing a motion for reconsideration of a bench decision. Additionally, in C.C.C.-Pompey Coal Co., Inc., 2 FMSHRC 1195 (1980), the Commission held that a judge is obligated to reconsider any holdings made in a bench decision if, during the interim between the rendering of the bench decision and its issuance in final form, the Commission issues a decision establishing a precedent which conflicts with the ruling made by the judge in his bench decision. The ruling in the Pompey case is applicable in evaluating Westmoreland's motion for reconsideration because the Commission issued a decision in United States Steel Corp., 6 FMSHRC 1423 (1984), after I had rendered the bench decision in this proceeding. In the U. S. Steel decision, the

Commission majority reduced one of my penalties from \$1,500 to \$400 because my conclusions were not supported by substantial evidence (6 FMSHRC at 1432). Therefore, I am obligated, before issuing this decision, to show that my assessment of a penalty of \$1,000 is supported by the evidence.

Westmoreland's motion first requests that I reconsider my finding that a violation occurred. The motion notes that Westmoreland presented the only testimony by eyewitnesses to the way the crosscut was mined and that their testimony showed that the hole in the face of the crosscut was caused by the "popping out" of coal as a result of the pressure exerted on the small amount of coal left standing between the face of the crosscut and the No. 4 entry (Exh. 4). Westmoreland agrees that the distance from the last permanent support to the face of the crosscut was 22 feet, as measured by the inspector, but Westmoreland claims that the alleged distance of 2-1/2 feet by which the operator of the continuous-mining machine proceeded beyond permanent supports was accounted for by Westmoreland's witnesses who said that the second roof bolt from the right rib was out of line with the other roof bolts by about 2 feet and that about 18 inches of coal had popped out of the face.

Exhibit 5 shows that if one measures obliquely from the left side of the cutterhead on the continuous-mining machine to the operator's controls located on the right side, the distance is 21 feet 10 inches, instead of the distance of 19 feet 6 inches obtained by the inspector who measured directly from the right cutterhead to the operator's controls which are on the right side of the continuous-mining machine. Westmoreland points out that the operator of the continuous-mining machine testified that the entry was off center and that he was cutting at an angle to bring the crosscut back into alignment. Westmoreland argues from the aforesaid facts that the operator of the miner was 21 feet 10 inches from the face because of the angle at which the crosscut was mined. That contention supports a conclusion that the operator, at most, was only 2 inches inby the last permanent support (22' minus 21'10" = 2").

Westmoreland then points out that the hole in the face of the crosscut was caused by popping or crumbling of the coal. The crumbling effect, according to Westmoreland, made an indentation in the face of 18 inches. That indentation, it is said, should also be subtracted from the inspector's measurement of 22 feet because the head of the continuous-mining machine did not cut that 18-inch indentation. If one subtracts the 18-inch indentation from the 2-inch distance that 22 feet exceed 21 feet 10 inches, it will be readily seen that the operator of the miner, instead of being 2 inches inby the second roof bolt from the right rib, was actually 16 inches outby that roof bolt.

In my bench decision, I found that the testimony of MSHA's witnesses was more credible than that of Westmoreland's witnesses. For that reason, I do not accept Westmoreland's claim that the second roof bolt from the right rib was 2 feet out by the other roof bolts in that last row of permanent supports. The argument above, however, does not even include that portion of Westmoreland's evidence to the effect that the second bolt was 2 feet out of line with the other bolts because Westmoreland's argument is based on the 21-foot 10-inch oblique measurement from the cutterhead to the controls and the 18-inch indentation in the face of the crosscut. Westmoreland's argument as to the cutting of the crosscut at an angle is controverted, however, by the testimony of the inspector and the chairman of the safety committee who stated unequivocally that cutting at the drastic angle that would be necessary to bring the 21-foot 10-inch measurement into play would have resulted in the cutting of a large piece shaped like a piece of pie in the right rib and both of the witnesses testified unequivocally that the right rib was smooth and free of any indications showing that the crosscut had been cut at an angle (Tr. 26; 52-53; 72-73; 257).

Exhibit 5 is a diagram of the continuous-mining machine. That diagram shows that the continuous-mining machine is 10 feet 10 inches wide and 23 feet 4 inches long. It was operating in a crosscut whose total width was 20 feet. An offset had been cut in the face on the right side. It is impossible for a machine 23 feet 4 inches long and almost 11 feet wide to be turned in a 20-foot entry so as to bring the oblique measurement of 21 feet 10 inches into play because the rear of the machine will come into contact with the left rib and prevent the machine from being turned at an acute angle. Additionally, it must be recognized that the helper to the operator of the continuous-mining machine testified that the ventilation curtain was in place both at the time they were mining and at the time they were cleaning up the crosscut (Tr. 187; 193-194). The ventilation curtain was 4 feet from the right rib (Tr. 193). The curtain therefore reduced the maneuverability of the continuous-mining machine by reducing the width of the entry to 16 feet. Moreover, exhibit 5 shows that the continuous-mining machine has a loading attachment on its rear end which is 9 feet 6 inches long and the helper further testified that he was involved in keeping the shuttlecars from becoming entangled in the continuous-mining machine's cable. While the loading apparatus on the continuous-mining machine will swing to the right and left to provide some flexibility in the way the continuous-mining machine is used, the fact remains that the machine's ability to turn at a dramatic angle was further reduced by the fact that it was delivering coal into shuttlecars.

It may easily be demonstrated why Westmoreland's motion for reconsideration dropped its contention that the second roof bolt from the right was about 2 feet outby and out of line with the other roof bolts in the last row of permanent supports. If that contention is added to Westmoreland's other arguments about an 18-inch indentation in the face and its contention that the operator's controls were 21 feet 10 inches from the face when the miner is being used at an angle, the result would be that the operator of the miner was 40 inches outby the last row of permanent supports, as shown in the calculation below:

- 22' 0" = distance from second roof bolt from right rib to face of crosscut (Exh. 4).
- 21' 10" = distance from left cutterhead to controls of machine (Exh. 5).
- 2" = distance operator was inby second roof bolt from right rib.

- 18" = indentation in the face caused by "popping off" of coal (which further reduces the inspector's 22-foot measurement).
- 2" = distance which operator would have been inby second roof bolt if he were 21' 10" from the face.
- 16" = distance operator would have been outby the second roof bolt if indentation accounted for 18 inches of inspector's 22-foot measurement.
- +24" = distance second roof bolt was out of line with other roof bolts in last row of permanent supports.
- 40" = distance operator would have been outby the last row of permanent supports if all of Westmoreland's contentions are applied to reduce the inspector's 22-foot measurement.

The inspector testified that he went into the crosscut to determine why no curtain had been erected in the crosscut. When he saw the hole in the face, he recognized that air would travel into the No. 4 entry, which was the return entry, and obviate the need to have a curtain installed, but then the inspector's attention was attracted to the fact that the crosscut had been mined beyond permanent support in violation of the roof-control plan (Tr. 17). If the operator of the continuous-mining machine had stopped cutting coal when the controls of the machine were 40 inches outby the last row of permanent supports, there is no likelihood that the inspector's attention would have been directed to the depth of the last cut of coal which had been removed from the crosscut because the operator of the machine could not have been close enough to the face for the controls of the machine to have been nearer to the face than the 19-foot 6-inch distance from the right cutterhead to the machine's controls (Exhs. 4 and 5).

There are other aspects of Westmoreland's evidence which cast doubt on the validity of its arguments. The person who made the measurements on which Westmoreland relies was Roger McMicken who was the section foreman on the second shift when the crosscut was mined. He testified that the first roof bolt from the right rib was 20 feet from the face of the crosscut (Tr. 204; Exh. B). McMicken did not claim that the measurement from the first roof bolt to the face was made to an indentation in the face. There is no way for the operator of the continuous-mining machine to have cut 20 feet inby the first roof bolt from the right rib without going at least 6 inches inby that roof bolt because the continuous-mining machine could not possibly have cut the extreme right side of the face to a depth of 20 feet without having the continuous-mining machine almost squarely against the face as claimed by MSHA's witnesses (Tr. 53; 72).

Westmoreland's contentions about nonoccurrence of the violation are further flawed by the lack of certainty shown in its witnesses' testimony. Raymond Watts was the operator of the continuous-mining machine on the night of September 15, 1982. Watts is classified as the helper to the operator of the continuous-mining machine (Tr. 141), but on the night of September 15, 1982, the regular operator did not report for work because of illness in his family (Tr. 157). Watts' helper was Roger Bias who was not familiar with the Joy miner which was being used at that time (Tr. 159). It is ordinary practice for the regular operator to make the first cut of the shift and for the helper to make the second cut. Then they generally alternate in that fashion throughout the shift, but Bias' inexperience prevented that sort of switching in assignments with the result that Watts made all of the cuts of coal which were mined on the evening shift of September 15 (Tr. 157-159).

Watts' testimony will not support many findings because he was not certain about his actions on September 15. He was only able to say that he "thinks" the bolts in the last row of permanent supports were out of line (Tr. 154). Watts agreed that the right side of the crosscut was definitely cut more deeply into the face than the left side, that he was the one who made both cuts, and that he believed the right side was cut from 10 inches to a foot deeper than the left side (Tr. 155). Watts also claimed that he was watching the curtain on the roof bolt closest to the right rib and that he did not go beyond that curtain (Tr. 145), but the section foreman found that it was 20 feet from that bolt to the face of the crosscut (Tr. 204). As indicated above, Watts could not have cut the extreme right corner of the crosscut to a depth of 20 feet without going inby that bolt by at least 6 inches. Despite Watts' contention that he had not gone beyond the last row of permanent supports, he did not bother to measure the distance to the face after the crosscut had been bolted (Tr. 179).

Watts' helper, Bias, was very unsure about what he had done when the crosscut was mined. He first stated that he was standing right beside Watts when Watts made the disputed cut, but then he added that he "believes" he was standing near Watts (Tr. 185). Bias had worked as Watts' helper only about 10 times, but so far as he could recall, he had not seen Watts go beyond permanent supports (Tr. 187). Bias said that the hole in the face could have popped out from pressure, but could also have been cut with the head of the continuous-mining machine (Tr. 186; 191). Bias did not recall which bolts he was watching when Watts made the cut on the right side, but he said that he ought to have been watching the two bolts nearest to the right rib (Tr. 190). Bias also testified that they did not take down the curtain before cleaning up the crosscut and that the curtain was still up when he left the section between 11:15 and 11:30 p.m. (Tr. 193).

The measurements on which Westmoreland relies were made by Roger McMicken, the section foreman who was on duty when the disputed deep cut was mined. He testified that he saw the hole in the crosscut when he made his last check of the face area on September 15, 1982. He saw nothing otherwise unusual about the way the crosscut had been mined (Tr. 199). His measurements were made the next night after the crosscut had been fully bolted, but he knew which bolt to use in his measurement because it had been marked (Tr. 201). Although he, like the inspector, obtained a 22-foot measurement from the second bolt from the right rib to the face, he said that one of the reasons the distance measured that much was that he had placed the end of the tapeline into the 18-inch indentation caused by the "popping" out of the hole in the face (Tr. 201). Yet he could not recall whether the hole was in line with the second bolt, or how far off the right rib the hole was, or whether the hole was on the left or right side of the cut (Tr. 203). After giving the distances which he measured, he said that he "believed" those were the measurements he obtained (Tr. 205). As to the 20-foot measurement from the first roof bolt from the right rib to the face, he testified that it was "maybe twenty foot" (Tr. 204). The aforesaid equivocations were made during his direct testimony.

On cross-examination, McMicken stated that the curtain was not up at 11 p.m. when he checked the crosscut (Tr. 208), but, as noted above, Bias stated that the curtain was still up when they cleaned up the crosscut. As to the offset in the face of the crosscut, which Watts said existed, McMicken testified that he could not recall whether the offset existed or not, but he would not say that it did not exist or that he had failed to see it (Tr. 211). Although McMicken believed that "more than likely someone was holding the tapeline" (Tr. 212) when he made his measurements, he could not recall who assisted him in making the

measurements. McMicken also could not recall whether the continuous-mining machine had made a square cut into the face on the right side (Tr. 213). Moreover, although McMicken based his belief that the distance from the second roof bolt from the right rib to the face measured 22 feet on a "belief" that the second bolt was out of line with the other bolts in the row by "maybe a foot or two" (Tr. 203), he did not examine the roof bolts sufficiently to be able to state what pattern of bolting or condition in the roof caused the misalignment, if any, or what was done by the roof-bolting machine's operator to compensate for having installed a roof bolt which was from 1 to 2 feet out of alignment (Tr. 217).

Although I noted in finding No. 10 of my bench decision that Egnor had gone to the face of the No. 4 entry where it could have been dangerous for him to go in order to assist the inspector in making his measurement, Westmoreland's claim that Egnor reached into the hole in order to obtain the inspector's hammer is based on the incredible testimony of Richard Sparks who alleges that he was operating a scoop in the No. 4 entry at the time Egnor came into the No. 4 entry. While Sparks claims to have seen Egnor reach into the hole for the purpose of getting something on the other side of the entry, Sparks' testimony is filled with unexplained gaps and inconsistencies. He first said that Egnor placed his hand on the rib and reached through the hole, but thereafter he was unable to state for sure which hand Egnor used to reach into the hole (Tr. 221; 225). He first said that he did not ask Egnor why he was doing such an unsafe act and then stated that he could not recall whether he asked Egnor anything about the hazardous act he had committed (Tr. 221; 226). Although Sparks was busy piling up coal at the very place where Egnor was said to have reached through the hole, Sparks testified that he did not see Egnor walk past him on his way to the face (Tr. 229-230). Although Sparks had an obvious interest in what happened in the mine, he professed not to be interested enough in what Egnor was doing to know what he obtained when he reached through the crosscut or to notice whether Egnor was carrying a hammer when he walked past him after he had reached through the hole to get something (Tr. 225; 230). Even though Sparks did not know why Egnor had come to the face of the No. 4 entry at the time Sparks claims to have seen him, Sparks claims that he asked someone later in the shift to find out what was going on, but cannot remember who it was that he asked (Tr. 227).

Additionally, Sparks claimed that Jake Henry, the helper to the continuous-mining machine operator on the day shift, was in the crosscut at the time the inspector made his measurement and Sparks stated that Henry told him it took the inspector two or three throws to get the hammer through the hole in the face of the crosscut (Tr. 223). Sparks then apparently realized that if Henry had seen the hammer go through the hole, it would

have been unnecessary for Egnor to reach through the hole to obtain the inspector's hammer as Sparks had previously testified (Tr. 220). Therefore, Sparks stated that the hammer must not have gone through the hole at all or he would not have been able to see Egnor reach through the hole to get it (Tr. 223).

The unconvincing nature of Sparks' testimony is adequate reason for me to reject it for lack of credibility. Sparks' testimony was rebutted by Egnor who stated that no one was in the No. 4 entry when he went there to assist the inspector in making his measurement. Egnor additionally stated that it would have been necessary for him to have flagged Sparks down so that he could proceed by him to the face of the entry (Tr. 259-260). Sparks stated that he did not see Egnor walk past him while he was operating the scoop because he had to move back and forth in the entry (Tr. 228). I find that Egnor's statement that he would have remembered flagging down the scoop's operator, if anyone had been operating a scoop, is more convincing and more credible than Sparks' statement that he was in the No. 4 entry and observed Egnor reach through the hole to obtain an unknown object.

I believe that the discussion above shows beyond any doubt that the inspector correctly concluded that the operator of the continuous-mining machine proceeded in by permanent supports when he mined the second cut on the right side of the crosscut on September 15, 1982. Having reexamined all of the evidence in light of Westmoreland's motion for reconsideration, I conclude that my bench decision correctly found that a violation of section 75.200 occurred as alleged in Order No. 2037676 dated September 16, 1982.

Assessment of Penalty

Westmoreland's motion for reconsideration uses my finding that the violation was associated with a low degree of negligence for the purpose of arguing that a penalty of \$1,000 is excessive in circumstances where management is found to have made a sincere and concerted effort to teach its miners safe mining practices. Westmoreland claims that no witness was able to suggest anything that Westmoreland could have done to avoid the instant violation. If there is any part of my bench decision which is incorrect, it is my conclusion that no portion of the penalty should be assessed under the criterion of negligence. I shall hereinafter explain in detail why I did not assess any portion of the penalty under negligence.

There is evidence in the record to support a finding of a greater degree of negligence than I found in my bench decision if I had thought it would be fair to Westmoreland to emphasize such evidence. Inspector Baisden, for example, checked Item 20

in his order of withdrawal to indicate that he believed that the violation was associated with a high degree of negligence (Exh. 2). The inspector supported his checking of a high degree of negligence by testifying that a section foreman was on duty on the section during the cutting of the crosscut and that he should have made certain that the crosscut was not mined to a depth of 22 feet (Tr. 27). Before becoming an inspector, Baisden had been the operator of various types of underground mining equipment and had also worked as both a section foreman and assistant mine foreman (Tr. 6-7). Therefore, the inspector's belief that the section foreman should have prevented the cutting of the crosscut 2-1/2 feet beyond permanent supports is entitled to be given considerable weight.

Moreover, the section foreman, Roger McMicken, was clearly negligent in the way he performed his job on September 15, 1982. The operator of the continuous-mining machine was not the regular operator and the helper of the substitute operator was an inexperienced person in that capacity, at least insofar as cutting with a Joy continuous-mining machine is concerned (Tr. 156; 159). Therefore, McMicken should have been paying special attention to the way the entries were being cut because they were all cut on that shift by Watts who was classified as a helper to the regular operator (Tr. 159). McMicken's own testimony shows that he noticed the hole in the face of the crosscut, but stated that he did not see anything else unusual about the crosscut (Tr. 199). The inspector's attention had been directed to the crosscut by the absence of a curtain. When the inspector saw the hole in the face of the crosscut, he concluded that ventilation was satisfactory, but then he noticed that the operator of the continuous-mining machine would have had to go beyond permanent supports to mine an entry to the depth the inspector observed (Tr. 13-19). The section foreman should have been able to make an evaluation of the excessive depth of the crosscut and should have left special instructions for the section foreman on the next shift to see that the crosscut was bolted as soon as possible so that the excessive area of unsupported roof could be made safe without leaving the area unsupported any longer than necessary.

The inspector discussed the order he had written with both the section foreman on the day shift and the mine foreman. The inspector offered to remeasure the crosscut in their presence if they believed he had made an error, but they declined to have him do so. According to the inspector, the mine foreman's conclusion, after seeing the crosscut, was that the miners who had made the cut just "messed up" (Tr. 23-24). Westmoreland's last witness was Jim Kiser who is Westmoreland's safety manager (Tr. 230). He testified that the mine foreman intended to discipline the section foreman because the mine foreman believed that they were at fault in having violated the roof-control plan (Tr. 245).

Kiser investigated the violation cited by the inspector and concluded that Westmoreland's personnel were not at fault because he did not believe that a violation had occurred, based on the arguments about measurements discussed in the preceding section of this decision. Since Kiser had concluded that no violation occurred, he influenced the mine foreman sufficiently to cause the mine foreman to reverse his decision to discipline the personnel who had been on duty when the violation occurred (Tr. 245).

My decision not to assess any portion of the penalty under the criterion of negligence is based largely on the fact that Westmoreland's mine foreman would have disciplined the personnel involved had he not been influenced to do otherwise by Westmoreland's own safety department. I also took into consideration that Watts, the miner who made the cut beyond permanent supports, had nearly been killed in a roof fall himself and had an excellent reputation for being safety oriented. I believed that Watts was telling the truth when he stated that he did not think he had gone beyond permanent supports and did not intend to go beyond permanent supports. Additionally, I believed that the section foreman could reasonably have relied upon Watts' good reputation for safety in failing to keep a constant vigil over him while he was operating the continuous-mining machine on September 15. Taking all of the aforesaid matters into consideration, I believed that it would be unfair to Westmoreland to assess any portion of the penalty under the criterion of negligence.

There is additional testimony in the record, however, which shows that Westmoreland overstates its case when it argues that no witness was able to suggest anything which Westmoreland could do to increase safety awareness above that which it was already doing. The section foreman, for example, claimed that he had daily contacts with the miners to instruct them in safe mining practices (Tr. 197). On the other hand, Watts, the operator of the continuous-mining machine who cut 2-1/2 feet beyond permanent supports, testified that they had a weekly safety talk or meeting and that they discussed the roof-control plan "fairly often" (Tr. 146).

The discussion above shows that Westmoreland's management was not so entirely free from fault in the occurrence of the violation, that a penalty of \$1,000 is completely unjustified when considered in conjunction with the fact that I did not assess any portion of the penalty under the criterion of negligence. In Nacco Mining Co., 3 FMSHRC 848 (1981), the Commission affirmed a judge's decision finding that the operator was not negligent, but the Commission also affirmed the judge's assessment of a penalty of \$500 because of the seriousness of the violation and the fact that the operator had an unfavorable history of previous violations.

In my bench decision, I emphasized the fact that Congress believed that the penalty provisions of the Federal Coal Mine Health and Safety Act of 1969 were not being properly administered because MESA was not proposing increasingly large penalties when there was evidence that an operator was repeatedly violating the same mandatory health and safety standards. S. REP. NO. 95-181, 95th Cong., 1st Sess. 43 (1977), made the following comment about using the criterion of history of previous violations in assessing penalties:

In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed. Seven or eight violations of the same standard within a period of only a few months should result, under the statutory criteria, in an assessment of a penalty several times greater than the penalty assessed for the first such violation. 2/

Exhibit No. 7 shows 29 previous violations of section 75.200 at the Hampton No. 3 Mine during the 24 months preceding the occurrence of the violation cited in this proceeding. All but two of the violations were considered to be "significant and substantial". 3/ Six of the violations occurred in August and September 1982 and the violation here involved was cited on September 16, 1982. The fifth of those six violations was cited in an unwarrantable-failure order issued only 12 days before the instant violation occurred and MSHA proposed a penalty of \$305 for that violation which was paid in full by Westmoreland. Therefore, my penalty of \$1,000 is within the guidelines mentioned in the legislative history because it is three times the amount proposed by MSHA for one of the previous unwarrantable-failure violations of section 75.200.

Since the Commission has held in several prior cases and most recently in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd Sellersburg Stone Co. v. FMSHRC, ___ F.2d ___, 7th Circuit No. 83-1630, issued June 11, 1984, that the Commission and its

2/ Reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 631 (1978).

3/ In Consolidation Coal Co., 6 FMSHRC 189 (1984), the Commission held that an inspector may properly designate a violation cited pursuant to section 104(a) of the Act as being "significant and substantial" as that term is used in section 104(d)(1) of the Act, that is, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety and health hazard.

judges are not bound by MSHA's assessment formula, it has not been my practice in the past to refer to MSHA's proposed penalties when I am assessing penalties on the basis of evidence presented at a hearing. Nevertheless, since the Commission majority in the U. S. Steel case, hereinbefore cited, found that MSHA's proposed penalty of \$400 was appropriate, whereas my penalty of \$1,500 was excessive (6 FMSHRC at 1432), it now behooves me to show why I have assessed a penalty of \$1,000 in this case although MSHA has proposed a penalty of only \$395. The first obvious defect in MSHA's proposed penalty is that MSHA assigned only six penalty points pursuant to 30 C.F.R. § 100.3(c) under the criterion of history of previous violations. MSHA assigned a total of 52 penalty points for the violation. If six penalty points are subtracted from that total, the penalty would have been only \$275 when the reduced points are entered on the penalty conversion table in section 100.3(g) of the assessment formula. In other words, MSHA assessed \$120 of the penalty under the criterion of history of previous violations. The violation here involved was the seventh violation of section 75.200 to have occurred at the Hampton No. 3 Mine within less than a period of 2 months. Consequently, it is obvious that MSHA is still not using the criterion of history of previous violations as Congress intended, or the proposed penalty would have been several times greater than the previous proposed penalties for violations of section 75.200.

Westmoreland's motion for reconsideration argues that my penalty of \$1,000 is excessive because I assessed \$800 of it under the criterion of gravity despite the fact that I failed to assess any portion of the penalty under the criterion of negligence. It is a fact, however, that gravity is a separate criterion and the Commission has not held in any case of which I am aware that a judge is precluded from assessing a penalty under the criterion of gravity wholly apart from any amount which he may think is appropriate under the criterion of negligence. It is certain that MSHA's assessment formula considers the criterion of gravity as a separate matter in section 100.3 (e) of the formula from the criterion of negligence which is considered in section 100.3(d) of the formula. In this case, MSHA assigned 16 penalty points under the criterion of gravity. If 16 points are deducted from the total of 52 points assigned under the formula, it can be seen by application of those points to the conversion table in section 100.3(g) of the formula, that MSHA attributed \$255 of the proposed penalty of \$395 to the criterion of gravity.

The inspector testified that the violation was very serious (Tr. 30-36); the chairman of the safety committee testified that the violation was very serious (Tr. 76-80); MSHA's roof-control specialist testified that the violation was very serious (Tr. 119-123); Westmoreland's section foreman testified that the

violation was very serious (Tr. 198); Westmoreland's operator of the continuous-mining machine testified that the violation was very serious (Tr. 146; 182); and Westmoreland's safety manager testified that the violation was very serious (Tr. 245). While it is true that all of Westmoreland's witnesses claimed that the violation did not occur, the fact remains that they all agreed that going beyond permanent roof supports is a very serious violation. I have already shown that there is no merit to any of Westmoreland's arguments in which it has striven to show that the violation did not occur.

It is my function to consider the preponderance of the evidence in deciding cases. Failure to assess a substantial amount under the criterion of gravity in this proceeding would require me to ignore a vast amount of evidence to the effect that the violation was very serious. My failure to assess any part of the penalty under the criterion of negligence may be in error because I probably should not have given as much weight as I did to the ameliorating factors hereinbefore discussed, but my failure to assess a portion of the penalty under the criterion of negligence is certainly no reason for me to assess only a token penalty under the criterion of gravity when that criterion is considered in light of Westmoreland's very unfavorable history of previous violations and the fact that Westmoreland is a large operator which has stipulated that payment of penalties will not cause it to discontinue in business.

For the reasons given above, I conclude that my bench decision assessing \$800 under the criterion of gravity and \$200 under the criterion of history of previous violations to derive a total penalty of \$1,000 should be affirmed.

WHEREFORE, it is ordered:

(A) Westmoreland's motion for reconsideration filed June 22, 1984, is denied.

(B) Westmoreland Coal Company, within 30 days from the date of this decision, shall pay a penalty of \$1,000.00 for the violation of section 75.200 cited in Order No. 2037676 issued September 16, 1982.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Kevin C. McCormick, Esq., Office of the Solicitor, U. S. Department of Labor, Room 1237A, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

F. Thomas Rubenstein, Esq., P. O. Drawer A & B, Big Stone Gap, VA 24219 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 21, 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-209
Petitioner	:	A.C. No. 15-06365-03509
v.	:	
	:	No. 1 Surface Mine
WEST VIRGINIA REBEL COAL	:	
COMPANY, INC.,	:	
Respondent	:	

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

On March 27, 1984, the Solicitor filed his Response to the Order to Submit Information issued in the above-captioned proceeding. At issue is one violation, the proposed settlement of which is \$20, the originally assessed amount.

Citation No. 2053339 was issued for a violation of 30 C.F.R. § 77.1605(b), because the foot and parking brakes on a scraper were inoperative. The Solicitor asserts in his motion that the Caterpillar 637 Scraper was operating on the outside edge of the coal pit at the time that this citation was issued and that there were no other miners on the ground near this machine. The Solicitor represents that although the machine was without service or footbrakes, it was operating on a very slight incline and was capable of being stopped by the use of its scraper blade or bowl. He also argues that the machine was not working on rocky ground and was therefore capable of exerting downward pressure with the blade to enable it to stop.

In his original motion, the Solicitor represented that gravity and negligence were moderate. I have consistently held that a \$20 penalty denotes lack of gravity. I am unable to approve a \$20 settlement of a violation which the Solicitor himself alleges is of moderate negligence and gravity. Moreover, it may be that the gravity was even more than moderate. Therefore, this case is hereby assigned to Judge James A. Broderick.

All future communications regarding this case should be addressed to Judge Broderick at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6200



Paul Merlin
Chief Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Carl A. Tibbetts, Gardner, Moss, Brown & Rocovich, Suite 900 First National Exchange Bank Building, 213 South Jefferson Street, P.O. Box 13606, Roanoke, VA 24035 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 21 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 81-342-M
Petitioner : A.C. No. 42-00712-05020
v. : Docket No. WEST 81-343-M
: A.C. No. 42-00712-05021
: :
KENNECOTT MINERALS COMPANY, : Arthur Concentrator
UTAH COPPER DIVISION, :
Respondent :

DECISION

Appearances: James H. Barkley, Esq., Peggy Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Kent W. Winterholler, Esq., Parsons, Behle & Latimer, Salt Lake City, Utah, for Respondent.

Before: Judge Morris

These cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act), arose from an inspection of respondent's worksite. The Secretary of Labor seeks to impose civil penalties because respondent violated a safety regulation promulgated under the Act.

Respondent withdrew its notice of contest to the underlying violations but contests the amount of the proposed penalties (Tr. 2, 3).

After notice to the parties, a hearing on the merits was held in Salt Lake City, Utah on September 20, 1983.

Respondent filed a brief at the hearing.

Issues

What penalties are appropriate for these violations?

Stipulation

The parties stipulated that the imposition of a penalty of \$2,964 would not affect respondent's ability to continue in business (Tr. 22, 23).

Citations

The two cases here involve 26 separate violations of Title 30, Code of Federal Regulations, Section 55.14-1.

For these violations the Secretary, in his proposed assessment, seeks penalties in the total amount of \$2,736. There are two citations for the same defective conditions but for these violations the Secretary seeks no penalties.

The regulation violated by respondent provides as follows:

Guards

55.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

Summary of the Evidence

On December 12, 1980 MSHA Inspector William W. Wilson inspected respondent's Arthur Concentrator (Tr. 6, 7). He issued citations for the violation of 30 C.F.R. § 55.14-1 when he found 26 unguarded ball mills (Tr. 7, 8, P1-P4). A series of steel balls in the machines grind ore inside a cylindrical drum. Ore concentrate is the resulting product. The drum itself has a five foot diameter and it is 2 1/2 feet above ground level (Tr. 9). The wheel turns inside a stationary drum holder at 600 revolutions per minute (Tr. 9, 10).

On these primary ball mills there were numerous pinch points between the drum holder and its supporting concrete frame. There are additional pinch points between the drum and the rotor (Tr. 8, 10; P1, P2).

A pinch point is that area located between two moving parts or between a moving and a stationary point. An object or material can become caught, pulled, torn, or entangled at a pinch point (Tr. 7, 8).

Photographs show a coke bottle, gloves, a rag and a grease can on the bottom of the steel ball machine frame (Tr. 11; P3, P4).

Workers maintain the machines by pouring grease into a cup on the top. At that point the maintenance worker is six feet off of the ground. He could slip and fall into the moving wheel (Tr. 12). The operators of the machines also use the walkway located to the left (Tr. 13, P4).

The twenty six ball mills, a football field in length, are adjacent to a walkway (Tr. 13). A person on the walkway could trip or fall into a moving wheel. In the winter a worker's heavy clothing could be caught in the machines (Tr. 14).

On the day of the inspection almost all of the unguarded 26 ball mills were running (Tr. 16, 17). The inspector later modified the citation as to two non-operating machines (Tr. 17, 18). But in the inspector's opinion all 26 violations existed. The machines that were not running that day were still capable of operating (Tr. 17, 18).

In the past the inspector had seen guards on similar machines at other concentrators (Tr. 20).

The condition here could cause a serious injury or a fatality. An accident would be likely to occur (Tr. 20). Respondent has 5,000 workers. A computer printout at the Arthur Concentrator shows an prior history of 26 violations of safety regulations, excluding the violations in contest in the instant cases.

An MSHA memorandum of October 3, 1979 deals with a situation where the same violations exist in the same area of a mine. The memorandum requires that one citation be issued (Tr. 26).

At the hearing the judge indicated he would take official notice of the MSHA memorandum (Tr. 28).

Discussion

Respondent's brief filed at the hearing raises two issues. Initially it is asserted that MSHA may not impose twenty four separate penalties as the result of issuing a single citation. As a secondary issue respondent claims that the penalties are excessive and unfair.

The Act provides that civil penalties may be imposed for the violation of mandatory safety standards. Further, "each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense" 30 U.S.C. 820(a).

It appears on this record that there were 26 separate offenses since all of the machines were unguarded. I find nothing in the Act or in the legislative history that would prohibit MSHA from issuing a single citation for these separate violations.

Respondent's reliance on the MSHA policy memorandum is misplaced. The memorandum states that where the same area of the mine is involved any multiple violations should be treated as one

violation and one citation should be issued. It does not necessarily follow from the memorandum that only one penalty must be proposed.

In any event the Commission is not bound by any method of assessment used by MSHA. Co-op Mining Company, 2 FMSHRC 784 (1980); the Commission can make de novo assessments. Shamrock Coal Company, 1 FMSHRC 469 (1979). The United States Court of Appeals for the 7th Circuit recently concluded that the Commission, as an independent adjudicative body, was required to follow the six criteria in 30 U.S.C. § 820(i) in assessing a civil penalty. Sellerburg Stone Company v. FMSHRC et al. No. 83-1630, 2 MSHC 2010, 3 MSHC 1385, June 11, 1984.

Following the statutory criteria I find on this record that the Arthur Concentrator has a history of 26 violations in the two years prior to December 27, 1980 (Exhibit P5). This would not appear to be an excessive number of violations considering the large size of respondent's facilities. I find the operator was negligent in that the unguarded conditions were apparent. The imposition of a penalty will not affect the operator's ability to continue in business. The gravity, in my view, is somewhat less than claimed by Inspector Wilson. The pinch points, apparently located between the rotator and the assembly frame, do not appear to be as readily accessible to miners in the immediate area as the inspector claims. Accordingly, I do not find that an injury is as likely as the inspector contends (Tr. 8; P1). The operator demonstrated good faith in installing guards after being notified of the violation.

On balance, I consider a penalty of \$50 to be appropriate for each unguarded ball machine at the site. I am further assessing penalties for the two unguarded machines that were not operating on the day of the inspection.

Respondent failed to offer any evidence that these particular machines had been removed from service. In sum, a total civil penalty of \$1,300 (26 x 50) should be assessed.

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

ORDER

1. In WEST 81-342-M and WEST 81-343-M respondent's motion to withdraw its notice of contest as to the validity of the citations is granted.

2. The following citations are affirmed and a penalty of \$50 is assessed for each such violation.

WEST 81-342-M

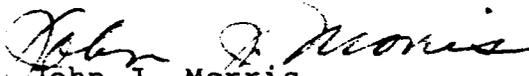
<u>Citation</u>	<u>Penalty</u>
583705 A	\$ 50.00
583705 B	50.00
583705 C	50.00
583705 D	50.00
583705 E	50.00
583705 F	50.00
583705 G	50.00
583705 H	50.00
583705 I	50.00
583705 J	50.00
583705 K	50.00
583705 L	50.00
583705 M	50.00
583705 N	50.00
583705 O	50.00
583705 P	50.00
583705 Q	50.00
583705 R	50.00
583705 S	50.00
583705 T	50.00

3. The following citations are affirmed and a penalty of \$50 is assessed for each such violation.

WEST 81-343-M

<u>Citation</u>	<u>Penalty</u>
583705 U	\$ 50.00
583705 V	50.00
583705 W	50.00
583705 X	50.00
583705 Y	50.00
583705 Z	50.00

4. Respondent is ordered to pay the sum of \$1,300 within 40 days of the date of this decision.


John J. Morris
Administrative Law Judge

Distribution:

**James H. Barkley, Esq., and Peggy Miller, Esq., Office of the
Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961
Stout Street, Denver, Colorado 80294 (Certified Mail)**

**Kent W. Winterholler, Esq., Parsons, Behle & Latimer, 185 South
State Street, Salt Lake City, Utah 84147 (Certified Mail)**

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 21 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-155-M
Petitioner	:	A.C. No. 42-00716-05015
	:	Docket No. WEST 83-60-M
v.	:	A.C. No. 42-00716-05503
	:	
KENNECOTT MINERALS COMPANY,	:	Magna Concentrator
UTAH COPPER DIVISION,	:	
Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., and Peggy Miller, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Petitioner;
Kent W. Winterholler, Esq., Parsons, Behle &
Latimer, Salt Lake City, Utah,
for Respondent.

Before: Judge Morris

These cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act), arose as the result of an inspection of respondent's tailings pond. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated safety regulations promulgated under the Act.

Respondent denies any liability for these incidents.

After notice to the parties, a hearing on the merits was held in Salt Lake City, Utah on September 20, 1983.

Respondent filed a post trial brief.

Issues

The issues on the contested citations are: whether the doctrine of res judicata and collateral estoppel bar the citations; whether the standard applies to respondent's tailings pond; and whether the standard is mandatory or merely advisory.

WEST 82-155-M

In the above case the parties proposed the following settlement:

<u>Citation No.</u>	<u>30 C.F.R. Section Violated</u>	<u>Assessed Penalty</u>	<u>Proposed Disposition</u>
577649	55.20-8	\$ 24.00	\$ 24.00
577650	55.12-25	40.00	40.00
577651	55.12-32	40.00	20.00
579422	55.20-3A	26.00	Vacated
579423	55.20-3A	26.00	26.00
579426	55.20-3A	26.00	26.00
577707	55.11-1	72.00	72.00
579429	55.16-5	52.00	52.00

(Transcript at pages 10-13 in
Docket No. WEST 83-5-M)

On the basis of the record I find that the proposed settlements are reasonable and they should be approved.

Litigated Citations

WEST 82-155 and WEST 83-60-M each contain a citation alleging a violation of 30 C.F.R. § 55.9-22. The standard cited by the Secretary provides as follows:

Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways.

Summary of the evidence

The evidence, generally uncontroverted, focuses on the same general area of respondent's tailings pond. This decision will first consider the tailings pond area itself and then, in chronological order, the three citations involved in the evidence. The first of the three citations was assigned to Commission Judge George A. Koutras. The subsequent citations are contested in each of the pending cases.

The tailings pond

A public highway intersects respondent's 4800 acre tailings pond at its Magna and Arthur Concentrators (Tr. 11, 12, 128, 131). The tailings pond assimilates each day some 85 tons of residue derived from the crushing of ore. The deposits in the pond, about 27 percent solid, causes a buildup in the sludge. From time to time it is necessary to increase the height of the discharge pipes (Tr. 12-14, 128-131).

The roadway cited by MSHA furnished access from one side of the tailings pond area to the roads (Tr. 15, 19, 21; Exhibits P1, P2). Contractors, maintenance personnel, dikemen and supervisors travel this road (Tr. 15). At various times respondent has placed berms on the road located below the upper dike level. But these berms, by trapping rainwater, have created unstable conditions for vehicles on the road. Phreatic water and erosion problems have also increased. Any dike failure could cause water to flow into the Great Salt Lake (Tr. 140, 141, 153).

Citation 583706

In due course the above citation evolved into FMSHRC case WEST 81-283-M.

The evidence in the instant case together with the Commission file in WEST 81-283-M establish that on December 10, 1980 MSHA Inspector William W. Wilson issued Citation 583706 ^{1/} alleging a violation of 30 C.F.R. § 55.9-22 at respondent's tailings pond (Tr. 54-59; R-1). After a meeting in January, 1981, the citation was modified to indicate that it applied to inclined access roads at the tailings pond (Tr. 60; Exhibit R-1). MSHA apparently considered that § 55.9-22 applied to inclined access roads (Tr. 60).

Respondent contested the foregoing citation and the issues, as previously stated, were docketed before the Federal Mine Safety and Health Review Commission in Case No. WEST 81-283-M. The case was assigned to Commission Judge George A. Koutras (Exhibit J-1).

Prior to a hearing the parties discussed a settlement. A letter, approved by the company, was forwarded to MSHA's counsel. It stated, in part,

Kennecott will withdraw its Notice of Contest of the citation and the proposed civil penalty in this action if the Department of Labor will agree that the penalty to be imposed for the alleged infraction of that mandatory standard cited will be \$235.00. The currently proposed penalty assessment is \$295.00. In addition, this settlement agreement will specify an understanding that the specific standard which Kennecott is alleged

^{1/} The Secretary strenuously objected to respondent's evidence relating to this citation (Tr. 54, 61-62).

to have violated in Citation number 0583706, i.e. that mandatory standard found at 30 C.F.R. § 55.9-22 would be considered to apply at Kennecott's Arthur Concentrator, specifically the tailings pond area, only to inclined access roads, and not to the entire tailings pond dike. This is our understanding of the agreement or understanding reached between Kennecott and the Federal Mine Safety and Health Administration in the termination of the citation which is the subject of this proceeding.

(Tr. 155; Exhibit J-1).

Subsequently MSHA's counsel filed a motion before Judge Koutras seeking his approval of the settlement. Paragraph number 2 of the motion states as follows:

It is to be noted in this settlement that the mandatory standard found at 30 C.F.R. § 55.9-22 is to be applied at Kennecott's Arthur Concentrator, specifically the tailings pond area, only to inclined access roads and not to the entire tailings pond dike. See respondent's attached agreement.

(Exhibit J-1).

There was no hearing and on October 19, 1981, Judge Koutras entered a decision approving the settlement.

As a result of the foregoing agreement the company believed it did not have to seek a variance. Respondent's witness Pinder indicated the company believed it would only have to berm inclined access roads (Tr. 155). Pinder further stated that the road cited in the pending cases was flat (Tr. 167).

In 1982 and 1983 MSHA's counsel and MSHA's representatives Hansen and Plimpton disputed the company's position relating to inclined roads (Tr. 161, 162, 182-184; Exhibit P-6).

In the instant cases Inspector Wilson explained that he modified the 1980 citation to show that the road was inclined. He sought to thereby distinguish it from the term "elevated" (Tr. 186-189). MSHA's position, as stated at this hearing, is that a berm is required on an elevated, inclined, declined, or level road (Tr. 190). The inspector did not intend to forever limit MSHA's authority to issue citations on access roadways at respondent's tailings pond (Tr. 189).

WEST 82-155-M - Citation 579431

On January 26, 1982 Inspector William Wilson issued Citation 579431 alleging a violation of 30 C.F.R. § 55.9-22. The citation alleges there was no berm or guard on the road adjacent to the Magna dike pump house.

Inspector Wilson had observed during his inspection that the road providing access on the south side of the tailings pond was unbermed and unguarded for approximately 150 feet (Tr. 15, 20-21). The road, adjacent to the dike house, furnished primary access to the dike area, other pump houses and pipes (Tr. 15). The road was elevated 8 to 12 feet above an adjacent overflow drainage stream (Tr. 19-22; P1, P2). If a vehicle overtraveled the road a serious or fatal injury could result (Tr. 22, 23).

Individuals using the roadway included contractors, maintenance personnel, electricians, dikemen, and supervisory personnel (Tr. 15, 24).

A company representative discussed with the inspector the problem caused by the berm trapping the rainwater. The area has a history of collecting water (Tr. 29). This citation was terminated when a berm was installed (Tr. 31).

WEST 83-60-M - Citation 2083505

A year later, in January 1983, in the same area Inspector Wilson found only remnants of a berm on the roadway. The conditions remained the same as in 1982 (Tr. 31-34). There were no berms or guards for a 150 foot length of the roadway. There were no means available to prevent overtravel on this portion of the road (Tr. 35, 36; P3, P4). Citation 2083505 was issued (Tr. 31-32).

The 1982 citation had been designated as one of a significant and substantial nature. The inspector testified the 1983 citation should likewise have been designated as an S & S violation (Tr. 37).

The 1982 and 1983 citations, if unabated, would ultimately result in an injury (Tr. 38).

The area of the roadway without berms was inclined. The incline was very gentle, like a camel's hump (Tr. 78).

Discussion

Respondent's initial contention is that the decision of Judge George A. Koutras, approving the settlement of the parties, has a res adjudicata effect on the two citations in contest here. It argues that the decision applied § 55.9-22 to "inclined" roads. Further, respondent argues that since the road here is flat the citations cannot be sustained.

Respondent's contentions lack merit. Section 55.9-22 does not require berms based on the inclination of a road. It is obvious on the record here that this portion of the roadway was elevated 8 to 12 feet above the adjacent stream (Tr. 20, 21; Exhibits P1, P2, R2, R3, R4). Accordingly, berms are required.

Respondent further contends that the roadway was flat; therefore, no berms were necessary. On this credibility issue I credit Inspector Wilson's testimony which is supported by the photographs. The evidence is rather clear that the road was inclined. But in any event whether the road was inclined is not relevant under the regulation.

In addition, the doctrine of res judicata cannot be invoked because at no time did Judge Koutras adjudicate the issues of whether respondent violated the berm standard on this stretch of roadway. The citations were issued for conditions that occurred in 1980, in 1982 and in 1983. Each violative condition was abated. Accordingly, in his decision on October 19, 1981, Judge Koutras could not adjudicate conditions that did not occur until 1982 and later again in 1983.

Respondent further claims that MSHA's citations are barred by the doctrine of collateral estoppel.

Virtually all of the evidence on this issue arises from the letter forwarded to MSHA's counsel from respondent's counsel. Subsequently, MSHA's counsel incorporated the letter in his motion filed with Judge Koutras seeking approval of the settlement (Exhibit J-1). Other than in the modification of the 1980 citation, I note that MSHA's officials took no affirmative action concerning what respondent now considers to be its agreement with the Secretary.

At the outset we can agree that equitable estoppel is a rule of justice which, in its proper field, prevails over all other rules. City of Chetopa v. Board of County Com'rs, 156 Kan 290, 133 P. 2d 174, 177 (1943). Generally four elements must be present to establish the defense of estoppel. These are (1) the party to be estoppel must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has the right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. United States v. Georgia Pacific Company, 421 F. 2d 92, 96, (1970), (9th Cir.). In this case elements (3) and (4) are not factually present in this record.

But even if the record established all of the factual elements to support the doctrine it would not be applied to deprive miners of the protection of the Mine Safety Act because of a public official's mistaken action. Maxwell Company v. NLRB, 414 F. 2d 477 (1969); Udall v. Oelschlaeger, 389 F. 2d 974 (1968). For a discussion of the doctrine of collateral estoppel also see the Commission decision of King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

For the foregoing reasons respondent's pleas of res adjudicata and collateral estoppel are denied.

The second contention is that 30 C.F.R. § 55.9-22 does not apply to respondent's tailings pond. Initially respondent argues that 30 C.F.R. § 55.9 speaks to those activities in metal and non-metal open pit mines that are defined in the scope note of the section as "Loading, Hauling and Dumping."

Respondent's contention lacks merit. The Commission has previously rejected this exact argument and ruled that the term "hauling" should be broadly construed. The term includes conveying men, ore, supplies or materials along elevated roadways where the roadways are used in the practice of normal mining. Cleveland Cliffs Iron Co. Inc., 3 FMSHRC 291, (1981).

The facts in this case clearly fall within the Commission's definition in the cited case. The unbermed roadway furnished access to the dike house, the pump house, the electrical substations and the pipeway (Tr. 78). All of the roads are interconnected. It is uncontroverted that the inspector observed respondent's personnel and its vehicles using the road (Tr. 83, 85, 87).

Respondent further claims that neither this Act nor its predecessor, the Federal Metal and Non-Metallic Safety Act of 1966, include within their definitions of a mine the term "tailings pond." Since 30 C.F.R. 55.9-22 became a standard under the present Act by virtue of 30 U.S.C. 961(b)(1) it is asserted that the Secretary must engage in rulemaking procedures to apply 30 C.F.R. 55.9-22 to its tailings pond. In support of its position respondent relies on Usery v. Kennecott Copper Corporation, 577 F. 2d 1113, (10th Cir., 1977). In the cited case the Secretary of Labor under the OSHA ^{2/} Act adopted an ANSI standard but in the transition the Secretary changed a word from "should" to "shall" without following any rulemaking procedures.

^{2/} Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq.

Respondent's contentions lack merit. Even if one assumes that respondent's tailings pond was not within the coverage of the 1966 Act, the present Act remedied any such defect when the Congress enacted an expansive definition of what constitutes a "mine." Congress further stated that the Act "must be given the 'broadest possible interpretation'" with "doubts resolved in favor of inclusion." Cypress Industrial Minerals Corp., 3 FMSHRC 1, (1981); See also Marshall v. Stout's Ferry Preparation Co., 602 F. 2d 589, 592 (3rd Cir. 1979). cert. denied, 444 U.S. 1015 (1980).

Respondent's cited case is not factually controlling. In this case, by adopting the Act Congress eliminated the necessity of the Secretary to follow any rule making procedures to apply the berm standard to a tailings pond.

Respondent's final argument centers on the proposition that 30 C.F.R. § 55.9-22 is fatally flawed. The focus of the argument centers on the proposition that the regulation as promulgated is advisory and not mandatory.

I agree with respondent's position. In order to resolve these contentions it is necessary to review the public records pertaining to the development of the berm standard at 30 C.F.R. § 55.9-22.

The standard, when initially proposed in 1969, read as follows:

§ 55.9-26 Mandatory - OPAC
Berms or guards shall be provided on the outer banks of elevated roadways.
(Emphasis added).

34 Fed. Reg. 656, January 16, 1969

Prior to the promulgation of the Chapter 55 standards comments were solicited and received. The berm standard was not promulgated as a part of the initial 30 C.F.R. Part 55 issuance on July 31, 1969. See 34 Fed. Reg. 12503, 12506 (July 31, 1969).

Subsequently, the Secretary of the Interior, the official responsible at that time, promulgated the following standard:

§ 55.9-22 Mandatory. Berms or guards should be provided on the outer bank of elevated roadways.
(Emphasis added)

35 Fed. Reg. 3663, February 25, 1970.

The Secretary of the Interior, in commenting about the changes between the originally proposed standards and the finally

promulgated standards, stated, in part, in his prefatory comments at 35 Federal Register 3663 as follows: "In a few instances in which the language of a proposed mandatory standard appeared to impose a requirement not within the intendment of the standard, the standard has been rephrased." The Secretary then cites some examples, but there are no references to the berm standard in his published remarks.

The situation then is that the Secretary originally proposed a standard in a mandatory form (shall), received comments, and finally promulgated the standard in an advisory form (should). Clearly supportive of the "should" language in the standard is the BNA ^{3/} Reference File which publishes 30 C.F.R. § 55.9-22 as follows:

Mandatory. Berms and guards should be provided on the outer bank of elevated roadways.

The Commission has not ruled on this issue. Cleveland Cliffs Iron Co., Inc., supra, does not address the point; hence, it cannot be considered as precedent.

A situation much akin to these facts can be found in Jim Walter Resources, Inc., 3 FMSHRC 2488, at 2490 (1981). In the cited case the Commission dealt with the phrase "shall be used as a guide". In ruling the standard unenforceable the Commission noted the mandatory nature of the word "shall," ^{4/} but concluded the term "guide" was something less than a mandatory requirement.

The term "shall" has almost universally been considered as the word used in regulations to express what is mandatory. Marshall v. Pittsburg Des Moines Company et al, 584 F. 2d 638, 643 (3rd Cir., 1978); Usery v. Kennecott Copper Corporation, supra; C.J.S. Statutes § 380(a); Webster's New Collegiate Dictionary, 1056, (1979).

In sum, the Secretary proposed the standard in mandatory form and promulgated it in advisory form. The Secretary's

^{3/} Bureau of National Affairs, Inc., Mine Safety and Health Reporter.

^{4/} 3 FMSHRC at 2490.

comments are, at best, unclear as to why the change occurred. These factors, in connection with the BNA publication, cause me to conclude that the Secretary's proposal to assess a civil penalty cannot be sustained.

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

ORDER

WEST 82-155-M

1. The proposed settlement agreement is approved and the following citations and penalties are affirmed:

<u>Citation</u>	<u>Penalty</u>
577649	\$ 24.00
577650	40.00
577651	20.00
579423	26.00
579426	26.00
577707	72.00
579429	52.00

2. The following citations and all proposed penalties therefor are vacated:

Citation 579422
Citation 579431

WEST 83-60-M

3. Citation 2083505 and all proposed penalties therefor are vacated.


John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Peggy Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Kent W. Winterholler, Esq., Parsons, Behle & Latimer, 185 South State Street, Salt Lake City, Utah 84147 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 21 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 83-5-M
Petitioner : A.C. No. 42-01660-05501
: :
v. : Ore Haulage Plant
: :
KENNECOTT MINERALS COMPANY, :
UTAH COPPER DIVISION, :
Respondent :

DECISION

Appearances: James H. Barkley, Esq., Peggy Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Kent W. Winterholler, Esq., Parsons, Behle & Latimer, Salt Lake City, Utah, for Respondent.

Before: Judge Morris

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act), arose from an inspection of respondent's ore haulage plant. The Secretary of Labor seeks to impose a civil penalty because respondent allegedly violated a provision of the Act.

Respondent denies that a violation occurred.

After notice to the parties, a hearing on the merits was held in Salt Lake City, Utah on September 20, 1983.

The parties waived the right to file post trial briefs.

Issues

The issues are whether respondent violated the Act; if so, what penalty is appropriate.

Citation 579438

This citation alleges respondent violated Section 109(a) of the Act. The cited section provides as follows:

Posting of Orders and Decisions

Section 109(a). At each coal or other mine there shall be maintained an office with a conspicuous sign

designating it as the office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notices and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this Act to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

Summary of the Evidence

MSHA's evidence: On April 29, 1982, as the result of an accident investigation at the ore haulage plant, MSHA Inspector William W. Wilson issued Citation 579438. The citation, issued at 2 a.m. was given to respondent's representative Frank Klobchar. The citation was not posted while Wilson was on respondent's property (Tr. 14-16, Exhibit P1).

The following morning Fred Peterson, a representative of the miners on the Magna Safety Committee of the United Steel Workers, (Local 392), called Wilson and advised him that the citation could not be located. Thirty minutes later Wilson told Peterson to recheck. On the recheck he was to be accompanied by a witness. Peterson reconfirmed to Wilson that he could not locate the citation (Tr. 16, 17).

Wilson went to the plant, arriving there at 9:30 a.m. on April 30, 1982 (Tr. 17). Wilson looked on the track office bulletin board but he did not find the citation (Tr. 18). The accident for which the citation had been issued involved primarily personnel from the track repair and maintenance crews (Tr. 18). The time cards for these workers are kept at the track yard office (Tr. 18).

Exhibit P2 indicates that respondent's concentrator plant and ore haulage plant are, in their totality, complex areas. The area includes a "time office", a "track yard office", and a small "time clock office" (Tr. 19-20, Exhibit P1, P2).

On April 30th Inspector Wilson checked but could not locate the citation in the yard office or change room for the track yard (Tr. 21).

Assignments are made by supervisors at the yard office. In addition, the supervisors' offices are there. Personnel also

change clothes there. The area also has a small lunchroom (Tr. 21). At this location the trackmen (the class of workers involved in the accident) usually have lunch, change and receive their instructions (Tr. 22).

In the near vicinity, across a number of railroad tracks, is the building known as the "time clock." This building, which is also for the track people, had not been checked by the inspector (Tr. 22).

In a conversation with the inspector on April 30th between 9:45 a.m. and 10:30 a.m., respondent's safety representatives indicated the citation had not been posted (Tr. 22-23).

Inspector Wilson opted that the citation should have been posted in the "track yard office." But he had checked and it was not at that location (Tr. 24, 25).

Witness Fred Peterson confirmed that he complained to MSHA that the citation had not been posted. After calling the MSHA office Peterson checked for the citation at the "time office", the "yardmaster office", the "trackmen change room", and the "time clock" areas (Tr. 30).

In Peterson's view the normal procedure at the site is to place information on the bulletin board at the yardmaster's office. But the best location to convey the information would be to post it on a small bulletin board inside the trackman's change room (Tr. 32). Trackmen would not look for any information posted at the "time clock" office (Tr. 32). Posting in the time clock building would be contrary to Peterson's experience at the plant (Tr. 32, 33).

Witness Steven Pollock, a trackman in April 1982, was familiar with the "time clock" building. He punches in and out at that location on a daily basis (Tr. 39-40). In April 1982 the "time clock" building did not have a bulletin board (Tr. 40). In Pollack's view the proper places to post notices is on the bulletin board in front of the old change room or on one of the two bulletin boards in the new change room (Tr. 41). Pollack would never go to the "time clock" building for information (Tr. 41). Prior to this litigation Pollard hadn't seen any information posted in the "time clock" building (Tr. 43).

In December 1983 the Union Safety Committee, in a letter to the company, requested that a bulletin board be maintained at the concentrator plant time office for the posting of citations, etc. (Exhibit P3).

Respondent's safety and health engineer Frank Klobchar testified for the respondent.

After he received the citation Klobchar made copies and went to a staff meeting. He posted the citation between 5:00 to 5:30 p.m. in the ore haulage track time office building used by the track people (Tr. 47-49). Wilson, in a telephone call, told Klobchar that he had not looked for the citation at that particular location (Tr. 49).

Photographs, taken the following week, showed where the citation had been posted by Klobchar (Tr. 50, Exhibit R1).

The practice has been to post citations at the time clocks. Klobchar had never previously posted anything at the location where he posted the April 29 citation (Tr. 53, 54).

Discussion

The facts establish a violation of the Act.

The citation issued on April 29th was not posted "immediately" as the Act requires. Further, it was not, even under respondent's evidence, posted at a location where it would be protected against unauthorized removal.

On the initial issue Inspector Wilson testified that he issued the citation at 2 a.m. on April 29 (Tr. 15-16). However, the citation itself indicates it was issued at 10:20, on a 24 hour time clock. Even if it was issued at the later time, a delay of more than six hours occurred before it was posted. Klobchar testified the citation was not posted until 5:00 to 5:30 p.m.

"Immediately", as defined in Section 109(a) of the Act, means "without interval of time, without delay, straightway, or without any delay and lapse of time", Black's Law Dictionary, 5th Edition, 1979.

Further, respondent's witness Klobchar agrees that at the location where he posted the citation there was nothing that would have prevented its unauthorized removal (Tr. 54). In this respect the location chosen, accordingly, did not comply with Section 109(a) of the Act.

Procedural Issues

At the conclusion of the hearing respondent moved the judge adopt the findings of fact contained in the judge's order of March 2, 1983. The order denied respondent's motion for summary judgment.

The Secretary's objection was sustained on the grounds that such a procedure would effectively deny the Secretary his right of cross-examination. The right of cross-examination is mandated under the Administrative Procedure Act, 5 U.S.C. § 556. Further,

since the function of the judge when resolving a summary judgment motion is to determine if a genuine factual dispute exists, affidavits may not be employed to resolve disputed factual issues. They may be used only to determine whether any issues actually are in dispute. U.S. ex rel Jones v. Rundle, 453 F. 2d 147, 150, Third Circuit, (1971); Fed. R. Civ. P., Rule 56.

Accordingly, I reaffirm my original ruling.

CIVIL PENALTY

The six criteria for assessing a civil penalty are set forth in 30 U.S.C. § 820(i).

Considering the evidence offered at the hearing on cases heard at the same time as the instant case (WEST 81-242-M; WEST 81-243-M) I find that the operator has a history of 58 prior violations. The minimal penalty will not affect the operator's ability to continue in business and it is appropriate in relation to the large size of the operator. The operator was negligent but a posting violation of this type is of minimal gravity. The file reflects that the operator rapidly abated the violation.

On balance, the proposed penalty of \$20 is appropriate and it should be affirmed.

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

ORDER

Citation 579438 and the proposed penalty of \$20 are affirmed.


John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Peggy Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Mr. Richard D. Baker, President, United Steelworkers of America AFL-CIO, District 38, Sub-District 5, P.O. Box 220, Magna, Utah 84044 (Certified Mail)

Kent Winterholler, Esq., Parsons, Behle & Latimer, 185 South State Street, Salt Lake City, Utah 84147 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 23 1984

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 84-2-R
v.	:	Citation No. 2001967; 9/12/83
	:	
SECRETARY OF LABOR,	:	Rowland No. 3 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-62
Petitioner	:	A. C. No. 46-01986-03511
	:	
v.	:	Rowland No. 3 Mine
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, for Contestant/Respondent; Kevin C. McCormick, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner/Respondent.

Before: Judge Steffey

A hearing in the above-entitled consolidated proceeding was held on June 13, 1984, in Beckley, West Virginia, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977. At the conclusion of presentation of evidence by both parties, I rendered a bench decision, the substance of which is set forth below (Tr. 216-235).

This proceeding involves a notice of contest filed on October 12, 1983, in Docket No. WEVA 84-2-R by Consolidation Coal Company, seeking vacation of Citation No. 2001967 issued on September 12, 1983, pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, alleging a violation of 30 C.F.R. § 75.200. This proceeding also pertains to a petition for assessment of civil penalty filed on January 11, 1984, in Docket No. WEVA 84-62 by the Secretary of Labor, seeking to have a civil penalty assessed for the violation of section 75.200 alleged in Citation No. 2001967.

In the notice of contest case, the issues are whether a valid citation was issued and whether it should be sustained or modified. In the civil penalty case, the issues are whether a violation occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Before I formulate a conclusion as to whether a violation occurred, it is necessary that I make some findings of fact which will be set forth in enumerated paragraphs.

1. On September 12, 1983, Inspector Rosiek went to the Rowland No. 3 Mine of Consolidation Coal Company. At the mine he met a State inspector by the name of Lonnie Christian. Since Inspector Rosiek had come to the mine for the purpose of checking the provisions of the roof-control plan to determine whether they were appropriate for the mining conditions that then prevailed, it was the practice for a West Virginia inspector and an MSHA inspector to make the determination jointly because the roof-control plan filed by the operator with MSHA is also the one which West Virginia recognizes. They were accompanied on the inspection by the mine foreman, Jerry Toney.

2. They proceeded to the No. 3-C Section of the mine where the mining crew was engaged in pillaring operations, specifically Pillar No. 6. A cut through the center of the pillar had already been taken, and while the inspectors were observing the mining crew, an additional amount of coal, or lift as they call it, was taken from the right corner of the left wing. The inspector, at that point, indicated to the mine foreman that he believed a violation had occurred of the provisions of Drawing No. 4, page 21, of the roof-control plan then in effect (Exh. 3).

3. The inspector remained in the vicinity of the No. 6 pillar until the miners began taking lifts in the sequence shown on Drawing No. 4, according to which lifts marked as two, three, four, five, and the pushout at the most outby portion of the right wing are removed. Then the continuous-mining machine is moved up the left entry and used to take lifts six, seven, eight, nine, and the final pushout at the most outby portion of the left wing.

4. The inspector marked the block on the citation which is labeled "significant and substantial" 1/ because he believed

1/ In Consolidation Coal Co., 6 FMSHRC 189 (1984), the Commission held that an inspector may properly designate a violation cited pursuant to section 104(a) of the Act as being "significant and substantial" as that term is used in section 104(d)(1) of the Act, that is, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

that removal of the right corner of the left wing would weaken the support provided by the left wing and cause a redistribution of weight. His reason for that belief was based on the fact that the lift taken from the right corner was about 12 feet wide at its inmost point and left only about 3 feet of coal standing at the extreme end of the left wing. He felt that if he remained in the vicinity of active mining operations until lifts six and seven had been taken, the danger would be eliminated.

5. Testimony was also given in this proceeding by an inspector named Darlie F. Anderson. Both Inspector Anderson and Inspector Rosiek are what is known as coal mine inspectors specializing in roof control. The difference between Inspector Anderson and Inspector Rosiek lies in the fact that Inspector Anderson has had a lot more practical experience than Inspector Rosiek, and apparently another reason for Inspector Anderson's testifying, in addition to giving his opinion based on his practical experience, was that he had participated in a revision or modification of the roof-control plan which occurred after Inspector Rosiek's Citation No. 2001967 was issued. The inspector had stated in Citation No. 2001967 (Exh. 4):

The approved roof control plan Permit No. 4-RC-12-70-1141-14 was not being complied with in the No. 6 pillar on the 3-C(008-0) Section in that a lift was taken from the left rib after the split had holed through prior to mining the right wing. The section was supervised by Rodney Reed, section foreman.

The change that was made in the roof-control plan, and this change was made under the supervision and investigation of Inspector Anderson, related to a change in Drawing No. 4 which is shown on page 21 of the roof-control plan introduced as exhibit 5 in this proceeding. That change allows Consolidation Coal Company to remove the right corner from the left wing of a pillar after the split has been taken from the middle, and that portion is to be no wider than seven feet at the inmost point of the left wing. An additional change in the modification is that instead of inserting eight breaker posts at point "E" shown on Drawing No. 4 of exhibit 5, only four breaker posts are set prior to the taking of the right corner of the left wing. After the right corner has been removed, then the four breaker posts on the left of the letter "E" are installed, together with five additional breaker posts, before the lift on the right wing is taken.

6. A great deal of opinion testimony was necessarily involved in the proceeding, and both inspectors agreed that roof conditions in this particular instance were good. Of course,

Inspector Anderson was not present on September 12, but he was given the fact that the roof conditions were good, and it was his opinion that removal of the right corner of the left wing was not a particularly dangerous act of mining. Inspector Rosiek's opinion was, as I have previously indicated, that removal of the right corner of the left wing did subject the miners to additional danger as compared with not removing the right corner.

7. Consolidation Coal Company presented several witnesses, the first one being Basil Green, who was the operator of the continuous-mining machine on the day that the inspector wrote the citation. He testified that it had been a question in his mind as to whether it was permissible to remove the right corner of the left wing in the situation that he encountered on September 12, but that he had been assured by management that it was in compliance with the roof-control plan for him to do so. Consequently, he had been taking the right corner of the left wing if a situation prevailed which he felt required him to do so. The condition which Green believed to be necessary before he would remove the right corner of the left wing was that there be some indication of an override of the breaker posts which are placed at the inmost portion of the left entry beside the left wing of the pillar that is being removed. On September 12 he had found that the first four of the eight breaker posts which are shown at the letter "A" on Drawing No. 4 of exhibit 3 had been broken, and therefore he installed four additional breaker posts outby the four remaining posts. As a result of that change in the location of the breaker posts, he said that it was not possible to get the continuous-mining machine up the left entry to the left of the left wing and still remove all of the pillar because his access to the inmost portion of the left wing would be blocked by the additional breaker posts which had been set. And he also had the ability, because of his experience, to evaluate the entire mining situation that prevailed at that time, and he said that there had not been enough of an override to cause a redistribution of weight, so that he did not encounter or see any evidence of a sloughing off of the coal on either the left or the right wing, and that since he did not see or hear any signs of a change in the weight distribution of the roof, he thought it was entirely safe to remove the right corner of the left wing. That is what he did on September 12, and he did so even though the mine foreman, Jerry Toney, was present, and he believed that he was proceeding in accordance with the roof-control plan. He testified that he would not take the right corner if he felt that there was a redistribution of weight as a result of the breaking and resetting of the breaker posts in the left entry as described above.

8. Jerry Toney, the mine foreman, also testified, and it was his belief that he was proceeding in accordance with the roof-control plan. He said that he would not have allowed the continuous-mining machine to take the right corner of the left wing in the presence of a Federal and a West Virginia inspector if he had not believed that it was appropriate, safe, and in compliance with the roof-control plan, and that he felt that no hazard existed because of the way they proceeded in this instance.

Another witness who appeared on behalf of Consolidation Coal Company was the superintendent of the mine, Norman Blankenship. He testified that he believed that he was entirely within compliance of the roof-control plan because of the second paragraph on page five of the roof-control plan. That provision appears in both exhibits 3 and 5 and provides as follows:

Where second mining is being done, management shall show on a mine map the sequence of recovering pillars. Pillaring methods shall maintain a uniform pillar line that eliminates pillar points and pillars that project inby the breakline. When conditions dictate that changes be made in the sequence of pillar recovery, such changes shall be authorized by the superintendent or designated mine foreman for the shift involved and shall include additional precautionary measures to be taken to compensate for the abnormal conditions encountered.

It was Blankenship's opinion that the abnormal condition which warranted deviation at the time the citation was written was the breaking of the posts, or the indication of some override, and that it was necessary that the right corner of the left wing be removed because if that were not done that it would be difficult, if not impossible, to get the inmost portion of the left wing removed without having the continuous-mining machine proceed inby permanent supports. Consequently, if they could not remove the last portion of the left wing by using the sequence of mining shown on Drawing No. 4 of the roof-control plan in effect on September 12, 1983, sufficient coal would be left standing to interfere with the normal dropping of the roof as retreat mining occurred. Blankenship's testimony regarding the adverse effect of leaving coal is supported by Jerry Toney's and the inspector's testimony. In fact, all witnesses agreed that leaving coal in a pillaring section is as dangerous a situation as taking too much coal at a given point. Blankenship also explained that he had made a request for a change in the roof-control plan after Inspector Rosiek had written Citation No. 2001967 because he had not previously been cited for having removed, or for having allowed the removal of the

right corner of the left wing, and as far as he was concerned, he had been in compliance, but having been cited for something which had been the practice at Rowland No. 3 Mine for anywhere from 5 to 10 years, he then concluded that it was necessary to request a modification of the roof-control plan.

9. The request for the modification probably can best be summarized by referring to exhibit A in this proceeding which is a letter showing the type of change that Blankenship thought was essential. That particular exhibit also has the signature of both the day-shift and the evening-shift miners who worked on the 3-C Section, including the signatures of not only the section foremen and the mine foreman, but also the rank and file miners who ran the continuous-mining machine and the helpers of the operators of the continuous-mining machine. The theory behind the request for the modification of the roof-control plan lies in the fact that all of the miners apparently prefer to have all of the coal removed any time a pillar is removed so that there will not be a residue of coal left to interfere with the smooth falling of the gob area as the pillars get pulled in the retreat-mining process.

Those findings summarize the testimony and exhibits which have been presented in this proceeding. Counsel for the Secretary and for Consolidation made concluding arguments. The Secretary's counsel asserts that there was a violation of the roof-control plan and he argues that it was improper for the mine superintendent to rely upon the second paragraph on page five of the roof-control plan as a device for saying that a different sequence could be used from that shown in the drawing in the roof-control plan in effect on September 12, 1983.

The provision on which the superintendent relied has been quoted in finding No. 8 above, and it appears to me that the superintendent is not entitled to rely upon that provision for the purpose of changing the sequence of the removal of the lifts that are shown in the roof-control plan. The reason for my ruling is based on the third sentence in that paragraph which provides, "When conditions dictate that changes be made in the sequence of pillar recovery, such changes shall be authorized by the superintendent or designated mine foreman for the shift involved and shall include additional precautionary measures to be taken to compensate for the abnormal conditions encountered."

I interpret the quoted sentence to mean that the changes must be made because of some very unusual circumstance that has arisen, because the sentence states that the changes shall be made "for the shift involved and shall include additional precautionary measures". I believe that the situation that

brought about the removal of the right corner of the left wing in pillaring was something that occurred so frequently that it would not be the type of abnormal condition that is contemplated by the third sentence of that paragraph on page five.

I think that when there is a condition which required a routine deviation from a particular provision of the roof-control plan, that the operator is required to get the change formalized in the way that was done after the citation was written. The operator of the continuous-mining machine said that if he removed 10 pillars, he might feel that it was desirable to remove the right corner of the left wing two times out of 10. I believe that that is such a common occurrence that "the abnormal conditions" do not exist which would permit the superintendent to rely on the second paragraph on page five of the roof-control plan. Since on September 12, 1983, there was not any outstanding provision in the plan which permitted the taking of the right corner of the left wing, as was done at that time, I believe that there was a violation of the roof-control plan as alleged by the inspector.

The other point made by both counsel is that there is a question as to whether the inspector properly checked on exhibit 4, which is the citation itself, the provision "significant and substantial". Of course counsel for the Secretary argues that Inspector Rosiek properly checked S&S, while counsel for Consolidation argues that he should not have checked S&S.

A decision as to whether a violation has been properly designated as being significant and substantial must be made in light of the Commission's rulings in that area. The term "significant and substantial" was first defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981) at page 825, where the Commission stated:

We hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature.

As indicated in footnote 1 above, the Commission recently held in a Consolidation Coal case that an inspector may check the words "significant and substantial" on a citation issued under section 104(a) despite the fact that that particular language is actually taken from section 104(d)(1) of the Act. Therefore, it was legally permissible for the inspector to check the words "significant and substantial" on the citation here involved which was issued under section 104(a) of the Act.

In both the Consolidation case I just mentioned and in Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission applied the definition of significant and substantial in four steps. The first step was whether a violation occurred, and I have already dealt with that by finding that a violation of the roof-control plan occurred. The second step in the definition of significant and substantial is whether the violation contributed a measure of danger to a discrete safety hazard. In this instance, there was an alleged discrete safety hazard in that Inspector Rosiek, who wrote the citation, believed that the miners had been subjected to an additional hazard because a certain amount of support that would have been on the left wing had been removed, thereby leaving less area to support the roof on the left side of the pillar. So there was a discrete safety hazard.

The third step in applying the definition is whether there is a reasonable likelihood that the hazard contributed to will result in injury. The testimony is equivocal on whether the removal of that right corner of the left wing really did bring about a reasonable likelihood that the hazard contributed to would result in an injury, because it is a fact that Consolidation Coal Company was using 4-foot resin bolts in the split which had been taken up through the middle of the pillar, although its roof-control plan provided for a minimum use of only 30-inch conventional bolts. Consol had used the secure 4-foot resin bolts because it wanted to provide maximum safety in the pillar removal operation which is necessarily hazardous work.

The inspector, despite the fact that he wrote a violation for the taking of that right corner of the left wing, still allowed the continuous-mining machine to proceed in the normal course of removing the pillar going through lifts two through 10, as shown in the drawing in the roof-control plan, and the inspector believed that by the time the lift at the most inby portion of the left wing had been taken, the danger had been so minimized, that there was no longer any hazard. At that point he left the section.

I cannot find on a preponderance of the evidence in this case that there was a reasonable likelihood that the hazard contributed to would result in an injury, because the only act which had been done here was the removal of the right corner of the left wing of the pillar, and there had been additional breaker posts set before the other lifts were removed. I cannot distinguish the claimed likelihood of injury in this instance on September 12 from the fact that subsequently to the occurrence of the instant violation, Consol was allowed to modify the roof-control plan to insert a provision which allows Consol, on a routine basis, to take the right corner of the left wing in almost exactly the same way it was being done on

September 12, but under the new and current modification of the roof-control plan, Consol is permitted to omit the setting of four of the eight breaker posts that had been set on the day that the inspector wrote the citation. So there has been a modification of the roof-control plan to allow, on a routine basis, almost exactly the same procedure that was used on September 12. The only difference now is that it is currently permissible under the roof-control plan to take the right corner of the left wing, but on September 12 it was not permissible to do so.

The fourth step in application of the significant and substantial definition is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Here again, I have to evaluate the seriousness and the likelihood of injury on the basis of the type of work being performed. I think all witnesses agreed that removing pillars is a hazardous mining procedure. The people who do it have to be trained and experienced to watch for all sorts of indicators of what hazards exist. Green, who was the operator of the continuous-mining machine, testified that he did take into consideration the question of whether there had been a weight distribution, whether there was sloughing of coal from the remaining wings on each side, and he made a determination that the No. 6 pillar could be removed by taking the right corner of the left wing without exposing him or the other men on the crew to any reasonable likelihood of a roof fall which would cause an injury.

Inspector Rosiek, who wrote the citation, allowed them to finish the taking of the No. 6 pillar, and while he asserted that he felt that there was a very serious exposure to injury, he also conceded and acknowledged the fact that if coal were left on the inby portion of the left wing, rather than allowing the miners to go in and take the right corner of the left wing, a safety hazard will occur from the standpoint of future removal of other pillars because there might not be the necessary uniform dropping of the gob area as retreat mining continued.

There has to be in retreat mining an overall consideration of so many different factors, that I cannot find that the removal of the right corner of the left wing was a matter which had a reasonable likelihood of injuring anyone in the way that this particular operator of the continuous-mining machine proceeded on September 12. Therefore, I find that the inspector improperly checked S&S on Citation No. 2001967, and I find that Consolidation Coal Company's notice of contest should be granted to the limited extent that the citation should not show a designation of "significant and substantial".

Having found a violation, however, it is necessary that a civil penalty be assessed. In order to do that, I have to consider the six criteria listed in section 110(i) of the Act.

The parties have stipulated to certain facts which deal with several of the six criteria. It has been stipulated that the Rowland No. 3 Mine is owned and operated by Consolidation Coal Company and that Consol showed a good-faith effort to achieve rapid compliance after the citation was written.

As for the criterion of the size of the company, it was stipulated that Consol's annual production is about 45,000,000 tons and that the Rowland No. 3 Mine produces about 199,000 tons per year. Those figures support a finding that Consol is a large operator. There was no stipulation as to whether the payment of a penalty would cause Consol to discontinue in business, but the Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd Sellersburg Stone Co. v. FMSHRC, 5 F.2d _____, 7th Circuit No. 83-1630, issued June 11, 1984, that when no financial evidence is presented in a given case, a judge may presume that a company is able to pay a penalty without causing it to discontinue in business. Therefore, I conclude that payment of a penalty will not cause Consol to discontinue in business.

The fourth criterion to be considered is history of previous violations. Exhibit 7 is a computer printout of the history of previous violations at the Rowland No. 3 Mine for the 24 months preceding the writing of the citation here involved. That exhibit shows that Consol has been cited for three previous violations of section 75.200. All three violations were alleged in citations written pursuant to section 104(a) of the Act. All three violations were cited on March 12, 1982, and MSHA proposed a penalty of \$112 for each violation. Those facts support a conclusion that Consol has not been cited for a particularly serious previous violation of section 75.200 at its Rowland No. 3 Mine. While the legislative history shows that Congress intended for the criterion of history of previous violations to be applied so as to increase the penalty progressively for each repeated violation of the same standard, ^{2/} Congress was concerned about repetitious violations which had occurred within a few months of the violation under consideration at a given time. The evidence in this instance shows that Consol has not violated section 75.200 at all during the 18 months preceding the occurrence of the violation here under consideration. In such circumstances, I find that Consol has a favorable history of previous violations which supports a conclusion that no portion of the penalty should be assessed under the criterion of history of previous violations.

The fifth criterion is negligence. As to that criterion, the inspector checked the word "moderate" in item 20 on Citation No. 2001967. The evidence shows that Consol's negligence

^{2/} LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 631 (1978).

is even less than the inspector indicated because Consol's management believed that the company had a right under the roof-control plan in effect when the citation was written to extract pillars in the way the miners were operating on September 12, 1983. The argument made by Consol in support of its having proceeded the way it did is logical and it is a position which had some merit, particularly in view of the fact that the taking of the right corner of the left wing was a practice which had been followed for from 5 to 10 years prior to the writing of the citation involved in this case. Consequently, I find that the degree of negligence associated with the violation was very low, bordering on none. For the aforesaid reasons, I conclude that no portion of the penalty should be assessed under the criterion of negligence.

The sixth and final criterion to be considered is gravity. I have already indicated above in my discussion of the term "significant and substantial" that there was no reasonable likelihood that anyone would be injured from the cut that was taken off the right corner of the left wing. In such circumstances, there is hardly any reason to assess a penalty apart from the fact that assessment of a penalty is mandatory under the Act once a violation is found to have occurred. Tazco, Inc., 3 FMSHRC 1895 (1981). In view of the fact that a large operator is involved, I believe that a minimal penalty of \$25 should be assessed for the violation of section 75.200 alleged in Citation No. 2001967.

The Commission held in C.C.C.-Pompey Coal Co., Inc., 2 FMSHRC 1195 (1980), that a judge is obligated to reconsider any rulings made in a bench decision if, during the interim between the rendering of the bench decision and its issuance in final form, the Commission issues a decision establishing a precedent which conflicts with the rulings made by the judge in his bench decision. The holding in the Pompey case applies to the bench decision set forth above because the Commission issued a decision in United States Steel Corp., 6 FMSHRC 1423 (1984), after I had rendered the bench decision in this proceeding, in which the Commission majority reduced one of my civil penalties from \$1,500 to \$400 and another penalty from \$80 to \$70. I have carefully reviewed the findings made in the bench decision and I do not believe that they conflict in any way with the holdings made by the Commission majority in the U. S. Steel case. Therefore, I do not think that the penalty of \$25 assessed in the bench decision needs to be further reduced in light of the Commission's U. S. Steel decision.

WHEREFORE, it is ordered:

(A) Consolidation Coal Company's notice of contest filed in Docket No. WEVA 84-2-R is granted to the extent of modifying Citation No. 2001967 issued September 12, 1983, to delete

the checking of the term "significant and substantial" in item No. 11a of the citation. The notice of contest is otherwise denied and the citation is otherwise affirmed.

(B) Within 30 days after issuance of this decision, Consolidation Coal Company shall pay a civil penalty of \$25.00 for the violation of section 75.200 alleged in Citation No. 2001967 issued September 12, 1983.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Robert M. Vukas, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Kevin C. McCormick, Esq., Office of the Solicitor, U. S. Department of Labor, Room 1237A, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 24 1984

ENERGY COAL INCOME	:	CONTEST PROCEEDINGS
PARTNERSHIP, 1981-1,	:	
Contestant	:	Docket No. KENT 83-30-R
	:	Citation No. 2053481; 11/4/82
v.	:	
	:	Docket No. KENT 83-31-R
SECRETARY OF LABOR,	:	Citation No. 2004021; 10/22/82
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-32-R
Respondent	:	Citation No. 2004022; 10/22/82
	:	
	:	Docket No. KENT 83-33-R
	:	Order No. 2004023; 10/22/82
	:	
	:	Docket No. KENT 83-34-R
	:	Citation No. 2053293; 10/22/82
	:	
	:	Docket No. KENT 83-35-R
	:	Citation No. 2053294; 10/22/82
	:	
	:	Docket No. KENT 83-36-R
	:	Citation No. 2053295; 10/22/82
	:	
	:	Docket No. KENT 83-37-R
	:	Citation No. 2053296; 10/22/82
	:	
	:	No. 15 Surface Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-153
Petitioner	:	A.C. No. 15-13382-03505
	:	
v.	:	Docket No. KENT 83-154
	:	A.C. No. 15-13382-03504
ENERGY COAL INCOME	:	
PARTNERSHIP, 1981-1,	:	Docket No. KENT 83-169
Respondent	:	A.C. No. 15-13382-03506
	:	
	:	No. 15 Surface Mine

SETTLEMENT DECISION

Before: Judge Melick

These consolidated cases are before me upon petitions for assessment of civil penalty and contests filed under section

105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). On October 20, 1983, the parties submitted a joint proposal for settlement of the captioned civil penalty proceedings and a request for withdrawal of all associated contest proceedings. On November 28, 1983, the undersigned requested additional information deemed necessary for consideration of the settlement motion. Information was submitted on December 2, 1983, December 5, 1983, May 3, 1984 and, subsequent to teleconference hearings on the motion on May 30, 1984, on June 26, 1984, July 5, 1984, and July 12, 1984. The motion for settlement was amended on July 5, 1984, in that the mine operator indicated a willingness to pay the full amount of penalties as originally proposed by the Secretary rather than the reduced amounts first suggested in the motion for settlement.

These cases arise from the death of bulldozer operator Bernard Farrar on October 20, 1982, at the No. 15 Surface Mine of the Energy Coal Income Partnership in Davella, Kentucky. His death occurred when the outer portion of the bench-roadway over the highwall collapsed under the weight of the bulldozer he was operating. The deceased was thrown out and crushed by the bulldozer as it rolled over. The investigation revealed that the bulldozer's seat belts had previously been removed.

The evidence shows that earlier on the day of the incident the day shift bulldozer operator had been working on the south side of the surface operation. At the completion of his shift as he approached the highwall catch-bench roadway from the south side to return to the portal he observed that part of the highwall berm had collapsed. He thereupon built a "barricade" of dirt with his bulldozer as a warning to persons travelling south to north. The operator then constructed a new roadway through the pit.

The day shift supervisor on the south side, Manuel Ward, shortly thereafter travelled towards the catch bench and saw the high wall erosion, the barricade, and the new roadway. While he decided to drive through the pit over the new road he took no action to barricade or close off the other end of the road and did not report the dangerous conditions. Shortly before 4 p.m. mine superintendent Mike Cantrell and second shift foreman Jarvis Hackworth travelled over the subject roadway. Cantrell saw the slip starting on the outer edge of the roadway. He said that he told Hackworth not to use the road but Cantrell nevertheless continued to use the road himself and, indeed, drove right over the dirt barrier that had been erected by the day shift bulldozer operator at the south end. Hackworth also continued to use the subject road and later transported the deceased and another miner over the same road.

There were no entries in the on-shift examination books reflecting any unstable or hazardous conditions on the bench roadway and, indeed, the only entries indicate that the road and highwall conditions were "good." The evidence also shows that aside from the efforts of the day shift bulldozer operator to erect a dirt barricade at one entrance to the roadway the deteriorating high wall and roadway conditions were not properly reported, corrected, nor barricaded. Moreover, while it appears that the mine superintendent expressed some concern about the continued use of the subject roadway because of its deteriorating condition, he and his foreman continued to use that roadway and indeed the victim himself was transported across that roadway by the foreman shortly before the fatal accident. The message reasonably inferred under the circumstances was that management was not seriously concerned with the dangerous road condition and there was no immediate need to stop using it.

Citation No. 2004021 alleges a violation of the standard at 30 CFR § 77.1713 for failing to record or correct the unstable condition of the catch-bench roadway and in failing to properly barricade the roadway to prevent access. A civil penalty of \$10,000 was initially proposed by the Secretary and a reduction to \$5,000 was proposed in the initial motion for settlement. The representations in that motion in support of the penalty reduction are not however, supported by the investigative report and statements of witnesses. Indeed in material respects the representations are in direct conflict with the investigative report. The report and the evidence in support thereof were available at the time the penalty of \$10,000 was assessed and, according to Special MSHA Investigator John S. South, no new evidence has since been developed concerning the violations.

Manuel Ward, the day shift foreman, admittedly had seen the dangerous conditions of the highwall road toward the end of his shift around 3:30 of the afternoon at issue and observed the dirt barricade erected by the day shift bulldozer operator at the south end of the road. Ward nevertheless failed to report the unstable condition and failed to see that the north end of the roadway was barricaded. In light of his clear knowledge that the road was unsafe to travel, I find his failure to report and correct the road condition to have been an omission of gross negligence.

According to the night shift foreman, Jarvis Hackworth, at the beginning of his shift at 4 p.m., Mine Superintendent Mike Cantrell told him "we're going to have to quit using this road" referring to the subject catch-bench roadway. Even assuming, arguendo, that such a statement had been made it apparently was made with no intent of immediate enforcement since Hackworth immediately thereafter drove his pickup truck over that very same road with the deceased as one

of his passengers. Hackworth conceded moreover that even the barricade erected by the day shift bulldozer operator at the south end of the road was not sufficient to block the road and that he twice drove over the barricade with his pick-up truck -- once with the deceased as his passenger. The road had still not been properly barricaded nor reported by 6:45 p.m. when the fatality occurred.

Mine Superintendent Mike Cantrell stated that during the course of the day shift and between shifts he had travelled over the subject roadway several times. Passing over the road around 3:30 that afternoon he saw that the berm had disappeared and he concluded at that point that the road was hazardous. He thought he had told night shift foreman Jarvis Hackworth that the road was "slipping off or breaking off" but did not instruct Hackworth to barricade or close the road off.

Within this framework of evidence it is clear that the fatal accident that is the subject of this proceeding was the result of gross negligence. Management personnel concede that the condition was hazardous and the seriousness of the hazard is evident from the accident that did in fact occur.

As further justification for the proposed penalty reduction the mine operator presented information concerning its financial condition including financial statements and the history of the petition for reorganization under Chapter 11 of the Bankruptcy Act. I have taken this information into consideration. In light of the high gravity and gross negligence associated with this fatal accident and considering the history of violations and size of the mine operator involved, it is clear that a penalty of \$10,000 would ordinarily be warranted. Considering however, the financial condition of the operator and that the facts underlying this violation are essentially the same as those supporting other violations and penalties in these cases, I believe a penalty of \$7,500 is appropriate.

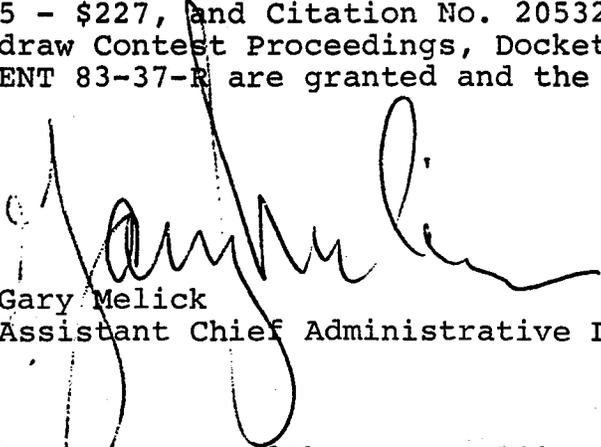
Citations No. 2053293 and 2053294 allege violations of standards at 30 C.F.R. § 77.1701(i) and 30 C.F.R. § 77.403 respectively, and primarily concern the failure of the mine operator to have provided operative seat belts on the subject bulldozer. The evidence shows that the buckle or fastening device had been removed thus rendering the belts inoperative. The investigators concluded that had the deceased been wearing a seat belt he would not have been killed. The mine operator has agreed to pay the initially proposed penalties in full and considering the criteria under section 110(i) of the Act, I find the penalties to be appropriate.

Citation No. 2053295 alleges a violation of the standard at 30 C.F.R. § 77.1606(c) and charges more particularly that the left brake on the subject bulldozer was defective causing a sharp left turn upon application. The investigators could not however, conclude that the cited defect either contributed or did not contribute to the fatal accident. The mine operator has agreed to pay the initially proposed penalty in full and considering the criteria under section 110(i) of the Act I feel that the proposed penalty is justified.

Citation No. 2053296 alleges a violation of the standard at 30 C.F.R. § 77.1001 and charges that loose hazardous material had not been stripped for a safe distance from the top of the high wall and that loose and unconsolidated material had not been sloped to an angle of repose. The mine operator has agreed to pay the proposed penalty in full. The underlying facts supporting this violation are the same as those supporting the violation in Citation No. 2004021 and for which I have assessed a penalty of \$7,500. To the extent that the factual basis for the violations is similar it would be inappropriate to assess another penalty of the same magnitude. Under the circumstances I find that the proposed penalty is appropriate.

ORDER

Energy Coal Income Partnership (1981-1) is hereby ORDERED to pay the following civil penalties within 30 days from the date of this decision: Citation No. 2004021 - \$7,500, Citation No. 2053293 - \$227, Citation No. 2053294 - \$2,000, Citation No. 2053295 - \$227, and Citation No. 2053296 - \$227. The requests to withdraw Contest Proceedings, Docket Nos. KENT 83-30-R through KENT 83-37-R are granted and the cases are dismissed.


Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

Barbara L. Krause, Esq., Smith, Heenan, Althen & Zanolli,
1110 Vermont Avenue, N.W., Washington, DC 20005 (Certified Mail)

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of
Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37230
(Certified Mail)

/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 24 1984

GARY GOFF, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 84-86-D
: MSHA Case No. VINC CD 84-03
THE YOUGHIOGHENY AND OHIO :
COAL COMPANY, : Nelms No. 2 Mine
Respondent :

DECISION GRANTING DISMISSAL

Before: Judge Melick

In his complaint filed with this Commission on July 6, 1984, the Complainant, Mr. Goff, alleges that he was discharged by Respondent in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, the "1977 Act" ¹ because of an underlying medical condition, pneumoconiosis.

In John Matala v. Consolidation Coal Company, 1 FMSHRC 1 (1979), the Commission held that review of discrimination complaints of a miner based on allegations that the miner

¹ Section 105(c)(1) of the 1977 Act provides as follows:

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

suffers from pneumoconiosis should be resolved under the specific statutory provisions set forth in section 428(b) of the Black Lung Benefits Act ² rather than under the

² Section 428 of the Black Lung Benefits Act provides as follows:

"(a) Mine operators. No operator shall discharge or in any other way discriminate against any miner employed by him by reason of the fact that such miner is suffering from pneumoconiosis. No person shall cause or attempt to cause an operator to violate this section. For the purposes of this subsection the term "miner" shall not include any person who has been found to be totally disabled.

(b) Determination by Secretary; procedure. Any miner who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section, or any representative of such miner may, within ninety days after such violation occurs, apply to the Secretary for a review of such alleged discharge or discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to enable the parties to present information relating to such violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of Title 5. Each administrative law judge presiding under this section and under the provisions of subchapters I, II, and III of this chapter shall receive compensation at a rate not less than that prescribed for GS-16 under section section 5332 of Title 5. Upon receiving the report of such investigation, the Secretary shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein, requiring the person committing such violation to take such affirmative action as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay. If he finds that there was no such violation, he shall issue an order denying the application. Such order shall incorporate the Secretary's findings therein.

(c) Costs and penalties. Whenever an order is issued under this subsection granting relief to a miner at the request of such miner, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonably incurred by such miner for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing the violation."

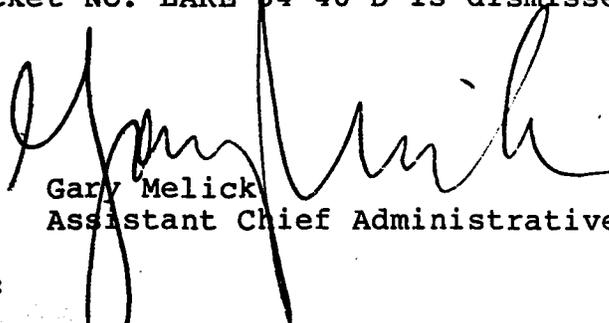
general anti-discrimination provisions of section 110(b) of the Federal Coal Mine Health and Safety Act of 1969, the "1969 Act." That case was, therefore, in accordance with section 428 of the Black Lung Benefits Act, transferred to the Department of Labor for adjudication by one of its administrative law judges.

While the anti-discrimination provisions of section 105(c)(1) of the 1977 Act replacing and enhancing the provisions of section 110(b) of the 1969 Act are broader in coverage than the comparable provisions of the 1969 Act, the rationale for having discrimination complaints based on allegations that the miner suffers from pneumoconiosis resolved under the specific statutory provisions set forth in the Black Lung Benefits Act has continuing validity.

Accordingly, it is appropriate to dismiss further proceedings before this Commission in this case. If the Complainant wishes to proceed with this matter, he should apply to the Secretary of Labor in accordance with section 428 of the Black Lung Benefits Act. ³

ORDER

Case Docket No. LAKE 84-46-D is dismissed



Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

Mr. Gary Goff, 57920 Rockyfork Road, Jacobsburg, OH 43933
(Certified Mail)

Gerald P. Duff, Esq., Kinder, Kinder & Hanlon, 185 West Main Street, St. Clairsville, OH 43950 (Certified Mail)

³ While Mr. Goff's complaint that he presumably filed with the Secretary of Labor under section 105(c)(2) of the Act has not been made a part of this record, it appears from Respondent's pleadings that the specific complaint of discrimination now raised before this Commission was not previously brought to the attention of the Secretary.

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 29 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 83-70
Petitioner	:	A.C. No. 36-03425-03511
v.	:	
	:	Docket No. PENN 83-78
U.S. STEEL MINING CO., INC.,	:	A.C. No. 36-03425-03512
Respondent	:	
	:	Maple Creek No. 2 Mine
UNITED MINE WORKERS OF	:	
AMERICA, LOCAL 2300,	:	Docket No. PENN 83-77
Intervenors	:	A.C. No. 36-04281-03505
	:	
	:	Dilworth Mine
	:	
	:	Docket No. PENN 83-94
	:	A.C. No. 36-00970-03514
	:	
	:	Maple Creek No. 1 Mine
	:	
	:	Docket No. PENN 83-74
	:	A.C. No. 36-05018-03508
	:	
	:	Docket No. PENN 83-75
	:	A.C. No. 36-05018-03509
	:	
	:	Docket No. PENN 83-76
	:	A.C. No. 36-05018-03510
	:	
	:	Cumberland Mine

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., U.S. Steel Mining Co.,
Inc., for Respondent.

Before: Judge Kennedy

The notice of contest in each of the captioned penalty proceedings admitted the fact of violation but challenged the S&S findings. After a lengthy consolidated hearing in Morgantown, West Virginia, the matters are before me on the operator's exceptions to 17 of my 27 bench decisions.

The parties' stipulations with respect to the operator's size, prior violations, ability to pay, and promptness in abatement are set forth in the record and were considered and incorporated by reference in the bench decisions. As indicated, the disputed issues focused on gravity, likelihood of contribution to another mine hazard, and negligence or culpability.

Decisions Accepted As Final

The operator filed no exceptions to the bench decisions assessing penalties for the following ten violations:

<u>Docket No.</u>	<u>Citation</u>	<u>Amount</u>
PENN 83-70	2013726	\$242
PENN 83-76	2013047	259
	2013052	178
	2013056	50
	2013056	50
PENN 83-77	1144515	20
	2012080	25
PENN 83-78	2013734	200
	2013737	227
	9901321	178
PENN 83-94	2014016	30
		<u>\$1,409</u>

Decisions Rejecting the \$20 Minimal Penalty Limitation.

Eight of the bench decisions rejected the operator's challenge to the trial judge's jurisdiction and authority to assess penalties of more than \$20 for violations which he found were not significant and substantial.

In May 1982, MSHA inaugurated an alternate dispute resolution policy for contested violations. Under this program, the District Managers were authorized to act as substitutes for the neutral decisionmakers established under section 113 of the Act, 30 U.S.C. § 823, and to conduct off-the-record, ex parte reviews of contested violations. Further, District Managers were authorized to vacate or reduce to \$20 the penalty for any violation promptly abated which they found "was not reasonably likely to result in a reasonably serious injury or illness." 30 C.F.R. 100.4.

The purpose of the new procedure was to insure the success of the administration's new non-adversary, cooperative enforcement policy. District Managers and their delegates do not, of course, enjoy the decisional independence and security of tenure of the Commission and its trial judges. Thus, when conscientious mine inspectors failed to follow the lax enforcement policy a mechanism was readily available to discipline the inspectorate through wholesale application of the ex parte review procedure.

An example of the policy in action was described in the Commission's decision in Bethlehem Mines, 6 FMSHRC 91, 96-101 (1964). 1/

In an effort to expand the "cooperative enforcement" policy to the limits of its logic, U.S. Steel took the lead in the move to persuade the Commission to require its trial judges to defer to MSHA's no-fault penalty policy by denying them authority to make de novo determinations of the gravity, negligence and penalties warranted for non-S&S violations. An editorial in the Courier/Journal for July 11, 1984, copy attached, noted that big bucks are involved in the "current emphasis on leniency and cooperation." For example, in the first full year under the \$20 minimal penalty policy MSHA succeeded in reducing operators' penalties by \$9.7 million dollars. Such a drastic reduction in penalties signals that mine safety and health is no longer the first priority of business with MSHA.

1/ A recent editorial in the Louisville Courier/Journal headlined "Mine Safety Agency Bespatters Its Own Image," described the effects of the new policy as follows:

Mine inspectors who hear more talk from the higherups about "cooperation" with safety law violators than about firmness are likely to feel that safety isn't the first order of business. When their citations frequently are thrown out or watered down--often without consultation with those who issued them--suspicions seem confirmed.

According to an in depth investigative report published in the same paper on Saturday July 7, 1984, the public perception is that the District Managers' evaluation of 70% or more of their inspectors' citations as insignificant and inconsequential has undermined inspector morale and effective enforcement of the Mine Safety Law. During the first year of operation under the new policy the administration succeeded in reducing the industry's liability for civil penalties for safety violations by over 60%. One of the principal justifications for the no-fault violation policy was to reward operators for prompt abatement of hazardous conditions. Ironically, the effect has been just the opposite because operators have learned that the cost of noncompliance, \$20, is cheaper than the cost of voluntary compliance. Thus, instead of encouraging voluntary compliance the new policy has provided a negative incentive for voluntary abatement of identified hazards. Compare 47 F.R. 22291 (May 1982) with MSHA Documents quoted in Courier/Journal Article, supra. See, also CNN Documentary "Mine Safety, Death, and The Bureaucracy" alleging lax and corrupt enforcement of the Mine Safety Law.

Recognizing the potential for almost total emasculation of the Act's civil penalty provisions, the Commission's trial judges stoutly resisted the U.S. Steel's insistence that the Commission's mandate to act as an independent adjudicatory agency (Article I Court) be subordinated to the operator's interest in promoting the \$20 no-fault penalty policy. The first Commission ruling on the matter occurred on May 31, 1984, when, in a decision affirming an earlier ruling by Judge Broderick, the Commission held that as a matter of law its trial judges were not bound by MSHA's penalty proposals and as a matter of policy should not be.

As the Commission observed:

The Mine Act divides penalty assessment authority between the Secretary of Labor and the Commission. The Secretary proposes penalties. The Commission assesses penalties. The Secretary's penalty proposals are made before hearing. In the event of a challenge to the Secretary's proposal, the Commission affords the opportunity for a hearing. Thereafter, the Commission assesses penalties based on record information developed in the course of the adjudicative proceeding . . . In assessing a penalty the Commission and its judges are required to consider the six statutory penalty criteria set forth in section 110(i) of the Act (30 U.S.C. § 820(i)). Thus, the Commission's penalty assessment is not based upon the penalty proposal made by the Secretary, but rather on an independent consideration of the six statutory penalty criteria and the evidence of record pertaining to those criteria . . .

The Act does not condition the penalty assessment authority and duties of the Commission upon the manner in which the Secretary of Labor has chosen to implement his statutory responsibility for proposing penalties. Therefore, it is irrelevant to the Commission for penalty assessment purposes whether a penalty proposed by the Secretary in a particular case was processed under § 100.3, § 100.4, or § 100.5 of the Secretary's regulations. The distinctions that U.S. Steel attempts to draw in this proceeding between a § 100.3 or § 100.4 penalty proposal by the Secretary are without merit and are rejected. Secretary v. United States Steel Mining Co., Inc., 6 FMSHRC 1148, 1150 (1984).

The Commission also rejected the suggestion that "as a matter of policy" it should require its judges to defer to MSHA's no-fault violation policy. Noting that such a "policy" would "unwisely restrict the wide discretion the Act affords the Commission in assessing civil penalties" the Commission held

that it, and its judges, must exercise an independent discretion to insure that the penalties assessed "are effective" and "encourage operator compliance." 2/

On June 11, 1984, the United States Court of Appeals for the Seventh Circuit confirmed that Part 100 is not binding on the determination of penalties by either the Commission or its trial judges. Sellersburg Stone Co. v. Secretary, _____ F.2d _____ No. 83-1630, 7th Cir. 1984.

As the court noted,

. . . we find no basis upon which to conclude that these MSHA regulations also govern the Commission. It cannot be disputed that the Commission and its

2/ A month later, however, the Commission reneged on its holding that penalties must be assessed on the basis of the record evidence by substituting for "reasons unknown or at least unexplained" MSHA's proposed penalties for the carefully crafted, neutrally oriented findings of its trial judge. Secretary v. United States Steel Mining Co., Inc., 6 FMSHRC 1423 (1984), (dissenting opinion). As the dissenting Commissioner noted, when the Commission "embarks on the uncharted waters of independent penalty assessment" the results are highly inconsistent and "furnish no guidance" for either the parties or its trial judges. Compare Sellersberg Stone Co., 5 FMSHRC 287 (1983) (Commission unanimously upheld judge's \$2,000 penalty for interference with MSHA's ability to investigate), with United States Steel Mining, supra (majority arbitrarily reduced penalty for interfering with inspector's ability to investigate from \$1,500 to \$400).

The propensity of the Commission's operator oriented majority to disregard adjudicated penalty findings and to defer, without rational explanation, to the Labor Department's extra-record penalty proposals for serious violations tends to undermine confidence in the neutrality and fairness of the Commission's decisions and to thwart the public interest in effective enforcement of the Mine Safety Law. Compare Southern Ohio Coal Co., 4 FMSHRC 1459 (dissenting opinion); United States Steel Mining, supra (dissenting opinion). A penalty assessment policy that substitutes whim and caprice for principled decisionmaking or that places the welfare of miners below that of stockholders or mine management violates not only the spirit but the letter of the Mine Safety Law.

ALJ's constitute an adjudicative body that is independent of MSHA. Sen. Rep. No. 461, 95th Cong., 1st Sess. 38 (1977). This body is governed by its own regulations, which explicitly state that, in assessing penalties, it need not adopt the proposed penalties of the Secretary, 29 C.F.R. § 2700.29(b) (1983)." Slip Op. 9-10.

For these reasons, I find the operator's challenge to my independent assessment of penalties for the following non-S&S violations is without merit. Accordingly, it is ordered that the bench decisions be, and hereby are, AFFIRMED, and the operator pay the penalties assessed.

<u>Docket No.</u>	<u>Citation</u>	<u>Amount</u>
PENN 83-74	2012781	\$100
	2012784	100
PENN 83-75	2011622	75
PENN 83-78	2013730	100
	2013731	75
PENN 83-94	2014005	50
	2014016	30
	2014013	50
	Total	<u>\$580</u>

The Decisions Rejecting the Challenges to S&S Findings.

The Secretary takes exception to one decision that rejected MSHA's S&S finding and the operator challenges eight bench decisions that sustained such findings. Based on an independent evaluation and de novo review of the record evidence my findings and conclusions with respect to these nine violations is as follows: 3/

I. Docket No. PENN 83-74 - Cumberland Mine

A. Citation 2013043

On October 19, 1982, the operator was charged with failing to provide a guard for a 7200 volt electrical

3/ The phrase "de novo determination" has an accepted meaning in the law. It means an independent resolution of a controversy that accords no deference to any prior resolution of the same controversy. United States v. First City National Bank of Houston, 386 U.S. 361, 368 (1967).

cable in violation of 30 C.F.R. 75.807. The standard required that underground high voltage transmission cables "shall be placed so as to afford protection against damage, [and] guarded where men regularly pass under them unless they are 6-1/2 feet or more above the floor . . ."

The inspector observed an unguarded cable, 4 inches in diameter, that was suspended only 5-1/2 feet above the mine floor in an area where miners and mobile equipment carrying supplies regularly passed under it. The inspector believed this created an electrical shock hazard that was "reasonably likely" to result in a fatality or lost work days. This, he testified, could occur if the cable were sliced, smashed or damaged by a piece of mobile equipment or supplies so as to pierce its insulated cover or if an individual miner carrying a sharp tool such as a pick or slate bar were to accidentally thrust the tool through the cable and thus penetrate one of its energized leads. The inspector speculated that a sharp tool such as a pick or digging bar could pierce the cable bypassing the inner protective sheathing and contact an energized 7200 volt lead before the automatic circuit breaker was tripped or activated. He then contradicted himself by stating that the MSHA District in which he works does not understand the requirement for a "guard" to mean what the dictionary says it means, namely, a device to protect the cable from injury by preventing its penetration by a sharp tool but merely a high visibility plastic wrapping. Thus, the inspector said that the learning of his MSHA District is that the intent of the requirement for a "guard" is only a requirement for a "guard" that serves as a warning or danger sign such as a sign reading "Danger--High Voltage Cable."

Under this inexplicably narrow construction of the standard, the inspector terminated the citation after the operator installed a piece of yellow plastic PVC pipe of indeterminate mechanical strength cut longitudinally around the lower half of the cable. The totally unguarded condition, which apparently existed for some time, was obvious and should have been reported by the pre-shift examiner.

In rebuttal of the claimed seriousness of the hazard, the operator's senior maintenance training engineer stated that in his expert opinion the cable did not need to be guarded because the inherent protective devices built into the cable and the high voltage system of which it was a part made the need for a guard or even a warning device unnecessary. This expert's opinion was that the likelihood of any contact resulting in a shock hazard of any consequence was too remote to be realistic. Indeed, the record considered as a whole is persuasive of the fact that the millisecond reaction time of the protective devices of the SHD High Voltage

Shielded Cable in question rendered unlikely the possibility or probability that any sharp instrument piercing the cable would become energized. As the operator's expert explained the ground system in the cable is of lower ohmic value than that of any piece of metal that might pierce the cable. Therefore, "the current would flow back to the ground conductors and make the vacuum breaker operate before it would travel into a piece of machinery and electrocute a man" (Tr. 664).

I conclude, as I did at the hearing, that a high visibility plastic warning device such as a piece of PVC plastic pipe added nothing to the electrical and mechanical protection already provided by the automatic deenergizing devices installed in the shielded cable. The absence of the alleged "guard" did not therefore significantly and substantially contribute to an electrical shock hazard.

In a series of recent decisions, the Commission has made clear that one of the essential elements of an S&S finding is that the underlying violation be of such a nature as to create a "discrete," i.e., a recognizable safety hazard that in the normal course of continued mining operations could contribute to an injury of a reasonably serious nature. Mathies Coal Company, 6 FMSHRC 1 (1984); Consolidation Coal Company, 6 FMSHRC 34 (1984); Consolidation Coal Company, 6 FMSHRC 189 (1984); United States Steel Corporation, 6 FMSHRC 1423 (1984); United States Steel Mining Co., Inc., 6 FMSHRC (July 11, 1984). I find it beyond dispute that the absence of the alleged "guard" in this instance did not create any condition that could reasonably be expected to cause death or serious physical harm before the condition could be abated. It did not therefore approach even the threshold of "significant and substantial."

But this is not to say that a violation even under the attenuated standard did not occur. Having disposed of MSHA's challenge to vacation of its S&S finding, therefore, I turn to the operator's claim that the penalty assessed for its knowing failure to provide a warning sign, \$200, was excessive. In my bench decision I found that while the failure to provide a warning sign did not contribute to the likelihood of a shock hazard it was nevertheless serious because of the "chance in a million" that the absence of the "guard" would fail to warn off a miner who due to some inexplicable combination of unforeseen circumstances might be killed or injured. Indeed, in its post-hearing brief the operator concedes that it is not arguing that it could not or should not comply with the attenuated standard:

USSM would not file a petition for modification because that would be a useless act. Even if the plastic pipe is not more than a warning sign, the operator cannot establish that a wire (sic) without a warning sign is as safe as one with a sign.

But, the operator argues, since MSHA had interpreted the standard to require only a warning sign and not a protective guard, it was correct in assuming that MSHA did not believe noncompliance presented a serious shock hazard. Thus, it continues, the trial judge erred in finding there was a culpable disregard for compliance that required more than a minimal \$20 penalty. 4/

It is true, of course, that while the risk of a serious shock hazard was remote, its occurrence was not beyond the realm of possibility and its consequences extremely grave--death or a disabling injury. I also felt, and my de novo review confirms that the record supports my finding that noncompliance stemmed from the operator's opinion that the requirement, even in its attenuated form, was arbitrary and, above all, unnecessary. I am sure this was the view of its expert witness. But if it was, as counsel concedes, the remedy was to seek a waiver or variance and not to unilaterally disregard the standard. For these reasons, I concluded the operator's decision to disregard the standard rather than seek a variance, waiver or modification demonstrated a lack of regard for compliance that should not be condoned by assessment of a token penalty. On reflection, however, I believe a lesser penalty than tentatively assessed will suffice.

Accordingly, I reject both parties' exceptions to the bench decision and assess a penalty of \$100 for the violation found.

B. Citation 212365

On October 6, 1982, a 104(a), S&S citation issued for a nonpermissible headlight on a Jeffrey Ramcar. The ramcar was parked in a crosscut awaiting repair of a broken trunion approximately 500 feet from the face. The headlight on the right, outby side had a damaged packing gland that permitted the power cable to be moved freely by hand in and out of the

4/ The operator also claimed that in the absence of a valid S&S finding, my jurisdiction was limited to assessing a penalty that did not exceed \$20. For reasons already expressed, I declined to accept this contention.

headlight indicating the seal around the power leads had been broken. While the ramcar was out of service due to the broken trunion, the operator was unaware of the existence of the permissibility violation.

The undisputed facts showed the power wires entered the headlights through a copper nipple or ferrule which had been broken off and a rubber conduit hose that had been stripped back so as to expose the power wires. As a result, the power leads were not clamped in place which caused a strain on the terminal connections inside the headlight. Because of the damage to the seal around the power leads the flame-path protection against ignitions or explosions within the headlight was inoperative. The operator challenges only my affirmance of the S&S finding.

The operator's expert testified that because the heat generated by a headlight does not exceed 350 degrees farenheit and the ignition point of methane is 1100 degrees the violation could not contribute to the cause and effect of a mine fire or explosion. I considered this to be irrelevant since the question was not whether the headlight could cause a fire or explosion but whether a spark or arc from damaged power leads could cause a fire or explosion. As to the latter there seemed to be no dispute. The operator also argued that because a light on the outby side of the ramcar would never get within 40 feet of the face it would be unlikely to encounter a 5 to 15% concentration of methane. It was also argued that since nothing in an unbroken headlight could cause an arc, something would have to fall on the headlight to create a spark of sufficient intensity to cause an ignition. Finally, the operator pointed out that the machine was not energized, was not operating inby the last open crosscut, and was out of service due to the broken trunion. I considered all of these contentions irrelevant. It was clear that since the ramcar was checked for permissibility only once a week and the operator was unaware of the permissibility violation it could have been returned to service without correction of the condition.

The Cumberland Mine is classified as a gassy mine that releases 3.5 million cubic feet of methane a day. This gas is emitted not only from the face and gobbed out areas but also from bleeders in and along the ribs. Consequently, even outby headlights were subject to operating in a gassy, dusty atmosphere in the presence of much loose coal and coal dust. It was not unusual for either inby or outby headlights to be smashed by loose and falling coal or rock or by striking the ribs. When and if this occurred it was likely that arcs and

sparks could result in ignitions or explosions in the headlights. While damage to lights can cause arcs and sparks even when the packing gland has not previously been damaged, the failure to maintain the gland in a permissible condition increases the risk or likelihood that a light with a damaged flame-path will cause an ignition that may not be contained within the light in the presence of an explosive concentration of gas or float coal dust.

The inspector considered the violation "very serious." He believed it could contribute to an ignition that could in turn cause a fire or explosion with resulting fatalities. On the other hand he considered the negligence slight because the condition, he thought, had occurred since the last weekly inspection and in the interim was not readily observable to anyone not making a check for permissibility. But, he noted, this could also result in the ramcar being put back into service after the repairs to the trunion were accomplished without correction of the permissibility violation.

In my bench decision (Tr. 728), I found that if there was a malfunction or damage to the headlight that caused it to arc or spark the absence of flame-path protection in this headlight could significantly and substantially contribute to the cause and effect of a mine safety hazard and assessed a penalty of \$178.

Applying the Commission's analytical construct cited, supra, including the deference to be given the experienced opinion of the inspector who found it was "reasonably likely" that the broken seal on the headlight could provide a link in the chain of causation from an ignition in the leads to a mine fire or explosion, I conclude that the probability of such an event was not so remote as to be unexpected or unforeseeable in the normal course of mining operations. I find, therefore, that on the basis of the record considered as a whole the evidence shows the underlying permissibility violation could significantly and substantially add, both qualitatively and quantitatively, to a "discrete" safety hazard, namely a mine fire or explosion, that could result in death or serious physical injury.

For these reasons, the operator's exceptions to the bench decision are denied and the penalty assessment of \$178 affirmed.

II. Docket No. PENN 83-75 - Cumberland Mine

A. Citation 2012377

This citation charged the operator with failure to provide guards for the tail and drive rollers on the Mains

South Conveyor Belt. The absence of the guards was not challenged. The operator contends only that the violation was not significant and substantial.

The undisputed facts showed that at 12 different locations and at various heights ranging from 2 inches above the mine floor to about 5 feet drive rollers up to 2 feet in diameter were unguarded for distances of up to 20 feet along the wide and tight side of the beltline. This exposed miners using the parallel 5 foot wide travelway on the wide side to accidental contact with the rollers as the miners performed rock dusting or fireboss duties or carried supplies from one point to another using the travelway. On the tight side exposure resulted when rock dust was spread while the belt was in motion.

The absence of the expanded metal guards presented multiple pinchpoint hazards which could result in hands, arm or legs getting accidentally caught between the moving rollers and the beltline. The unguarded condition could result in severed or dismembered limbs, traumatic amputations, or a fatality.

The guards removed from the supporting vertical posts were found in a crosscut about 50 feet away. The fact that they were covered with mud, rock dust and coal dust indicated they had been there for some time. Even so, there were not enough expanded metal guards to provide protection for the entire length of the unguarded rollers on the wide and tight sides.

There was conflicting evidence over whether the walkway was damp and slippery or dry. Since the tail roller was under the walkway a miner would have to fall or slip from the walkway to become entangled. While these circumstances may or may not have attenuated the risk with respect to this roller, they obviously did not eliminate it. The evidence also showed the support posts for the missing guards were 4 to 5 feet apart and 18 inches from the edge of the walkway and drive rollers. These dimensions did not provide a protection by location.

The operator claimed the absence of the guards could not significantly and substantially contribute to the pinchpoint hazard because the evidence does not support a finding that an accident involving the pinchpoints "would be reasonably likely to occur" before the condition was voluntarily abated. The operator claims that to assume the condition would "never be corrected significantly alters the test to be applied." The Commission's test, namely, "reasonable likelihood that the hazard contributed will result in a serious injury" requires, the operator contends, a time continuum. I agree.

The appropriate time continuum in my judgment is whether there is a reasonable likelihood that normal mining operations can be expected to continue before the hazardous condition is abated. Eastern Associated Coal Corp., 491 F.2d 277 (4th Cir. 1974); U.S. Steel Mining Co., Inc., 6 FMSHRC _____ (July 11, 1984). Here the evidence amply supports the conclusion that the condition had existed for some time prior to issuance of the citation and that absent issuance of the citation the pinchpoint hazard would have continued to exist for a time sufficient for an accident to occur before the condition would have been "voluntarily" abated.

For these reasons, the operator's exceptions to the bench decision are denied and the penalty assessed, \$120, is affirmed.

B. Citations 2012379, 2012380, 2011625.

These three citations involved the absence of water sprays at dumping points. Citation 2012379 was occasioned by the inspector's reading of the operator's preshift examination reports. They showed that on three consecutive working days, Friday, November 5, Monday, November 8, and Tuesday, November 9, 1982, the preshift examiner (fireboss) had reported a hazardous condition on the Main Face South Conveyor Belt. This consisted of an excessive accumulation of float coal dust at numerous locations around the No. 2 conveyor drive for a distance of approximately 100 feet. The dust had collected on the belt structure, the electrical drive motors and the power cables. The electrical power sources while protected with short circuit devices were not permissible.

When the inspector arrived on the scene, he observed that the belt was energized and running and that the atmosphere was visibly dusty with large amounts of float coal dust deposited on the ribs and roof. As a result of his observations, the inspector issued a 75.316, 104(a), S&S, citation. 5/

It alleged a violation of the operator's Methane and Dust Control Plan in that water sprays were not provided at the belt transfer point. The operator admitted the violation but contested the S&S finding.

Water sprays are required at belt transfer points to precipitate float coal dust from the atmosphere thereby reducing the concentration of respirable and explosive coal dust. In this case, the presence of a visible concentration of dry float coal dust created both a health (respirable dust)

5/ He also issued a 104(a), S&S 75.400 citation which was not contested.

and safety hazard. Miners working on the beltline and elsewhere were subjected to the hazard of a fire or explosion if an ignition source were to ignite the float coal dust or a methane bleeder. The inspector testified these hazardous conditions existed in the presence of nonpermissible electric motors and where hot rollers or friction from a misaligned belt could occur at any time. As the preshift reports established, the condition was one about which the operator knew or should have known.

The operator's assistant mine foreman claimed the accumulation of float coal dust could have occurred even if the sprays had been installed and made operative because much float coal dust comes from the bottom belts for which no sprays are required or from other sources such as the ventilation system. From this counsel for the operator argued that it could not be assumed that the absence of the water sprays at the transfer point significantly and substantially contributed to the hazardous accumulation of float coal dust.

On rebuttal, the inspector testified that the accumulation of float coal dust observed could not be attributed solely to dust from the bottom belt. He admitted the sprays did not completely suppress or control the suspended float coal dust but was certain that the absence of the required sprays permitted much of the excessive accumulation that he observed. He was also of the opinion that if an electrical malfunction occurred it was "highly probable" that an ignition would cause the float coal dust to ignite.

Citation 2012380 was issued for the absence of water sprays at a belt transfer point inby the point cited in Citation 2012379, supra. Twenty-four hours after this citation issued, the inspector issued a 75.400, 104(a), S&S citation on the same area, the 128 West Conveyor Drive. Counsel for the operator argued that because sprays were installed by the end of the shift on November 9, 1982, and the 75.400 citation did not issue until the next day is proof that the sprays were ineffective and inconsequential in preventing the accumulation of float coal dust.

The accumulation cited, and not contested, was that float coal dust on previously rock dusted surfaces was permitted to accumulate on the mine floor from rib to rib in the belt entry and crosscuts for a distance of 200 feet. In addition, loose dry coal and coal dust had been permitted to accumulate under the drive and rollers on the drive motor in amounts up to 19 inches deep in an area 3 by 4 feet.

The inspector testified he did not issue the 75.400 citation on November 9 because he did not see the accumulation

he cited on the 10th. He conceded it was possible that he did not see it because it was not there on the 9th. I find that in view of the large accumulation found under the drive and rollers it was more probable than not that the accumulation existed at the time the 75.316 citation issued on November 9 but that the inspector overlooked it.

The parties stipulated that the same two witnesses who testified in support of and in opposition to Citation 2012379 would give similar testimony with respect to the gravity, negligence, and significant and substantial nature of the violation.

Citation 2011625 was issued on November 12, 1982, for failure to provide water sprays on the feeder located at the 52 Main East Section in violation of the same Methane and Dust Control Plan that applied to Citations 2012379 and 2012380. The belt, which was energized but not running when observed, had three water sprays mounted on a bar approximately 300 to 400 feet outby the face at the point where the shuttle cars dumped on the feeder to the main conveyor belt. The sprays were inoperative because no hose was attached to them to supply water.

Coincident with his observation of the inoperative water sprays the inspector saw a shuttle car dump a load of coal on the feeder. When this failed to activate the water sprays the inspector noted the absence of the water hose. Looking further, the inspector observed and wrote a 104(a), S&S citation for a 75.400 violation that disclosed an accumulation of loose, dry, coal dust to a depth of 21 inches in an area around the sequence roller that measured 6 feet wide by 6 feet long. He also noted an accumulation under the tail roller that was 4 feet by 4 feet that was wet. The sequence roller, however, was turning in loose, dry coal and coal dust. This citation was not contested.

As in the case of the other two citations, the inspector testified that it was reasonably foreseeable that the absence of the water sprays could contribute to the hazard of a fire or explosion or to a respirable dust health hazard.

An aggravating circumstance alluded to was the fact that the evidence showed the violation occurred on an intake air split inby the return for the belt air which meant that the respirable dust generated by the absence of the sprays was being carried over the eight miners working at the face.

Since the inspector observed only one load of coal being dumped on the feeder and the belt was not running the operator contended coal was not being produced and therefore no immediate hazard either serious or nonserious was presented. The operator also showed that, as the inspector admitted, the accumulation of coal under the tail roller was wet but offered no evidence to rebutt the inspector's showing that under the sequence roller the loose coal and coal dust was dry.

In summing up counsel for the operator argued that because each of the violations occurred in an area that was well ventilated and rock dusted the absence of the water sprays was insignificant and not likely to result in or contribute to a hazard that would result in a reasonably serious injury. The operator asserts that any contribution that the absent sprays might make to a buildup in the dust concentration in each of these areas was so minimal as to make the violations trivial and certainly not of such a nature as to increase the risk of any recognizable health or safety hazard.

I do not agree. I admit that quantifying the degree of contribution each of these violations made either singly or in the aggregate to a respirable dust, fire or explosion hazard is impossible. Nevertheless the existence of the spray requirement in the operator's own dust control plan is a plain recognition of the fact that water sprays play a significant role in the suppression of respirable and float coal dust. Further, their absence particularly under the circumstances that appear here, namely, the presence of excessive accumulations of loose, dry coal and float coal dust in working areas rife with potential sources of ignition is persuasive of the fact that the underlying violations were of such a nature as to constitute a significant and substantial link in a chain of causation that could result in death or serious physical injury if normal mining operations continued with these conditions unabated.

Accordingly, I find the absence of the sprays could and did contribute to a significant and substantial increase in the amount of loose, dry float coal dust and respirable dust in suspension and to an increase in the accumulation of loose, dry coal dust on previously rock dust surfaces; that such accumulations did, in fact, occur; and that the presence of such dust could contribute to the cause and effect of at least three discrete hazards, namely a health (respirable dust) hazard and a fire and/or explosion hazard. Applying the Commission's analytical construct cited supra, and giving deference to the testimony of the inspector and weight to the uncontested 75.400 violations, I conclude the conditions cited were significant and substantial violations.

Upon review of the record considered as a whole, therefore, I am constrained to affirm the bench decisions and the amounts of the penalties assessed for each of the first two violations, \$136 and \$98 respectively. As to Citation 2011625, I find the aggravating circumstance warrants an increase in the amount assessed from \$100 to \$200.

III. Docket No. PENN 83-76 - Cumberland Mine.

A. Citation 2013051

On November 15, 1982, a 104(a), S&S citation issued for a violation on an energized torkar shuttle car parked without wheel chocks on a slight down grade in an underground section of the Cumberland Mine. At the time the citation issued miners were observed walking or standing in front of the car on the downhill side. The citation charged the condition was a violation of a notice to provide safe-guard issued September 8, 1981. The existence of the condition was undisputed. The operator contested only the S&S finding.

The testimony of the inspector and the walkaround showed that even where the mechanical parking brake on a shuttle car is set the wear and tear on the teeth of the ratchet mechanism may permit the 20 ton vehicle to drift down a hill with sufficient force to crush a miner against a rib.

The operator's senior maintenance engineer testified that, while he had no personal knowledge of the condition of the car in question, he believed all the torkars purchased by the operator had a dual braking system. The first system was that described by the inspector and walkaround and is similar to the parking brake mechanism found on an automobile. The brake is engaged by pressing the brake pedal down and then pulling back on a lever that locks the foot pedal down and the car in place.

The second braking system on the torkar is called the "failsafe" brake. This braking system is activated when the car is unattended or shut off by hitting the panic bar. The walkaround testified, and the operator's expert did not deny, that the "failsafe" brake did not automatically prevent a car from drifting.

The maintenance engineer said the "failsafe" brake is a hydraulically activated spring brake that works as follows: "If the torkar is in movement, and you activate the panic bar, the panic bar deenergized the pump motor, and, at the same time, the failsafe brake will lock to the rotor on the braking mechanism" and bring the vehicle to a stop (Tr. 845). He further testified that the failsafe brake requires considerable maintenance as its use in stopping a 20 ton vehicle in

10 feet tears up the rotor. Instead of taking such a vehicle out of service, chocks will be used until the "failsafe" brake is repaired. The maintenance engineer did not know of his own knowledge whether the "failsafe" brake on the torkar in question was operative on the day the citation issued. The walk-around testified that on the basis of his personal experience with the vehicle the "failsafe" brake was not operative.

The operator's expert testified that "failsafe" is a misnomer because no brake is "failsafe" if it is not properly maintained. These particular "failsafe" brakes need a lot of maintenance and repair because, he said, the "momentum of a twenty ton piece of equipment traveling ten miles an hour coming to a screeching halt within, maybe, ten feet . . . tears up the rotor that the brakes grab on to" (Tr. 848). After this occurs, the "failsafe" brake is no longer operative.

Counsel for the operator contended that MSHA had the burden of showing the claimed "failsafe" braking system was not on the vehicle in question, was not operative, and would not have prevented the car from drifting. A miner who actually operated the torkar in question, testified that he was never told the vehicle had a failsafe brake or how to operate it (Tr. 855-856). He further testified that the torkar drifted after shutting the power off and before setting the mechanical brake which led him to believe it had no failsafe brake or at least not one that engaged automatically. I conclude, therefore, that MSHA carried its burden of showing that the violation charged did, in fact, occur and that it was reasonably foreseeable that the underlying violation, i.e., the absence of the chocks would significantly and substantially increase the risk of death or serious physical harm.

Once MSHA established the fact of the underlying violation, the operator had the burden of going forward with evidence to show that the violation was trivial because the shuttle car had a fully operative "failsafe" backup braking system that would prevent the car from drifting after the mechanical brake was set. Not only did the operator fail to carry its burden but, as we have seen, MSHA affirmatively proved that in all probability the vehicle in question did not have an operative "failsafe" braking system.

Applying the Commission's approved analysis we have, therefore, (1) an underlying violation; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed

to by the violation; 6/ (3) a reasonable likelihood that the hazard contributed will result in injury; 7/ and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 8/

For these reasons, the exceptions to the bench decisions are denied and the \$200 penalty affirmed.

IV. Docket No. PENN 83-77 - Dilworth Mine

A. Citation 2011736

The roof control plan for the Dilworth Mine in effect at the time this citation issued required that when the sum of the diagonal measurements of an intersection exceeded 60 feet, "posts or jacks shall be installed to reduce the longest span to 28' or less." On November 8, 1982, a 104(a), S&S citation issued when measurements taken at the intersection of the number 14 (intake escapeway) entry and the number 5 crosscut showed that each of the diagonals measured 32 feet and no posts or jacks had been installed. The existence of the condition cited was admitted. The challenge was to the S&S finding.

6/ Quantifying the increase in risk is, as I have noted, incapable of proof by mathematical certainty, since no one can say whether the absence of the chocks would necessarily result in a disabling injury or fatality. As Prosser states:

Proof of what we call the relation of cause and effect, that of necessary antecedent and inevitable consequence, can be nothing more than "the projection of our habit of expecting certain consequence to follow certain antecedents merely because we had observed these consequences on previous occasions." (Citations omitted). "If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists." Prosser on Torts, p. 243 (4th ed. 1971).

7/ It is self evident that no man is a match for a 20 ton shuttle car.

8/ Experience as well as common sense teaches that the likelihood of a serious or disabling injury, dismemberment or death as the result of a collision between a shuttle car and a miner was reasonable.

At the time the citation issued, the operator was engaged in retreat mining. Three intersections inby the crosscut in question, at the number 8 crosscut between the 15th and 16th entries and the 26th and 32d pillars approximately 2 feet of the roof shale had oxidized and peeled or flaked away across the entire 16 foot entry leaving the roof bolts exposed.

The inspector believed this condition, which was approximately 400 feet from the overwide intersection, had resulted from override pressure on the roof due to the failure of the operator to effect total caving of the roof in the gobbed or pillared out areas. This explanation for the S&S finding is lacking in evidentiary support and at odds with the inspector's statement that he found no basis for concluding the operator was, or had, engaged in improper pillar recovery methods. The operator's general assistant mine foreman, who accompanied the inspector and personally abated the violative condition by setting three posts in the intersection, testified convincingly that the roof condition in the number 8 crosscut between the 26th and 32d pillars was not the result of a roof fall.

Both witnesses agreed that the roof bolts in the area in question were still firmly anchored in the sandstone rock and that the black shale had fallen or peeled away from between the bolts to a depth of about two feet. The inspector speculated that if all this had fallen at once he would consider it a dangerous unintentional roof fall that might have crushed a miner. The mine foreman, who testified from personal observation of the condition, said the condition did not result from a roof fall but one that occurred over time "when the air hits it and so forth, it just peels off around the pins. The pins are still anchored, hanging about a foot and a half. They are anchored, but nothing massive falling down, just the black shale falling down" (Tr. 360-361).

My de novo review of the record leads me to conclude the inspector erred in finding the condition in the number 8 crosscut was due to override pressure. His own diagram of the area characterized the condition not as a roof fall but as "Broken roof here, will need [to be] rebolted" (GX-6). Indeed, the inspector's initial testimony was that "The roof had pulled away from the bolts. The bolts were hanging down. Everything was broken" (Tr. 329). The inspector also said that because he saw what he thought was a roof fall inby the area in question, "You might as well say there was a roof fall there [in the number 8 crosscut] too, but it wasn't above the anchorage line, maybe a foot or two high, stuff had spalled out and came down which means it had to be rebolted before" further retreat mining could be accomplished (Tr. 329).

The inspector then went on to claim he decided on the S&S finding because the operator was not getting "clean falls" of the roof during his pillar recovery. This turned out to be incorrect because on close examination the inspector admitted "No, there was no improper practice on mining the pillar line" (Tr. 334-335).

On the basis of the record considered as whole, I conclude there was no factual basis or credible expert opinion to support a finding that the broken roof condition observed in the number 8 crosscut contributed to the risk of a roof fall in the number 5 crosscut. Both witnesses agreed the roof in the number 5 intersection was good with no signs of stress. The mine foreman readily admitted that someone had improperly removed the three support posts that had been set in the intersection and that this was a serious violation of safe mining practice. The inspector found the negligence involved was "moderate."

For these reasons, I hereby vacate the finding in my bench decision and find the condition in the number 5 crosscut, while serious, did not significantly and substantially contribute to a different or discrete hazard that could result in death or serious physical harm. I conclude; (1) the violation was serious; (2) affirm my ruling rejecting the operator's offer to prove that the sum of the diagonals requirement was obsolete and contributed nothing to safety; and (3) reduce the penalty from the \$500 initially assessed to \$150.

V. Docket No. PENN 83-94 - Maple Creek No. 1 Mine -

A. Citation 2014066

On November 16, 1982, a 104(a), S&S citation issued in the 8 Flat, 56 Room of the Maple Creek No. 1 Mine when the inspector found the ground wire from the frame of a Ricks Water Gathering Pump twisted together with the return ground of the power conductor for the pump. Power was being drawn by a fused nip cable from the 550 volt trolley wire. The two grounds were in turn grounded to the mine track by a ground clamp attached to the rail as shown in GX-12.

The violation, which was admitted, consisted in the fact that the two ground wires were not attached to the mine track or other grounded conductor by separate clamps. 30 C.F.R. 75.701-5. The operator challenged the S&S finding contending the hazard contributed to -- shock or electrocution -- was too remote and speculative to create a reasonable likelihood of the event occurring.

The undisputed facts showed that if the ground clamp were dislodged from the mine track through vibration, derailment or

other accident and the twisted ground wires thereby lost their ground to the track, they would continue to conduct the 550 volt current from the overhead trolley wire through the ground frame wire to the frame of the water pump. With the circuit thus completed the pump would continue to operate normally, but with the frame energized with a voltage sufficient to cause a lethal electrical shock.

A miner required to do maintenance on the pump or a miner travelling the track entry on the tight side who had occasion to contact the pump frame while standing in the water that surrounded the pump could ground himself and receive the full force of the 550 volts of power coming from the trolley wire.

The evidence showed the water pump was checked on each shift to see if it was functioning properly and weekly for electrical compliance. The record of the weekly check was too vague to permit the inspector to determine whether this particular pump had been inspected that week or, if it was, whether the inspection included the ground clamp. Both MSHA and the operator had recognized that "robbing" ground clamps was a problem. A solution was found with respect to permanent pumps by welding a roof bolt to the track to serve as a permanent ground clamp.

State law required such clamps to be at least six inches apart. Federal law merely required two clamps. But since both laws had to be read together the requirement was for two clamps at least six inches apart. The operator's maintenance foreman said no permanent solution was possible for pumps that were installed temporarily because they had to be detachable to be moved.

A fair appraisal of the testimony of the operator's maintenance foreman shows management was aware that miners "infrequently" engaged in the practice of "robbing" ground clamps and using one clamp to ground electrical equipment where the law required two. In fact, the parties' stipulated the operator had a history of nine prior violations of this standard in the 24 months preceding issuance of this citation. While the foreman was reluctant to admit personal knowledge of the practice, he did state that "once in a while," "not frequently," but "once in a while," he had seen wires clamped in a single ground clamp. He didn't take this lightly but said it was difficult to pin point responsibility.

Even if the practice was "infrequent," as counsel for the operator would have it, it was frequent enough, as witness the nine recent prior violations, to require management's attention.

The foreman's ready admission of the same problem on the permanent pumps when contrasted with his inability to recall how frequent it was on the temporary pumps cautions against ready acceptance of the view that the problem was hardly worthy of management's attention.

I conclude that even if the practice was "infrequent" management's awareness of the problem and its failure to take effective steps to insure compliance made out a case of aggravated negligence on its part. While control of the problem may have presented difficulties with respect to the temporary pumps, it was no excuse for tolerating the condition or turning a purblind eye to it. The circumstances of this violation are precisely those in which a civil penalty can be most effective in encouraging voluntary compliance.

The inspector initially found the operator's negligence was "moderate" because he felt it was a problem that was difficult to control. But he did recognize, as did the other witnesses, that the substitution of one clamp for two took a knowing and deliberate act. This in turn reflects a deficiency in the operator's safety training and enforcement program.

The evidence also showed that the violation could result in anything from a lost workday or restricted duty accident to a fatality due to electrocution. The maintenance foreman felt a fatality or other injury was unlikely because his experience was that derailment would cut both wires and thus break the circuit. He was not asked to address the problem of a dislodgment due to vibration. The operator's ventilation foreman, who accompanied the inspector, thought the wires were not twisted together and that if the clamp was dislodged the wires would physically separate and thus break the circuit. The inspector and the walkaround were sure the wires were twisted together.

The citation merely recites that the two ground wires "was (sic) attached to the same clamp." The operator's foreman candidly admitted that whether the wires were twisted together was "immaterial" because the wires were "squeezed" together in the clamp and unless the manner in which the clamp broke released the "squeeze" the circuit would not break. On rebuttal, the inspector demonstrated (see GX-12) how one wire was twisted around the other before the washers squeezed them together. I conclude that whether the wires were "twisted" or "squeezed" the hazard created was the same.

With respect to the S&S question, I find a derailment or vibration that could result in dislodging the ground clamp from the mine track could result in energizing the pump frame and that this was a foreseeable intervening cause that could

contribute to a discrete hazard, namely that of a shock or electrocution. I further find that the likelihood of dislodgment was probable and certainly not so remote as to be inconsequential if normal mining operations continued.

Remoteness in time or space are undoubtedly important in determining whether an underlying violation could significantly and substantially contribute to a discrete and foreseeable hazard. But where, as here, the chain of causation (vibration or derailment) is direct and predictable and a hidden hazard could exist for an indeterminate time before abatement or injury there is no merit in the contention that uncertainty as to the exact time of occurrence bars a finding of significant and substantial contribution.

The same reasoning applies to the claim that a dislodgment by derailment would almost surely sever the wires and break the lethal connection. In the inspector's contrary opinion, to which I give deference, it was "very likely" that the wires would remain twisted or squeezed and the circuit complete. Viewed from the standpoint most favorable to safety, I find that it was at least as probable as not that the circuit would not be broken and therefore the hazard was real. Because of its hidden nature it was certainly a hazard likely to occur before the operator would discover and voluntarily abate it. This condition like the well known booby trap is most likely to lurk until some unwary individual trips it.

As Prosser notes: "The defendant who set a bomb which explodes ten years later, or mails a box of poisoned chocolates from California to Delaware, has caused the result, and should obviously bear the consequences." Prosser on Torts, supra, p. 253. Here, of course, we are trying to forecast the likelihood of an adverse consequence and are denied the insight that comes from hindsight after an actual injury has occurred. Nevertheless common sense and unhappy experience show that either view reinforces the picture of a stage set for disaster for some unwary individual.

In my judgment, when an underlying violation sets the stage and provides a contributing cause of a major hazard its remoteness in time or space is irrelevant and immaterial. Compare, Consolidation Coal Company, supra, 6 FMSHRC 194 (Causative chain of a danger in a mine may have many links). The purpose of the law is to nip nascent hazards in the bud and not to find excuses for condoning them by trivializing the penalty.

A significant and substantial cause need not be the only cause, nor the last nor nearest cause. It is sufficient if it

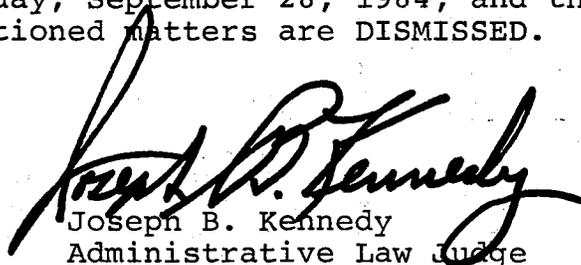
can occur with some other cause acting at the same time, which in combination with it results in a major mine safety hazard. See, Hylin v. U.S.A., 3 MSHC 1020, 1028 (7th Cir. 1983), (MSHA's negligence contributed significantly and substantially to operator's negligence that resulted in a mine fatality due to electrocution).

Because of the gravity and negligence involved, I found, that the amount of the penalty proposed, \$119, was insufficient to insure management's prompt attention to a condition and practice that was resulting in a serious, hidden, potentially lethal mine hazard. To deter a violation that can occur only through a deliberate act of noncompliance with both federal and state law, I assessed a penalty of \$750. Any lesser penalty, I believe, would result in paralyzing with one hand what the Act seeks to promote with the other.

For these reasons, the exceptions to the bench decision are denied and the decision and the penalty assessed therein, \$750, are affirmed.

ORDER

Accordingly, it is ORDERED that the operator pay the penalties assessed, allocated as indicated, in the total amount of \$3,921 on or before Friday, September 28, 1984, and that subject to payment the captioned matters are DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Attachment

Distribution:

Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market St., Philadelphia, PA 19104
(Certified Mail)

Louise Q. Symons, U.S. Steel Mining Co., Inc., 600 Grant St., Rm. 1580, Pittsburgh, PA 15230 (Certified Mail)

Mr. Arthur E. Guty, Sr., Chairman Safety and Health Local Union 2300, 341 Derrick Ave., Uniontown, PA 15401 (Certified Mail)

Michael Holland, Esq., UMWA, 900 15th St., NW, Washington, DC 20005 (Certified Mail)

/ejp

The Courier-Journal

BARRY BINGHAM JR.
Editor and Publisher

ROBERT T. BARNARD
Opinion Page Editor

Associate Editors

BERT EMKE JAMES EDDLEMAN
THOMAS F. MAPP

HUGH HAYNIE, *Cartoonist*

WEDNESDAY, JULY 11, 1984. FOUNDED 1826.

Mine safety agency bespatters its own image

THE BEST EFFORTS of *Courier-Journal* reporters to investigate charges against the U.S. Mine Safety and Health Administration turned up no evidence to support claims that systematic corruption exists in the agency. But that's not overly consoling. The verifiable facts show a situation that is only marginally better.

The reports of writers Mike Brown and R.G. Dunlop showed an atmosphere in which charges and rumors of wrongdoing were bound to arise, whether true or not. Mine inspectors who hear more talk from the higher-

ups about "cooperation" with safety law violators than about firmness are likely to feel that safety isn't the first order of business. When their citations frequently are thrown out or watered down — often without consultation with those who issued them — suspicions seem confirmed.

And when enforcement practices vary widely from one district to another — and even from office to office in the same district — either the efficiency or the integrity of the whole process is suspect. More than 53 percent of citations in MSHA's Pittsburgh

District are classified as "significant and substantial," compared to 13 percent in the Barbourville district. It's doubtful that anyone believes that this and other such disparities represent the real situation.

Coal operators, on the whole, doubtless are better satisfied with MSHA's current emphasis on leniency and cooperation. In the fiscal year ending September 30, 1981, the industry was fined \$16 million for health and safety violations. Under new procedures adopted for the following year, penalties totaled only \$6.3 million.

Maybe the new-found spirit of cooperation has reduced the need for fines, though many observers will be skeptical on that point. But the erratic way the penalties are levied — and the attitude of MSHA toward its own inspectors — leave little doubt that enforcement of mine health and safety rules still needs much improvement.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

(703) 756-6210

AUG 29 1984

RICHARD E. BJES,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. PENN 82-26-D
v.	:	
	:	Laurel Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

ORDER

On June 15, 1984, the Commission issued its decision in this matter affirming my decision that the complainant Richard E. Bjes was discriminated against by the respondent in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977. The case was remanded to me for the purpose of determining the appropriate relief due Mr. Bjes.

In response to my orders of July 27 and August 13, 1984, the parties have advised me that they have reached an agreement as to the following compensation and awards due to Mr. Bjes:

Back Pay.....	\$3451.10
Interest.....	1497.88
Expenses.....	172.93
	<u>\$5121.91</u>

Attorney Fees.....\$1375.00

In view of the foregoing, the respondent IS ORDERED to immediately make payment to Mr. Bjes in the amounts shown above, and to immediately disburse and pay to the attorneys of record the agreed upon amounts as shown. Upon full payment by the respondent in the amounts shown, these proceedings are dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Karl Skrypak, Esq., Consolidation Coal Company, Consol Plaza,
Pittsburgh, PA 15241 (Certified Mail)

Carson Bruening, UMWA District II, 521 W. Homer St., Ebensburg,
PA 15931 (Certified Mail)

Mary Lu Jordan, Esq., UMWA, 900 15th St., NW, Washington, DC
20005 (Certified Mail)

/slk

