

AUGUST 1986

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AUGUST 1986

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

White County Coal Corporation v. Secretary of Labor, MSHA, Docket No. LAKE 86-58-R, 86-59-R. (Judge Melick, June 30, 1986).

Secretary of Labor on behalf of John Gilbert v. Sandy Fork Mining Co., and, John Gilbert v. Sandy Fork Mining Co., Docket No. KENT 86-76-D, and KENT 86-49-D. (Judge Melick, July 3, 1986).

Greenwich Collieries, Div. of Pennsylvania Mines Corporation v. Secretary of Labor, MSHA, Docket No. PENN 85-188-R, etc. (Judge Maurer, June 14, 1986 partial decision - Petition for Interlocutory Review).

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

Harry L. Wadding v. Tunnelton Mining Co., Docket No. PENN 84-186-D. (Judge Melick, June 18, 1985).



COMMISSION DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 7, 1986

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. WEST 84-26-M  
 :  
COTTER CORPORATION :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,  
Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Administrative Law Judge John A. Carlson concluded that Cotter Corporation ("Cotter") violated 30 C.F.R. § 57.18-25 (1984), a mandatory metal-nonmetal underground safety standard providing:

No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen.

7 FMSHRC 360 (March 1985)(ALJ). 1/ For the following reasons, we reverse.

Cotter's Schwartzwald Mine is an underground uranium mining operation located in Jefferson County, Colorado. On October 6, 1984, Pete Redmond, a Cotter shift boss, assigned three miners to work in stopes 17-3 and 17-4 of the mine. (Stopes are excavated areas from which ore is mined in a series of steps.) The work crew consisted of Romolo Lopez, Paul Herrera and Bobby Varela. Because Lopez's partner had not reported for work that day, Redmond instructed Herrera to "bounce back and forth" between Lopez and Varela. Lopez was assigned to stope 17-3 and Varela was assigned to stope 17-4. The distance between stopes 17-3 and 17-4 was approximately 50-60 feet. In order to move from one stope to another, it was necessary to climb down a ladderway, walk 50-60 feet and then climb up another ladderway.

1/ Following the Secretary of Labor's revision of the metal-nonmetal standards in January 1985, this standard now is found unchanged at 30 C.F.R. § 57.18025 (1985).

Lopez was assigned to drill three boreholes with a jackleg drill. (A jackleg drill, sometimes referred to as a "jackdrill," is an air-operated rock drill that has a single support leg or "jackleg".) The shift had begun at 8:00 a.m. and Lopez reached his work area at around 8:30 a.m. After completing some preparatory work not involving drilling, Lopez was ready to drill at about 8:40 a.m. Herrera checked on Lopez at around 9:00 a.m. and stayed with him for approximately 15 minutes. As Herrera left stope 17-3 to go back to stope 17-4, he met Redmond, the shift boss, at the manway leading into stope 17-3. Redmond also was on his way to check on Lopez. Redmond stayed with Lopez for approximately 15 minutes, during which time Lopez was operating the drill. As Redmond left the work area, he met an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Richard Coon, and one of Cotter's safety and training specialists at the bottom of the manway leading into stope 17-3.

Inspector Coon entered stope 17-3 at approximately 10:00 a.m. and observed Lopez operating the jackleg drill by himself. Coon asked Lopez where his partner was and Lopez informed him that there was no one working with him directly, but that the other two members of the crew, who were in stope 17-4, checked on him periodically. Inspector Coon asked to speak to the other two crew members and sent Lopez to find them. On his way down the ladderway, Lopez met Herrera, who was coming up to stope 17-3 to check on him. Inspector Coon thereafter issued an imminent danger withdrawal order and citation alleging a violation of 30 C.F.R. § 57.18-25. 2/

In his decision, Judge Carlson concluded that Cotter had violated section 57.18-25. Relying on statistical reports concerning accidents involving rock drilling and on testimony from Inspector Coon, he found that an area in which jackleg drilling takes place is one where "hazardous conditions" exist within the meaning of section 57.18-25. 7 FMSHRC at 361-62. The judge applied the reasoning in Old Ben Coal Co., 4 FMSHRC 1800 (October 1982), in which, analyzing a comparable "working alone" standard (30 C.F.R. § 77.1700), the Commission held:

[T]he standard requires [that where miners are working alone where hazardous conditions exist, there must be] communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation.

4 FMSHRC at 1803. The judge found that the contact that Lopez had with other Cotter employees was insufficient to meet the Old Ben test.

7 FMSHRC at 365-68. He ultimately held that Lopez was allowed to work alone in an area where hazardous conditions existed without sufficient contact with other miners. 7 FMSHRC at 368.

2/ The withdrawal order was not at issue in the proceedings before Judge Carlson.

We granted Cotter's petition for review. The American Mining Congress ("AMC") filed an amicus brief and we heard oral argument in this matter. Cotter and the AMC contend that jackleg drilling is not a per se hazardous mining activity. Cotter also asserts that there is no evidence to support the conclusion that Lopez was working in an area where specific hazardous conditions existed. Cotter argues that, even assuming hazardous conditions were present, the contact that Lopez had with other Cotter personnel was sufficient to meet the Commission's Old Ben test.

We conclude that the evidence presented by the Secretary on the present record fails to demonstrate that jackleg drilling is per se hazardous within the meaning of section 57.18-25. We further conclude that even had hazardous conditions existed in connection with Lopez's drilling, the level of contact that he had with others satisfied the requirements of the cited standard as a matter of law.

At the outset, we must dispel misconceptions as to the general meaning of this "working alone" standard. Section 57.18-25 does not prohibit employees from working alone. <sup>3/</sup> Contrary to some of the testimony in this case (Tr. 14-15), this standard also does not contemplate that, merely because an employee is working alone, "hazardous conditions" automatically exist. If that were the intended meaning of the regulation, its reference to "hazardous conditions" would be surplusage. Rather, under section 57.18-25, an employee assigned a task alone must have sufficient contact with others (i.e., must be able to be heard or seen) if, and only if, hazardous conditions within the meaning of the regulation are associated with that task. It is equally clear that the standard does not require constant contact in such circumstances. Cf. Old Ben, supra, 4 FMSHRC at 1803-04. Thus, the real question in cases arising under section 57.18-25 where hazardous conditions are shown to exist is whether the employee's contact with others, which need not be continual, was sufficient to satisfy the protective purposes of the standard.

The judge found that an area in which jackleg drilling occurs is one where "hazardous conditions" exist within the meaning of section 57.18-25. 7 FMSHRC at 261-62. The Secretary's position concerning this point is not clear. In his reply brief counsel for the Secretary disclaimed the view that jackleg drilling is per se hazardous, yet during oral argument seemed to agree with the judge's finding in that regard. Tr. Oral Arg. 35-38, 42. In any event, we conclude that the judge's finding is not supported by substantial evidence.

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<sup>3/</sup> If the Secretary wishes to prohibit certain tasks from being performed alone, he may promulgate standards that expressly accomplish that end. Such a standard is not involved here.

The judge relied primarily on MSHA computer-generated summaries of drilling accidents in underground metal-nonmetal mines during the years 1981-1984. Exhs. P-2 through P-5. These summaries cover a wide range of different drilling operations and it is impossible to determine from the brief descriptions in many of the summaries whether jackleg drilling was specifically involved in a given accident. Moreover, some of the accidents appear to have stemmed from incidents that may not have involved drilling at all. See, e.g., Exh. P-4, Items 1, 3, 4, 5, 6 & 7. On the basis of evidence so lacking in substantive explanation, we cannot endorse the judge's virtual legislative determination that jackleg drilling is per se hazardous within the intentment of section 57.18-25. 4/

Returning to our examination of the standard in light of the facts surrounding Lopez's drilling, we agree in result with the judge that Lopez was working "alone" as that term is used in section 57.18-25. 7 FMSHRC at 364-65. As discussed above, the three-man crew that included Lopez was divided between two worksites, stopes 17-3 and 17-4. Lopez was working in stope 17-3 while the other two members of the crew, Herrera and Varela, were assigned to stope 17-4. The distance between the stopes was approximately 50-60 feet, and travel between the stopes required climbing up one ladderway and down another. Under these circumstances, we conclude that "for practical purposes" Lopez was working alone in the particular work area to which he was assigned. See Old Ben, 4 FMSHRC at 1802. (As previously noted, such an assignment is not forbidden by the standard and does not, by itself, imply any violation of the standard.)

For purposes of this decision only, we will assume that specific hazardous conditions existed in connection with Lopez's work and turn to the crucial issue of whether Lopez had sufficient contact with other miners. In establishing in Old Ben a test under which such contact issues could be resolved, the Commission rejected approaches either

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4/ The judge also relied upon the testimony of the inspector who issued the citation. Without detracting from the inspector's qualifications as a general expert in mine health and safety, we note his statement that he had never operated a jackleg drill (Tr. 60), his candid admission that he was not an expert on drilling (Tr. 61), and his apparent misconceptions as to the general meaning of the cited regulation. Tr. 14-16. We further note that because of its age, the judge expressed some doubt as to the weight to be accorded Exh. P-1, a 1975 report on jackleg drilling prepared by MSHA's predecessor agency, MESA, based on data for the years 1973-74. 7 FMSHRC at 362. The judge assigned weight to the report largely on the basis of the subsequently prepared MSHA computer summaries but, for the reasons discussed above, we cannot conclude that these summaries lend weight to the older MESA report. Finally, some evidence was presented that the practice of Cotter and the industry is to have miners operate jackleg drills in pairs. However, the evidence in this record falls short of establishing that any such industry norm exists or whether any such practice is founded primarily on safety or production considerations.

requiring constant contact under all conditions or allowing any minimum level of contact to satisfy the standard. The standard involved in Old Ben, 30 C.F.R. § 77.1700, provides that no employee shall be required to "work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen." The Commission held that this standard requires:

communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation. As the hazard increases, the required level of communication or contact increases.

4 FMSHRC at 1803. 5/

Thus, the precise issue presented is whether the contact Lopez had with the other Cotter employees was (1) of a regular and dependable nature, and (2) commensurate with the hazard presented. The judge answered the first question in the affirmative and we agree. 7 FMSHRC at 367. Herrera, who had been assigned by the shift boss, Redmond, to assist Lopez, was aware that he was to check on Lopez on a periodic basis. He did check on Lopez around 9:00 a.m., staying with him approximately 15 minutes. He also attempted to check on Lopez a second time shortly after 10:00 a.m.; however, the citation had already been issued. In between these two visits, Redmond also checked on Lopez, staying with him for approximately 15 minutes. Under these circumstances, we affirm the judge's finding that the presence of Herrera and Redmond "was in general accord with a plan to provide periodic contact with Lopez on a regularized basis." 7 FMSHRC at 367.

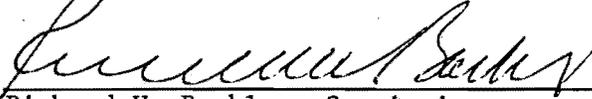
The actual amount of time that other miners spent with Lopez is particularly compelling. The judge found, and the evidence shows, that Lopez was in contact with other miners for a total of approximately 30 of the 80 minutes before being observed by the inspector. 7 FMSHRC at 366-67. This is nearly 40% of the time during which he was engaged in drilling-related activities in stope 17-3. Moreover, the actual drilling consumed only about 30 minutes of the 8:40-10:00 a.m. time period involved. Also during this period Varela twice walked down towards the entrance to stope 17-3 to check on Lopez. From the sound of the drill, Varela could hear that the drilling was proceeding normally. We conclude that, as a matter of law, such a substantial level of contact is sufficient to satisfy the requirements of the standard during the drilling operation at issue. Lopez was an experienced

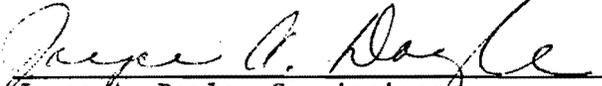
5/ Section 57.18-25 refers to being heard or seen but, unlike section 77.1700, does not refer to "communication" with others. Like the judge (7 FMSHRC at 365-66), we do not view this difference in wording as important in this specific case, although we recognize that different issues may arise under each standard. We use the term "contact" here as a convenient summary term for being heard or seen apart from any notions of interactive "communication."

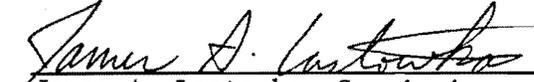
miner (Tr. 108), his drilling assignment appears to have been routine, and the record does not reflect that any unusual mining conditions were present. We emphasize that the facts here differ significantly from the nearly total lack of contact involved in Old Ben. See 4 FMSHRC at 1801-02. Therefore, on the facts involved in the present case, the judge erred in concluding that a violation of the standard occurred.

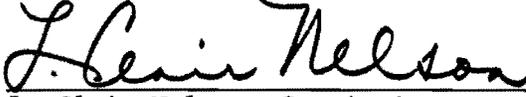
For the foregoing reasons, the decision of the administrative law judge is reversed and the civil penalty assessed by the judge is vacated.

  
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Ford B. Ford, Chairman

  
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Richard V. Backley, Commissioner

  
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Joyce A. Doyle, Commissioner

  
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James A. Lastowka, Commissioner

  
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L. Clair Nelson, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 20, 1986

Harry L. Wadding :  
 :  
 v. : Docket No. PENN 84-186-D  
 :  
 :  
 Tunnelton Mining Co. :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,  
Commissioners

ORDER

BY THE COMMISSION:

On June 16, 1986, Harry L. Wadding filed with the Commission a Motion to Have the Judgment Set Aside in the above matter. The decision of Commission Administrative Law Judge Gary Melick in this proceeding, dismissing Mr. Wadding's discrimination complaint, was issued on June 18, 1985. 7 FMSHRC 896 (June 1985) (ALJ). Wadding failed to file a timely petition for discretionary review of Judge Melick's decision within the 30-day period prescribed by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). 30 U.S.C. § 823(d)(2)(A)(i). See also 29 C.F.R. § 2700.70(a). The Commission did not direct review on its own motion, and by operation of the statute the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). Under these circumstances, we construe Wadding's motion as a request for relief from a final Commission order. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply in absence of applicable Commission rule); Fed. R. Civ. P. 60 (Relief from Judgment or Order). See William A. Haro v. Magma Copper Co., 5 FMSHRC 9-10 (January 1983); Gerald D. Boone v. Rebel Coal Co., 4 FMSHRC 1232, 1233 (July 1982).

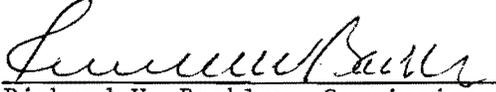
Wadding, who prepared his motion and supporting materials without the assistance of counsel, alleges that Tunnelton Mining Company engaged in fraud, through perjured testimony and other deception, during the hearing below. See Fed. R. Civ. P. 60(b)(3). We have reviewed Wadding's motion and related papers, the voluminous materials that Wadding has submitted in support of his motion, the operator's response, and the judge's decision. The motion is denied for two reasons.

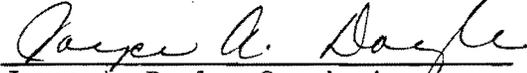
First, the motion is seriously untimely. A Rule 60 motion based on allegations of fraud "shall be made within a reasonable time, and ... not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b) (emphasis added). Although Wadding's motion falls within the one-year period, we do not find the lapse of time between the issuance of the judge's decision and the submission of his motion to be reasonable under the circumstances. Wadding's motion is not based on newly discovered material evidence, but rather on evidence and allegations pertaining to the merits of his discrimination complaint and contested at the hearing below. There is no apparent reason why Wadding could not have filed a timely petition for discretionary review challenging the judge's findings and credibility resolutions with respect to the matters that he now seeks to raise. Rule 60 is not a substitute for appeal, and under settled principles of finality and repose the present motion is untimely. See, e.g., Central Operating Co. v. Utility Wkrs. of America, 491 F.2d 245, 252-53 (4th Cir. 1974); 11 Wright & Miller, Federal Practice and Procedure § 2866 (p. 232) (1973).

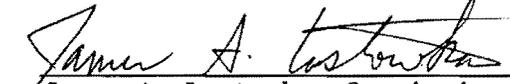
Second, even were the motion to be entertained as timely, it is insufficient on the merits to justify relief. A movant under Rule 60(b)(3) must establish by clear and convincing evidence that the adverse party engaged in fraud or other misconduct, and that the wrongdoing prevented the moving party from fully and fairly presenting his case. E.g., Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978). Wadding has made no such showing but rather, as noted, merely attempts to relitigate evidentiary matters and assertions ruled upon by the judge. We also observe that Wadding was represented by counsel at the hearing below. We find no clear and convincing evidence of fraud, misconduct or illegality on this record.

For the foregoing reasons, the motion is denied.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 27, 1986

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. CENT 84-91-M  
 :  
AMAX CHEMICAL COMPANY :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,  
Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982), Commission Administrative Law Judge Gary Melick concluded that Amax Chemical Company ("Amax") violated 30 C.F.R. § 57.3-22 (1984) by failing to provide adequate support for loose ground (roof). 1/ 7 FMSHRC 447 (March 1985) (ALJ). We granted Amax's petition for discretionary review and heard oral argument. On the bases that follow, we affirm.

1/ This mandatory ground control safety standard, which applies to metal-nonmetal underground mines, provides:

Miners shall examine and test the back, 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.

30 C.F.R. § 57.3-22 (1984) (emphasis added). In 1985, this provision was renumbered as 30 C.F.R. § 57.3022 but its wording was not changed.

Amax operates an underground potash mine and surface preparation mill located in Eddy County, New Mexico. The mine's ore is composed of potash and sodium chloride (salt) and contains seams of clay, mud, and carnallite. 2/ On June 19, 1984, Clyde E. Bays, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of Amax's mine. In the shuttle car unloading area Inspector Bays observed an area of roof 15-feet by 8-feet in which a crack or separation was visible. Eight to ten roof bolts had been installed around the visible crack. Inspector Bays proceeded to sound the roof with his hammer. The inspector testified that when a solid roof is sounded a clear ringing sound is generally produced but that if there is "some separation in the strata" of the immediate roof a dull, "drummy" sound is heard. Tr. 27-28. 3/ When Inspector Bays sounded the area in question, he encountered a drummy, "dull thud" sound. Because of the presence of the visible crack and the results of his sounding test, the inspector believed that the roof was loose and inadequately supported and issued the subject citation alleging a violation of section 57.3-22. The inspector designated the alleged roof control violation as "significant and substantial." 30 U.S.C. § 814(d)(1).

The citation was terminated after Amax installed six additional roof bolts in the cited area. After installation of those bolts, Inspector Bays again tested the roof and found that it no longer sounded drummy.

At the hearing before Judge Melick, Amax's general mine superintendent, Robert Kirby, acknowledged that a drummy sound suggests that there is a separation at some point above the ceiling. He stated, however, that this does not necessarily mean that the material is loose and will fall. Kirby testified that the practice at Amax was to install roof bolts in drummy-sounding areas as insurance against roof falls. Kirby conceded on cross-examination that, despite his past experience in the mine, he is unable to determine with absolute certainty whether a drummy area will fall. S.K. Desai, Amax's production superintendent, testified that drummy-sounding roof is evidence of either a physical separation in the roof strata or loosened adhesion between the strata because of the presence of carnallite or mud seams. Desai testified that when carnallite comes in contact with salt it will produce a drummy sound when tapped. He further stated that the presence of carnallite poses the same hazard as separation in the seams and the material could fall.

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2/ Carnallite is a massive, granular, greasy, milk-white, soluble, hydrous magnesium-potassium chloride. Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms 177 (1968) ("DMMRT").

3/ Drummy is defined as, "[l]oose coal or rock that produces a hollow, loose, open, weak, or dangerous sound when tapped with any hard substance to test condition of strata; said especially of a mine roof." DMMRT 356.

In affirming the citation, the judge seemed to indicate that the critical issue was whether drummy-sounding roof alone is sufficient to support a finding that ground is loose and inadequately supported within the meaning of section 57.3-22. 7 FMSHRC at 448-49. The judge relied in part on the testimony of Desai that "drummy sounding roof is evidence of either a physical separation in the roof strata or loosened adhesion between the strata resulting from the presence of carnallite or mud seams." 7 FMSHRC at 449. The judge determined that even using Amax's "definition of 'loose' as 'not rigidly fastened, or securely attached' or as 'loosely cemented ... material,'" the cited drummy roof was loose and required additional support. 7 FMSHRC at 449. Accordingly, the judge found a violation. He further concluded that the evidence was insufficient to establish a "significant and substantial" violation within the meaning of section 104(d)(1) of the Act, as no effort had been made by the MSHA inspector to bar down the area around the fracture. 7 FMSHRC at 450. <sup>4/</sup> The judge assessed a \$50.00 civil penalty.

We conclude that substantial evidence supports the judge's finding of a violation in this particular instance but, on the present record, we disavow any implication in the judge's decision that the presence of drummy-sounding roof (back) in a metal-nonmetal mine always signifies "loose" ground within the meaning of the standard.

Section 57.3-22 requires in pertinent part: "Loose ground shall be taken down or adequately supported before any other work is done." (Emphasis added). In light of the arguments advanced in this case, we emphasize at the outset that this standard does not provide that "drummy" ground be taken down or adequately supported but rather requires that "loose ground" be taken down or supported. "Loose ground" is not defined in the standard, and we therefore turn to the commonly accepted meanings of the term.

Both the Secretary and Amax note that "loose" is defined as "not rigidly fastened or securely attached." Webster's Third World New International Dictionary (Unabridged) 1335 (1966). The term "loose ground" has a specific meaning within the mining industry and is defined as "[b]roken, fragmented, or loosely cemented bedrock material that tends to slough from sidewalls into a borehole. ... As used by miners, rock that must be barred down to make an underground workplace safe...." DMMRT 658. Accordingly, the term loose ground, as used in this standard, refers generally to material in the roof (back), face, or ribs that is not rigidly fastened or securely attached and thus presents some danger of falling.

While this definition is generally useful, the crux of the matter is how it is determined that ground is, in fact, loose within the meaning of section 57.3-22. As discussed in recognized texts, practical roof testing is not yet a precise science served by a sophisticated technology.

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<sup>4/</sup> The Secretary did not seek review of the judge's finding that the violation was not "significant and substantial."

See, e.g., S.M. Cassidy (ed.), Elements of Practical Coal Mining 76-77 (1973). Certainly, a major means of detecting loose roof is the one employed by the inspector in this matter: the sound-and-vibration method, which is a simple test involving tapping the roof with a hammer. Generally, loose roof will give off a dull, hollow, drummy sound as compared with the solid ring of firm roof. While a drummy sound is generally an indication of loose roof, circumstances may be present in which the sound-and-vibration test is not reliable. See, e.g., Cassidy, id., at 77. We note the concession of Inspector Bays that there are instances when a drummy sound is produced during testing but the roof is not, in fact, loose. Tr. 64-65.

In this regard, it bears emphasis that Amax's mine is a potash mine. Unlike the regulatory scheme that obtains with respect to underground coal mines, approved roof control plans are not required in underground metal-nonmetal mining operations. Rather, "[g]round support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required." (30 C.F.R. §57.3020 (1985) (formerly numbered as 30 C.F.R. § 57.3-20 (1984)). See generally, White Pine Copper Div., Copper Range Co., 5 FMSHRC 825, 835-37 (May 1983). (Of course, the standard involved in the present case also imposes the continuing duty to examine ground conditions in such mines and to take down or adequately support any loose ground.)

In view of the distinctive nature of ground control in metal-nonmetal mines and the uncertainties that may be involved in any particular sound-and-vibration test, and on the basis of the present record, a per se rule equating drumminess with loose ground in underground metal-nonmetal mines cannot be endorsed. Rather, we hold that in evaluating ground conditions and the adequacy of support under this standard, all relevant factors and circumstances must be taken into account. The result of a sounding test is an important factor, but is not necessarily dispositive. The size of the drummy area and other possible explanations for the drumminess must also be considered. Visible fractures, sloughed material, "popping" and "snapping" sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas, are also relevant factors to be considered. Cf. White Pine, supra, 5 FMSHRC at 833-37.

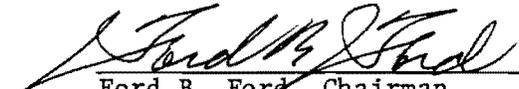
In the present case, we conclude that substantial evidence, which includes but is not limited to the inspector's sounding test, supports the judge's finding that the cited ground was loose. Here, the inspector carefully examined the area of roof in question. His attention was engaged first by the presence of a clearly visible crack surrounded by 8 to 10 previously installed roof bolts. A fracture often signifies loose roof, and Amax's previous bolting efforts indicated some level of concern by the operator itself. As noted, the inspector's sound test produced a drummy sound despite the existing bolting. The testimony of production superintendent Desai regarding ground conditions in Amax's mine lends

corroborative support to the inspector's belief that the cited area was loose. As noted, Desai testified that drummy-sounding roof is evidence of either a physical separation in the roof strata or loosened adhesion between the strata because of the presence of carnallite or mud seams. Desai also testified that carnallite poses the same hazard as does separation in the seams. Although Amax correctly contends that its operating experience must also be considered, we discern no persuasive reason on this record to challenge the inspector's informed judgment or to overturn the judge's finding that the roof was loose. 5/

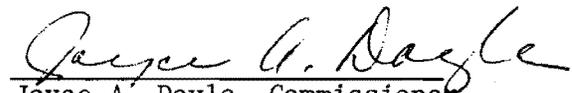
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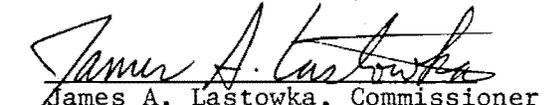
5/ We reject any suggestion that the ground control measures required by the standard apply only when ground is in immediate danger of falling. The standard contains no such qualification. If an operator disagrees with an inspector's determination that the ground is loose, it can attempt to demonstrate the soundness of the ground by barring the area in question. Tr. 68. The operator also can point to the operating history of the mine and any other relevant factors tending to show that the ground is not loose. Here, rather than barring the area in question Amax installed additional roof bolts. However, as the facts of this case show the fact that roof bolts have previously been installed does not guarantee compliance with the standard. The standard requires not just support but adequate support.

On the foregoing bases, the judge's decision is affirmed.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 1 1986**

RUSHTON MINING COMPANY, : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. PENN 86-217-R  
: Citation No. 2692281; 6/23/86  
SECRETARY OF LABOR, : Rushton Mine  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Respondent :

DECISION

Appearances: Timothy M. Biddle, Esq., and Susan E. Chetlin,  
Esq., Crowell & Moring, Washington, D.C., for  
Contestant;  
Robert A. Cohen, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Respondent.

Before: Judge Maurer

This case is before me upon the notice of contest and motion to expedite filed by the Rushton Mining Company (Rushton) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" and Commission Rule 52, 29 C.F.R. § 2700.52, challenging the validity of Citation No. 2692281 issued pursuant to section 104(a) of the Act. A hearing was held in Pittsburgh, Pennsylvania, on July 3, 1986.

The issue in this case is whether a violation of the mandatory standard at 30 C.F.R. § 75.1400(c) existed as alleged in Citation No. 2692281. The citation, as modified, reads as follows:

The devices used to transport persons in the slope [do] not provide assurance they will act quickly and effectively in the event of an emergency in that the Sanford-Day Brakecar is the trailing car when entering the slope and the lead car when exiting the slope. [S]hould uncoupling take place the Sanford-Day Brakecar could not control or stop the other mantrip car used in conjunction with the brakecar.

The cited standard provides as follows:

(c) Cages, platforms, or other devices used to transport persons in shafts and slopes shall be equipped with safety catches or other no less effective devices approved by the Secretary that act quickly and effectively in an emergency. Such catches or devices shall be tested at least once every two months.

Rushton has filed a post-hearing motion to supplement the record to offer into evidence the affidavit of Raymond G. Roeder, Mine Manager of the Rushton Mine (marked as Exhibit C-7) and the affidavit of Gerald P. Scanlon, Resident Mining Engineer of the Rushton Mine (marked as Exhibit C-8). The stated purpose of these two exhibits is to supplement Rushton's evidence concerning the likelihood of a failure in the coupling between the brakecar and mancar, which question is at issue in this case. These exhibits contain technical analyses of the coupling strength between the brakecar and the mancar, as well as the loads the various components are subjected to, which are clearly relevant, at least insofar as they concern the equipment as it existed on the day the citation was written, June 23, 1986. The Secretary objects to these submissions on the grounds that they go beyond the scope of the testimony adduced at the hearing and obviously do not provide an opportunity for cross-examination. Considering the proffered exhibits in their entirety, I agree. However, I am going to admit Exhibits C-7 and C-8 into evidence for the very limited purpose of clarifying certain estimates that were made on the record at the hearing and which are applicable to the equipment as it existed on June 23, 1986. These estimates were subject to cross-examination at the hearing and I see no reason not to admit the more correct data into evidence if the party sponsoring it has taken the trouble to refine it. In each case the estimate which is in the hearing record and the later computation are relatively close and the raw data is available for anyone to verify or differ with the mathematical computations.

#### Findings of Fact

1. Access into and out of the Rushton Mine is via a 16 degree slope approximately 700 feet in length beginning at the surface.
2. In its existing configuration, there is a hoist with a one-inch diameter steel cable rated to hold approximately fifty tons dead weight attached to a brakecar which is in turn coupled to a mancar or a supply car to take men and supplies, respectively, into and out of the mine.

3. A "man-trip" is composed of two cars, the brakecar and a mancar, which can take a maximum of 52 people, 32 in the mancar and 20 in the brakecar, into or out of the mine. It is used at the beginning and end of each shift, of which there are three, to take the full complement of miners into and out of the mine.

4. Normal procedure is for the mancar to be disconnected from the brakecar during the shift and left on a side track on the surface. The brakecar remains attached to the hoist rope and a supply car is coupled to the brakecar to make up a "supply-trip."

5. The brakecar is only detached from the hoist rope when the cable is changed, which is approximately every 4 to 6 months and on those occasions when heavy equipment is moved into or out of the mine.

6. Attaching the hoist rope to either the brakecar as is presently done or the mancar as is proposed by MSHA, requires a relatively complex (compared to the brakecar-mancar attachment) multi-step connection process which takes two men to accomplish because the coupling assembly weighs 177 pounds.

7. The brakecar contains a braking system which can be activated either manually by a person seated in the front seat of the car or automatically if either of two centrifugal switches senses an overspeed condition which would occur when the brakecar reaches a speed of approximately 300 feet per minute. The hoist normally runs at 100 feet per minute when hoisting people in the mantrip. In the event of an overspeed condition, such as would be caused by a hoist rope break, the brakes would automatically stop the brakecar and the coupled mancar.

8. These brakes are tested in the slope at least monthly and when tested together with the mancar, the brakes have performed properly, holding both the brakecar and the mancar.

9. The mancar is connected to the down-slope end of the brakecar by means of a steel drawbar that is 23 inches long, from 6 to 5-1/4 inches wide and 1-1/4 inches thick. There are two three-inch holes in either end of this bar through which a 2-1/2 inch steel pin connects the drawbar to the mancar. A 2-1/4 inch steel pin connects the drawbar to the brakecar by a coupling lever which obviates the need for anyone to go between the cars to connect them.

In addition to the drawbar assembly, two separate one-inch link safety chains independently connect the brakecar and mancar.

10. The steel drawbar assembly existent at the time the citation was written is estimated to be capable of withstanding a load of fifty tons. <sup>1/</sup> The safety chains, whose purpose is to keep the two cars connected in the event the drawbar or one of the pins should fail, can withstand eighteen tons of stress on each chain.

11. The brakecar weighs approximately 13,500 pounds and the mancar weighs 11,280 pounds. Thus, the total weight of the empty mantrip is 24,780 pounds. When fully loaded with 52 men (assuming 200 pounds per man), the mantrip will weigh an additional 10,400 pounds or approximately 35,180 pounds total. When the fully loaded mantrip is on the 16-degree slope track, however, resolution of the force of gravity into two components determines that 72.5% of the total weight acts perpendicular to the surface of the slope and is absorbed by the slope track leaving only 27.5% or approximately 5 tons of dead weight acting parallel to the slope and pulling on the hoist rope that is capable of supporting fifty tons.

12. When fully loaded (at 200 pounds per man) the mancar weighs 17,680 pounds. On the 16 degree slope track, the perpendicular component of gravity again absorbs 72.5% of the total weight. Thus the actual weight drawing on the pin and drawbar coupling assembly between the cars is approximately 5,000 pounds or 2.5 tons of dead weight pulling on a drawbar capable of supporting fifty tons.

13. The mantrip, in its existing configuration, was placed in service in late 1972. Since that time, the instant citation is the only one written by MSHA for the alleged failure of this equipment to meet the cited mandatory standard. In that time there has never been an accident involving the cable attachment or the coupling assembly between the cars. Nor have the brakes ever failed.

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<sup>1/</sup> Because the manufacturer could not define with certainty the steel characteristics of the existing drawbar and pins, Rushton has purchased a new drawbar and new pins. The load capacity of the new drawbar is 405,000 pounds or 202.5 tons. The new 2-1/4 inch pin has a load capacity of 248,125 pounds or 124.06 tons and the new 2-1/2 inch pin a load capacity of 306,875 pounds or 153.43 tons.

DISCUSSION, FURTHER FINDINGS OF FACT, AND CONCLUSIONS OF LAW

MSHA's interest in the Rushton mantrip dates back to sometime in 1984 when at least one inspector became concerned with whether it met the regulations in its present configuration. The matter began to come to a head in April of 1986 when an MSHA inspection party visited the mine to observe hoist operations. At that time they requested that Rushton relocate the brakecar to place it inby the mancar, i.e., switch the cars around. When Rushton balked at doing this, his "superiors" directed Inspector Reichenbach to issue the instant citation, which he did on June 23, 1986.

MSHA's concern over this configuration of the cars in the mantrip stems from the fact that the mancar has no independent braking system or anything else for that matter to stop it from running away down the slope should it become detached from the brakecar. While MSHA agrees that the coupling assembly, together with the two one-inch link safety chains appears to be a secure method of attaching the two cars, MSHA argues that in order to satisfy the cited regulation, the attachment must be permanent, or the mancar must be up-slope from the brakecar. Mr. Gossard, the chief witness for the Secretary at the hearing testified on direct examination at Tr. 59:

Q. Now, the mantrip car and the braking car are attached by means of a link aligner?

A. It's a pin and link arrangement, yes, sir.

Q. Okay. And, safety chains?

A. That's correct, bridle chains.

Q. And, in order for the mantrip car to come unattached from the braking car, would both of those devices have to fail?

A. Both devices, if they were both hooked up, initially, both devices would have to fail to cause a situation.

Q. And, in your opinion could that situation occur?

A. It may. I wouldn't want to bet thirty men's lives on that it wouldn't occur.

The key phrase in the above-quoted testimony is that "[i]t may", and that is the crux of the Secretary's case.

Since the mancar has no independent means of stopping, it is axiomatic that it cannot comply with the regulation unless it is attached to the brakecar. The issue herein, however, is does the regulatory standard require a down-slope mancar to be a permanent fixture on the brakecar in order to have the brakes on the brakecar satisfy the regulatory requirement for the mancar. It is not disputed herein that the brakes on the brakecar would stop both cars fully loaded should there be a hoist rope break or other overspeed condition, as long as the two cars remained attached. In fact, the preferred method of abatement of this citation is to simply reverse the order of the cars, putting the brakecar on the down-slope end. In that configuration per MSHA, the mancar would not require an independent braking system, but rather the brakes on the brakecar would suffice to handle the braking for both cars.

I conclude that the regulation does not require a permanent brakecar-mancar attachment. On the contrary, I conclude that if these two cars are sufficiently tied together, they are in fact operating as a single device used to transport persons in a slope and that device (i.e., the mantrip) is equipped with an adequate automatic braking system capable of stopping both cars in an emergency (such as a hoist rope break).

Therefore, the ultimate issue is the adequacy of the attachment between the mancar and the brakecar since everyone appears to agree that so long as the mancar remains coupled to the brakecar there is no hazard under any conceivable emergency situation. The possibility of brakecar-mancar uncoupling is the hazard the Secretary is concerned with.

The only empirical data or scientific evidence concerning the strength of the coupling assembly between the two cars, including the safety chains, came from the contestant and I find such evidence to be credible. The gist of that evidence was that the coupling assembly can withstand many times the maximum fully loaded weight of the mancar. Likewise, the safety chains in the event that the principal coupling did break would be sufficient, by a safety factor of at least 8 (eight), to keep the mancar attached to the brakecar. This evidence was unrebutted. Also unrebutted was the fact that Rushton has 13 years experience operating this mantrip in that configuration without experiencing any separation of the cars or any other problem associated with the coupling or safety chains.

In his brief, the Secretary states that "[T]here is still a possibility that the connection between the [mancar]

and brakecar could fail due to either excess wear or human error." That may be, but the Secretary has the burden of proving that allegation and he introduced no evidence of either.

The clear preponderance of the relevant evidence in this record does not support the alleged violation. Accordingly, I find that there has been no violation of the cited standard.

ORDER

Citation No. 2692281 is VACATED and the contest is GRANTED.

  
Roy J. Maurer  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 5 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 85-36-M  
Petitioner : A.C. No. 39-00055-05539  
: :  
v. : Homestake Mine  
: :  
HOMESTAKE MINING COMPANY, :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

The parties have reached a settlement of the four violations involved in the total sum of \$8,290.00. MSHA's initial assessment therefor totaled \$11,040.00.

The terms of the settlement are as follows:

<u>Citation</u>	<u>Assessment</u>	<u>Settlement</u>
2097234	\$10,000.00	\$8,000.00 (fatality)
2097564	1,000.00	250.00
2097965	20.00	20.00
2097966	20.00	20.00

This settlement is approved for the following reasons:

With respect to Citation No. 2097234, it appears that the workman who had fallen to his death would have not have fallen had he used a safety belt. While his foreman was aware he was not utilizing the safety belt, nevertheless it appears he had been issued a safety belt by Respondent, and instructed as to the need and use of such. In view thereof, the 20% reduction from the statutory maximum penalty (\$10,000) appears justified and this compromise is approved. For the same reasons the reduced penalty for Citation No. 2097564 (failure to install a handrail) is also approved.

I take notice from prior matters involving this Respondent that, in terms of size, Respondent is a large gold mine operator. It also appears from the settlement motion that Respondent abated the violative conditions and demonstrated "a good faith desire to comply with the health and safety standards in the future.

Citation Nos. 2097965 and 2097966 were not the subject of reduced penalties.

The settlement, viewed in its totality, involves a substantial penalty sum, and the reduction of the penalties for the major violations appear warranted in the circumstances.

ORDER

Respondent, if it has not previously done so, is ordered to pay \$8,290.00 to the Secretary of Labor within 30 days from the date of this decision.

*Michael A. Lasher, Jr.*  
Michael A. Lasher, Jr.  
Administrative Law Judge

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/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 5 1986**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 86-64-M
Petitioner	:	A.C. No. 41-03281-05503
	:	
v.	:	Carter Pit
	:	
D. P. FROST CONSTRUCTION CO.,	:	Docket No. CENT 86-65-M
Respondent	:	A.C. No. 41-02422-05519
	:	
	:	Docket No. CENT 86-66-M
	:	A.C. No. 41-02422-05520
	:	
	:	Yelverton Pit

ORDER APPROVING IN PART AND DENYING IN PART  
THE PROPOSED SETTLEMENT AGREEMENT

Before: Judge Broderick

On July 22 and August 4, 1986, the Secretary filed motions to approve settlement agreements in the above cases presently scheduled for hearing (with Docket No. CENT 86-29-M) on September 16, 1986.

Docket No. CENT 86-64-M contains three alleged violations originally assessed at \$689. The parties propose to settle for \$297. Citation 2661194 charged a violation of 30 C.F.R. § 56.11027 because of a sagging work platform with two of eight welds separated. It was assessed at \$168, and the parties propose to settle for \$126 because the area in question is a metal walkway and if it sagged it would contact a flywheel located below it and the resulting sound would have warned of the deteriorated condition of the platform/walkway. In my judgment, the reduction in the penalty is not supported by the motion. Citation 2261195 charged a violation of 30 C.F.R. § 56.15005 because an employee was standing on a conveyor belt shovelling material and was not wearing a safety belt. No handrails were on the belt. It was originally assessed at \$227 and the parties proposed to settle for \$151 because "Defendant states this was an isolated incident . . . there was little or no negligence involved since the violation could not have been reasonably predicted." I conclude again that the proposed reduction is not justified by the motion. Citation 2661196 charged a violation of

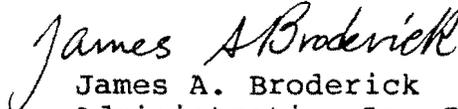
30 C.F.R. § 56.14003 because the guard on the head pulley was not of sufficient length to protect against a pinch point. The violation was assessed at \$294, and the parties propose to settle for \$20 because "Defendant states that this head pulley is 8' above the ground." Does the government accept this statement? If it is impossible to reach the pinch point, why was the citation issued? The motion does not provide justification for the settlement. Therefore the motion is DENIED.

Docket No. CENT 86-65-M contains 20 alleged violations originally assessed at \$1141. The parties propose to settle for \$804. Eleven of the violations were treated as "single penalty assessments" and assessed at \$20 each. The motion states that the parties agree that the proposed penalties for these violations are appropriate. I concur. Citation 2662166 charged a violation of 30 C.F.R. § 56.14008B because of a bench grinder without a tool rest. It was assessed at \$79 and the motion states that the parties agree that the violation occurred and the proposed penalty was appropriate. I concur. Citation 2662178 charged a violation of 30 C.F.R. § 56.12025 because of a loose ground wire and improper fittings in the coarse conveyor box. It was assessed at \$63, and the parties agree that the violation occurred and the proposed penalty was appropriate. I concur. Citation 2661182 charging a violation of 30 C.F.R. § 56.14001 because of an unguarded tail pulley was assessed at \$147. The parties propose to settle for \$110 because the violation "was over-evaluated by the inspector." This statement does not justify the proposed reduction. With respect to citations 2661183 (the violation was originally assessed at \$105, the proposed settlement is for \$78), 2661187 (originally assessed at \$112; proposed settlement \$20), 2662171 (originally assessed at \$79; proposed settlement \$60), 2662175 (originally assessed at \$79; proposed settlement \$20), the motion provides justification for the proposed settlement, and I will approve it. With respect to citations 2662169 (charging a violation of 30 C.F.R. § 56.12030 because of exposed electrical conductors and a leaking fuel valve, originally assessed at \$178; proposed settlement \$134) and citation 2662176 (charging a violation of 30 C.F.R. § 56.11012 because of an open hole in the floor of the generator trailer, originally assessed at \$79; proposed settlement \$20), the motion does not justify the proposed settlement and I will DENY it.

Docket No. CENT 86-66-M contains three citations, two of which charged violations assessed as "single penalty assessments" at \$20 each. The parties propose to settle these violations for the assessed amounts, and I will approve the settlement. Citation 2661186 charges a violation of 30 C.F.R. § 56.11001 because of an opening in a berm at the dump of the crusher feeder and hopper. It was originally assessed at \$112

and the parties propose to settle for \$84. The motion states that the violation was the result of ordinary negligence and "was over-evaluated by the inspector." This statement does not justify the settlement proposal and I will deny it.

The case will be called for hearing in Dallas, Texas commencing September 16, 1986 for all the alleged violations with respect to which I have indicated that I will not approve the proposed settlement agreement.

  
James A. Broderick  
Administrative Law Judge

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slk

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 5 1986

CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDINGS  
Contestant :  
v. : Docket No. WEVA 86-311-R  
: Order No. 2711294; 4/16/86  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Docket No. WEVA 86-312-R  
ADMINISTRATION (MSHA), : Order No. 2711295; 4/16/86  
Respondent :  
: Docket No. WEVA 86-313-R  
: Order No. 2711298; 4/16/86  
:  
: Blacksville No. 1 Mine

## ORDER DISMISSING CONTESTS

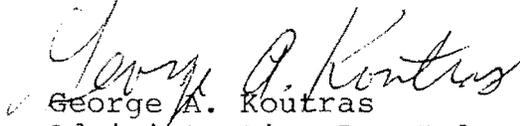
Before: Judge Koutras

The captioned cases were scheduled for hearing with several other dockets heard in Morgantown, West Virginia, during the term July 29 - 31, 1986. When the cases were called, counsel for the parties advised me on the record that they have reached an agreement which will enable me to dispose of the cases without the necessity of hearings.

With regard to Docket No. WEVA 86-311-R, counsel advised me that the contested section 104(d)(2) order should be affirmed as issued and that the contestant no longer desired to contest the order and would file a motion to withdraw its contest.

With regard to Docket Nos. WEVA 86-312-R and WEVA 86-313-R, counsel advised me that MSHA has agreed to modify the contested section 104(d)(2) orders to section 104(a) citations, with "significant and substantial" (S&S) findings. Under the circumstances, contestant moved to withdraw the contests, and the request was granted.

In view of the foregoing agreements by the parties, I see no reason why these contests should not be dismissed. Accordingly, they are dismissed.

  
George A. Koutras  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 6 1986**

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 86-93-D  
ON BEHALF OF : MSHA Case No. BARB CD 85-52  
CHARLES BALL, :  
Complainant : No. 37 Mine  
v. :  
ARCH OF KENTUCKY, INC., :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the Secretary of Labor on behalf of Charles Ball against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The complaint alleges that on or about June 6, 1985, the complainant was discriminated against and suspended by the respondent because he had complained to the respondent about safety violations and refused to continue to work under certain alleged existing hazardous conditions. The matter was scheduled for hearing in Duffield, Virginia, on August 26, 1986.

On August 4, 1986, the parties filed a motion for my approval of a proposed settlement of the case. Counsel for both parties, including the complainant Charles Ball, have executed the proposed settlement, the terms of which are in pertinent part as follows:

1. Respondent agrees to pay to Mr. Charles Ball wages in the amount of \$534.20 representing wages he would have earned had he not been placed on suspension for 3 days without pay. In addition to this, respondent agrees to make appropriate

adjustment in payment of any benefits which may have accrued to Mr. Ball during the period of 3 days during which he was subject to suspension without pay on or about June 6, 1985, including but not exclusively pension and welfare benefits.

2. Respondent agrees to remove any references to any derogatory comments about the suspension of Mr. Ball on or about June 6, 1985, from Mr. Ball's personnel and company records.

3. In light of the difficulties and contingencies necessarily attendant to litigation of the subject case together with the complex factual disputes requiring many witnesses and the minimal nature of the economic loss to the complainant which will be entirely recompensed as a result of this settlement, the parties agree that the proposed settlement in this case is appropriate in consideration of all the circumstances.

4. The Secretary recognizes that satisfaction of the miner's interests is paramount to the imposition of a discrimination civil money penalty. The miner's interests in this case are well served by the settlement in which he recovers lost wages and has all adverse references to the circumstances involved in his suspension removed from his employment record. The Secretary agrees to waive the proposed discrimination civil penalty because such a waiver is necessary to achieve a prompt and favorable disposition of the miner's claim. The Secretary asserts that the respondent has no known history of previous violations of section 105(c) of the Act.

5. In consideration of the willingness of the respondent to resolve the claim quickly by payment of restitution to the complainant and the willingness of the respondent to take what other action is necessary to make the complainant whole, the Secretary agrees to waive imposition of any civil penalty. The sum being advanced by the respondent to the benefit of the miner is such that all purposes which would be served by a civil penalty assessment in this case are satisfied. Since section 105(c) of the Act is uniquely designed to benefit individual miners

as well as the public interests by restitution to those affected by violations of section 105(c) of the Act, the Secretary believes that such purposes are fulfilled in this case by the settlement terms.

6. It is the parties' belief that approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act of 1977.

7. Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

#### Conclusion

After careful review and consideration of the settlement terms and conditions executed by the parties in this proceeding, including Mr. Ball, I conclude and find that it reflects a reasonable resolution of the complaint filed by MSHA on Mr. Ball's behalf. Since it seems clear to me that all parties are in accord with the agreed upon disposition of the complaint, I see no reason why it should not be approved.

#### ORDER

The proposed settlement IS APPROVED. Respondent IS ORDERED AND DIRECTED to fully comply forthwith with the terms of the agreement. Upon full and complete compliance with the terms of the agreement, this matter is dismissed. The scheduled hearing is cancelled.

  
George A. Koutras  
Administrative Law Judge

#### Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 6 1986**

TUNNELTON MINING COMPANY, : CONTEST PROCEEDINGS  
Contestant :  
v. : Docket No. PENN 86-65-R  
: Citation No. 2696550; 12/11/85  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Docket No. PENN 86-66-R  
ADMINISTRATION (MSHA), : Citation No. 2696551; 12/11/85  
Respondent :  
: Docket No. PENN 86-67-R  
: Citation No. 2696552; 12/11/85  
: :  
: Docket No. PENN 86-68-R  
: Citation No. 2696554; 12/12/85  
: :  
: Docket No. PENN 86-69-R  
: Citation No. 2696555; 12/13/85  
: :  
: Docket No. PENN 86-70-R  
: Citation No. 2696556; 12/13/85  
: :  
: Docket No. PENN 86-71-R  
: Citation No. 2696557; 12/13/85  
: :  
: Docket No. PENN 86-108-R  
: Citation No. 2696464; 2/10/86  
: :  
: Docket No. PENN 86-111-R  
: Citation No. 2696473; 2/27/86  
: :  
: Marion Mine

ORDER OF DISMISSAL

Before: Judge Koutras

These proceedings concern notices of contests filed by the Contestant Tunnelton Mining Company pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging the validity of nine section 104(a) non-"S&S"

citations issued by an MSHA inspector at its Marion Mine on December 11, 12, and 13, 1985. The citations charge Tunnelton with nine alleged violations of mandatory safety standard 30 C.F.R. § 75.1101-5(a), because of its purported failure to provide foam generator fire suppression devices capable of discharging foam to certain electrical components used in conjunction with certain belt conveyor drives at different locations in the mine.

Tunnelton filed a motion for summary decision and requested expedited consideration in light of the abatement deadlines imposed by MSHA. The abatement times were extended by MSHA, and extensions were also granted for the purpose of permitting MSHA to file its responses to the request for summary decision. Subsequently, the parties resolved the dispute and MSHA agreed to accept Tunnelton's alternative means of compliance with the mandatory safety standard in issue. At the same time, MSHA vacated the contested citations, and the parties are now in agreement that these contests may be dismissed.

ORDER

In view of the fact that the disputed citations have now been vacated, and with the agreement of the parties, these contests ARE DISMISSED.

  
George A. Koutras  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 6 1986**

GREENWICH COLLIERIES,	:	CONTEST PROCEEDINGS
DIVISION OF PENNSYLVANIA	:	
MINES CORPORATION,	:	Docket No. PENN 86-135-R
Contestant	:	Order No. 2689830-02; 3/31/86
v.	:	
	:	Docket No. PENN 86-136-R
SECRETARY OF LABOR,	:	Order No. 2689831-02; 3/31/86
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 86-137-R
Respondent	:	Order No. 2689832-02; 3/31/86
	:	
	:	Docket No. PENN 86-138-R
	:	Order No. 2689833-02; 3/31/86
	:	
	:	Docket No. PENN 86-139-R
	:	Order No. 2689834-02; 3/31/86
	:	
	:	Docket No. PENN 86-140-R
	:	Order No. 2689835-02; 3/31/86
	:	
	:	Docket No. PENN 86-141-R
	:	Order No. 2689837-01; 3/31/86
	:	
	:	Docket No. PENN 86-142-R
	:	Order No. 2689838-01; 3/31/86
	:	
	:	Docket No. PENN 86-143-R
	:	Order No. 2689839-01; 3/31/86
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	:	Docket No. PENN 86-144-R
	:	Order No. 2689840-02; 3/31/86
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	:	Docket No. PENN 86-145-R
	:	Order No. 2689884-01; 3/31/86
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	:	Docket No. PENN 86-146-R
	:	Order No. 2689885-02; 3/31/86
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	:	Docket No. PENN 86-147-R
	:	Order No. 2689886-02; 3/31/86

: Docket No. PENN 86-148-R  
: Order No. 2689887-02; 3/31/86  
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: Docket No. PENN 86-154-R  
: Order No. 2689895-02; 3/31/86  
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: Docket No. PENN 86-155-R  
: Order No. 2690021-02; 3/31/86  
:  
: Greenwich No. 2 Mine

ORDER OF DISMISSAL

Before: Judge Koutras

These proceedings concern Notices of Contests filed by the contestant pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging the legality of 21 section 104(d)(2) orders issued by MSHA inspectors for alleged violations of the training requirements found in 30 C.F.R. § 48.6. The orders were issued because of the alleged failure by the contestant to train newly employed experienced miners. The alleged violations were originally issued as section 104(a) citations, but were subsequently modified by MSHA to section 104(d)(2) orders after an MSHA "manager's conference."

The contestant raised several defenses to the issuance of the orders, including claims that they were not issued promptly as required by section 104(d)(2), and that they were not issued as a result of any inspection as required by that section. The cases were scheduled for hearing in Indiana, Pennsylvania, during the term August 5-7, 1986, but the hearings were continued after the parties informed me of a possible settlement of the dispute. As a result of further conferences by the parties,

they informed me that MSHA has agreed to modify each of the orders to a non-S&S section 104(a) citation, with a reduction of the gravity findings to "No Lost Workdays." This agreement was confirmed by letter dated August 1, 1986. In view of the modification of the contested orders, the parties agree that these contests may now be dismissed.

ORDER

In view of the foregoing, the Notices of Contest filed by the contestant in these dockets ARE DISMISSED.

  
George A. Koutras  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 6 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 85-169  
Petitioner : A.C. No. 46-02493-03536  
v. : Quinland No. 1 Mine  
QUINLAND COALS, INC., :  
Respondent :

DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, VA, for  
Petitioner;  
William D. Stover, Esq., Quinland Coals, Inc.,  
Beckley, WV, for Respondent

Before: Judge Fauver

The Secretary of Labor brought this action for civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Having considered the hearing evidence and the record as a whole, 1/ I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACTS

1. Respondent's Quinland No. 1 Mine was formerly owned and operated by Westmoreland Coal Company under the name of Ferrell Mine.

1/ Respondent's Objection to Acceptance of Posthearing Evidence is rejected. The preshift reports of Dayton Lane are the best evidence of the reports filed by Lane. They are received as evidence in this proceeding. Respondent's Motion for a Protective Order is moot, because no other preshift reports of Lane were submitted by the Secretary after such motion and before entry of this Decision.

2. In November, 1980, at Westmoreland's mine there was a methane explosion that killed five people. After the explosion and recovery of the bodies, seven seals were installed in the Main East area of the mine to seal off the explosion area from the active workings. The atmosphere in the area behind the seals consists of a high level of methane and a low level of oxygen. This is desirable because an explosive concentration of methane is between five and fifteen percent. That is, if methane is above 15 percent, or below five percent, it is scientifically considered to be nonexplosive. If the oxygen level is kept below sixteen percent, it is also scientifically considered that there will not be enough oxygen for combustion. It is important for the seals to operate effectively to prevent the atmosphere behind them from leaking out into the active workings, since the high methane and low oxygen content would present a serious hazard to persons in the active workings.

3. As a result of the 1980 accident, the mine was designated by MSHA to receive a spot inspection every five days pursuant to § 103(i) of the Act. In a spot inspection, an inspector takes samples of the atmosphere behind the seals, checks the seals to make sure that they are not leaking or being crushed and that the roof conditions are adequate, and tests to be sure the methane is staying behind the seals.

4. On October 11, 1984, Inspector Ernest Thompson made a spot inspection of Respondent's mine under § 103(i). In the Main East area he took samples of the atmosphere from behind the seals. At the No. 7 seal he observed a large roof fall in the entry, which he described as follows in his testimony at the hearing:

There was cribs at the end of the falls. They had all the weight they could stand. They were crushing. There was eight or ten posts broke in the center of the entry. The top was broke all to pieces, and I could hear the gas hissing out of the top coming through the cracks in the top (Tr. 24).

\* \* \* \*

Their top had dropped down. Part of the top dropped down approximately an inch from the remainder. The roof, in my opinion, had already fallen. It wasn't on the mine floor. It was leaning on what supports they had in there and the seal. It was crushing out the seal (Tr. 26).

Inspector Thompson also observed that the broken posts had not been replaced. In his opinion, the condition had been in existence for some time because the broken posts had a lot of dust on them, leading him to believe that they had been broken for at least a month to two months. The roof site was an active working place where preshift examiners and other workers were required to go on a regular basis. Inspector Thompson found an inadequate roof condition, and issued § 104(d)(1) order (No. 2144040) charging a violation of 30 C.F.R. § 75.200, alleging that this was a significant and substantial violation, that negligence was high, and that the violation was reasonably likely to result in a fatal injury.

5. On the same day Inspector Thompson issued § 104(d)(1) Order No. 2144047, alleging a violation of 30 C.F.R. § 75.303, as follows:

The preshift examination made by Dayton Lane on 10/10 and 10/11/84 for No. 7 seal in Main East area was inadequate in that No. 7 seal was leaking excessively (more than 5% methane was detected) and the mine roof was inadequately supported and Mr. Lane certified this area to be clear.

Inspector Thompson testified that he tested the air for methane about six feet from the No. 7 seal and detected methane in the area. He took a bottle sample which, when analyzed, showed a methane level of 5.64 and oxygen level of 19.21 (Ex. G-9). This was an explosive level of methane and a low level of oxygen.

6. The preshift examiner, Dayton Lane, had certified the area to be clear during the examination he conducted between 5:00 and 7:50 a.m. on October 11, 1984 (Ex. G-15).

DISCUSSION WITH FURTHER FINDINGS

The Roof Conditions Cited in Order No.  
2144040

The cited standard, 30 CFR § 75.200, requires, in part, that "the roof and ribs of all active underground roadways, travelways, and working places be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." I credit Inspector Thompson's testimony as to the roof conditions and find that the roof support in the No. 7 seal entry was inadequate to protect persons from roof falls. There were broken timbers that had not been replaced, contrary to Respondent's roof control plan. The roof was breaking or damaging the seal, and methane was leaking into the active working area. This was a dangerous condition.

Respondent was negligent in allowing this violation to exist. Dust on the broken posts indicated that the condition had been in existence for a long time. In addition, Respondent's witness McClure testified that the condition of broken timbers was longstanding, having been in existence when he started work there in August of 1984. Although McClure was of the opinion that the unbroken timbers and cribs provided adequate roof support, he was aware that the roof control plan required that broken timbers be replaced and that there were some broken timbers that had not been replaced as of October 11, 1984.

The Preshift Examination Cited  
in Order No. 2144047

The cited standard, 30 CFR § 75.303, requires that within three hours immediately preceding the beginning of any shift a certified person examine all active workings of the mine, examine seals to determine whether they are functioning properly, and examine active roadways, travelways and approaches to abandoned areas. Dayton Lane testified that he was the certified person responsible for conducting the preshift examination of the Main East seals on October 11, 1984. He conducted a preshift examination between 5:00 and 5:45 a.m. Although he was aware of the broken timbers, roof fall, and cracks in the roof in the area of the No. 7 seal, he did not report these conditions in his preshift report. Instead, he noted "clear" in the preshift mine examiner's book for that day (Ex. G-15, p. 4). It was his opinion that the roof was adequately supported.

I credit the inspector's testimony on this point, and I find that the roof was inadequately supported and that this condition should have been reported in Lane's preshift report. It was a violation of § 75.303 to fail to report this condition.

However, the methane hazard found by Inspector Thompson does not establish a violation of the preshift examination requirements cited in Order No. 2144047. As noted above, the preshift examiner is required to examine seals to determine whether they are functioning properly. This would include examining them to make sure they are not leaking methane. Inspector Thompson heard a hissing sound from the cracks in the roof above the seal. This fact, when combined with the high methane reading obtained from the methane detector and bottle sample, establishes that methane was leaking at the time Inspector Thompson was there. However, methane leakage was not a constant condition, and there is no proof that there was methane leakage at the time of Lane's preshift examination.

Lane testified that he tested for methane at the No. 7 seal and found none, and he did not hear hissing in that area. There is no evidence that conditions were otherwise when he made his inspection.

The Test of a Significant  
and Substantial Violation

In Secretary of Labor v. Consolidation Coal Company, 6 FMSHRC 189 (1984), the Commission held that the Secretary must prove the following elements to establish that a violation of a safety standard is significant and substantial: (1) the violation of a safety standard; (2) a discrete safety hazard, that is, a measure of danger contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.

The roof conditions cited in Order No. 2144040 created the danger of a roof fall. Since a number of people (about seven) regularly went into this area, there was a reasonable likelihood that one of them would be injured if a roof fall occurred. The type of injury which could result, of course, could be a fatality. Also, the roof conditions were allowing methane to escape. This could result in an explosion or, if a person were present when a large quantity of gas was escaping, he or she could be killed as a result of low oxygen.

The practice cited in one part of Order No. 2144047, i.e., failing to conduct an adequate preshift inspection of the roof, created a serious hazard. The purpose of the preshift examination is to detect and report hazardous conditions, so that corrective measures can be taken. The failure to report the dangerous roof condition could have significantly and substantially contributed to a serious mine accident.

However, the second part of Order No. 2144047, the failure to report leaking methane, was not proved by a preponderance of the evidence.

Respondent is a large operator. At the time of the inspection, Quinland Mine No. 1 was producing about 800,000 tons of coal a year and employed about 150 employees.

Considering all of the criteria of section 110(i) of the Act a civil penalty of \$850 is ASSESSED for the roof violation (30 C.F.R. § 75.200).

Considering all of the criteria of section 110(i) of the Act, a civil penalty of \$450 is ASSESSED for the preshift examination violation (30 C.F.R. § 75.303). This penalty is reduced from the Secretary's proposal of \$900 because of the failure to prove the part of the charge concerning failure to report a methane hazard in the preshift report.

#### CONCLUSIONS OF LAW

1. The Commission's administrative law judge has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 75.200 on October 11, 1984, as charged in Order No. 2144040.

3. Respondent violated 30 C.F.R. § 75.303 on October 11, 1984, as charged in that part of Order No. 2144047 pertaining to a roof hazard, but the Secretary did not meet his burden of proving a violation as to the part alleging a failure to report a methane hazard.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above-assessed civil penalties in the total amount of \$1,300 within 30 days of this Decision.



William Fauver  
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 7 1986

EMERY MINING CORPORATION,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 86-126-R
v.	:	Citation No. 2834575; 4/15/86
	:	
SECRETARY OF LABOR,	:	Deer Creek Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA,	:	
(UMWA),	:	
Intervenor	:	

DECISION

Appearances: John A. Macleod, Esq., and Ellen Moran, Esq.,  
Crowell & Moring, Washington, D.C.,  
for Contestant;  
Edward Fitch, Esq., Office of the Solicitor, U.S.  
Department of Labor, Arlington, Virginia,  
for Respondent;  
Mary Lu Jordan, Esq., United Mine Workers of  
America, Washington, D.C.,  
for Intervenor.

Before: Judge Morris

This is a contest proceedings initiated by contestant Emery Mining Corporation pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act). Emery has contested a citation issued under § 104(a) of the Act by the Mine Safety and Health Administration, (MSHA), on April 15, 1986.

The citation alleged Emery violated § 103(f) of the Act in refusing to permit an international representative of the United Mine Workers of America (Intervenor UMWA) to accompany an MSHA inspector on a regular inspection of Emery's Deer Creek mine.

Emery, in its notice of contest, asserts that it did not violate § 103(f) of the Act because it permitted a representative authorized by his miners to accompany the inspector. Further, Emery permitted the UMWA representative (Mr. Rabbitt) to accompany the inspector subject to his compliance with Emery's policy at the mine. Emery's policy requires that a written notice be given at least 24 hours before the UMWA representative visits the mine. Further, the policy requires that the UMWA representative sign a release and waiver form before entering the mine.

(The form itself is entitled "release and waiver." A hazard training check list also appears on the form. The witnesses in this case at various times referred to the form as a "waiver," a "release" and as a "hazard checklist." For the convenience of the reader all such references are to the document received in evidence as Contestant Exhibits 3 and 6). The portion of the instrument particularly relied on by Emery provides as follows:

#### Waiver of Liability

The undersigned, in consideration of being allowed to come upon the Deer Creek mine property (insert name of mine), hereby forever releases, discharges and waives as to Emery Mining Corporation ("Emery"), any and all claims rights of causes of action that the undersigned now has or may hereafter acquire against Emery on account of any damages sustained or injuries suffered, presently or hereafter, while present upon or within the mine property. The undersigned further agrees to hold Emery harmless on account of any and all liability which may attach to Emery on account of damages sustained or injuries suffered by the undersigned while upon or within the mine property. All references to Emery shall include its officers, directors, shareholders, employees and agents.

Emery, in its notice of contest, asserts that Mr. Rabbitt failed to comply with Emery's notice and waiver requirements. When MSHA supported Mr. Rabbitt and issued a citation Emery permitted Mr. Rabbitt to enter the mine without signing the required release form.

In its contest seeking to vacate this citation Emery insists that its requirements are reasonable and prudent; further, Emery asserts it did not violate § 103(f), the statutory grant of walk-around rights.

Section 103(f) of the Act, 30 U.S.C. § 813(f), the statutory provision in issue here, provides as follows:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of

miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

#### The Hearing

A hearing on the merits commenced in Denver, Colorado on May 14, 1986. The evidence was essentially credible and uncontroverted.

#### The Secretary's Evidence

Vern Boston, an MSHA inspector for eight years, was the sole witness called by the Secretary.

Inspector Boston, a person experienced in mining, has been stationed in the Orangeville, Utah MSHA office for the last two years (Tr. 30, 31).

On April 15, 1986 the inspector met Mr. Rabbitt at the mine gate. Boston knew Rabbitt by reputation, but he didn't know if Rabbitt had ever previously been in the Deer Creek mine. Rabbitt introduced himself as the International Representative of the UMWA. The inspector knew Rabbitt had been in Utah for sometime. The two men agreed that Rabbitt would travel with the inspector during the inspection (Tr. 32-35, 52). Dixon Peacock, a representative of Emery's safety department who frequently accompanied the inspector, concurred.

After changing clothes the inspector entered the company safety department. Mr. White, the Deer Creek mine manager <sup>1/</sup>, stated he had a problem with Rabbitt accompanying the inspector. Mr. White recognized Rabbitt as a member of the International Health and Safety Department of the UMWA but he did not believe Rabbitt was a representative of the miners because he was not an employee of the mine. Also the company had its own miner representative on the property. In addition, he had come on the property without giving any advance notice (Tr. 32-38).

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<sup>1/</sup> As mine manager he is in charge of all phases of the mining operation (Tr. 37).

At this point the inspector issued a § 104(a) citation alleging a violation of § 103(f) of the Act. White was given ten minutes to abate the citation. White agreed Rabbitt could accompany the inspector. The citation was then terminated (Tr. 33). White then indicated Rabbitt should sign a waiver form. Inspector Boston checked with his supervisor. He was directed to proceed. White asked for an additional citation but the inspector added the waiver allegation to the prior citation. 2/ Rabbitt did not sign the waiver and Emery abated the citation by permitting Rabbitt to accompany the inspector (Tr. 33-42, 61). Boston believed it was clear to White that if he did not permit Rabbitt to enter the mine without signing the waiver the inspector would issue a closure order. But it was not clear to the inspector at the time whether White knew that the closure order would be a "no-area affected order" 3/ (Tr. 63).

This was a AAA inspection. It was not an inspection under section 103(g) of the Act. Rabbitt was not abrasive and acted in an orderly manner (Tr. 45, 51). Boston had been instructed that international representatives are miners' representatives (Tr. 55).

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2/ After the inspection the inspector decided he was not satisfied with the wording of the original citation, so he voided the original and issued a new citation No. 2834575 (Tr. 34-44, 49, 64-67; Gov't. Ex. 5).

3/ A "no area affected order" arises from the Secretary's interpretative bulletin published in F.R. Vol. 43, No. 80 April 25, 1978 and contained in Government Exhibit 4. It provides in part as follows:

It should be noted that section 104(b) of the Act provides for issuance of withdrawal orders if an inspector finds that a violation described in a citation has not been abated. Pursuant to the requirements of section 104(b), orders under that provision will be issued in cases where there has been a failure to abate violations of section 103(f). However, actual withdrawal of miners will not ordinarily occur in cases arising under section 103(f), because section 104(b) also requires the inspector to determine the extent of the area of the mine affected by the violation. In most cases, the area(s) of the mine affected by an operator's refusal to permit participation or to compensate the representative(s) under section 103(f) would be a matter of conjecture and could not be determined sufficient specificity. However, cases may arise where a particular condition or situation, in the opinion of the inspector, cannot be adequately evaluated in the absence of a representative of miners. In such cases, the area affected by a refusal to permit participation could be determined, and physical withdrawal of miners in the affected area would be directed in the order.

In previous numerous inspections of the Deer Creek mine inspector Boston had frequently been accompanied by representatives of the miners at that mine. This function is usually performed by the same individuals who are employees of Emery (Tr. 53, 54). On this inspection he was accompanied by Mr. Larsen, an employee of Emery (Tr. 67). The inspector had not previously been accompanied by a non-employee asserting that right as a representative of the miners.

In the inspector's opinion Rabbitt did not have any special skills, talent or knowledge of the mine that would cause the inspection to be any different from what it would have been without him (Tr. 55). Further, management representatives did not aid the inspector. But generally speaking, miners representatives and company representatives assist the inspector in performing broader, more comprehensive and more complete inspections (Tr. 68).

Boston agrees that when § 103(f) refers to "his miners" the reference is to miners employed at Deer Creek (Tr. 57). But in Boston's view the context of that section of the Act refers to representatives of miners on the international level. Boston had no knowledge whether Rabbitt's presence had been requested by the Deer Creek miners. Further, he did not take steps to ascertain if Rabbitt had been designated in any Part 40 filing by the Deer Creek miners (Tr. 57, 58).

#### UMWA's Evidence

Thomas J. Rabbitt and Joseph Main testified for the UMWA.

Thomas J. Rabbitt has been employed by the UMWA for seven and one half years as an International Health and Safety Representative (Tr. 71).

He reports to Joseph Main, administrator of the UMWA Health and Safety department (Tr. 117). Rabbitt has held various positions involving matters of safety. He also investigates accidents, disasters, fires and explosions (Tr. 72). Investigations have included the Homer City mine disaster, Greenwich Collieries as well as numerous accidents and fatalities. He has held virtually every job in a coal mine. In addition, he served as a safety committeeman for three years (Tr. 72, 73). His training includes seminars sponsored by MSHA. These are the same courses given the MSHA inspectors (Tr. 74).

On June 12, 1985 his supervisor assigned him to assist in the recovery of bodies and to monitor the investigation of the Wilberg mine disaster of December 19, 1984 (Tr. 74, 87, 118, 119).

Rabbitt now resides in the vicinity of the Wilberg mine. Usually on a daily basis he goes underground and consults with the safety committees. He has accompanied federal inspectors on 103(i), 103(g), 103(a) inspections.<sup>4/</sup> Rabbitt was not restricted at the Emery mine until three or four months ago (Tr. 75, 118). He normally would enter the mine at 8 o'clock, contact the safety director and then go underground (Tr. 75). His underground work included investigations and search for the Wilberg victims (Tr. 75). Three or four months after he arrived in Utah the Cottonwood mine was opened. (The Cottonwood is a part of the now sealed Wilberg mine). In the Cottonwood he has gone on inspections in coal producing sections that were unrelated to the recovery operations<sup>5/</sup> (Tr. 76).

In January 1986 Rabbitt had written Emery's mining management concerning conditions within the sealed area of the Wilberg mine (Tr. 79). A copy of the letter went to various federal and state officials as well as the UMWA office (Tr. 80; UMWA Ex. 2). The letter, directed to Emery mine manager John Boylen, was sent after a meeting with Emery's mine superintendent. The letter complained about the seals at #37 crosscut. Approximately three weeks later the seals were isolated and regulated (Tr. 81).

After the January 20th letter Emery began to restrict Rabbitt's access to the mine. He was stopped at the gate and manager Boylen had to be notified before he could enter. He would then have to go to Boylen or Neldon Sitterud's office (Tr. 79, 107, 108). In the sample room a sign stating "Authorized Persons Only" appeared. Rabbitt accepted Boylen's explanation of the situation and he had no problem with it (Tr. 107, 108).

On March 3, 1986 Rabbitt again wrote to Emery's mine manager at the Wilberg and Cottonwood mines. This letter probably caused the most concern to management. It addressed certain technical matters and its purpose was to verify a conversation so there would be no later misunderstanding (Tr. 85, 109; UMWA Ex. 3). The process and procedure of entering the mine had worked smoothly for a period of time but it became less smooth after March 3.

The totality of the letters in early March dealt with full notice and compliance with MSHA's regulations which had not been fully complied with in the past (Tr. 109).

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<sup>4/</sup> These inspections are described in the transcript at page 146: a 103(i) is a special five day spot inspection required at the Wilberg mine; a 103(g) is a special request inspection by the representatives of the miners or a miner; a 103(a) is a regular quarterly MSHA inspection of the entire mine.

<sup>5/</sup> Related cases filed simultaneously with this decision involve Emery's Wilberg mine.

On March 4 Rabbitt learned of a request by Emery to maintain less than a specific width, length and height in an escapeway <sup>6/</sup> (Tr. 110, 111). No one initially objected to Rabbitt accompanying the team to the area involving the request. A discussion occurred whether this was a right under the UMWA contract or § 103(f). This was the first time § 103(f) was expressly discussed (Tr. 112, 121, 148).

About 45 minutes later manager Boylen refused to let Rabbitt go with the group (Tr. 112, 148). At that point he renewed his 24-hour prior notice requirement. Before March 5 Rabbitt had total access to the mine and no 24-hour prior notice had been required (Tr. 113, 130, 149). Rabbitt was concerned that Emery's policies might adversely affect his ability to represent the UMWA in investigating this disaster in Utah as well as any other disasters in the future (Tr. 114). But he didn't know if the policy was directed at his activities (Tr. 122, 123).

Rabbitt also wrote to manager John Boylen on April 12, 1986 concerning sealed areas of the Wilberg mine (Tr. 105; UMWA Ex. 6). The letter followed a conversation with Emery officials (Tr. 106). About a week before April 15, 1986 Rabbitt learned from Frank Fitzek (chairman of the Deer Creek local union safety committee) that MSHA inspectors were writing numerous citations and orders alleging unwarrantable failures. <sup>7/</sup> The local union wanted Rabbitt's assistance in looking into these matters. The local union felt the matters were serious. It was not a point-blank request. But Rabbitt indicated he'd be there in the next week or two (Tr. 88, 125, 126).

The day before the MSHA inspection of April 15 Rabbitt called Fitzek and advised him he would respond to the request the next day. Prior to the MSHA inspector's arrival at the gate Fitzek appeared and told Rabbitt that he had notified various management personnel including White and Peacock. White was reported to have been disturbed at the arrangement (Tr. 89).

6/ 30 C.F.R. § 75.1704-1 authorizes the MSHA district manager to approve an escapeway not in compliance with the specified criteria (Tr. 110).

7/ The Federal Mine Safety and Health Review Commission has defined the term "unwarrantable failure", as contained in § 104(d)(1) of the Act, to mean that the operator failed to abate the condition or practices constituting a violation and knew or should have known the condition existed or that it failed to abate because of a lack of due diligence or indifference or lack of reasonable care, United States Steel Corporation, 6 FMSHRC 1423, 1436 (1984); Westermoreland Coal Company, 7 FMSHRC 1338, 1342 (1985) citing Zeigler Coal Co., 7 IBMA 280 (1977).

At that point Fitzek joined the day shift and inspector Boston arrived. Rabbitt introduced himself and he proceeded onto the property to obtain clearance. About five minutes later Boston returned with Mark Larsen, a safety committeeman at the mine (Tr. 90). In discussing the matter White, the Deer Creek mine manager, questioned Rabbitt's authority to enter under the contract. <sup>8/</sup> Rabbitt indicated his authority was under § 103(f) of the Act (Tr. 90). After the men discussed the matter Boston issued a citation and he gave White 10 minutes to abate (Tr. 91).

White then relented but told Rabbitt he would have to sign a waiver of liability form. Discussion continued. Boston then called his supervisor. White requested another citation. Boston complied and issued a citation (Tr. 91, 92).

Mark Larsen (representative of the miners from the safety committee), Terry Jordan and Dixon Peacock (for Emery) and Rabbitt accompanied the inspector underground (Tr. 93). While underground one citation was written concerning the company's roof control plan. The inspection team went to a specific area because Emery had requested that MSHA abate certain prior citations and orders in that area (Tr. 93). During this inspection Boston asked for and received opinions from those present (Tr. 94). Rabbitt also pointed out one roof control violation to Boston (Tr. 94).

Rabbitt accompanied Boston until 5 p.m. that day (Tr. 95). At about 2:15 p.m. White handed Rabbitt a letter. The original had been forwarded to the safety committee of the Union. Rabbitt's copy stated that under the wage agreement Emery required 24-hour notice in writing before any international health and safety representative could enter the mine. White also mentioned the waiver requirement (Tr. 96, 97; UMWA Ex. 4).

Rabbitt had never previously knowingly <sup>9/</sup> signed a waiver at the Deer Creek mine or elsewhere. The first time he heard of the waiver was on March 11 or 12. However, he signs a check in/check out form which is common at all mines (Tr. 98, 99, 123, 142; UMWA Ex. 5). Rabbitt next saw the waiver release form on April 15. He declined to sign it because he thought his supervisors should approve such action (Tr. 133, 134; Contestant Ex. 3).

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<sup>8/</sup> The contract referred to by White was received in evidence and the scope of its terms are not an issue in the case. The agreement is entitled "Bituminous Coal Wage Agreement of 1984 between Emery Mining Corp and the International Union United Mine Workers of America". Article III, section (d) of the contract provides the conditions under which the UMWA may have access to the mine (UMWA Ex. 7).

<sup>9/</sup> In fact, on January 10, 1986, March 7, 1986 and April 15, 1986 Rabbitt had signed a "Visitor Release" form that was kept in a clipboard at the Deer Creek mine (Tr. 100, 101, 137, 138, 139, 142; Contestant Ex. 4; UMWA Ex. 5).

Before April 15, specifically in January and February (or early March) 1986, Rabbitt visited the Deer Creek mine (Tr. 102). The company had requested, under § 101(c), 10/ a modification to use a two-entry longwall mining system. Rabbitt was directed by his superior in Washington, D.C. to investigate the matter and report back to him (Tr. 102, 103, 124). On the first occasion he was underground for five hours. He met with Earl White and persons in the safety department. He also met with the superintendent and persons in the engineering department (Tr. 103, 124). On the second occasion he was underground nine hours. He entered various areas of the Deer Creek mine as a result of this investigation (Tr. 103, 124). The Union opposed the petitions for modification that Emery had filed at the Cottonwood as well as the Deer Creek mines (Tr. 103). In October 1985 Rabbitt had done a similar investigation at the Deer Creek mine. On those occasions, before April 15, there was no discussion about Rabbitt's ability to conduct such investigations or to enter the property (Tr. 104).

Rabbitt believes his right of entry under § 103(f) can be conditioned on reasonable restrictions such as eye protection requirements (Tr. 135, 136). He didn't feel the hazard training checklist on Emery's release form was necessary (Tr. 136; Contestant Ex. 3).

Joseph Main testified that he is the administrator of the Department of Occupational Safety and Health for UMWA (Tr. 152). Thirty-five members of his staff of 40 are trained, experienced and educated international health and safety representatives who basically represent the UMWA members on health and safety matters. Their duties include conducting inspections at the mines, assisting plan approvals, processing petitions for modifications filed by the operator, providing assistance to local unions and guidance to the local safety committees (Tr. 154, 155). They also investigate mine disasters, injuries and accidents that occur (Tr. 154). The local union safety committee is comprised of miners employed full time at the mine site. The local members serve in an extra capacity as a representative (Tr. 155). The background educational level of the local mine committee is less than the health and safety representatives on the UMWA staff (Tr. 155).

Main estimates that the UMWA staff is in the field on a daily basis in some type of § 103(f) activity. There are numerous events which trigger a participation with an MSHA inspection. These include investigations of an accident, injury or an explosion, a regular inspection, or an inspection made for some special problem. In addition, participation may occur where the mine operator wishes to modify the law. Many mining plans

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10/ Section 101(c) of the Act authorizes the Secretary to modify the application of any mandatory safety standard upon petition of the operator or the representative of miners subject to certain conditions.

such as ventilation, blasting, roof control, and training require continual review (Tr. 154-156). If it is believed that a violation exists it is normal procedure for the local union committee or the international representatives to have the conditions checked out. From time to time the UMWA representatives travel with the MSHA inspectors to determine the existence or seriousness of the condition (Tr. 156-157).

The historical application of § 103(f) is to provide an ability for the representatives of miners to assist MSHA to carry out its function to protect miners' lives. (Tr. 157). Those representatives of miners who are also employees of the operator, are subject to a certain amount of control by the operator (Tr. 157). Such controls may inhibit the miners from expressing whatever views they may have. However, confidentiality is provided for a complaining witness. In addition, there are extensive provisions <sup>11</sup>/ to protect miners against discrimination. But some miners are reluctant to rely on this protection (Tr. 168, 169).

In addition, the local miners are not trained for analyzing problems (Tr. 158). The members of UMWA's staff are trained experts participating in various functions on a national scale. If the staff was strictly restricted to the provisions of the contract to gain access it would interfere with UMWA's ability to protect the miners (Tr 159).

At times access to the mine is gained through the labor contract and at times under § 103(f) (Tr. 159). The witness described some circumstances of entries under § 103(f)(Tr. 160, 161). In some instances committeemen have been afraid to call in the international so the UMWA has bypassed the contractual provisions and entered under a § 103(f) inspection (Tr. 161). The international uses different types of approaches, such as checking abatement dates, etc., to find out when the MSHA inspector will arrive at a mine site (Tr. 161). Witness Main was not aware that any mine operators required the international representatives to sign waivers to gain access to the mine (Tr. 162). The only occasion known to the witness where an operator questioned a Part 40 filing was evolved in the Consolidation Coal Company case (cited, infra).

Main assigned Rabbitt and several other representatives to the Wilberg mine (Tr. 163). The representatives are charged with coordinating the investigation.

Among other duties the international representatives also inspect Emery's mines based on complaints they receive. In addition, they have helped recover the victims of the Wilberg disaster (Tr. 163).

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<sup>11</sup>/ Section 105(c), the discrimination section of the Mine Safety Act.

The designation of who constitutes the representatives of the miners is basically a decision making process on the part of the miners at the mine in conjunction with the organization representation rights (Tr. 166).

The miners that are employed at the mine have a right to designate their representatives. The UMWA has the inherent right, based on its organizational structure and the fact that they are the bargaining representative of those employees, to have access to the mine under § 103(f). In sum, once the miners at the mine designate the UMWA International they designate it for all provisions of the Act (Tr. 168).

The persons designated in the Part 40 regulations are filed with MSHA and the operator. The filings under Part 40 provide a mechanism for the miners at the mine to designate their representatives (Tr. 170).

#### Emery's Evidence

Earl R. White, James T. Jensen, Dave Lauriski, William Ponceroff and John Barton testified for Emery.

Earl R. White, the mine manager and top management official at the Deer Creek mine, is presently employed by Utah Power and Light. On April 15, 1986 he served in the same capacity for Emery Mining Company (Tr. 171, 172, 196). White is responsible for the mine, its production, its surface facilities and the transportation of the coal (Tr. 173).

On April 15 at 7:45 a.m. Frank Fitzek (chairman of the local safety committee) and Joe Crespini, (a member of the pit committee <sup>12/</sup>), entered his office at the mine and stated that Tom Rabbitt would be visiting the mine that day. This time of the day involved a shift change and White was very busy. White called Terry Jordan, safety engineer at Deer Creek, to inquire as to what was "going on"; in addition, he asked if they had been notified. At that particular time there was a closure order on the third south belt, one of the main belt arteries in the mine (Tr. 174, 175). On inquiry Fitzek denied inviting Rabbitt. White asked what provision of the contract was involved. The miner replied it was under paragraph 1 of Article III, section (d) of the labor contract (Tr. 175, 176). White asked if they had invited Rabbitt underground to look at something in particular. His reply was negative. They wanted Rabbitt to talk to White. White complained about the short notice. The 24-hour notice requirement had been relayed to White, Fitzek and others

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<sup>12/</sup> Pit committee is a group of individuals elected by miners. The committee handles contract issues (Tr. 175, 195).

about two weeks before 13/ (Tr. 176). White agreed to meet with Rabbitt. Fitzek left (Tr. 176, 177, 196).

White then contacted Dixon Peacock, the company's safety engineer. Peacock stated Rabbitt was going to accompany Vern Boston, the MSHA inspector (Tr. 177). White directed Peacock to see if Boston had invited Rabbitt to make the inspection with him (Tr. 177). Peacock reported back that Rabbitt had approached the MSHA inspector (Tr. 178). White objected because Rabbitt was supposed to be talking to him, not going on an inspection with the federal inspector (Tr. 178). Since becoming the mine manager on April 29, 1985 White had not known of any non-employee being admitted as a representative of miners under § 103(f) (Tr. 215, 217).

White, Rabbitt and Larsen met. Rabbitt inquired if there was a problem if he traveled with the inspector. White said he had not been notified and he also asked under what provisions of the contract was the inspection being made. Rabbitt replied he was entering under § 103(f) (Tr. 178-180). White then read the Act while conferring with Jordan, Peacock, Boston, Rabbitt and Larsen. White refused to let Rabbitt accompany the inspector. White stated that it was clear that the walkaround man is the employee authorized by the miners at the mine (Tr. 181, 182). Boston said he would write a citation and he gave White 10 minutes to reconsider. If the company continued its refusal he would then write an order (Tr. 182).

White then called his superior, Dave Lauriska, and discussed the details with him (Tr. 182, 183). Lauriska agreed with White's position. White said they were going to get an order on it. Lauriska said they didn't need another order and he instructed White to abate the citation if Rabbitt signed the waiver (Tr. 183).

The guard in the shack said Rabbitt hadn't signed the waiver form. On rechecking Lauriska said Rabbitt could not go underground without signing the form (Tr. 184). A waiver was brought in and discussed. Boston called his supervisor (Ponceroff). Boston said he would include the waiver matter on the previous citation (Tr. 186; Contestant Ex. 1). White relied on the citation in permitting Rabbitt to go underground. Upon White's demand, Rabbitt returned the unsigned waiver (Tr. 187).

At this point Inspector Boston and the walkaround party went underground (Tr. 187).

At about 2:30 p.m., when the group came out of the mine, there was a further discussion about the walkaround citation as it related to the waiver agreement. White understood another citation would be written (Tr. 188-190).

13/ White had been told by his superior that the 24 hour notice requirement was directed to the international safety representatives. He interpreted that his instruction related to notice under the collective bargaining agreement (Tr. 196).

Witness White identified Emery's notice to Frank Fitzek. It indicated that management (in accordance with Article III(d) of union contract) would require 24-hour notice to the company before the UMWA could enter the mine property (Tr. 190, 191; UMWA Ex. 4). White gave a copy of the notice to Rabbitt the afternoon of April 15 (Tr. 191).

Emery maintained two clearly marked sign-in, sign-out books. One says "Company Visitor Release", the other says "Non-Company Visitor Release" (Tr. 192, 193). No portion of the text was obscured by the punch holes or the bar (Tr. 193). An hour before he testified White had verified the condition of the books with his secretary (Tr. 194).

Prior to April 15, White had never discussed § 103(f) with management or members of the local union (Tr. 197). White construed § 103(f) to relate exclusively to employees of the mine (Tr. 198).

About mid-March White first became aware of the waiver policy. He was advised of it by Dave Lauriski and Stan Rajski (Emery's director of security) (Tr. 199, 213).

Under Emery's policy a visitor is any non-employee or federal or state inspector at the mine (Tr. 199).

On April 15 Rabbitt signed under the old release policy. That form shows a check number. The visitor retains the brass tag with a number stenciled into it (Tr. 201; Contestant Ex. 4). Its purpose is to identify the persons in the mine (Tr. 202). The check-in, check-out procedure is mandated by federal law (Tr. 202).

White did not know on April 15 but he agreed that the definitions in 30 C.F.R. Part 40 [40.1(b)(1)] defines a representative of miners as any other person or organization which represents two or more miners at a coal or other mine (Tr. 206, 207).

White outlined, in detail, his previous mining experience (Tr. 208-210).

The contract provision authorizing access for the international safety and health representatives does not contain any reference to a 24-hour notice (Tr. 211). The only notice provision in the contract provides as follows: "The committee shall give sufficient advance notice of the intended inspection to allow a representative of the employer to accompany the committee" (Tr. 211). The safety and health committee makes regular monthly inspections under the contract (Tr. 212).

The contract further provides: the provisions of this section are in no way intended to impair or to waive any

statutory rights under federal or state laws or regulations which union officials and representatives may have to enter upon mine property or enter the mines (Tr. 212; UMWA Ex. 7).

Prior to April 15, 1986 James T. Jensen, an attorney practicing in Utah, served as general counsel for Savage Industries, the parent of Emery Mining Corporation (Tr. 219).

Witness Jensen prepared and implemented Emery's release and waiver form (Tr. 219). At the time of the Wilberg accident in 1984 Emery carried general liability insurance aggregating \$50,500,000. When these policies expired in June 1985 only \$30,500,000 in insurance coverage could be procured (Tr. 219-220). The base policy was \$500,000, then a first level of excess coverage at \$10 million, then \$5.1 million and then another \$15 million.

In October or November the first \$10 million excess was cancelled. Hence, there was a gap in the coverage (Tr. 221). The company was able to find a \$1 million partial replacement policy (Tr. 221). In December 1985 the \$15.1 was cancelled. Emery's efforts at replacement were unsuccessful (Tr. 221).

The additional insurance coverage was not available at any cost and the \$1.5 million coverage was, in Emery's opinion, inadequate (Tr. 222).

After consultation it was determined that Emery would continue in business and also attempt to limit its exposure (Tr. 222-223).

Emery's employees were covered by workman's compensation and the areas of potential exposure involved claims by non-employees (Tr. 223). It was decided to use a release and waiver approach for those entering the company property. Existing and new forms were reviewed (Tr. 223-225; Contestant Ex. 3, 4). There were no discussions concerning the status of mine rescue terms from other companies, federal inspectors or UMWA representatives in connection with the release and waiver forms (Tr. 224, 225, 230).

The Wilberg disaster generated claims and caused the company to focus on non-employee visitors. But lawsuits against Emery by non-employees were not an extensive part of the litigation and the total of such claims would be within Emery's \$1,500,000 coverage (Tr. 226-228).

The final release form was finally approved in the latter part of February 1986 (Tr. 231). In part, the policy came about after a vendor was killed in a Kaiser mine (Tr. 231).

Dave Lauriski, Emery's director of health and safety, testified that he has 16 years experience in the mining industry (Tr. 237, 238). His responsibilities include overall safety at the company's mines and the coordination of staff activities.

Between late December 1985 and February 1986 Lauriski helped develop the waiver of liability form. The waiver was created due to the inability of Emery to maintain an adequate amount of insurance (Tr. 259). Utah Power and Light (UP&L) subsequently advised the press that it was taking over the operation of the mines because of the insurance question (Tr. 259, 260). The waiver policy has been continued by UP&L but the basic reason for the policy was negated by UP&L's insurance capability (Tr. 260). Lauriski indicated the older form was "very loose" (Tr. 240; Contestant Ex. 4). After receiving forms from various companies Lauriski began to develop Emery's new form based on the company's experience (Tr. 241). At that point he added on the form the hazard recognition or training checklist for all non-employee personnel. The draft form was approved by various individuals who reviewed it (Tr. 242). In early March 1986 a final form emerged (Tr. 243; Contestant Ex. 3, 5). An interoffice memorandum, dated March 21, 1986, identified those who would have to sign the waiver and those exempt from signing it (Tr. 245; Contestant Ex. 5). One of the criteria used to determine whether a person should be required to sign the waiver was the risk involved after the person entered the mine property (Tr. 246).

The first exemption involved state and federal agencies on mine property for reasons relating to coal production and/or inspections or enforcement actions. Even if any of these individuals were injured on mine property Emery believed it would not be held liable for such injuries (Tr. 246, 270, 282). An additional exemption focused on the employees of common carriers such as United Parcel and Uintah Freight. These individuals are exempt because of existing contracts holding Emery harmless in the event of injury to them. Further, Emery didn't think the risk was great enough for them to sign a waiver for each entry to the mine property (Tr. 247, 270, 283). In addition, the common carrier personnel do not go underground (Tr. 247, 283). A further exemption involved Lowdermilk Construction Company. This company does underground and surface work at the mine 100 percent of the time (Tr. 247). In addition, the Lowdermilk contract indemnifies and insures Emery (Tr. 248).

An additional exempted class consists of employees of Utah Power and Light. UP&L owns these particular coal mines and Emery serves as the operator (Tr. 248).

With the exception of the four described classes of persons, the waiver of liability policy applies to all other non-employees visitors to Emery's mines (Tr. 248).

The Emery people who developed the exemptions (Lauriski, Jensen, Cowan and Rajski) did not discuss the status of mine rescue teams entering the property. But such teams are exempt because a Utah state law holds coal operators harmless for miner rescue teams on their property (Tr. 250)

When the waiver policy was issued (Rajski's memorandum, Contestant's Ex. 5) there was no discussion of the status of the international representatives of the UMWA (Tr. 265). But in any event such a person would be required to sign under category 4, that is, as "all other visitors" (Tr. 266; Contestant Ex. 5).

The hazard training checklist incorporated with the release form used at Deer Creek mine is identical to the form used at the other Emery mines (Tr. 268). Lauriski directed the mine managers to implement the program (Tr. 250, 251).

Emery's mines consist of three separate complexes geographically very close but with three different entrances. The mines are independent. They are known as the Deer Creek mine, the Des-Bee-Dove complex and the Cottonwood Wilberg complex. Deer Creek mine overlies the Wilberg mine (Tr. 252, 293). Each of the three mines has its own security system (Tr. 252). A security guard records the times when visitors enter the property. Further, they are responsible for a visitor signing the waiver (Tr. 253).

Tom Rabbitt was the only person known to Lauriski who refused to sign the waiver although for the preceding six or seven months it had been the practice for Rabbitt to come on Emery's property day or night without its knowledge (Tr. 253, 288-289).

Witness Lauriski identified an exhibit which consisted of a large number of waiver and release forms. The forms received in evidence were generated at the Deer Creek mine between March 21, 1986 and April 27, 1986 (Tr. 254, 290; Contestant Ex. 6). All of the forms had been signed by non-employee visitors to the mine.

Up until the events of April 15, 1986 Lauriski was not aware of any person asserting the right to enter an Emery mine under § 103(f) of the Mine Act (Tr. 255, 273, 287).

In cross examination Lauriski agreed that during a § 103(g) inspection in January 1985 four UMWA health and safety representatives accompanied the federal inspectors during an electrical inspection (Tr. 285).

When a representative of the UMWA, who is also an non-employee, enters the mine under a contract right Emery requires that waiver be signed (Tr. 268).

On April 15, 1986 Lauriski instructed White to abate the citation rather than take a closure order. He did not understand at that time whether the closure order would be a "no-area affected order" (Tr. 256, 257). In three subsequent similar events Emery accepted the closure order (Tr. 257). The refusal to abate came about because Lauriski was advised by his counsel that the closure order would not affect any area of the mine (Tr. 257, 279).

As director of health and safety for Emery, Lauriski had a fairly broad knowledge of the presence of MSHA and the UMWA on mine property (Tr. 261). Lauriski has known Tom Rabbitt for eight or nine months (Tr. 261). Lauriski understood Rabbitt was there to work on the Wilberg investigation (Tr. 261, 286). Significant delays have occurred during the lengthy investigation into the Wilberg fire (Tr. 261).

On two occasions during the delays of the Wilberg disaster investigation, Rabbitt went underground in the Deer Creek mine to look at a two entry mining system (Tr. 262). He also entered the Cottonwood mine in late 1985 for the same purpose (Tr. 262). He has also been underground in the Wilberg mine and participated in the recovery operations (Tr. 262). Further, the witness does not dispute the claim that Rabbitt accompanied the inspectors on more routine inspections (Tr. 286).

Witness Lauriski was aware of Rabbitt's letter in January dealing with the seals (Tr. 263). The company thought Rabbitt was reiterating positions already decided on by the company (Tr. 264). The company was irritated over the second letter (Tr. 264).

William Ponceroff, called as an adverse witness, indicated that he is the supervisor at the MSHA field office in Orangeville (Utah)(Tr. 300).

Witness Ponceroff, a person experienced in mining, holds a degree in safety (Tr. 301-303). The field office, with six inspectors, has ten mines under its jurisdiction (Tr. 303).

At the time of this incident MSHA inspector Boston called Ponceroff and advised him that mine management refused to permit a UMWA representative to travel with him unless he signed a waiver (Tr. 305, 306). Ponceroff was not familiar with the waiver form nor did he attempt to learn about it. Abatement time was not discussed.

In a similar incident about March 5, 1986 MSHA inspector Baker had not taken any action (Tr. 306, 307). At a staff meeting a few days later the issue was discussed. It was decided that if any union representative on an international level wanted to accompany the inspector the company was to have equal representation. If the operator refused then a citation was to be issued. If the operator failed to comply then a (b) order would be issued but it would be a no-closure type of order (Tr. 309, 310). The foregoing policy resulted in the instructions given to Boston on April 15, 1986 (Tr. 310).

When Boston called him, Ponceroff was not aware Rabbitt had previously signed any release forms. In any event, that fact would not have affected his judgment (Tr. 310).

Boston later advised his supervisor that he had rewritten the citation. In Ponceroff's opinion, if Emery denied access to a representative of the International UMWA claiming the right to enter under § 103(f), then such a denial constituted a violation of the Act (Tr. 312). A violation would also occur if the company refused access conditioned upon the signing of a release and waiver (Tr. 313, 325). However, if a representative of miners does not act in an orderly fashion or hinders the inspection in any manner, he would be asked to leave and someone else would be selected (Tr. 326).

After April 15 no person employed by Emery indicated that Rabbitt should not be considered as a representative of the miners at the mines (Tr. 326). On the Part 40 filing form the UMWA is one of the organizations named as a representative of the miners (Tr. 326, 327; Contestant Ex. 7).

Witness Ponceroff testified concerning situations where disputes might arise over different individuals claiming to be representative of the miners (Tr. 327, 328).

Ponceroff's duties include enforcement of MSHA's regulations under 30 C.F.R. Part 40. The Part 40 regulations require representatives of miners to make certain designations and file certain documents with the MSHA District Manager (Tr. 314).

On July 30, 1984 a Part 40 document was filed with MSHA's Orangeville office (Tr. 315, 316; Contestant Ex. 7). The document received in evidence was the most recent on file and it identifies for MSHA the representatives at the various mines (Tr. 316, 317). Boston's call of April 15 did not inquire as to the name of the individual who was listed as a representative of the miners at the Deer Creek mine (Tr. 318). The form designates who will represent the miners under various sections of the Act (Tr. 322, 323).

The parties stipulated that UMWA international representative Rabbitt was not listed as a named delegate on any filing under Part 40 associated with any of the Emery mines (Tr. 323).

Ponceroff did not recognize the name of any UMWA international representative on the Part 40 form (Tr. 324). Nor did he look at the filing made by the Deer Creek miners (Tr. 324).

John W. Barton, called as an adverse witness, testified as to his education and experience in mining. He further identified himself as the district manager of District 9 for Coal Mine Health and Safety (Tr. 330, 344, 345). He is responsible for the total administration of the Act. He has 110 employees and four primary divisions including administrative, education and training (a consultant service to industry), an engineering service to industry, and an enforcement division (Tr. 342-343).

Barton's jurisdictional area consists of all states west of the Mississippi except for Minnesota, Iowa and half of Missouri (Tr. 343). His duties include enforcing the Part 40 regulations (Tr. 331). Barton's office has written letters to various mines concerning steps that need be taken to comply with Part 40 (Tr. 331, 332).

When changes are made in Part 40 filings by individual mines MSHA accepts such changes as a matter of course and enters them as part of the official MSHA file (Tr. 332). On occasion mines have been directed to use MSHA forms (Tr. 333). Barton identified the form prepared in his office. It was prepared as a convenience for miners' representatives (Tr. 333, 334).

Barton considers Part 40 to be a procedure available to mine workers. However, in accordance with the Secretary's directions, MSHA is told to take a very broad view of miners participation rights (Tr. 343, 344, 356). Portions of the Part 40 regulations use the term "shall", (Tr. 356) but the witness believed the wording in the preamble instruct him how to interpret the regulation (Tr. 357). In Barton's opinion Inspector Boston acted correctly (Tr. 358).

Section 103(f) is a general provision of the Act that allows a non-employee miners' representative to travel with the representative of the Secretary (Tr. 335, 350). Such an individual is not an employee of the agency but is present to assist the MSHA inspector (Tr. 350). The regulations state that participation by a miners' representative cannot interfere with the active completion of the inspection. The inspector has authority under the law to prevent a representative from further traveling with him (Tr. 351). MSHA encourages the representatives to have some input into the inspections (Tr. 351). Barton only knew of one instance where an intentional representative of the UMWA was denied access to a mine (Tr. 349).

In Barton's understanding, the Act and its regulations seek to encourage miners to participate and to bring forth people who would best serve the purpose on any particular inspection (Tr. 349). This evolves from the fact that miners at an individual mine do not have a great amount of experience and therefore outside representation and wider experience can be of great benefit to the rank and file members (Tr. 349, 350). The miners representatives are chosen at the discretion of the employees at the mine (Tr. 335, 336). Such discretion can be exercised by submitting the form or by submitting a miners' representative when the inspector arrives at the mine (Tr. 336). The preamble in Government Exhibit 3 (the Secretary's bulletin of July 7, 1978) states, in part, that "it should be noted that miners and their representatives do not lose their statutory rights under § 103(f) by their failure to file as a representative of the miners under this part" (Tr. 336).

The Part 40 filing form itself was discussed by the witness (Tr. 337, 338).

The policy that any UMWA international representative has an automatic entry right under § 103(f) emanated from Barton's office when Part 40 was promulgated (Tr. 338, 339). The Part 40 filings are occasionally consulted by MSHA since the regulations govern the identification of representatives of miners for all mines under the Act (Tr. 340). Further, the regulations define the term "representatives of miners" (Tr. 341).

Barton analyzed a procedure to be followed if conflicting claims arise between different persons claiming to be representatives of miners (Tr. 354, 355).

In rebuttal Forrest Adison and Mark Larsen testified for the UMWA.

Forest Adison has been employed at the Wilberg mine for eight years. His local union offices include safety committeeman and mine committeeman (Tr. 360). Adison was present at a meeting with mine management representatives Neldon Sitterud, Jorgenson (shift foreman), John Boylen, and Baker (MSHA) at the Wilberg mine on March 5. At that time Adison requested that international representative Tom Rabbitt accompany him on a regular quarterly safety inspection conducted by Bob Baker. There was a question of a variance involving an escapeways in the Wilberg mine (Tr. 361, 366). Sitterud told Rabbitt he had no right to enter the mine. He and Boylen were not aware of the Act. Baker took no enforcement action when the company refused to allow Rabbitt to walkaround. Adison considered Rabbitt to be his representative protecting him and keeping the membership aware of activities (Tr. 362-367). Since the mine disaster he has asked the international union representatives about matters within their expertise (Tr. 364).

Mark S. Larsen, a safety committeeman for the two years, has been employed at the Deer Creek mine for seven years (Tr. 368, 369, 373).

On April 15, 1986 Larsen was present to accompany the MSHA inspector whom he met at the gate. The two men picked up Rabbitt. Later, in his office, White questioned Rabbitt's authority to enter the mine under the contract. Rabbitt stated his entry was not under the contract but under § 103(f) of the Act (Tr. 369, 370). When he read the Act, White said Rabbitt was not an employee. Rabbitt agreed but stated that he would suffer no lost wages by accompanying the inspector (Tr. 370). Larsen indicated Rabbitt was being paid in part by the local union dues of \$40 per month (Tr. 370, 371).

As the argument continued Larsen told White that he felt Rabbitt was his representative (Tr. 371). The MSHA citation, as previously described, was issued (Tr. 371). At this meeting Rabbitt did not state he could get into the mine at any time (Tr. 372).

Larsen trusts the advice he receives from the international representatives. He further thought such advice was important to his safety (Tr. 372, 373). Larsen felt they need the UMWA's expertise. This is why the local miners pay their dues. Further, the international helps them (Tr. 373, 374).

Witness Rabbitt, recalled by the UMWA, described the sign-in and sign-out books at the mine (Tr. 375, 376).

#### Discussion

This case turns on the interpretation of § 103(f) of the Federal Mine Safety and Health Act of 1977. 14/

The walkaround participation right was first enacted in the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 750, Public Law 91-173. Section 103(h) thereof provided as follows:

(h) At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

The 1977 amendment, enacted in § 103(f), considerably broadened the walkaround participation right and addressed the issue of pay when a representative of miners accompanied the inspection team.

Specifically, such representative of miners "who is also an employee of the operator shall suffer no loss of pay ..." Clearly, then, Congress contemplated that non-employees may be representatives of miners. Commission Judge James A. Broderick ruled to this effect in Consolidation Coal Company v. Secretary of Labor et al, 2 FMSHRC 1403 (1980).

In fulfilling his statutory rulemaking mandate contained in the 1977 Act the Secretary issued his interpretative bulletin, 43 Fed. Reg. 17546, (April 25, 1978) setting for his general interpretation of the scope of § 103(f). The bulletin provides, in part, as follows:

14/ This section has been before the Courts of Appeals in UMWA v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (DC Cir. 1982), cert. denied 74 L. Ed.2d 189 (1982); Magma Copper Company v. Secretary of Labor, 645 F.2d 694 (9th Cir. 1981) cert. denied 50 U.S.L.W. 3296 (1981); Consolidation Coal Co. v. Federal Mine Safety and Health Review Commission, 740 F.2d 271 (3rd Cir. 1984); Monterey Coal Co. v. Federal Mine Safety and Health Review Commission, 743 F.2d 589 (7th Cir. 1984).

The Federal Mine Safety and Health Act of 1977 (Pub. L. 91-173, as amended by Pub. L. 95-164, November 9, 1977) (hereinafter referred to as the Act) is a Federal statute designed to achieve safer and more healthful conditions in the nation's mines. Effective implementation of the Act and achievement of its goals depend in large part upon the active but orderly participation of miners at every level of safety and health activity. Therefore, under the Act, miners and representatives of miners are afforded a wide range of substantive and procedural rights. Section 103(f) provides an opportunity for the miners, through their representatives, to accompany inspectors during the physical inspection of a mine, for the purpose of aiding such inspection, and to participate in pre- or post-inspection conferences held at the mine. As the Senate Committee on Human Resources stated, "If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act." S.Rep. No. 95-181, 95th Cong., 1st Sess., at 35 (1977).

Further, in 1978 the Secretary promulgated 30 C.F.R. Part 40 wherein he defined a representative of miners to mean: "(1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act" and (2) "Representatives authorized by miners", "Miners or their representatives", "authorized miner representative" and other similar terms as they appear in the Act. (§ 40.1).

I agree with Emery that it seems beyond contradiction that there are two principal reasons for the § 103(f) walkaround right. They are to increase the safety awareness of miners and to produce more thorough inspections through the participation of those familiar with the conditions being inspected. However, I do not concur with Emery's view that a colloquy <sup>15/</sup> between Senators Helms and Javits is determinative of the final scope of this section.

Contrary to Emery's views Senate Report No. 95-181 contained in the legislative history is much more persuasive. On the point the report states as follows:

The right of miners and miners' representatives to accompany inspectors

Section 104(e) contains a provision based on that in the Coal Act, requiring that representatives of the operator and miners be permitted to accompany inspectors in order to assist in conducting a full inspection. It is not intended, however, that the absence of such participation vitiate any citations and penalties issued as a result of an inspection.

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<sup>15/</sup> The senators, in discussing § 103(f), referred to "employees" and "miners."

The opportunity to participate in pre- or post-inspection conferences has also been provided. Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties. The Committee also recognizes that in some circumstances, the miners, the operator or the inspector may benefit from the participation of more than one representative of miners in such inspection or conferences, and this section authorizes the inspector to permit additional representatives to participate.

(Emphasis added)

Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session 616, 617 (July 1978).

In short, the Senate in its formal report had no difficulty deciding that the inspector might include additional miners' representatives to participate with him in the inspections.

In support of its position, Emery cites Emery Mining Corporation, 783 F.2d 155, 158 (10th Cir. 1986), Council of Southern Mountains, Inc., v. Federal Mine Safety and Health Review Commission, 751 F.2d 1418 (DC Cir. 1985), and Stouffer Chemical Company v. E.P.A., 647 F.2d 1075 (10th Cir. 1981), among other cases.

The cited Emery case is not controlling. In Emery the court reviewed the scope of a different section of Act, namely § 115. Further, the Court emphasized that none of the Secretary's "otherwise extensive regulations" addressed the issue of the operator's liability to pay newly hired miners for their costs in receiving 32 hours of miner training, 383 F.2d at 159. The instant case involves the Secretary's interpretative bulletin but more particularly he has defined a representative of miners to be a person or organization which represents two or more miners. Mr. Rabbitt is such a person and the UMWA, intervenor, is such an organization.

In Council of Southern Mountains the Council, a non-employee miner representative, sought access to mine property to monitor certain training classes. Specifically, the Court noted that "(i)t was not, in these circumstances, asserting its right under

§ 103(f), 30 U.S.C. § 813(f), to accompany a federal mine inspector investigating mines for compliance with safety training requirements" (fn 21, 751 F.2d at 1421).

In fact, in footnote 18 the Court takes a contrary position to Emery's view that a distinction exists between employee and non-employee representatives. The Court stated that "(t)he Council is a non-employee miners' representative. The Mine Act, however, merely refers to 'representatives' and does not articulate any distinction between the rights of employee and non-employee representatives", 751 F.2d at 1421.

Further, in footnote 31 the Court noted: "Our holding is limited to situations where miners' representatives assert an independent right to enter mine property for monitoring purposes. It has no application to instances where representatives assert a statutory right under Section 103(f) to accompany federal mine inspectors investigating mines for compliance with statutory or regulatory safety training requirements", 751 F.2d at 1418.

In Stauffer Chemical Company the question before the Court involved the right of access by EPA's contractor under the Clean Air Act. Stauffer provides no support for Emery's position that the miner's representatives must be employees of the operator in order to be allowed access to mine property. Under § 103(f) Mr. Rabbitt was not an employee of the Secretary. He was an employee of the miners at the Deer Creek mine.

Emery's search warrant cases, commencing with Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967) and its progeny illustrate a principle of law. But the Supreme Court has already ruled that a search warrant is not required under the Mine Act, Donovan v. Dewey, 101 S. Ct. 2534 (1981). The right of the international representative under § 103(f) is to inspect mine property at the same time and in the presence of the MSHA inspector.

On this record it is uncontroverted that the UMWA International was bound by its collective bargaining agreement to Emery and its miners. Further, Emery knew Rabbitt was a UMWA international representative. Rabbitt and UMWA both meet the Secretary's definitions of a miners' representative. Further, miners Fitzek, Addison and Larsen wanted Rabbitt's expertise and assistance. A portion of the local union dues go to Rabbitt's wages.

The foregoing facts cause me to conclude that Rabbitt may participate in a walkaround inspection with the MSHA inspector as a matter of statutory right.

The second issue focuses on whether Emery may condition the entry of the UMWA international representative upon his signing a release and waiver agreement.

A credibility issue arises here as to whether the release agreement was intended to restrict the activities of Rabbitt at the Emery mines. Rabbitt expressed such an opinion but no collateral evidence supports such a conclusion. Accordingly, I reject such a construction of the evidence. Emery's reasons for requiring various parties to sign the release and waiver are credible and detailed in the summary of the evidence. However, the record indicates that the potential exposure for possible claims from this class of persons was within Emery's initial coverage of \$1,500,000. In addition, the insurance problem was resolved when Utah Power and Light took over the operation of its mines.

In any event, § 103(f) does not condition the international representative's access upon a waiver of that person's right to seek redress for injuries that might be sustained as a result of the operator's negligence. The right to apply to the courts for relief from the perpetration of a wrong is a substantial right. Bracken v. Dahle et al, 68 Utah 486, 251 P. 16 (1926).

In addition, the State of Utah's Constitution in Article I, Section 11 provides as follows:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

The State of Utah has included the above right within the protection of its constitution. It would appear that if Emery's position were sustained, serious 10th Amendment implications could arise.

Emery may well have the right, in dealing with the members of the public, to condition access to its mine. There are certain benefits accruing to sales representatives and similar persons in entering a mine. The signing a waiver in those cases is an appropriate quid pro quo for the expanded business opportunity. But the person seeking access here is acting under a statutory provision. The Commission has noted that access under this provision plays an important role in the overall enforcement scheme of the Act. It is therefore inappropriate for Emery to equate the UMWA international representative's access with that of a sales representative in determining the appropriateness and validity of the operator's release and waiver requirement. Providing access to the former was determined by Congress to be an important means of achieving the goal of improved health and safety in our nation's mines. Providing access to sales representatives and the like does not relate to the achievement of goals that are in the public interest and that matter is left to the operator's discretion.

It is also noted that non-employee Union representatives have been held to have a right of access to an employer's property, in order for the union to properly carry out its duties as collective bargaining representative under the National Labor Relations Act. NLRB v. Holyoke Water Power Co., 778 F.2d 49 (1st Cir. 1985).

For the foregoing reasons, I conclude that Emery may not insist that the UMWA international representative sign a waiver prior to exercising § 103(f) rights.

Emery's policy also requires 24 hour advance notice before entry into a mine will be permitted. However, it is not necessary to explore this aspect of the case because the notice requirement clearly relates to entry under the terms of the wage agreement (UMWA Ex. 4). And the parties agree the terms of the wage contract are not an issue in the case.

The final issue centers on whether Emery may refuse entry to UMWA international representative Rabbitt merely because he was not designated by name in the filings made under 30 C.F.R. Part 40.

This issue was squarely addressed by the Commission in Consolidation Coal Company, 3 FMSHRC 617 (1981).

In the Consol case the inspection was requested by the safety committee of the UMWA local. The UMWA was the collective bargaining representative of the miners. The operator refused entry on the grounds that their names had not been submitted pursuant to 30 C.F.R. Part 40.

In considering the issue the Commission stated as follows:

We have previously recognized the important role section 103(f) plays in the overall enforcement scheme of the Act, both in assisting inspectors in their inspection tasks and in improving the safety awareness of miners. (Case cited) We are not prepared to restrict the rights afforded by that section absent a clear indication in the statutory language or legislative history of an intent to do so, or absent an appropriate limitation imposed by Secretarial regulation.

Neither the statute nor the legislative history indicates that prior identification of miners' representatives is a prerequisite to engaging in the section 103(f) walkaround right, and Part 40 on its face is silent as to the intended effects of a failure to file. The preamble to Part 40 does discuss, however, the intended effect of the filing regulations on walkaround participation. It states:

[I]t should be noted that miners and their representatives do not lose their statutory rights under section 103(f) by their failure to file as a representative of miners under this part.

43 Fed. Reg. 29508 (July 7, 1978). This statement provides a clearly indication of the Secretary's intent in promulgating the filing regulations and is not inconsistent with the language of Part 40.

In footnote 3 of the decision the Commission further observed:

The Part 40 filing requirements were not promulgated merely to identify miners' representatives for section 103(f) purposes. As the preamble to Part 40 noted, the Act "requires the Secretary of Labor to exercise many of his duties under the Act in cooperation with miners' representatives." 43 Fed. Reg. 29508 (July 7, 1978). Filing under Part 40 serves, among other things, to identify such representatives that they will be included in the processes contemplated by the Act. See, e.g., sections 101(e), 103(c), 103(g), 105(a), 105(b), 105(d), 107(b), 107(e), 109(b), 305(b).  
3 FMSHRC at 618, 619

In the Consol case the operator was well aware of who the UMWA safety representatives were and why they were at the mine. Likewise, in the instant case, international representative Rabbitt was well known to Emery's management.

For the foregoing reasons, I conclude that the mere failure of representative Rabbitt to file under 30 C.F.R. Part 40 does not authorize the operator to deny access under § 103(f).

#### Briefs

The parties have filed pre-trial and post-trial briefs which have been most helpful in analyzing the record and defining the issues. However, to the extent they are inconsistent with this decision, they are rejected.

#### Conclusions of Law

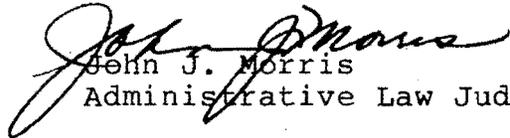
Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Contestant failed to meet its burden of proof to establish that Citation 2834575 should be vacated.
3. The contest of Citation 2834575 should be dismissed.

ORDER

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

The contest filed herein is dismissed.

  
John J. Morris  
Administrative Law Judge

Distribution:

John A. Macleod, Esq., Ellen Moran, Esq., Crowell & Moring, 1100  
Connecticut Avenue, NW, Washington, D.C. 20036 (Certified Mail)

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department  
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Mary Lu Jordan, Esq., United Mine Workers of America, 900  
Fifteenth Street, NW, Washington, D.C. 20005 (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 7 1986

UTAH POWER & LIGHT,	:	CONTEST PROCEEDING
substituted for	:	
EMERY MINING CORPORATION,	:	Docket No. WEST 86-131-R
Contestant	:	Order No. 2833458; 4/22/86
	:	
v.	:	Wilberg Mine
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA,	:	
Intervenor	:	

DECISION

Appearances: John Macleod, Esq., Crowell & Moring, Washington, D.C., for Contestant;  
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent;  
Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., Intervenor.

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 contestant's Wilberg mine on April 22, 1986. On that date a federal mine inspector issued Order No. 2833458 under § 104 of the Act.

A hearing on the merits commenced in Denver, Colorado on May 14, 1986.

Stipulation

The parties agreed that the ruling in WEST 86-126-R would be controlling in this case (Tr. 18-20).

Conclusions of Law

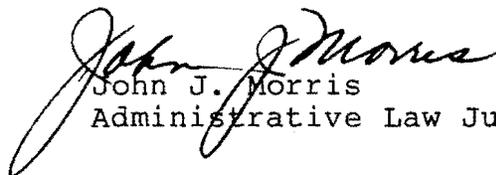
Based on the record and the stipulation of the parties, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. On this date an order was entered dismissing the contest in WEST 85-126-R.
3. The contest of MSHA Order No. 2833458 herein should be dismissed.

ORDER

Based on the stipulation of the parties and the conclusions of law I enter the following order:

The contest of Order No. 2833458 is dismissed.

  
John J. Morris  
Administrative Law Judge

Distribution:

John Macleod, Esq., Crowell & Moring, 1100 Connecticut Avenue, NW, Washington, D.C. 20036 (Certified Mail)

Edward Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mary Lu Jordan, Esq., United Workers of America, 900 Fifteenth Street, NW, Washington, D.C. 20005 (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 7 1986

UTAH POWER & LIGHT, : CONTEST PROCEEDING  
substituted for :  
EMERY MINING CORPORATION, : Docket No. WEST 86-140-R  
Contestant : Order No. 2833456; 4/17/86  
: :  
v. : Wilberg Mine  
: :  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Respondent :  
and :  
UNITED MINE WORKERS OF AMERICA, :  
Intervenor :

DECISION

Appearances: John Macleod, Esq., Crowell & Moring, Washington,  
D.C.,  
for Contestant;  
Edward H. Fitch, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Respondent;  
Mary Lu Jordan, Esq., United Mine Workers of  
America, Washington, D.C.,  
Intervenor.

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 contestant's Wilberg mine on April 17, 1986. On that date a federal mine inspector issued Order No. 2833456 under § 104 of the Act.

A hearing on the merits commenced in Denver, Colorado on May 14, 1986.

Stipulation

The parties agreed that the ruling in WEST 86-126-R would be controlling in this case (Tr. 18-20).

Conclusions of Law

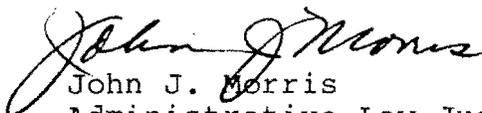
Based on the record and the stipulation of the parties, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. On this date an order was entered dismissing the contest in WEST 85-126-R.
3. The contest of MSHA Order No. 2833456 herein should be dismissed.

ORDER

Based on the stipulation of the parties and the conclusions of law I enter the following order:

The contest of Order No. 2833456 is dismissed.

  
John J. Morris  
Administrative Law Judge

Distribution:

John Macleod, Esq., Crowell & Moring, 1100 Connecticut Avenue, NW, Washington, D.C. 20036 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 7 1986

UTAH POWER & LIGHT,	:	CONTEST PROCEEDING
substituted for	:	
EMERY MINING CORPORATION,	:	Docket No. WEST 86-141-R
Contestant	:	Order No. 2835048; 4/23/86
	:	
v.	:	Cottonwood Mine
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA,	:	
Intervenor	:	

DECISION

Appearances: John Macleod, Esq., Crowell & Moring, Washington, D.C., for Contestant;  
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent;  
Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., Intervenor.

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 contestant's Cottonwood Mine on April 23, 1986. On that date a federal mine inspector issued Order No. 2835048 under § 104 of the Act.

A hearing on the merits commenced in Denver, Colorado on May 14, 1986.

Stipulation

The parties agreed that the ruling in WEST 86-126-R would be controlling in this case (Tr. 18-20).

Conclusions of Law

Based on the record and the stipulation of the parties, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. On this date an order was entered dismissing the contest in WEST 85-126-R.
3. The contest of MSHA Order No. 2835048 herein should be dismissed.

ORDER

Based on the stipulation of the parties and the conclusions of law I enter the following order:

The contest of Order No. 2835048 is dismissed.

  
John J. Morris  
Administrative Law Judge

Distribution:

John Macleod, Esq., Crowell & Moring, 1100 Connecticut Avenue, NW, Washington, D.C. 20036 (Certified Mail)

Edward Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mary Lu Jordan, Esq., United Workers of America, 900 Fifteenth Street, NW, Washington, D.C. 20005 (Certified Mail)

/blc

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 8 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 86-46  
Petitioner : A. C. No. 01-00515-03632  
: :  
v. : Mary Lee No. 1 Mine  
: :  
ALABAMA BY-PRODUCTS CORP., :  
Respondent :

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,  
U.S. Department of Labor, Birmingham, Alabama,  
for Petitioner.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary against Alabama By-Products Corporation. By Notice of Hearing dated July 22, 1986, the hearing was set for August 6, 1986, in Birmingham.

On August 5, 1986, at the conclusion of hearings on cases set for that day, the Solicitor asked to be heard with respect to this case. The Solicitor advised on the record that the citation which was the subject of the penalty assessment had been vacated by MSHA. He moved to dismiss, explaining that the citation had been issued for a violation of the operator's roof control plan but that upon further consideration MSHA had concluded that the plan did not cover the situation in question. Upon inquiry from the bench, the Solicitor gave assurances that both the operator and MSHA were now reviewing the roof control plan in light of this case.

Finally, the Solicitor advised that, if required, operator's counsel would appear the following morning as had been scheduled. However, in light of the Solicitor's representations, further appearances by counsel were excused and additional hearing was deemed unnecessary.

In light of the foregoing, this case is Dismissed.



Paul Merlin  
Chief Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Suite 201, 2015 Second Avenue North, Birmingham, AL 35203 (Certified Mail)

David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., 12th Floor, Watts Building, Birmingham, AL 35203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 8 1986

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 86-19
Petitioner	:	A.C. No. 05-01370-03550
	:	
v.	:	Eagle No. 5 Mine
	:	
EMPIRE ENERGY CORPORATION,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Carlson

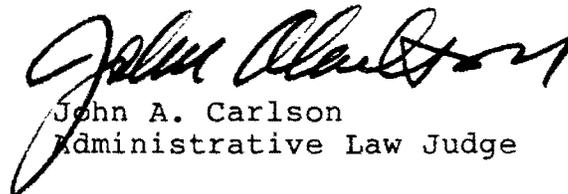
The parties have submitted a joint motion to approve a settlement agreement. Specifically, the Secretary asks leave to amend the penalty proposed for citation 2072087 from \$10,000.00 to \$7,500.00 on grounds that the operator's negligence proved to be less than originally believed. The Secretary also asks leave to amend the proposed penalty for citation 23333640 from \$98.00 to \$78.00 for the same reason. Finally, the Secretary moves that citation 2072088 be vacated on grounds that he lacks sufficient evidence to establish the violation.

The respondent, in turn, agrees to withdraw its notices of contest to citations 2072087 and 2333640 if the settlement is approved.

Based upon the representations of the parties and the contents of the file, I conclude that the settlement agreement is appropriate and should be approved in its entirety.

Accordingly, the settlement agreement is approved and the attendant motions are granted. Citation 2072088 is vacated. Respondent shall pay a total civil penalty of \$7,578.00 for the remaining two citations within forty days of the date of this decision. This proceeding is dismissed.

SO ORDERED.



John A. Carlson  
Administrative Law Judge

Distribution:

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

R. Henry Moore, Esq., Rose, Schmiudt, Chapman, Duff & Hasley, 900 Oliver Building, Pittsburgh, PA 15222-5369 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 12 1986

MARTHA PERANDO, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. YORK 85-12-D  
: MSHA Case No. MORG CD 85-17  
METTIKI COAL CORPORATION, :  
Respondent :

DECISION

Appearances: Martha Perando, Deer Park, Maryland, pro se;  
Timothy Biddle, Esq., and Lisa B. Rovin, Esq.,  
with Susan E. Chetlin, Esq., on the brief,  
Crowell & Moring, Washington, DC, on behalf of  
Respondent.

Before: Judge Melick

This case is before me upon the complaint by Martha Perando under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging discrimination and discharge by the Mettiki Coal Corporation (Mettiki) in violation of section 105(c)(1) of the Act.<sup>1/</sup>

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

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

In order to establish a prima facie violation of section 105(c)(1) Ms. Perando must prove by a preponderance of the evidence that she engaged in an activity protected by that section and that the discriminatory action taken against her was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case. A miner's "work refusal" is protected under section 105(c) of the Act if the miner has a good faith, reasonable belief in the existence of a hazardous condition. Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). Such a "work refusal" may be based upon a perceived hazard arising from the miner's own physical condition or limitations. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1417 (1984).

As noted in the decision denying Mettiki's motion to dismiss (8 FMSHRC 364) Ms. Perando first alleges that she suffered unlawful discrimination when she was given less pay upon her transfer from underground work to surface laboratory work after Mettiki officials were informed that she could no longer work underground because of a health impairment, industrial bronchitis, contracted as a result of her underground work at Mettiki.

In this case I find that Ms. Perando had indeed contracted industrial bronchitis from her exposure to coal dust while working at the Mettiki underground mine beginning October 1, 1980. The award to Ms. Perando of Worker's Compensation based on this claim is not disputed and the medical evidence of record supports this finding. Because of this medical impairment, in May 1984 two physicians (Drs. James Raver and Karl E. Schwalum) told Mettiki officials and Ms. Perando that she could, in effect, no longer work in Mettiki's underground coal mine and that she should be placed in a job in which she would not be exposed to coal dust. More specifically this information was reported in a May 14, 1984, letter from Dr. Raver to Mettiki personnel manager Thomas Gearhart.

In a subsequent letter dated June 25, 1984, and also received by Gearhart, Dr. Raver again concluded that Ms. Perando was suffering from industrial bronchitis. He opined that it was "moderate to severe and [was] disabling in terms of her normal ability to work." Dr. Raver also concluded that it "most likely would remain a chronic condition and [would] not clear or be 'cured'."

As a result of this medical data Mr. Gearhart offered Ms. Perando a job transfer to the surface laboratory in September 1985. Gearhart then knew that she was unable to work underground because of the hazard of coal dust exposure to her health. It is not disputed that Ms. Perando accepted a transfer to the surface laboratory and began working at that job on September 27, 1985, at a reduced rate of pay.

While it is apparent that Ms. Perando never "refused" to work underground in the traditional sense, she knew, based on the medical evidence, that she should no longer work underground because of the hazard presented to her from coal dust exposure and Mettiki knew this too. Thus her medically substantiated inability to work underground was the functional equivalent of a work refusal. Since Ms. Perando had been apprised by her physicians of her medical condition and of the "disabling" consequences of continued underground work, her work refusal was also based upon a good faith and reasonable belief in the hazard.

This refusal was also communicated to the mine operator by the doctors' reports to Personnel Manager, Thomas Gearhart. Moreover in recognition of the health hazard presented to Ms. Perando by underground work and in apparent recognition of its obligation to address this danger, Mettiki offered her the outside job in the laboratory. See Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993 (1983).

By reducing Perando's pay in the laboratory however (apparently from \$520.20 to \$383.20 per week), I find that Mettiki did in fact unlawfully discriminate against her because of her work refusal.<sup>2/</sup> Under the circumstances I find that Ms. Perando is entitled to damages amounting to the pay differential between her underground job and her laboratory job for the period of her employment in the laboratory.

Ms. Perando next claims that she was discriminatorily charged with unexcused absences because she filed an application for Worker's Compensation. She seeks to have all such unexcused absences expunged from her personnel file. The record shows that she had received a copy of the Mettiki employee handbook in August 1984 which included a requirement for telephoning the mine office at least one half hour before the employee's work shift when reporting in sick. Perando knew that she was therefore required to call the office by 6:30 a.m. on the days that she was reporting sick and

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<sup>2/</sup> The fact that Ms. Perando may have failed to formally protest this pay reduction to Mettiki officials before filing her claim of discrimination under the Act would not constitute any consent to, or waiver of, such discrimination.

acknowledges that the requirement applied equally to all employees and not just to her.

Ms. Perando also admits that there were occasions when she failed to call in as required and she does not therefore dispute the corresponding unexcused absences. She is not however specific in her testimony as to which unexcused absences, if any, remain to be challenged. She has no independent recollection of, nor adequate corroboration for, the dates on which she allegedly tried to call in but was unsuccessful and for which she now claims she was charged with unexcused absences. Under the circumstances neither the allegations nor the evidence is sufficient and her complaint in this regard must therefore be dismissed.

Ms. Perando alleges, lastly, that she was unlawfully discharged on March 27, 1985, while off work under a doctor's care. As explained at the hearings on Mettiki's Motion to Dismiss she is here claiming that she was discharged because she had a serious medical condition caused by Mettiki (industrial bronchitis) and that she could not and would not work because of the hazardous health environment presented in the laboratory where she had been transferred from her underground job. This complaint was also construed as a work refusal in the face of conditions alleged to be hazardous to her health.

As previously indicated Ms. Perando did indeed contract industrial bronchitis from her underground coal mine employment and she was thereafter transferred to the surface performing work in the Mettiki testing laboratory. She claims that the laboratory environment, even after the installation of a special ventilation hood, was such that her symptoms of industrial bronchitis returned with "a lot of pain" and "heavy pressure" on her chest accompanied by difficulty in breathing. Between January 21, 1985 and the date of her termination on March 27, 1985, she admitted being absent from 2 to 5 days a week. Shortly before her termination Ms. Perando told Personnel Manager Gearhart that she did not know when she would be able to return to work and that she was not then able to work at all. According to Gearhart she was thereafter discharged because she had not reported to work for a significant period of time.

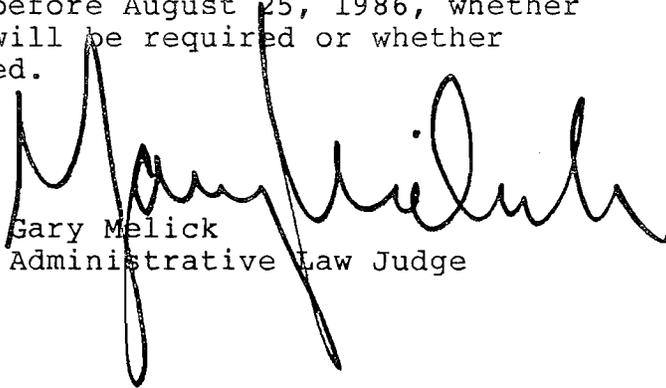
The record shows that coal samples are tested in the Mettiki laboratory as a quality control measure. According to lab supervisor Anne Colaw the moisture, sulfur and ash content of the coal is measured in the lab and its "BTU's and volatility" are determined. According to Colaw the lab was kept clean and, when testing was performed, only about 1 gram of coal was tested at any one time and that was tested in an enclosed area separated from the area where Ms. Perando was assigned before her discharge.

The results of dust sampling performed in the laboratory are not disputed. On September 25, 1984, only .4 milligram of respirable dust per cubic meter was found. Subsequent tests performed during regular lab activities on October 1, 1984, on samples taken from various parts of the laboratory showed respirable dust ranging from .1 to .3 milligram per cubic meter. Samples taken from the laboratory on March 11, 1985, showed respirable dust ranging from .1 to .2 milligram per cubic meter with .4 milligram per cubic meter in the area of the hood. It is not disputed that .1 milligram of respirable dust per cubic meter is equivalent to the amount of dust found in the "ambient air" of a normal environment. Indeed Ms. Perando concedes that she knew the respirable dust levels in the lab were within the "normal range."

Considering that Ms. Perando knew that there were no abnormal dust levels in the lab and considering that she had the same alleged symptoms of her illness whether or not she was working in the lab I cannot conclude that her belief that the lab environment was hazardous was either reasonable or held in good faith. I note moreover that she continued to have the same symptoms even a year after leaving the laboratory.

Her lack of a good faith belief that the lab presented a hazardous health environment is also demonstrated by the fact that she wore her respirator only part of the time she was working. In addition her practices became such that co-workers could determine in advance when she would not be working a full day by the fact that she would appear on those days without her lunch. It may reasonably be inferred from this practice that she may have been malingering. Under the circumstances I find that Ms. Perando's alleged inability to work in the lab was not based on either a reasonable or a good faith belief in a hazardous condition. Her complaint in this regard of discrimination under section 105(c)(1) of the Act is accordingly denied.

The complaint herein is thus granted in part and denied in part and further proceedings may be necessary to establish corresponding damages, costs and interest. The parties are accordingly directed to confer regarding these matters and to advise the undersigned on or before August 25, 1986, whether further evidentiary hearings will be required or whether those matters can be stipulated.



Gary Melick  
Administrative Law Judge

Distribution:

Martha Perando, P.O. Box 3012, Deer Park, MD 21550 (Certified Mial)

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

rbg

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 13 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 86-67  
Petitioner : A.C. No. 01-01247-03701  
: :  
v. : No. 4 Mine  
: :  
JIM WALTER RESOURCES, INC., :  
Respondent :

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,  
U.S. Department of Labor, Birmingham, Alabama,  
for Petitioner; R. Stanley Morrow, Esq., and  
Harold D. Rice, Esq., Birmingham, Alabama, for  
Respondent.

Before: Judge Merlin

This case is a petition for the assessment of three civil  
penalties filed by the Secretary of Labor against Jim Walter  
Resources, Inc.

At the hearing the Solicitor advised that the parties  
proposed to settle the violations for the full assessed amounts  
as follows: Citation 2605565 was issued for a violation of 30  
C.F.R. § 75.517 because the power cable from the scoop charger to  
batteries that were being charged on the 010 section, was not  
insulated adequately and fully protected. The gravity of the  
violation was serious because a miner contacting the bare,  
energized conductors could receive a serious electrical shock.  
In addition, the violation resulted from the operator's  
negligence. The proposed settlement was for the original amount  
of \$800.

Citation No. 2605566 was issued for a violation of 30 C.F.R.  
§ 75.400 because combustible materials were permitted to  
accumulate at a scoop charging station. The gravity of the  
violation was serious, because oil, coal and oil-soaked coal were  
permitted to accumulate on the footwall. Power cables were  
coiled on top of the combustible materials which could have  
provided an ignition source for the accumulation. A fire could  
cause a miner in the area to be exposed to smoke inhalation and

other fire hazards. The operator was plainly negligent in allowing this condition to occur. The proposed settlement was for the original amount of \$800.

Citation No. 2605567 was issued for a violation of 30 C.F.R. § 75.512 because the scoop charger on the 010 section was not maintained in a safe operating condition. The violation was serious, because the charger had been hit, causing the control panels on each side to be loose, exposing the bare electrical components inside the charger. Furthermore, the doors were damaged and would not close. A miner contacting the bare components could receive a serious electrical shock. The operator was negligent because the violation was obvious. The proposed settlement was for \$800.

Information was provided regarding the remaining statutory criteria set forth in section 110(i).

As I advised operator's counsel at the hearing, the occurrence of three such serious violations on the same day in the same mine is a cause for very serious concern. Greater care must be taken. If a case such as this involving this operator comes before me in the future I will not approve settlements of even these substantial amounts because it will then be clear that even greater deterrence in the form of higher penalties is needed.

Because the recommended settlements are for substantial amounts which appear adequately to effectuate the statutory purposes in this instance, said settlements are APPROVED and the operator is ORDERED TO PAY \$2400 within 30 days from the date of this decision.

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

Paul Merlin  
Chief Administrative Law Judge

Distribution:

William Lawson, Esq., U.S. Department of Labor, Office of the  
Solicitor, Suite 201, 2015 Second Avenue North, Birmingham, AL  
35203 (Certified Mail)

Harold D. Rice, Esq., R. Stanley Morrow, Esq., Jim Walter  
Resources, Inc., P.O. Box C-79, Birmingham, AL 35283  
(Certified Mail)

H. Gerald Reynolds, Esq., Jim Walter Corp., 1500 Dale Mabry Hwy.,  
Tampa, FL 33607 (Certified Mail)

slk

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 14 1986**

DAN L. THOMPSON, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEST 85-77-DM  
: MSHA Case No. MD 82-27  
GILBERT INDUSTRIAL, :  
Respondent : Cyprus Thompson Creek Project

DECISION DENYING JOINDER

On July 22, 1986, the Complainant filed with this Commission a request for joinder of the Secretary of Labor as a "party-respondent" in this case of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, the "Act," and as grounds therefore stated as follows:

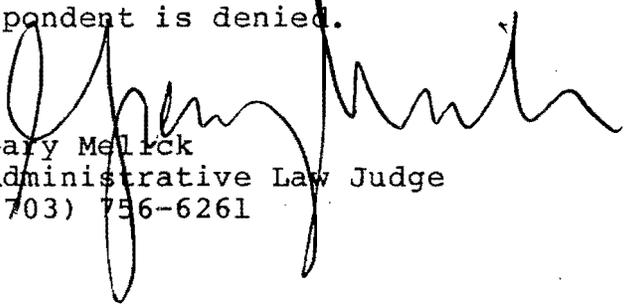
This matter has been allowed to languish, wrongly, for approximately five (5) years. It is only with the intervention of the Commission that MSHA has even nominally been willing to address their statutory responsibility [presumably under section 105(c)(3) of the Act] to resolve this matter. At this juncture, the Complainant simply does not know what it is that the Secretary has done to fairly investigate and/or assess the underlying Complaint herein. Without the inclusion of the Secretary, so as to be subject to service of process, can the Complainant fully present the facts of this matter to the Commission.

FED. R. CIV. P. 19(a) applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. § 2700.1(b), provides in relevant part as follows:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief can not be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition if the action in his absence may (i) as a practical matter impare or impede his ability to protect an interest or (ii) leave any of the persons already a party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of

his claimed interest. If he has not been so joined the court shall that he be made a party . . . .

The Secretary opposes joinder arguing that there are no circumstances under which the exercise of his discretionary function under section 105(c)(3) can constitute discrimination under section 105(c).<sup>1/</sup> Roland v. Secretary of Labor, 7 FMSHRC 630 (1985), aff'd Roland v. Federal Mine Safety and Health Review Commission et al., No. 85-1828 (10th Cir. July 14, 1986). Under the present status of law the Secretary's position must prevail. Under these decisions review of the Secretary's exercise of this function is not permitted regardless of how wrong, negligent or improperly motivated it might be. Accordingly this Commission could not in any event provide the relief sought by the Complainant against the Secretary. There is therefore no basis for the joinder of the Secretary in this proceeding. Under the circumstances the Motion for Joinder of the Secretary as a party-respondent is denied.



Gary Mellick  
Administrative Law Judge  
(703) 756-6261

Distribution:

W. Craig James, Esq., Skinner, Fawcett & Mauk, 515 South Sixth Street, P.O. Box 700, Boise, Idaho 83701 (Certified Mail)

Ronald F. Sysak, Esq., Prince, Yeates & Geldzahler, Third Floor Mony Plaza, 424 East Fifth South, Salt Lake City, Utah 84111 (Certified Mail)

Frederick Moncrief, Esq., U.S. Department of Labor, Office of the Solicitor, Suite 400, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

<sup>1/</sup> Section 105(c)(3) of the Act provides in part as follows:  
"Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

rbg

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 14 1986**

SOUTHERN OHIO COAL COMPANY, : CONTEST PROCEEDINGS  
Contestant :  
: Docket No. WEVA 86-46-R  
: Citation No. 2703324; 10-16-85  
:  
: Docket No. WEVA 86-98-R  
: Citation No. 2703528; 1-13-86  
:  
v. : Docket No. WEVA 86-104-R  
: Citation No. 2704403; 1-22-86  
:  
: Docket No. WEVA 86-105-R  
SECRETARY OF LABOR, : Citation No. 2704404; 1-22-86  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 86-106-R  
Respondent : Citation No. 2704405; 1-22-86  
:  
: Docket No. WEVA 86-107-R  
: Citation No. 2704406; 1-22-86  
:  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 86-51  
Petitioner : A.C. No. 46-03805-03688  
:  
: Docket No. WEVA 86-133  
: A.C. No. 46-03805-03707  
:  
: Docket No. WEVA 86-134  
v. : A.C. No. 46-03805-03708  
:  
: Docket No. WEVA 86-199  
: A.C. No. 46-03805-03712  
SOUTHERN OHIO COAL COMPANY, :  
Respondent : Martinka No. 1 Mine

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia, PA, for  
Respondent/Petitioner;  
David A. Laing, Esq., and Mark S. Stemm, Esq.,  
Southern Ohio Coal Company, Columbus, OH, for  
Contestant/Respondent

Before: Judge Fauver

These consolidated proceedings are contests filed by Southern Ohio Coal Company, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., to review six citations issued by the Secretary of Labor, and petitions by the Secretary, under section 110(i) of the Act, for civil penalties for the violations alleged in the six citations.

The basic issue is whether water pumps specified in the citations are "permanent pumps" within the meaning of 30 C.F.R. § 75.1105. If they are permanent pumps, the safety standard requires that they be contained in fireproof housing and that they be air-vented into a return entry of the mine. It is acknowledged that they were not so housed and vented at the time the citations were issued. Other issues raised are:

1. Whether the reference to "permanent pumps" in 30 C.F.R. § 75.1105 is unconstitutionally vague.
2. Whether MSHA's actions with respect to the interpretation and enforcement of 30 C.F.R. § 75.1105 have denied SOCCO due process.
3. Whether the water pump violations, if any, were "significant and substantial" within the meaning of § 104(d) of the Act.

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

#### FINDINGS OF FACT

1. Citation No. 2703324 was issued October 16, 1985, when MSHA Inspector John Paul Phillips observed that the air current used to ventilate a booster pump was not vented directly into the return. The pump was a 20 Horsepower T & T fresh water pump located at the No. 9 stopping inby. The pump was reasonably expected to be in this location at least one year.

2. Citation No. 2703528 was issued January 13, 1986, when Inspector Phillips observed that a gathering pump was not housed in a fireproof enclosure or area with the air current coursed directly into the return. The pump was a 10 Horsepower T & T 250 volt direct current pump located at No. 9 stopping in the track heading of the No. 13 left section. The pump had been in this location about a year and a half.

3. Citation No. 2704403 was issued January 22, 1986, when he observed that a booster pump was not housed in a fireproof structure and the air current used to ventilate the pump was not coursed directly into the return. The pump was a 20 Horsepower T & T fresh water pump located at No. 6 stopping. The pump had been in this location at least one year.

4. Citation No. 2704404 was issued January 22, 1986, when he observed that a gathering pump was not housed in a fireproof structure with the air current coursed directly into the return. The pump was a 10 Horsepower T & T direct current pump located at No. 50 Block, 1 East Track. The pump had been in this location for about three to five years.

5. Citation No. 2704405 was issued January 22, 1986, when he observed a gathering pump not installed in a fireproof area with the air current vented directly into the return. The pump was a 10 Horsepower T & T direct current pump located at the No. 9 stopping in the No. 3 Butt Section. The pump had been in this location at least one year.

6. Citation No. 2704406 was issued January 22, 1986, when he observed a gathering pump not housed in a fireproof structure with the air current vented directly into the return. The pump was a 10 Horsepower T & T pump located at No. 21 stopping in the No. 3 Butt Section. The pump had been in this location for at least one year.

7. None of the pumps cited was in a working section. Nor did the pumps advance with any working section.

8. Given the length of time at each location, and each pump's function and expected use, long-term installation and use of each pump were clearly established by the evidence.

#### Booster Pumps

9. The function of a booster pump is to boost the water pressure at the working faces in the working sections inby the pump. There are 10 booster pumps in the mine. At the time of hearing, all were located in the track haulage entry outby the working sections. Booster pumps generally stay in the same location until the sections served by them are driven up and pulled back on retreat. They are usually in the same place at least one year.

### Gathering Pumps

10. The function of a gathering (or "dewatering") pump is to pump water from local swags along the track or in the intake entry, and discharge the water into the main reservoir or into a main sump area. There are 39 gathering pumps at the mine. At the time of hearing, each was located in the track entry, outby the working sections. A gathering pump usually stays in the same place until an inby section is driven up and the longwall goes in and retreats to the area where the pump is located; then the pump is moved. They usually stay in the same place for at least one year.

### DISCUSSION WITH FURTHER FINDINGS

The essential facts are not in dispute. Inspector John Paul Phillips, an electrical inspector out of MSHA's Morgantown, West Virginia, District Office, began an electrical inspection at Martinka in October, 1985. Inspector Phillips issued six § 104(a) citations for violations of 30 C.F.R. § 1105 between October 16, 1985, and January 22, 1986.

Inspector Phillips issued Citation Nos. 2703324 and 2704403 when he observed that two 20 Horsepower fresh water "booster" pumps were not housed in fireproof structures and the air currents used to ventilate the pumps were not coursed directly into the return. Citation Nos. 270328, 2704404, 2704405, and 2704406 were issued when he observed that four 10 Horsepower "gathering" pumps were not housed in fireproof structures and air currents ventilating the pumps were not coursed directly into the return. None of the pumps involved in these citations was located in a working section. Nor did any of the pumps advance with any working section.

Regular inspections of the Martinka Mine are performed by MSHA inspectors out of the Subdistrict Office in Fairmont, West Virginia, which operates under the direction of the Morgantown District Office. After several of the citations involved here were issued, it became apparent that a difference in policy existed between the District and the Subdistrict Offices regarding the citation of permanent pumps for a violation of § 1105. At least one inspector from the Fairmont Office, Charles Thomas, who was the regular inspector at Martinka, operated under a "visibility standard" in citing permanent pumps for § 1105 violations. Under this approach, pumps located in frequently traveled areas or in track haulage entries were not cited for violations of § 1105. Permanent pumps in more isolated areas were cited.

Inspector Thomas' approach was at odds with District and National Office policy, which subjects all pumps to § 1105 requirements if they meet the definition of a "permanent" electrical installation as contained in the following part of MSHA's Underground Inspection Manual p. II-471 (March 9, 1978):

#### POLICY

A permanent electrical installation is electric equipment that is expected to remain in place for a relatively long or indefinite period of time.

Consequently, the following electric equipment should be considered permanently installed:

All rectifiers, transformers, high-voltage switchgear and battery chargers which are not located on and advanced with the working section; rotary converters; motor-generator sets; belt drivers; compressors; pumps (except those excluded below) and other similar units of electric equipment.

The following electric equipment should not be considered permanently installed:

Electric equipment which is located on and advanced with the working section, self-propelled electric equipment, portable pumps and portable rock dusters which are regularly moved from one location in the mine to another, and similar electric equipment. (Emphasis supplied.)

All of the cited pumps meet the Manual definition of a permanent installation. They were not located in working sections and did not advance with working sections. They did not regularly move from one location in the mine to another. When installed they were expected to remain in place for a relatively long or indefinite period.

The citations allege a violation of 30 C.F.R. § 75.1105, which is a verbatim restatement of § 311(c) of the Act:

Underground transformer stations, battery-charging stations, substations, compressor stations, shops and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fire-proof construction. (Emphasis supplied.)

The term "permanent pump" is not specifically defined in the Act or Regulation. Section 311(c) of the Act and § 1105 of the Regulations were contained in the earlier Act of 1969. Permanent pumps were not specifically defined there either. Neither legislative history nor case law is helpful on the issue of what constitutes a permanent pump. It is clear, however, that the purpose of § 1105 is to protect miners against fire and smoke inhalation. It is part of a larger section dealing with fire protection in coal mines. This purpose coupled with the broad language of the standard leads to the conclusion that the standard is meant to have a broad reach to effectuate the purposes of the standard and the Act.

MSHA has interpreted the term "permanent pump" to mean a pump that is expected to remain in place for a relatively long or indefinite period of time. This definition is contained in the MSHA Underground Manual quoted above. The Manual has been in effect since its publication in March 1978.

Respondent contends that use of the term "permanent pump" in the standard is unconstitutionally vague and overbroad. In order to be constitutional, a standard must not be "so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connolly v. Gerald Constr. Co., 269 U.S. 385, 391 (1926). Rather, "Laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 109 (1972).

A standard is not unenforceably vague if a reasonably prudent person familiar with the mining industry and protective purposes of the standard would recognize the hazardous condition which the standard seeks to prevent. Secretary v. Ozark-Mahoning Co., 3 FMSHRC 2117, 2118 (1986); Secretary v. U.S. Steel, 3 FMSHRC 1550, 1533 (1984). "Broadness is not always a fatal defect in a safety and health standard." Secretary v. Alabama By-Products Corp., 2 FMSHRC 1918, 1920 (1982) Many standards must be drafted in general terms "to be broadly adaptable to myriad circumstances" in a mine. Secretary v. Kerr-McGee Corp., 2 FMSHRC 1492, 1493 (1981).

In two cases involving a safety belt standard, the Commission rejected the operators' arguments that 30 C.F.R. § 55.15-5 was unconstitutionally vague and ambiguous. Secretary v. U.S Steel, 3 FMSHRC 1550 (1984); Secretary v. Great Western Electric, 2 FMSHRC 2121 (1983). That standard requires that safety belts and lines be worn by miners where there is a "danger of falling." The operators objected on the grounds that the standard's phrase "danger of falling" was too vague and ambiguous to enable an operator to define all situations where belts and lines must be worn. The Commission ruled, however, that application of a broad standard to particular factual situations did not offend due process. Sufficient clarity may be provided if an alleged violation is judged by a test of what actions would have been taken under the same or similar circumstances by a

reasonably prudent person familiar with the mining industry, relevant facts, and protective purpose of the standard. 3 FMSHRC at 1553; 2 FMSHRC at 2122. The Commission noted that the specific purpose of § 57.15-5 is the prevention of falls. It ruled that by requiring positive means of protection whenever any danger of falling exists, the standard reasonably achieved its purpose of protecting all miners. Applying this rationale to the instant cases, I conclude that it is reasonable to apply § 75.1105 to a booster or gathering pump expected to remain in place for a long or an indefinite period outby a working section or sections.

Respondent further argues that the Manual definition of "permanent" violates the Administrative Procedure Act (5 U.S.C. § 553). Section 101(a) of the 1977 Mine Act (30 U.S.C. § 811(a)) requires all rules concerning mandatory health or safety standards to be promulgated in accordance with § 553 of the A.P.A. Further, § 101(a)(2) requires the Secretary to publish in the Federal Register any "proposed rule promulgating, modifying, or revoking a mandatory health or safety standard" and to permit public comment on the proposed regulation. Therefore, there would be a violation of the A.P.A. if the Manual policy were more than an interpretation or general statement of policy. However, I find that the Manual definition is a general policy statement of MSHA's interpretation of "permanent." It is not subject to the A.P.A.'s notice and comment requirements.

Respondent also contends that the conflicting enforcement policies of MSHA's District (Morgantown) and Subdistrict (Fairmont) Offices will result in a denial of due process if MSHA is permitted to charge a violation in these cases.

It is clear from the record that it is MSHA's official policy to follow the Manual definition of permanent electrical installations in determining whether a particular pump is "permanent." This approach is followed by the Morgantown District Office, as stated by Inspector John Paul Phillips and Electrical Supervisor Mike Hall. In addition, Gene Fuller, Safety Specialist from the MSHA National Office, testified that this is a nationwide enforcement policy.

The fact that the Subdistrict Office in Fairmont may have had a less stringent enforcement policy for some period does not estop the Secretary from enforcing the Manual definition in these cases. Respondent has had a copy of the 1978 Manual for many years. It was put on notice by Inspector Phillips' discussion and subsequent citations in September, 1985, that the Manual definition would be enforced at Respondent's mine. The citations at issue in these cases were issued a month after such notice by Inspector Phillips.

The policy previously applied by the Fairmont Subdistrict Office was unauthorized and was contrary to national policy as shown by the Manual, which provides that "The guidelines in this chapter supersede all previous instructions as of February 1, 1978, relating to the same subject category." The situation was corrected by the District manager upon learning of the conflict. All subdistrict supervisors and personnel have been brought into line with National Office policy.

In Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417, 1422 (1981), the Commission stated:

...[An] estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the penalty....

Even in those cases where the courts have recognized an estoppel defense, it has been held that estoppel does not apply "if the government's misconduct [does not] threaten to work serious injustice and if the public's interest would...be unduly damaged by the imposition of estoppel." King Knob, 3 FMSHRC at 1422, quoting United States v. Lazy F.C. Ranch, 481 F.2d, 985, 989 (9th Cir. 1973). In view of the availability of penalty mitigation as an avenue of equitable relief, finding an operator liable would not work such a "profound and unconscionable injury" that estoppel should be invoked. King Knob, 3 FMSHRC at 1422.

In order to be considered a "significant and substantial" violation, it must be found that:

...based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981).

Under this test, a "significant and substantial" finding turns on whether a reasonable likelihood of harm exists due to the violation. The inspector issued the citations when he observed that the pumps were not housed in fireproof structures with the air currents vented directly into the return. All six pumps were in working order and had energized circuits at the time the condition was cited. The inspector testified that any of the equipment could wear out, motors could fail or short circuit. Events of this nature could happen with electrical equipment after any length of time. He stated that if a pump got hot, it could ignite the coal or any combustible materials around it. He also stated that in his opinion, "even smoke from insulation in the pump, when they fail, could ignite or cause fumes that would be harmful to employees" (Tr. 30).

MSHA Electrical Supervisor Hall also testified as to similar hazards presented by failing to house and vent the pumps.

The Commission emphasized in National Gypsum that the inspector's "independent judgment is an important element in making 'significant and substantial' findings, which should not be circumvented." 3 FMSHRC at 825-826. The inspector's conclusions in this case were based on his observations of unhoused and unvented pumps and the number of employees who would have been affected by fire or smoke moving into the working sections. The inspector made a careful assessment of the conditions he observed and concluded that the hazard was reasonably foreseeable or reasonably likely. I credit his expert opinion on these matters, and find that the violations were "significant and substantial" within the meaning of section 104(d) of the Act.

In assessing civil penalties, I give substantial weight to the confusion created by MSHA's inconsistent enforcement policies at its Morgantown District and Fairmont Subdistrict Offices. I find this to be a substantial mitigation of the violations, and conclude that a civil penalty of \$10 for each violation is appropriate.

CONCLUSIONS OF LAW

1. The Commission's administrative law judge has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 75.1105 as alleged in Citations Nos. 2703324, 2703528, 2704403, 2704404, 2704405, and 2704406.

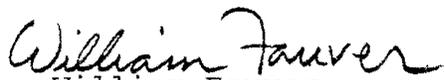
3. Respondent is ASSESSED a civil penalty of \$10 for each of the above six violations.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citations Nos. 2703324, 2703528, 2704403, 2704404, 2704405, and 2704406 are AFFIRMED.

2. Respondent shall pay the above civil penalties in the total amount of \$60 within 30 days of this decision.

  
William Fauver  
Administrative Law Judge

Distribution:

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kg

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041  
(703) 756-6220

**AUG 19 1986**

FRED O. W. ARNTZ, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. SE 86-47-DM  
METRIC CONSTRUCTORS, INC., : MD 85-56  
Respondent :

ORDER OF DISMISSAL

Before: Judge Broderick

On August 14, 1986, Complainant filed a motion to dismiss this proceeding because of a settlement of his discrimination complaint against Respondent for the payment to Complainant of \$3500.

Therefore, it is ORDERED that the motion is GRANTED, this proceeding is DISMISSED and the hearing scheduled for August 25, 1986 is CANCELLED.



James A. Broderick  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 21 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 86-12-M  
Petitioner : A. C. No. 09-00265-05505  
v. :  
 : Junction City Mine  
BROWN BROTHERS SAND COMPANY, :  
Respondent :  
 :

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor,  
U. S. Department of Labor, Atlanta, Georgia,  
for the Petitioner  
Messrs Carl Brown, Steve Brown, and Greg  
Brown, Howard, Georgia, for the Respondent

Before: Judge Kennedy

This matter came on for a hearing in Columbus, Georgia in June 1986. The parties' stipulations as to jurisdiction, size, prior violations, ability to pay, and abatement are a part of the record. Four of the seven violations charged were cited for insignificant and insubstantial conditions. At the conclusion of the presentation of evidence as to each violation the trial judge entered a tentative bench decision. As a result five of the seven violations were dismissed, including one S&S violation. Of the two remaining violations one was reduced from S&S to non-S&S and the other was affirmed.

After receipt of the transcript the parties were afforded an opportunity to file post-hearing briefs challenging the tentative bench decisions.

Based on a review of the evidence in the record considered as a whole, I find each of the tentative decisions should be, and hereby is, CONFIRMED for the reasons set forth in the transcript and as supplemented below.

Citation No. 2007655

On July 19, 1985, the windshield on a John Deere 644-B front-end loader was cited for a non-S&S violation of 30 CFR

56.9-11 at respondent's sand mine in Junction City, Georgia. This mandatory standard requires the safety glass in cab windows be in "good condition." Inspector Mattson's 104(a) citation alleged the windshield was "broken and spider-webbed cracked right through the windshield from top to botton." Elaborating in response to questions from the bench, the inspector testified that the windshield measured 34 by about 36 inches; that the "entire windshield," some 1,224 square inches, was spider-webbed cracked on both sides starting from the upper left corner, which had a hole in it, and spreading throughout the windshield down to the "weather seal" at the bottom. The inspector said the condition of the windshield made "vision--visibility bad for the operator, especially when he got glare from the sun."

The inspector testified he understood the requirement that the safety glass be in "good condition" to mean that it "be free of cracks and broken glass . . . and kept clean." As far as the hole was concerned he felt that was not a "problem" but that the spider-web cracks were because they obstructed the operator's vision. Despite this, the inspector did not consider the condition hazardous because it was a "small operation, and there's very little foot traffic around, and what he's doing is doing clean-up work and loading trucks." The inspector said that in his judgment, the likelihood of injury to an employee was "minor" and "remote."

In response to further questions from the bench, the inspector said that he considers a windshield to be in "good condition" if "you have little cracks in the corner and so forth that doesn't obstruct the vision" and in "excellent" condition if it has "no cracks at all and it be kept clean and no cracks or no cloudiness from the sun from age." The inspector said he felt this windshield was below par for "good" because the spider-web cracks throughout the glass obstructed vision and created "eyestrain" and "glare" from the reflection of light through the cracked glass.

The inspector's description was at almost totally variance with the facts. At the time the inspector testified neither he nor his lawyer knew the operator had a picture of the windshield in question taken shortly after the citation was written and before it was replaced. He was shown this picture on cross examination but said he could not identify it because it did not show a "hole" in the "upper left corner." In its rebuttal case, the operator conclusively established that the picture of the windshield in the 644-B loader (OX-6) had no "hole" in the "upper left corner," in fact it had no hole at all. The picture also shows that the windshield was not cracked with spider-webs from top to bottom. There were only two large cracks that extended from the point of impact at about the center line of the glass

through the operator's line of vision and to the side or bottom of the glass. In addition, there were eight to ten hairline cracks radiating from the point of impact but no broken glass.

Mr. Gregg Brown, the foreman, who took the photograph testified he was very familiar with the 644-B loader; that the crack on that glass was "right in the middle of the windshield" but that there was no "hole" in the windshield; that the windshield was not cracked through and that when seated in the vehicle the large crack "in the middle" was above the operator's line of vision. He further testified that if the crack had obstructed the operator's line of vision he would have replaced it. Mr. Lucas, a loader operator, testified the cracks in the glass did not interfere with his operation of the machine.

Despite the fact that all the witnesses agreed that whatever impairment of vision existed did not make operation of the loader unsafe, the Solicitor argued and continues to argue that the "slightest impairment of vision" means the glass is not in "good condition" and constitutes per se a non-S&S violation. In his post-hearing brief, the Solicitor also asserts that "good condition" clearly implies an unbroken window. Since the undisputed evidence from the photograph (OX-6) and the testimony of the operator's witnesses conclusively show that the windshield in the 644-B loader, while cracked, was not "broken," the Solicitor's argument is obviously fatally flawed.

I find that as properly interpreted the standard was intended to promote safety not the sale of safety glass. Since the hazard against which the standard was directed, likelihood of injury to the loader operator or foot traffic, did not exist, I conclude the condition of this windshield was "good" and that the violation charged did not, therefore, occur.

Citation No. 2521743

On the same date as the previous citation a John Deere 644-C front-end loader was also cited for a non-S&S violation of 30 CFR 56.9-11. Inspector Grabner's 104(a) citation charged the windshield was "broken 'spider-web crack.'" In his testimony he described the windshield as "spider-webbed cracked the entire length of the windshield, from side to side, and from height to width." He further testified that the loader was being used to "push material into the surge pile" and to "clean up and load trucks." He said it was his observation that the "visibility of the operator to see through was obstructed by the number of cracks that ran the

length and width of the windshield." He said the citation was for a violation considered insignificant and insubstantial because "I didn't feel that . . . the operator's vision was impaired as far as being able to see out the windshield clearly . . . In other words it was not much exposure to foot traffic in the area of people around it." When shown the two photos of the windshields (OX-5 and OX-6) on cross examination, the inspector could not identify the windshield he was testifying about.

In response to questions from the bench, the inspector contradicted his earlier testimony and said that while the condition of the windshield did not make it unsafe to operate the loader, "the condition of the windshield made it difficult for the operator to have good, clear vision out the front of the machine." Nevertheless, the inspector affirmed that "even with the amount of spider-webbing we had here," he did not consider it unsafe to operate the loader.

Once again it was difficult to credit the inspector's description of the condition because the contemporaneous photograph of the windshield, made within a month after the citation was written, shows the only cracking or spider-webbing was in the upper left quadrant and that there was no cracking or spider-webbing in the lower half of the windshield (OX-5). Mr. Gregg Brown, who took the photo, testified the picture showed essentially the same condition that existed on July 19 and that "it didn't continue to shoot spider cracks every which-a-way, no sir. It reached certain--say side to side, and then it stopped." He further testified that after impact the glass did not shatter, that there was no broken glass, and that there was no "hole in either one of the windshields."

Mr. Gregg Brown, the operator's foreman and a part owner of the business, said it was the operator's policy to replace any windshield that had been hit and cracked in the middle so as to obstruct the operator's line of vision. Mr. Brown said he did not consider the 644-C windshield needed replacing because "There's still fifty percent or more of that windshield that is not obstructed, and I did not feel that his line of vision was impaired." On cross examination, Mr. Brown pointed out that while the vision of an operator who had to look through the upper left quadrant to load a truck might have some impairment there was a side window through which he could also look to align his vehicle. He also said the loaders were seldom used to load the trucks as they usually loaded off the conveyor belt.

Counsel for the Secretary argued that the test he applied to determine whether there was a violation was whether there was "even the slightest impairment" and not whether the condition created a hazard to the operator or miners working on

foot around the area. Later he argued that "'good condition' means the windshield should not have any cracks in it whatsoever; otherwise . . . you could purchase and install cracked windshields in any vehicle." In his post-hearing brief, counsel argues that "Visibility should not be considered relevant in establishing a violation." Needless to say, this extreme contention was contradicted by the testimony of both inspectors as well as the operator's witnesses.

Since I cannot agree that the standard "good," a comparative term, can properly be interpreted as "perfect" or that a de minimis likelihood of injury mandates the compulsory replacement of windshields with insignificant cracks I must once again reject the solicitor's interpretation and find the violation charged did not, in fact, occur.

Citation Nos. 2521413 and 2521414

On September 4, 1985, two inspectors returned to the operator's plant to check on the abatement of the windshield violations and to continue the regular inspection begun in July. At that time Inspector Manis wrote two 104(a) citations, the first being non-S&S and the second S&S.

The citations charged a violation of the guarding standard, 30 CFR 56.12-23. More specifically, they charged that at the No. 2 and 3 pumps there were four unguarded openings that exposed uninsulated inter electrical parts carrying 220 volts to possible contact. (Exhibits 1A, B, C, and D; 3A, B, C, and D; PX-6 and 8). It was further alleged that these openings were not guarded by location and that at the No. 2 pump the area was wet and an operator was in the area. These charges collapsed when the operator produced a video tape, witnesses and expert testimony which showed that there was no electrical voltage in the connections cited within six to eight seconds after the motors were started. (Tr. 112-113, 167).

Since there was no recognizable electrical shock hazard, I found the violations did not, in fact, occur. In his post-hearing brief, counsel appears to concede this but claims the issue now to be decided is "whether the openings were protected by location." Since I find there was no hazard to be guarded against, I also find the question of whether the openings were guarded by location is moot.

Citation No. 2521467

During the inspection of September 4, 1985, Inspector Grabner observed that a grounding wire for the control panel for the pole mounted 220 volt electrical disconnect switch for the shaker had been pulled loose from the earth grounding rod. In the absence of a ground, the condition created a

potential shock hazard to the shaker operator. For this condition, the inspector wrote a section 104(a), S&S citation charging a violation of 30 CFR 56.12-25. The violation was considered S&S because the operator had to turn the switch off and on several times a day.

Respondent did not deny that the condition alleged existed but attempted to show there was another power ground that went back to the substation through an underground cable. The only photograph of the location, however, clearly showed only three, not four, wires coming from the substation (PX-10). In the absence of a showing that a power ground wire was connected to the disconnect switch, I found this violation did, in fact, occur and that it was significant and substantial. The gravity was, of course, serious but negligence was only modest. After considering the other criteria, I found, and affirm, that the amount of the penalty warranted is that proposed, namely, \$126.

Citation No. 2521468

On September 4, 1985, Inspector Grabner also observed a single unguarded 110 volt incandescent light bulb in the surge tunnel. Usually, the tunnel was lit by florescent lighting located above the conveyor belt. The light bulb was temporary until the florescent lighting in the area could be repaired. The tunnel was about 5 feet, 6 inches high and the light bulb was suspended approximately 5 feet, 3 inches above the walkway. Miners passing through the tunnel would have to bend forward to walk through the tunnel and under or around the light bulb. The inspector wrote a 104(a), S&S citation charging a violation of 30 CFR 56.12-34 for failure to guard the light bulb. The inspector considered the violation S&S because he believed that the bulb could easily be struck by miners traveling the area and that such contact could possibly have caused "burns, shock or cuts from broken glass." A penalty of \$126 was proposed.

There was no dispute about the existence of the condition charged. Respondent offered a video tape of the area which lent support to its argument that the bulb was located to the side of the walkway, not directly above it. I found a preponderance of the evidence showed the bulb was in sufficiently close proximity to the walkway that it could be struck by an individual passing through but that the likelihood of a burn, shock or cut from broken glass was so remote, speculative, and unlikely that the S&S finding must be vacated. This was predicated on the fact that miners passing through the area would be wearing hard hats and sufficient

clothing including protective clothing such as glasses and gloves to protect them from burns or cuts and that it would be most unlikely for anyone to grab the exposed filament of a broken light bulb, assuming, without deciding, that such a contact might result in an electrical shock.

Accordingly, I affirm my finding that the violation charged did, in fact, occur, that it was not serious, that the negligence was slight and that, after considering the other criteria, the amount of the penalty warranted should be reduced from \$126 to \$10.

Citation No. 2521469

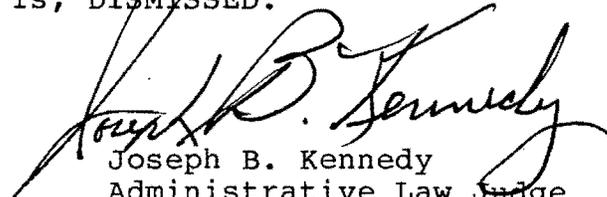
While Inspector Manis was writing his citation for the alleged failure to guard the electrical connections on the No. 3 pump motor, Inspector Grabner wrote his third citation of the day. This stemmed from his observation of an alleged unguarded keyway on a 10 1/2 inch long shaft that protruded from the No. 3 motor some 43 inches off the motor platform. It was not claimed that the shaft itself was a hazard but that the keyway which was cut into the shaft to some unspecified depth might, because it was rusted and rough, catch or entangle someone's clothing and possibly strangle them (PX-13). Because this was unlikely Inspector Grabner wrote only a 104(a), non-S&S citation for which a \$20 penalty was proposed.

The evidence showed that because of its location the likelihood of anyone coming into contact with the keyway while the motor was running was extremely remote, if not entirely speculative. Only a maintenance man regularly went near the shaft and then only when the motor was turned off. Anyone else wishing to approach the shaft would have to climb an 8 to 10 foot high stairway, step over a large discharge pipe, and other obstacles and make several sharp turns to even get near it. Even so there was no pinch point and the likelihood of a piece of clothing from a man's waist or neck becoming so entangled in the open keyway in such a way as to inflict an injury, let alone strangulation, was so inexplicable as to defy description or belief. In fact, the inspector admitted he found the violation to be non-S&S because it was unlikely to cause injury to anyone (Tr. 239). For these reasons, I found the violation charged did not, in fact, occur. I see no reason to change that determination.

The premises considered, therefore, it is ORDERED:

1. That for the two violations found the operator pay a penalty of \$136 on or before Friday, September 19, 1986.

2. That as to the other five violations the petition for assessment of civil penalties be, and hereby is, DISMISSED.



Joseph B. Kennedy  
Administrative Law Judge

Distribution:

Ken Welsch, Esq., Office of the Solicitor, U. S. Department of Labor, 1371 Peachtree Street, N.E., Room 339, Atlanta, GA 30367 (Certified Mail)

Mr. Carl Brown, Brown Brothers Sand Company, P. O. Box 32, Howard, GA 31039 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 26 1986

FRANK McCOART, : DISCRIMINATION PROCEEDING  
Complainant :  
 : Docket No. KENT 86-63-D  
v. : CD 86-05  
 :  
ELM COAL COMPANY, : No. 2 UG Mine  
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Frank McCoart, Van Lear, Kentucky, pro se;  
Michael J. Schmitt, Esq., Wells, Porter,  
Schmitt & Walker, Paintsville, Kentucky,  
for Respondent.

Before: Judge Maurer

Statement of the Case

This is a discrimination proceeding initiated by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, charging the respondent with unlawful discrimination against Mr. McCoart for exercising certain rights afforded him under the Act. A hearing in this matter was convened in Prestonsburg, Kentucky, on August 5, 1986. After commencing his case-in-chief, Mr. McCoart moved for a continuance so that he might obtain counsel to assist him in preparing and presenting his claim. I granted this motion over objection of respondent's counsel and the hearing was continued at that point.

Subsequently, the parties have jointly proposed a settlement by a written motion to approve settlement filed on August 8, 1986. That proposal contemplates a dismissal of the complainant's claim against the respondent with prejudice upon the following terms and conditions:

- (1) The respondent shall and has purged the complainant's personnel file of all reprimands, warnings and disciplinary actions so that such records will not reflect adversely upon the complainant and inhibit his ability to obtain future employment as a coal miner.

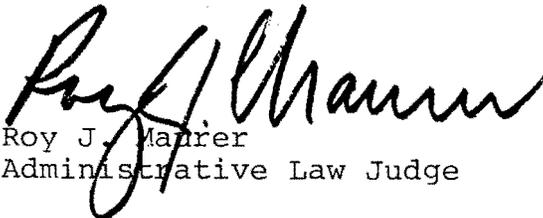
(2) The respondent has agreed to pay and has paid to the complainant the sum of \$3,000.00 in complete and total settlement of all of complainant's claims for monetary relief (backpay), for reinstatement and for all claims whatsoever.

Conclusion

After careful review and consideration of the settlement terms and conditions proposed by the parties in this proceeding, I conclude and find that it reflects a reasonable resolution of the complaint. Further, since it seems clear to me that all the parties, including Mr. McCoart personally, are in accord with the agreed upon disposition of the complaint, I see no reason why it should not be approved.

ORDER

The proposed settlement is APPROVED. Respondent IS ORDERED AND DIRECTED to fully comply with the terms of the agreement. Upon full and complete compliance with the terms of the agreement, this matter is DISMISSED.

  
Roy J. Maurer  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 25, 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 86-57  
Petitioner : A. C. No. 01-01247-03696  
: :  
v. : No. 4 Mine  
: :  
JIM WALTER RESOURCES, INC., :  
Respondent :

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,  
U. S. Department of Labor, Birmingham, Alabama,  
for Petitioner; R. Stanley Morrow, Esq., and  
Harold D. Rice, Esq., Birmingham, Alabama, for  
Respondent.

Before: Judge Merlin

This case is a petition for the assessment of two civil  
penalties filed by the Secretary of Labor against Jim Walter  
Resources, Inc. It was heard as scheduled on August 5, 1986.

In accordance with their pre-hearing statements and at the  
hearing the parties agreed to the following stipulations:

1. the operator is the owner and operator of the subject  
mine;
2. the operator and the mine are subject to the provisions  
and jurisdiction of the Federal Mine Safety and Health Act of  
1977;
3. I have jurisdiction in this case;
4. the MSHA inspector who issued the subject citations and  
orders was and is a duly authorized representative of the  
Secretary;

5. true and correct copies of the subject citations and orders were properly served upon the operator;

6. imposition of penalties will not affect the operator's ability to do business;

7. the operator is medium in size;

8. the operator's prior history of violations is average.

At the outset of the hearing the Solicitor and operator's counsel moved for approval of a settlement in the amount of \$150 for Citation No. 2604923 which had been issued for a violation of 30 C.F.R. § 75.1707 because an intake escapeway was not separated from the belt haulage entry. A two foot by four foot thermax block had been knocked out of the permanent stopping located behind the power center. The violation was serious but negligence was less than originally thought because the operator had had the stopping replaced once but it had fallen out again. The proposed settlement of \$150 was approved.

Citation No. 2604926 was issued for a violation of 30 C.F.R. § 75.400 because a deposit of coal dust and float dust had been allowed to accumulate in the cross-cut where the versatrac charger was located on the No. 2 longwall section. Approximately 23 hours later, Order No. 2604928 was issued pursuant to section 104(b) of the Act because an inadequate effort had been made to clean up the accumulation. At the conclusion of the inspector's testimony a recess was taken after which the parties proposed a settlement based upon the following additional stipulations: the operator was negligent; there was not the requisite good faith abatement with respect to the original citation but there was good faith abatement with respect to the order; the violation was serious but gravity was substantially less than originally thought because there was no ignition source on the section due to a breakdown of the machinery. The proposed settlement of \$450 was approved. In view of the testimony, counsel are encouraged to acquaint their witnesses with the applicable definition of "significant and substantial" as set forth in Commission decisions.

ORDER

It is ORDERED that the operator pay \$600 within 30 days from date of this decision.



Paul Merlin  
Chief Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 26 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 85-140-M  
Petitioner : A. C. No. 15-00112-05504  
: :  
v. : Clover Bottom Underground  
: :  
M. A. WALKER COMPANY, INC., :  
Respondent :

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for Petitioner;  
Lyle A. Walker, President, M. A. Walker Company,  
Inc., McKee, Kentucky, for Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging the M. A. Walker Company, Inc. (Walker) with three violations of regulatory standards. The issues before me are whether Walker has committed the violations as alleged and, if so, whether those violations were of such a nature as could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard, i.e., whether the violations were "significant and substantial". If violations are found; it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with the criteria set forth in section 110(i) of the Act. Pursuant to notice, the case was heard in Berea, Kentucky, on June 24, 1986.

Citation No. 2247898 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.3022 and charges as follows:

Ground conditions along haulageways and travelways was not scaled. This include the three entries to the mine. Loose rock and frozen ice was observed on roof and ribs. The employee enter the mine through these portals. Customer truck go in and out through these portals.

The cited standard requires that "[g]round conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary."

Inspector Kenneth Ruffner of the Federal Mine Safety and Health Administration (MSHA) performed an inspection at the Clover Bottom limestone mine on January 30, 1985, when he discovered the aforementioned condition. This condition is more fully described in a technical report authored by Mr. Richard R. Pulse, a geologist also employed by MSHA (Secretary's Exhibit No. 4). Depicted therein are photographs of areas where loose rock slabs and rock overhangs are present above and adjacent to the north, one-way portal and the middle, two-way portal. Mr. Pulse reports that many of these rocks are loosely keyed into the rock walls and separated or detached rock slabs were observed to be resting upon steeply inclined weathered shale slopes. In his opinion, all of these could potentially slide or fall into the mine roadway or into the portal entrances. The report and the photographs contained therein document the existence of numerous loose slabs of limestone resting upon steep slopes above the portals and rocks loosely keyed into place, above and adjacent to the access road and mine portals. In the opinion of this geologist, it has taken decades for this condition to develop, but these rocks constitute a present danger to people entering the portals, especially during periods of heavy rain or during cycles of freezing and thawing.

Inspector Vernon Denton also testified concerning the loose rock he observed at the two aforementioned portals. He stated that it appeared to be all different sizes--from the size of a bowling ball to something approaching table size, including a large slab of rock about six (6) feet long, three (3) feet wide, and a foot thick.

The respondent's witness, Mr. James Denham, testified of the extreme difficulty he had removing the rocks that MSHA demanded be removed to abate the citation. For example, he broke a 3/4 inch cable trying to pull one of the rocks down that MSHA claimed was loose.

On the issue of whether loose rock existed along the haulageways and travelways in the area of these two portals, I must make a credibility choice. Two mine inspectors are of the definite opinion that loose rocks existed in these areas and their opinion is buttressed by the report of a geologist who likewise concluded that numerous loose slabs

of limestone existed resting on steep slopes above the portals. Weighing that formidable testimony against that of the mine superintendent who essentially testified that because the rocks were difficult to pull down, in his opinion they would not have fallen down, I must make the credibility finding in favor of the Secretary, and thus find a violation of the cited standard.

Under the circumstances herein, I find that it was reasonably likely that the aforementioned loose rock could fall down at any time, and if one of these large rocks that the Secretary maintains was loose fell, it would be reasonably likely that it could fall on one of the vehicles, including customer's trucks, that go into and out of the mine and crush it. I therefore find that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). Furthermore, it is undisputed that mine management knew of the condition prior to the citation being issued. They just didn't believe that it was a condition that needed correction. I disagree and find that their negligence was "high" as cited by the inspector.

Citation No. 2247378 was also issued on March 5, 1985, by Inspector Ruffner and alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.9003 and charges as follows:

No. 2 Euclid haul truck did not have any brakes.

According to Inspector Ruffner, he overheard a conversation between the men working at the Clover Bottom Mine that there were no brakes on at least one of the trucks being used in the mine and that there was a danger of colliding with one of the customer's trucks while they were going in and out hauling from the stockpile. He asked the safety director to let him test the brakes on the No. 1 and 2 trucks, which he did. When he tested the No. 2 truck, by having the driver accelerate the truck over a predetermined distance and then apply the brakes, he found it to have no brakes, caused in his opinion by running through water under the stockpile bins which was deep enough to reach the brake drums.

The record establishes that this truck was being operated in a fairly congested area with brakes that were rendered useless for all practical purposes. Therefore, I find that the violation was a "significant and substantial" one. Mathies, supra. Furthermore, the lack of adequate brakes is the type of violation that should have

been easily discoverable by the truck driver and apparently was noticed by some employees because their talking about it called the inspector's attention to the matter. Therefore, I find that the operator is chargeable with at least moderate negligence because, at a minimum, it is chargeable with negligent training and supervision for the failure of its employees to correct this condition. I also note that the violation was abated by simply drying out the brakes. No other repair was required. Before leaving this subject, I specifically reject the operator's argument that the emergency brake or parking brake being in an operable condition is sufficient to satisfy the regulatory requirement that "[p]owered mobile equipment shall be provided with adequate brakes."

Citation No. 2247379 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.9053 and charges as follows:

Water was allowed to accumulate which created a hazard to moving equipment.

The cited standard requires that water which creates a hazard to moving equipment be removed.

According to the undisputed testimony of Inspector Ruffner, who likewise issued this citation on March 5, 1985, after he had issued Citation No. 2247378 concerning the truck with no brakes, the operator continued to load the other haul truck in the water which existed in the stockpile bin area. The danger according to the inspector being that the brakes would get wet and suffer the same consequences as they had on the No. 2 haul truck, which had been written up two hours earlier. Under the circumstances, as before, if a vehicle was operating in a congested area with no brakes, an accident was reasonably likely to occur resulting in disabling or even fatal injuries. Accordingly, I find the violation to be "significant and substantial." Mathies, supra.

On the issue of negligence, the water had been in the area under the stockpile bins that morning because of a drain being stopped up. Respondent produced testimony that this was the first time this drain had ever backed up. In order to abate the citation, they pumped the water out and then opened the drain. I concur with the inspector that the operator is certainly chargeable with the knowledge that the water was there at the time it existed, and of the consequences of operating the haul trucks in the water. I therefore find the operator chargeable with a "high" degree of negligence, as alleged in the citation.

In determining the amount of penalties I am assessing in this case, I have given great weight to the fact that Walker is a small operator, has a relatively minor history of reported violations and abated the violative conditions in a timely manner. Accordingly, the following civil penalties are deemed appropriate:

<u>Citation</u>	<u>Amount</u>
2247898	\$100
2247378	\$250
2247379	\$250

ORDER

The M. A. Walker Company, Inc., IS HEREBY ORDERED to pay civil penalties of \$600 within 30 days of the date of this decision. Payment is to be made to MSHA, and upon receipt of same, this proceeding is DISMISSED.



Roy J. Maurer  
Administrative Law Judge

Distribution:

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Lyle A. Walker, President, M. A. Walker Company, Inc., P. O. Box 143, McKee, KY 40447 (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 28 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. SE 86-28-M  
: A.C. No. 31-00052-05501 J2K  
: v. :  
: Pomona Mine & Mill  
: YATES CONSTRUCTION CO., :  
INC., :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On August 22, 1986, the parties filed a Joint Motion to Approve Settlement and to Dismiss this proceeding. A similar motion was filed in the case of Secretary v. Martin Marietta Aggregates, Docket No. SE 86-31-M, with which this proceeding was consolidated by order issued April 18, 1986.

This proceeding involves three alleged violations, one originally assessed at \$2000 and charging a violation of 30 C.F.R. § 56.3005, the others each assessed at \$98. By this settlement agreement, the parties propose to amend citation 2385988 charging a violation of § 56.3005 to read as follows:

Respondent's employee operating at a mine site on or about April 15, 1985 wrongfully worked between equipment and the pit wall in violation of 30 C.F.R. § 56.3012.

The parties represent, and I accept the representation, that the amended citation alleges a violation of the standard more directly applicable to the circumstances of this case. The settlement agreement proposes that Respondent pay the sum of \$1000 for the violation charged in the amended citation, and the assessed amount, \$98 for each of the other alleged violations.

The violation charged in citation 2385988 is serious, since it caused or contributed to a fatal accident. Respondent states that the violation resulted from an employee violating a previously communicated work rule, and the Secretary does not contest this assertion. Respondent has no prior history of inspection under the Act. It is a small operator.

I have considered the Motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, IT IS ORDERED that the settlement agreement is APPROVED. Respondent is ORDERED to pay the sum of \$1,196 within 30 days of the date of this decision. Upon payment, this proceeding is DISMISSED. The hearing scheduled August 27, 1986 in Greensboro, North Carolina is CANCELLED.

*James A Broderick*  
James A. Broderick  
Administrative Law Judge

Distribution:

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slk

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 28 1986**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 86-31-M  
Petitioner : A.C. No. 31-00052-05504  
: :  
v. : Pomona Quarry  
: :  
MARTIN MARIETTA AGGREGATES, :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On August 18, 1986, the parties filed a Joint Motion to Approve Settlement and to Dismiss this proceeding. A similar Motion was filed in the case of Secretary v. Yates Construction Co., Inc., Docket No. SE 86-28-M, with which this proceeding was consolidated by order issued April 18, 1986.

The proceeding against Martin Marietta involves two violations alleged in two citations for which penalties in the amount of \$4,157 were sought. By the settlement agreement, the Secretary proposes to "withdraw" the two citations and substitute therefor a new citation charging a violation of 30 C.F.R. § 56.3012 which shall read as follows:

An employee (Daniel Preston Moore) of Yates Construction Company operating at Respondent's mine site on or about April 15, 1985 wrongfully worked between equipment and the pit wall in violation of 30 C.F.R. § 56.3012.

The Secretary represents, and I accept the representation, that the new citation alleges a violation of the standard more directly applicable to the circumstances of this case. A penalty of \$2000 is proposed for the violation which Respondent agrees to pay.

The violation is serious in that it caused or contributed to a fatal accident. Respondent states that it made regular inspections to ensure the safety of the area involved in the

citation, and the Secretary does not contest this assertion. Respondent had no history of prior violations from November 1982 through August 1985.

I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, IT IS ORDERED that the settlement agreement is APPROVED; that citations 2385993 and 2385994 are VACATED. A new citation, 2385993 is substituted and Respondent is ORDERED to pay within 40 days of the date of this decision, a civil penalty in the amount of \$2000 for the violation alleged therein. Upon payment of said penalty this proceeding is DISMISSED. The hearing scheduled August 27, 1986 in Greensboro, North Carolina is CANCELLED.

  
James A. Broderick  
Administrative Law Judge

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