

AUGUST 1987

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08-13-87	Otis M. Schmoldt v. Gabriel Mining Co. Inc.	KENT	87-65-D	Pg. 1452
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08-20-87	Sec. Labor for Bryan Pack v. Maynard Branch Dredging Co. and Roger Kirk	KENT	86-9-D	Pg. 1474
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08-21-87	Sec. Labor for Joseph Gabossi v. Western Fuels-Utah, Inc.	WEST	86-24-D	Pg. 1481
08-21-87	Utah Power & Light Company	WEST	87-31-R	Pg. 1507
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08-26-87	Roger Hall v. Jericol Mining, Inc.	KENT	87-51-D	Pg. 1514
08-28-87	Galite Corporation	SE	86-137-M	Pg. 1515
08-31-87	Little Shepherd v. Big Elk Creek Coal Co.	KENT	87-29-D	Pg. 1529
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08-31-87	Con-Ag, Incorporated	LAKE	87-15-M	Pg. 1532
08-31-87	Robert E. Hirschfield	LAKE	87-51-M	Pg. 1532
08-31-87	Lee Kuck	LAKE	87-84-M	Pg. 1532
08-31-87	Kaiser Sand & Gravel Company	WEST	86-230-M	Pg. 1534

AUGUST 1987

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

Secretary of Labor v. Florence Mining Company, Docket No. PENN 86-297-R,
PENN 87-16. (Judge Fauver, June 30, 1987)

Secretary of Labor v. Kaiser Coal Corporation, Docket No. WEST 86-225-M.
(Judge Cetti, June 29, 1987)

Secretary of Labor v. Rushton Mining Company, Docket No. PENN 86-253-R,
PENN 86-1. (Judge Broderick, July 23, 1987)

Local 2274, Dist. 28, UMWA v. Clinchfield Coal Company, Docket No. VA 83-55-C.
(Judge Melick, July 23, 1987)

Secretary of Labor on behalf of Michael Price & Joe John Vacha v. Jim
Walter Resources, Inc., Docket No. SE 87-87-D. (Interlocutory Review of
Judge Broderick's July 7, 1987 Temporary Reinstatement Order)

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

Secretary of Labor on behalf of Alvin Casey v. Brent Coal Corporation,
Docket No. VA 86-45-D. (Judge Broderick, July 6, 1987)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 3, 1987

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), on :
behalf of MICHAEL L. PRICE :
and JOE JOHN VACHA :
 :
v. : Docket No. SE 87-87-D
 :
JIM WALTER RESOURCES, INC. :

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

ORDER

BY: Backley, Lastowka and Nelson, Commissioners

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), we review Commission Administrative Law Judge James A. Broderick's order of temporary reinstatement issued under Commission Procedural Rule 44, 29 C.F.R. § 2700.44 (1986). For the reasons that follow, we affirm.

On January 1, 1987, Jim Walter Resources, Inc. ("JWR") inaugurated a "Substance Abuse Rehabilitation and Control Program" for its employees. Section II E of the program provides for random urine testing of "employees whose duties ... involve safety...." On March 2, 1987, JWR conducted urine testing of certain employees covered by this provision. Among the employees included in the test group were the complainants, Michael L. Price and Joe John Vacha, who were elected United Mine Workers of America ("UMWA") safety committeemen. Both employees failed to provide the requested urine samples, assertedly by reason of physical incapacity, and that same day were suspended with intent to discharge. JWR's stated reason for discharge was insubordinate conduct.

Following their terminations, Price and Vacha on March 9, 1987, filed discrimination complaints with the Secretary of Labor pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), alleging that JWR had discharged them discriminatorily in violation of section 105(c) of the Act. 30 U.S.C. § 815(c). On May 14, 1987, after commencing the required investigation of the complaints and determining that they were not frivolous, the Secretary filed with this independent Commission an application for the temporary reinstatement of Price and Vacha. 30 U.S.C. § 815(c)(2). JWR filed a request for a hearing on the appli-

cation pursuant to 29 C.F.R. § 2700.44(a). Subsequently, the parties engaged in discovery. On June 29, 1987, a hearing was held before Judge Broderick. At the outset of the hearing, the judge permitted the UMWA to intervene.

Following the hearing, on July 7, 1987, the judge issued an order directing JWR to reinstate the complainants temporarily. The judge determined that the discrimination complaints "were not clearly without merit, were not fraudulent or pretextual" and that "the evidence establishes a reasonable cause to believe that the discharge of Price and Vacha was in violation of section 105(c)." Accordingly, the judge concluded that the complaints were not frivolously brought. On July 17, 1987, JWR filed with the Commission a petition for review of the judge's order and a motion for stay of the order. 29 C.F.R. § 2700.44(e). Both the Secretary and UMWA have filed oppositions.

We have carefully reviewed the evidence, pleadings, and briefs, and conclude that the judge's order is supported by the record and is consistent with applicable law. The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought. 30 U.S.C. § 815(c)(2); 29 C.F.R. § 2700.44(c). The judge properly found that the testimony and other evidence raises a non-frivolous issue as to whether the terminations of the complainants were in violation of the Mine Act.

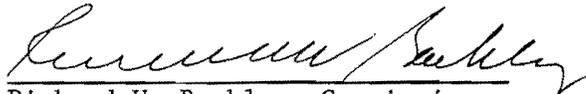
We are not prepared at this preliminary juncture to conclude from the evidence and findings of record that section II E of JWR's drug testing program itself contravenes section 105(c)(1) of the Mine Act, as alleged by the complainants. However, although the complainants' precise theories of discrimination have not been presented with the utmost clarity, we find in the Secretary's pleadings, in the evidence, and in the closing arguments before the judge a claim that the specific manner of application of the drug testing program to Price and Vacha constituted discriminatorily disparate treatment, retaliation, or interference because of their prior protected activities. Evidence has been introduced tending to show that the complainants were active safety committeemen who had filed numerous safety complaints; that there may have been some hostility on the part of some JWR management officials towards that protected activity; and that the manner of testing the complainants and their resultant discharge may have been tainted by discriminatorily disparate treatment, retaliation, or interference. We make no determination at this point as to the ultimate merits of a case of discrimination on this evidence. We hold only that the evidence presented to date is sufficient to support the judge's conclusion that the complaints are non-frivolous.

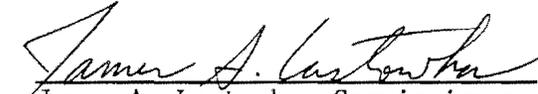
JWR also raises due process objections to the temporary reinstatement procedures employed below. The Supreme Court's decision in Brock v. Roadway Express, Inc., 481 U.S. ___, 95 L.Ed. 2d 239, 248-254 (1987), approved temporary reinstatement without prior hearing under comparable reinstatement provisions of the Surface Transportation Act of 1982. The Commission's temporary reinstatement procedures exceed the constitutional minimum sanctioned in Roadway Express. JWR has been

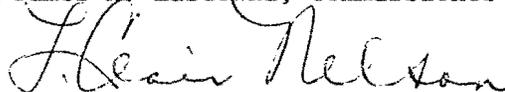
fairly heard in a pre-deprivation hearing in which it was allowed to present witnesses and to cross-examine the government's witnesses.

We also note that the Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of JWR's drug testing program apart from the scope and focus appropriate to analysis under section 105(c) of the Mine Act. Finally, the Secretary is reminded of the imperative requirement and need to complete his investigation of the complaints pursuant to section 105(c)(2). Secretary on behalf of Donald R. Hale v. 4-A Coal Co., Inc., 8 FMSHRC 905, 907-08 (June 1986).

No view is intimated in this order as to the ultimate merits of this case. The only issue decided is that the complainants' discrimination complaints were not frivolously brought. JWR's request for a stay is denied and the judge's order is affirmed. This matter is remanded to the judge.


Richard V. Backley, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

Chairman Ford, dissenting:

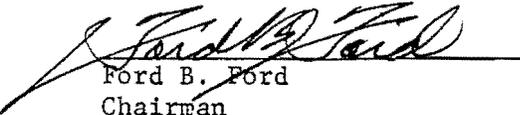
A temporary reinstatement proceeding is limited to deciding whether or not the miner's complaint has been "frivolously brought." The judge, correctly in my view, has cast the frivolousness test in terms of whether there is "reasonable cause to believe" that a violation of section 105(c), 30 U.S.C. § 815(c), has occurred. I agree with my colleague in dissent, Commissioner Doyle, however, that before the frivolousness issue can be addressed, the burden is on the Secretary to establish the elements of a section 105(c) claim. The record, here, fails to establish a causal nexus between the adverse action complained of (discharge for failure to provide a urine sample) and the protected activity of Messrs. Price and Vacha (engaging in safety activities in their capacities as safety committeemen).

The majority states that the Secretary's theories of discrimination have not been presented with the "utmost clarity." I find that those theories lack coherence and are not congruent with established bases for asserting a violation of section 105(c).

The Secretary argues that the Petitioner's drug abuse program is per se discriminatory apparently because complainants reasonably believed it to be so. As noted by the majority, this Commission does not sit in judgment on the relative merits or demerits of a drug testing program. More importantly, to accept such a discrimination theory requires one to believe that Petitioner, solely for the purpose of discharging the complainants, established an elaborate and expensive drug testing and rehabilitation program and then predicted that these particular employees (out of a tested workforce of 232) would be unable or unwilling to provide urine samples after being on notice to provide them for several hours. Alternatively, the Secretary argues that section 105(c) can somehow be read to grant a miner the "right to refuse to comply with a discriminatory work order" even when such an order involves no safety or health hazard. Without further amplification this newly propounded theory of discrimination does not surmount the frivolousness test. In any event, under either theory the Secretary does not establish a colorable nexus between the discharges and the protected activity.

The majority suggests that discrimination may lie in the disparate treatment of the complainants in the application of the drug abuse program, but the Secretary has not so argued and the judge did not so find. My review of the record does not reveal evidence that would support this theory.

Accordingly, I would vacate the judge's order of reinstatement but would join with my colleagues in urging the Secretary to expedite his investigation in this matter.


Ford B. Ford
Chairman

Commissioner Doyle, dissenting:

Although a temporary reinstatement proceeding is limited to resolving whether the miner's complaint is frivolous, that issue cannot be addressed unless the basic elements of a claim of discrimination are offered. Without some evidence of these elements first being presented, one cannot advance to a determination of whether a claim is non-frivolous.

In my view, the judge did not determine that there was any evidence tending to establish that adverse action was taken against the complainants in consequence of their engaging in protected activity. Absent this underlying determination, the issue of frivolousness could not be addressed. Accordingly, I would vacate the judge's order of temporary reinstatement.


Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 17, 1987

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), on :
behalf of MICHAEL L. PRICE :
and JOE JOHN VACHA :
 :
v. : Docket No. SE 87-87-D
 :
JIM WALTER RESOURCES, INC. :

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

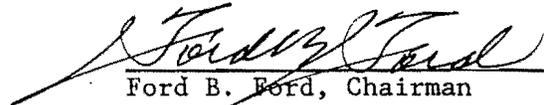
ORDER

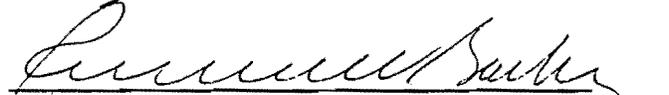
BY: THE COMMISSION

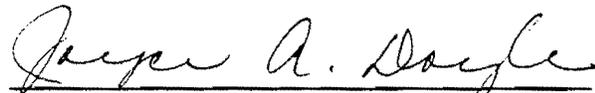
Respondent Jim Walter Resources, Inc. ("JWR") has moved the Commission for a stay of the Commission's August 3, 1987 order in this proceeding pending disposition of JWR's petition for review of that order in the United States Court of Appeals for the Eleventh Circuit. The Commission's order affirmed Commission Administrative Law Judge James A. Broderick's order of temporary reinstatement of complainants Price and Vacha. 30 U.S.C. § 815(c)(2); 29 C.F.R. § 2700.44. The Secretary of Labor has filed an opposition to JWR's motion.

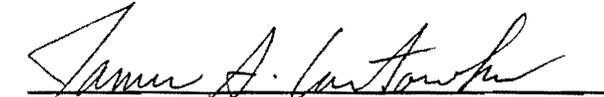
Upon consideration of JWR's motion and the Secretary's opposition, the motion is denied. JWR argues only that the order of temporary reinstatement in this case poses substantial issues of law and policy. However, JWR has failed to make a showing of any of the factors ordinarily justifying stay of an agency order pending judicial review. E.g., Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

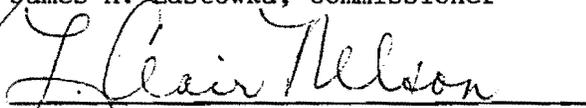
Accordingly, JWR's motion for a stay of the Commission's temporary reinstatement order is denied.


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 25, 1987

ODELL MAGGARD :
 :
 v. : Docket No. KENT 86-1-D
 :
 CHANEY CREEK COAL COMPANY :
 :
 and :
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :
 on behalf of ODELL MAGGARD :
 :
 v. : Docket No. KENT 86-51-D
 :
 DOLLAR BRANCH COAL CORPORATION :
 and CHANEY CREEK COAL COMPANY :

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

DECISION

BY: Ford, Chairman; Backley and Lastowka, Commissioners

This consolidated proceeding involves two discrimination complaints filed on behalf of Odell Maggard. Both complaints allege an illegal discharge based on the same circumstances. The first complaint (Docket No. KENT 86-1-D) was brought by Odell Maggard in his own behalf against Chaney Creek Coal Company. The second complaint (KENT 86-51-D) was brought by the Secretary of Labor ("Secretary") on behalf of Odell Maggard against Chaney Creek Coal Co. ("Chaney Creek") and Dollar Branch Coal Corporation ("Dollar Branch"). The complaints allege that Chaney Creek and Dollar Branch (collectively, "operators") discharged Maggard in violation of section 105(c)(1) of the Federal Mine Safety and Health Act, 30 U.S.C. § 815(c)(1) ("Mine Act"), because of his refusal to

perform certain work that he believed to be hazardous. 1/ Commission Administrative Law Judge Gary Melick concluded that the termination of Maggard's employment was discriminatory, ordered that Maggard be reinstated at the same rate of pay, and assessed a civil penalty of \$1,000 for the violation of section 105(c)(1). 8 FMSHRC 806 (May 1986)(ALJ). In a supplemental decision, the judge awarded Maggard back pay and attorney's fees, and assessed an additional civil penalty because of the operators' continuing failure to reinstate Maggard. 8 FMSHRC 966 (June 1986)(ALJ).

We granted the operators' petition for discretionary review, which questioned whether the judge's decision upholding Maggard's complaint of discrimination was supported by substantial evidence, whether the judge was biased, and whether the judge's award of attorney's fees was proper. 2/ On the bases explained below, we affirm the judge's finding of a discriminatory discharge, conclude the judge was not biased, and vacate the award of attorney's fees.

I.

In September 1984, Chaney Creek owned and operated the Dollar Creek No. 3 Mine, an underground coal mine located in southeastern Kentucky. Maggard worked at the mine as a shuttle car driver. On January 10, 1985, Maggard was advised by Howard Muncy, the section foreman, that Maggard was to work as a miner-helper. In this capacity Maggard was to keep the continuous mining machine's trailing cable from being run over when the machine backed up. 3/

1/ Section 105(c)(1) of the Mine Act provides in part 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 ... in any coal or other mine ... because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this [Act.]

30 U.S.C. § 815(c)(1).

2/ After their petition for review was granted by the Commission, the operators filed a motion to dismiss Dollar Branch as a party to the proceeding on the ground that Dollar Branch's records showed no direct relationship between Dollar Branch and Maggard. Section 113(d)(2)(A)(iii) of the Mine Act limits the Commission's review authority to only those issues raised in petitions for discretionary review. 30 U.S.C. § 813(d)(2)(A)(iii). Accord, 29 C.F.R. § 2700.70(f). No issue concerning Dollar Branch's party status was raised by Dollar Branch or Chaney Creek in their petition for review. Consequently, the operators' motion to dismiss Dollar Branch must be denied.

3/ Coal is extracted at the mine by a continuous mining machine that

According to Maggard, on January 10 he was shocked twice while handling the trailing cable. Maggard testified that on both occasions he told Muncy that he had been shocked and asked that Muncy fix the cable, but Muncy refused. Maggard further testified that he asked Muncy for alternative work, but Muncy told him to "pull cable or else." Tr. 43. As a result, Maggard left the mine.

On June 11, 1985, Maggard filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA"). 4/ In September 1985, the Secretary advised Maggard by letter that he had not yet made the determination required to be made within 90 days of the filing of a complaint as to whether Maggard had been discriminated against. 5/ The Secretary further informed Maggard that,

receives its operating power through a 500-foot long, 480-volt cable that trails behind it.

4/ Section 105(c)(2) provides that the miner file a complaint within 60 days after the act of discrimination occurs. Congress, however, intended that the time limit not be jurisdictional and that delays be allowed "under justifiable circumstances." Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978). No issue concerning the timeliness of Maggard's initial complaint has been preserved on review.

5/ 30 U.S.C. § 105(c)(3) states in relevant part:

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). The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been

pursuant to the Act and Commission Procedural Rule 40(b), Maggard had the right to file a complaint on his own behalf with this Commission. The Secretary also informed Maggard, however, that the Secretary's investigation was on-going and in the event it was determined that a violation of section 105(c) had occurred, the Secretary would file a complaint on Maggard's behalf.

On October 1, 1985, Maggard, through private counsel, filed a discrimination complaint asserting jurisdiction under section 105(c)(3) of the Act and Commission Rule 40(b), 29 C.F.R. § 2700.40(b). 6/ On December 14, 1985, the Secretary informed Maggard that the Secretary had determined that a violation of section 105(c) had occurred and on December 26 the Secretary filed a complaint on Maggard's behalf pursuant to section 105(c)(2) of the Act. 30 U.S.C. § 815(c)(2). 7/ The Secretary thereafter moved the judge to dismiss the complaint that Maggard had filed in his own behalf. The judge reserved decision on the

reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation....

30 U.S.C. § 815(c)(3).

6/ Commission Procedural Rule 40(b) stated:

A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary.

7/ Section 105(c)(2) states in relevant part:

If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief.

30 U.S.C. § 815(c)(2).

Secretary's dismissal motion and consolidated the two complaints for hearing.

After an evidentiary hearing, the judge found that Maggard suffered serious electrical shock while handling the cable and that Maggard had a good faith, reasonable belief that continuing to handle the cable would be hazardous. 8 FMSHRC at 815-16. The judge also found that Maggard had communicated his concern to the operators and had been denied alternative work. 8 FMSHRC at 816. Consequently, the judge held that Maggard was the subject of a discriminatory discharge, concluding that Maggard engaged in a protected work refusal when he left the mine rather than handle the cable. 8 FMSHRC at 818. The judge denied the Secretary's Motion to Dismiss Maggard's individual complaint, stating: "It is clear ... that Congress intended that the miner have the right to file a complaint on his own upon the failure of the Secretary to act within the prescribed 90-day period." 8 FMSHRC at 809. He further found that Commission Procedural Rule 40(b) implemented that intent. Id.

The judge awarded Maggard back pay and interest through June 1, 1986, totaling \$33,660.19. In awarding attorney's fees and expenses of \$16,456.22, the judge rejected the operators' argument that Maggard would have been sufficiently represented by the Secretary and that retention of private counsel was unnecessary and unreasonable. The judge concluded that although Maggard's individual complaint paralleled the Secretary's complaint, it was independent of it. The judge noted that Maggard's private counsel took an active role in trying the case and that the Secretary did not file his complaint until twenty days prior to the hearing that had been scheduled on Maggard's individual complaint. 8 FMSHRC at 967.

II.

In reviewing an administrative law judge's findings of fact, the Mine Act imposes on the Commission a substantial evidence standard of review. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The operators assert that the judge's factual findings underlying his conclusion of illegal discrimination are not supported by substantial evidence. They argue that Maggard did not believe reasonably and in good faith that handling the cable was hazardous and that Maggard was not fired, but quit voluntarily because he was assigned a job he found onerous. On review, our task in deciding substantial evidence questions is to determine whether there is "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Applying this standard, we conclude that the challenged findings of fact are supported by substantial evidence.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on

behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity alone and would have taken the adverse action in any event for the unprotected activity. Pasula, supra; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Robinette, supra; Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983)(approving nearly identical test under National Labor Relations Act).

With respect to the first element of a prima facie case, the Commission has held that a miner's work refusal is protected under section 105(c) of the Mine Act if the miner has a reasonable, good faith belief in a hazardous condition. Pasula, 2 FMSHRC at 2793, 2796; Robinette, 3 FMSHRC at 807-12. See also Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982). The judge found that Maggard's allegation that he was shocked by the cable was corroborated by the continuous mining machine operator and three other witnesses. 8 FMSHRC at 816; Tr. 107-110, 113, 121-23, 130, 134-138. While the operators' witnesses testified that the trailing cable was in good condition and that it did not shock those who handled it, the judge found this testimony to be undercut by prior conflicting statements by those witnesses. 8 FMSHRC at 817.

The judge stated that witness credibility was critical to resolution of the case and he found "[Maggard] and his supporting witnesses to be more credible." 8 FMSHRC at 815. We have recognized that a "judge's credibility findings and resolution of disputed testimony should not be overturned lightly." Robinette, 3 FMSHRC at 813. See also Secretary of Labor on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 999 (June 1983). Accord, Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1418 (June 1984). We have reviewed carefully the operators' allegations regarding the condition of the trailing cable and the alleged shock suffered by Maggard. We conclude that the operators have not provided evidence so compelling to justify the extraordinary step of overturning the findings of a trier of fact resting on credibility determinations. Thus, we conclude that substantial evidence supports the judge's finding that Maggard had a good faith, reasonable belief that handling the cable was hazardous.

Where reasonably possible, a miner refusing work ordinarily must communicate to a representative of the operator his belief that a safety or health hazard exists. Dillard Smith v. Reco, Inc., 9 FMSHRC ____, Docket No. VA 86-9-D, slip op. at 4 (June 30, 1987); Simpson v. Kenta Energy, Inc. and Roy Dan Jackson, 8 FMSHRC 1034, 1038-39 (July 1986), appeal docketed sub nom. Simpson v. FMSHRC, No. 86-1441 (D.C. Cir. August 7, 1986); Secretary on behalf of Dunmire and Estle v. Northern

Coal Co., 4 FMSHRC 126, 133 (February 1982). Such communication accords with the requirement that the work refusal be premised on a good faith, reasonable belief in the hazard. Maggard stated that he told Section Foreman Howard Muncy he had been shocked, that he asked Muncy to repair the cable and report the accident, and that when Muncy refused he asked for other work. Muncy stated that Maggard did not tell him he had been shocked nor ask that the accident be reported. The judge found Maggard's version, which was corroborated in part by the continuous mining machine operator, to be more credible and logically consistent. 8 FMSRHC at 816. Again, we conclude that there is not a sufficient basis in the record for us to overturn the judge's credibility determination, and we conclude that substantial evidence supports the judge's finding that Maggard communicated his safety concerns to Muncy at the time of the work refusal.

With respect to the second element of a prima facie case, that the adverse action complained of was motivated in any part by the protected activity, there is nothing in the record to suggest that prior to Maggard's discharge the operators were dissatisfied with his work. The operators argue that there was no adverse action and that Maggard was not discharged, but rather quit because he was angry at being assigned the job of miner-helper. The judge noted that Maggard did not complain when assigned to pull cable prior to January 10 and similarly that he did not complain when assigned the task on January 10. The judge concluded that it was "highly unlikely that Maggard would have quit ... but for some extraordinary reason such as unsafe working conditions." 8 FMSHRC at 817. Although the operators presented witnesses who testified that Maggard told them that he quit because he was assigned to pull cable, the judge did not credit their testimony. We conclude that the evidence is not so compelling that we can overturn the judge's finding that Maggard was discharged because of his protected work refusal.

Accordingly, we affirm the judge's conclusion that the operator's termination of Maggard's employment violated section 105(c)(1) of the Act.

III.

On the final day of the hearing, private counsel for Odell Maggard called Jerry Maggard, Odell Maggard's cousin, as a rebuttal witness. The previous evening, a group composed of private counsel, counsel for the Secretary, Odell Maggard, and W.F. Taylor, another Department of Labor attorney, had travelled to Jerry Maggard's residence to serve on him a subpoena requiring his attendance and testimony at the hearing which had been continued until the following morning. At the hearing, Jerry Maggard testified that he worked with Odell Maggard on January 10, 1985, but that he could not recall the details of the events of that day. Upon completion of Jerry Maggard's testimony, private counsel for Odell Maggard called W.F. Taylor to testify, over the objection of counsel for the operators, concerning statements that Jerry Maggard had made while being served with the subpoena the previous evening, which statements conflicted with his testimony at the hearing. Taylor testified that Jerry Maggard had stated the previous evening that he had

seen Odell Maggard throw the cable and jump, and that Odell had told him that he was leaving because he had been shocked. The operators argue a denial of due process resulting from Taylor's testimony on a number of grounds. We conclude, however, that the judge did not err in permitting Taylor's testimony.

Although Taylor was not listed as a witness in Maggard's pretrial submissions, the judge, in his discretion, permitted both parties to call witnesses not identified previously. In addition, Taylor was called solely to impeach Jerry Maggard's testimony. Although Taylor, unlike the other witnesses, was not sequestered during the hearing, he was not present in the hearing room during Jerry Maggard's testimony. Further, Taylor's testimony regarding what he was told by Jerry Maggard was both material and relevant, and therefore admissible. Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135-36 (May 1984). Although Taylor was called to testify after Jerry Maggard had left the courthouse, the operators made no effort to have Jerry Maggard recalled or to have him testify at a later date.

We also find no basis for the operators' assertion that the judge's treatment of Taylor's testimony establishes that the judge was biased against the operators. The judge noted that Taylor's testimony regarding Jerry Maggard's out of court statements corroborated the testimony of Odell Maggard and the continuous mining machine operator. 8 FMSHRC at 815. This is not an impermissible characterization of the testimony and does not indicate that the judge was predisposed to decide the case in Maggard's favor. Further, the judge's comment at a continued hearing that he had always found Taylor's conduct "above board" and "highly ethical" was based upon Taylor's previous appearances before the judge and relates only to Taylor's character and not to the merits of the case. Tr. 2-4 (May 20, 1986). 8/ We conclude that the circumstances surrounding Taylor's testimony and its consideration by the judge in no way affected the judge's ability to rule impartially on the case. 9/

IV.

Maggard filed his individual complaint of discrimination asserting jurisdiction under section 105(c)(3) and citing Commission Rule 40(b), 29 C.F.R. § 2700.40(b), when the Secretary failed to determine within 90 days of Maggard's initial complaint to the Secretary whether Maggard was the subject of prohibited discrimination. Approximately three months

8/ The comment was made in the context of a discussion as to the propriety of Taylor having testified on Maggard's behalf.

9/ While this case has been pending, counsel for Maggard filed two procedural motions regarding the issue of Taylor's testimony and the alleged bias of the judge. In view of our conclusion that Taylor's testimony was heard properly by the judge and that the record does not support a finding that the judge was biased or prejudiced, the motions are denied.

after Maggard filed on his own behalf, the Secretary filed a discrimination complaint on Maggard's behalf pursuant to section 105(c)(2) of the Act. The Secretary then moved to dismiss Maggard's individual complaint arguing that it lacked a jurisdictional base since the Secretary had filed a complaint on Maggard's behalf under section 105(c)(2). The judge denied the Secretary's motion, holding that a complainant had the right to file on his own behalf upon the failure of the Secretary to make a determination within 90 days. He also noted that Commission Procedural Rule 40(b) provides for such a procedure. 8 FMSHRC at 808-09.

In awarding attorney's fees totaling \$16,452.22 to Maggard, the judge noted that the Secretary had filed his complaint with the Commission nearly two months after the hearing had been scheduled on Maggard's complaint and that Maggard's attorney had taken the lead role in the prosecution of the complaint. Under such circumstances, he found that attorney's fees were expenses "reasonably incurred by the miner" within the meaning of section 105(c)(3) of the Act. 8 FMSHRC at 967.

In another decision issued today, we have concluded that section 105(c)(3) of the Mine Act does not grant complainants the right to initiate an action on their own behalf prior to the Secretary's determination as to whether a violation of section 105(c) has occurred. Comcomitantly we have invalidated the part of Commission Procedural Rule 40(b) that provides for such a procedure. John A. Gilbert v. Sandy Fork Mining Co., 9 FMSHRC ____, Docket Nos. KENT 86-49-D and KENT 86-76-D, slip op. at 10-13 (August 25, 1987). Because Maggard filed his complaint alleging jurisdiction under section 105(c)(3) prior to the Secretary's determination as to whether a violation occurred, Maggard's individual complaint under section 105(c)(3) must be dismissed.

Moreover, attorney's fees are no longer awardable to Maggard under our decision in Secretary on behalf of Ribel v. Eastern Associated Coal Corp., 7 FMSHRC 2015 (December 1985), rev'd in part sub nom. Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639 (4th Cir. 1987). In Ribel, we held that in an action initiated by the Secretary under section 105(c)(2) the complainant was entitled to reimbursement for private attorney's fees as long as the services rendered were non-duplicative of the Secretary's efforts and contributed substantially to the successful litigation of the claim. 7 FMSHRC at 2025. The U.S. Court of Appeals for the Fourth Circuit has disagreed with our conclusion and held that an award of attorney's fees under the Mine Act is not authorized in cases where the Secretary has found a violation and has filed a complaint as the representative of the complainant pursuant to section 105(c)(2). Eastern Assoc. Coal Corp., supra, 813 F.2d at 644. Although the court of appeals in Eastern reversed our contrary conclusion on this issue and this case does not arise in the Fourth Circuit, we will follow the court's holding in the absence of contrary judicial authority.

Therefore, in accordance with the decision of the Fourth Circuit in Eastern, no attorney's fees may be awarded to Maggard since the Secretary prosecuted his complaint pursuant to section 105(c)(2).

Accordingly, we vacate the judge's award of attorney's fees. 10/

V.

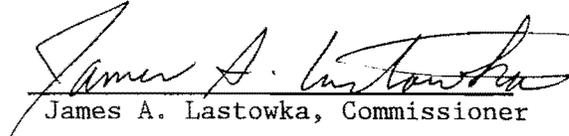
In sum, we hold that the judge's findings of fact underlying his conclusion that Maggard was discharged in violation of section 105(c)(1) of the Mine Act are supported by substantial evidence. We also find no error in his treatment of the testimony of W.F. Taylor. We further hold that the judge erred in awarding attorney's fees to Maggard in view of the Secretary's prosecution of his complaint. Accordingly, the judge's decision on the merits is affirmed as is his order of reinstatement, the award of backpay and interest through June 1, 1986, totaling \$33,660.19, and his imposition of penalties. The award of attorney's fees is vacated.



Ford B. Ford, Chairman



Richard V. Backley, Commissioner



James A. Lastowka, Commissioner

10/ Also, the motion of counsel for Maggard for additional attorney's fees for time spent to prepare a reply to a motion by Chaney Creek is denied.

Commissioner Doyle and Commissioner Nelson, concurring in part and dissenting in part:

Applying the substantial evidence standard of review imposed by the Mine Act, we concur with the majority in affirming the judge's finding of discrimination and we also concur that the judge did not err with respect to the testimony of W.F. Taylor. We respectfully dissent, however, from the decision to the extent that it dismisses Mr. Maggard's individual complaint and vacates the award of attorneys' fees in their entirety. The majority's action comes as a result of their decision issued today in another case in which they conclude that the Mine Act does not grant a miner a right of individual action until the Secretary of Labor makes a determination that no discrimination has occurred. On that basis, the majority invalidated that portion of the Commission's Rule 40(b) that provided claimants the right to bring their own action if the Secretary failed to act within the statutory time period. John A. Gilbert v. Sandy Fork Mining Co., 9 FMSHRC _____, Docket Nos. KENT 86-49-D and KENT 86-76-D, slip op. at _____. (August _____, 1987).

Rule 40(b) read, in pertinent part, as follows:

A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary.

29 C.F.R. §2700.40(b)(1986) (emphasis added).

Thus, under Rule 40(b), if the Secretary failed to act within ninety days after his receipt of a complaint, his exclusive jurisdiction to prosecute discrimination complaints arising under the Mine Act ended at that time. In this case the Secretary failed to take action within ninety days and so advised Mr. Maggard in an undated letter that reads, in pertinent part, as follows:

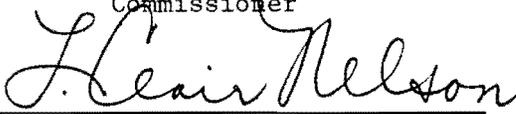
By the terms of the Act and the Federal Mine Safety and Health Review Commission's procedural rules, you have a right to file your own complaint with the Commission because the Secretary has not completed his consideration within 90 days. Should you desire to file a complaint of discrimination directly with the Commission, it should be addressed ... (emphasis added).

Mr. Maggard followed the Commission's Rule 40(b) and the Secretary's advice and commenced his own action. Three months later the Secretary commenced an action under section 105(c)(2) and subsequently moved to

dismiss Mr. Maggard's action on the grounds that it lacked a jurisdictional basis. The operator did not join in the motion or otherwise move to have one or the other of the actions dismissed. ^{1/} After a consolidated hearing, the judge denied the motion, finding that the Secretary lacked standing to file such a motion in Mr. Maggard's private action and that, in any event, section 105(c)(3) and the Commission's Rule 40(b) provided a jurisdictional basis for Mr. Maggard's individual complaint. After finding for Mr. Maggard, he awarded attorneys' fees in the amount of \$16,456.22.

For the reasons stated in our dissent in Gilbert, 9 FMSHRC _____, we are of the opinion that the Commission's Rule 40(b) was a reasonable construction of the Mine Act and, as such, should remain in effect. Chevron, U.S.A., v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). Accordingly, we cannot join with the majority's action in invalidating Rule 40(b). As a consequence, we would affirm the administrative law judge's denial of the Secretary's Motion to Dismiss Mr. Maggard's individual complaint. We would also affirm the award of attorneys' fees in the individual action to the extent that they were incurred in instituting and prosecuting Mr. Maggard's discrimination claim, as provided in section 105(c)(3). We would disallow such fees to the extent that they were incurred in relation to the jurisdictional issue or in coordinating the prosecution of the two cases.


Joyce A. Doyle
Commissioner


L. Clair Nelson
Commissioner

^{1/} In its response to the statement of attorneys' fees filed after the hearing and in its brief on review to the Commission, the operator argued that fees should not be awarded after the date on which the Secretary commences representation of the complainant and, alternatively, that the fees should be reduced for time spent on peripheral issues. Respondent's Response to Statement of Attorney's Fees and Expenses at 2-3, Reply Brief for Respondent at 14-15.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 25, 1987

JOHN A. GILBERT :
 :
 v. : Docket No. KENT 86-49-D
 :
 SANDY FORK MINING CO., INC. :
 :
 :
 :
 SECRETARY OF LABOR, MINE SAFETY :
 AND HEALTH ADMINISTRATION (MSHA), :
 on behalf of JOHN A. GILBERT :
 :
 v. : Docket No. KENT 86-76-D
 :
 SANDY FORK MINING CO., INC. :

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

DECISION

BY: Ford, Chairman; Backley and Lastowka, Commissioners:

This consolidated discrimination proceeding involves two discrimination complaints filed on behalf of John A. Gilbert. Both complaints allege an illegal discharge based on the same circumstances. The first complaint (Docket No. KENT 86-49-D) was filed by Gilbert on his own behalf against Sandy Fork Mining Company, Inc. ("Sandy Fork"). The second complaint (Docket No. KENT 86-76-D) was filed by the Secretary of Labor on behalf of Gilbert against Sandy Fork. The complaints allege that Sandy Fork discharged Gilbert in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), because of his refusal to perform work that he believed to be hazardous. 1/ Commission Administrative Law Judge

1/ Section 105(c) provides in relevant part:

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a

Gary Melick issued a decision: (1) denying the Secretary's motion to dismiss the complaint filed by Gilbert on his own behalf; and

complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because of the exercise by such miner ... of any statutory right afforded by this [Act].

(2) Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint.... If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner ... alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner ... may present additional evidence on his own behalf during any hearing held pursuant to [t]his paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner ... 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). The Commission shall afford an opportunity for a hearing

(2) concluding that Sandy Fork Mining Company ("Sandy Fork") had not discriminated against Gilbert in violation of section 105(c)(1) of the Act. 8 FMSHRC 1084 (July)(ALJ). For the reasons below, we affirm on substantial evidence grounds the judge's conclusion that Sandy Fork did not discriminate against Gilbert in violation of the Act, but we reverse the judge's denial of the Secretary's motion to dismiss the complaint Gilbert filed on his own behalf.

I.

Facts and Procedural History

For three and a half years prior to August 1985, Gilbert was employed as a miner at Sandy Fork's No. 12 underground coal mine in Beverly, Kentucky. During the last two and a half years of that period, Gilbert worked as an operator of a continuous mining machine on the second (evening) shift from 3:00 p.m. to 11:00 p.m. During the relevant time Gilbert worked in the 002 section, which consisted of six entries.

For several weeks prior to August 6, 1985, the 002 section had experienced difficult roof conditions caused by "hill seams," encountered when mining operations are conducted near surface outcroppings. 2/ Gilbert testified that during that period rock had fallen on his mining machine and that on August 5, 1985, he and another miner operator, Carmine Dean Caldwell, had left certain work locations because of "working" hill seams -- that is, hill seams emitting creaking

... and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. ...

30 U.S.C. § 815(c).

2/ A "hill seam" is a crack or fault in a mine roof that generally has mud or water emanating from it. Tr. I 30, II 143. See also Shamrock Coal Co., 5 FMSHRC 845, 847 & nn. 3 & 4 (May 1983).

noises indicative of unstable roof conditions. Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 1244 (1968).

On the afternoon of August 6, 1985, while travelling to the 002 section, Gilbert and Caldwell expressed their concerns about the roof conditions to Section Foreman Willie Sizemore. Sizemore gave permission for the two to work together operating one mining machine so that they could look out for one another's safety. On the section, Gilbert was told by the miner operator leaving the earlier shift that the roof was bad and breaking up. Gilbert and Caldwell then examined the faces in the section. Gilbert testified and the judge found that the No. 3 entry had a hill seam and a stress crack in the rib and roof and that the crosscut approaching the No. 4 "kickback" had a hill seam and stress cracks. ^{3/} Sizemore and Darrell Huff, Sandy Fork's chief engineer and acting safety director, also examined the faces on August 6 and 7, 1985. They testified that there were no exposed hill seams in the No. 4 kickback, that a crack and hill seam were present in the No. 3 entry, and that hill seams were present in other areas of the section. The judge found that there was not an exposed hill seam in the No. 4 kickback itself.

After examining the faces on August 6, Gilbert and Caldwell proceeded to the No. 4 kickback, where one cut of coal remained to be taken before moving to the No. 3 entry. Sizemore testified and the judge found that this final cut in the No. 4 kickback involved about four or five hours of work. Gilbert told Caldwell that he was going to refuse to cut the coal. He then left the face of the No. 4 kickback, located Sizemore and expressed his concerns about the condition of the roof. Sizemore testified and the judge found that Gilbert was referring specifically to roof conditions in the No. 3 entry.

Gilbert testified that Sizemore stated that he would add a few extra "cribs" as support for the roof or stand with the two miners as they cut the coal. Sizemore testified that he told Gilbert that he would have cribs built on both sides of the No. 3 entry, the only area about which Gilbert had expressed concern. After speaking with Sizemore, Gilbert went outside and repeated his concerns to General Mine Foreman Eddie Spurlock. Spurlock told Gilbert that he would not insist that he resume work, but advised Gilbert to go home and return the next day to meet with Mine Superintendent Willie Begley and General Manager Bill Phipps. Gilbert left the mine. After Gilbert left, Sizemore spent the remainder of the shift having cribs built in the No. 3 entry.

That same evening Gilbert went to Mine Superintendent Begley's home to repeat his concerns about the top. Gilbert also asked what Begley was going to do to get him another job. Begley told Gilbert to meet with him the next morning at the mine. During the night, a roof fall occurred in the No. 3 entry and the area was "dangered off."

^{3/} A "kickback" is an entry mined in the direction opposite to its normal course because of adverse roof conditions. Tr. I 111; II 140.

On the morning of August 7, 1985, because of Gilbert's statements and because of the roof fall that had occurred in the No. 3 entry, Begley and Phipps went underground to inspect the face areas. Gilbert arrived at the mine office about 9:00 a.m., six hours before his scheduled shift was to begin. While waiting for Begley and Phipps, Gilbert was told by another miner of the roof fall. When the two supervisors returned to the office about 9:30 or 10:00 a.m., Gilbert asked what they intended to do to support the roof. Begley and Phipps responded, in essence, that they were doing all they could to provide adequate support given the roof conditions being encountered. Begley testified and the judge found that Gilbert requested alternate work at any mine other than the No. 12 mine. Begley replied that the only job available for Gilbert was his present position. Gilbert then handed in his safety equipment and left the mine.

When Gilbert left the mine on the morning of August 7, he had not been given a specific assignment as to the work he would be performing later that day when the evening shift began. The judge found that "he could not have known where in the No. 12 mine he would be working." 8 FMSHRC at 1091. According to company records and Phipps' testimony, Gilbert was paid for one hour's work on August 6, and was carried on the company rolls as an "absentee" until August 9, 1985, when the daily report listed him as "quit."

On August 8, 1985, the day after he left the mine, Gilbert filed a section 105(c) discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that he had been discriminatorily discharged. The Secretary of Labor timely initiated his investigation of the complaint, pursuant to section 105(c)(2) of the Mine Act. He did not, however, make a determination within 90 days of receipt of Gilbert's complaint, as required by section 105(c)(3) of the Act, as to whether a violation of section 105(c) had occurred. See n. 1 supra.

By letter dated November 15, 1985, the Secretary informed Gilbert that the investigation into his complaint had not yet been completed. The letter also stated: "By the terms of the Act and the Federal Mine Safety and Health Review Commission's procedural rules, you have a right to file your own complaint with the Commission because the Secretary has not completed his consideration within 90 days." Thereafter, on December 23, 1985, Gilbert filed his own discrimination complaint with the Commission pursuant to Commission Procedural Rule 40(b). 4/ Two

4/ Commission Procedural Rule 40(b) states:

A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90

months later, on February 24, 1986, the Secretary finally filed with the Commission a section 105(c)(2) discrimination complaint on behalf of Gilbert. The Secretary then proceeded to move to dismiss Gilbert's individual complaint in light of the complaint filed by the Secretary. The administrative law judge deferred ruling on the motion and permitted both complaints to proceed to hearing.

In his decision on the merits the judge denied the Secretary's motion to dismiss. Acknowledging that section 105(c) does not expressly provide a right of action to individual complainants when the Secretary fails to determine within 90 days whether a violation of section 105(c) has occurred, he opined that Congress must have intended that the miner have the right to file a complaint on his own upon the failure of the Secretary to act within the prescribed 90-day period. 8 FMSHRC at 1087. The judge pointed to Commission Procedural Rule 40(b) permitting such complaints in those circumstances. He accordingly determined that he had jurisdiction to entertain both complaints. Id.

With respect to the merits of Gilbert's discrimination claims, the judge treated Gilbert's departure from the No. 4 kickback on the afternoon of August 6 and from the mine premises on the morning of August 7 as two distinct work refusals, and found that neither was reasonable nor made in good faith. 8 FMSHRC at 1090-91. Addressing the events of August 6, the judge found that Gilbert had four to five hours of work left in the No. 4 kickback when he refused to cut coal and that there is "no credible evidence that any unusual hazard did in fact exist in the No. 4 kickback." 8 FMSHRC at 1091. The judge concluded:

It was clearly premature for Gilbert to have exercised any work refusal for alleged hazards in the No. 3 entry some 4 to 5 hours before he would be expected to work in that entry and before any of the supplemental roof support promised by his section foreman had been erected.... It was incumbent on Gilbert to at least wait and see what additional support would be provided before exercising a work refusal. Accordingly, the work refusal was neither reasonable nor made in good faith.

8 FMSHRC at 1091.

Turning to Gilbert's decision on August 7 to leave the mine, the judge stated:

I also observe that Gilbert had not been discharged and was given the opportunity to return to work on August 7, the day after he refused to work and walked out of the mine. At that time there had already been a roof fall in the No. 3 entry and conditions had significantly changed. Indeed it

days after the miner complained to the Secretary.

29 C.F.R. § 2700.40(b).

appears that when Gilbert was told on August 7, that he could return to his job in the No. 12 mine as a continuous miner operator he declined and insisted on being transferred to a different mine. At this time he had been given no specific work assignment and could not have known where in the No. 12 mine he would be working. Thus again he could not at this time have entertained a reasonable or a good faith belief that he would have been required to work in a hazardous condition.

8 FMSHRC at 1091.

Noting evidence revealing an interest and request by Gilbert to transfer to a day shift job, the judge questioned Gilbert's good faith in his work refusals: "Thus it appears that Gilbert's refusal to work and his insistence on transferring to another mine may actually have been motivated by a pressing desire to work on a different shift." 8 FMSHRC at 1092. In summary, the judge denied Gilbert's claims on the grounds that his work refusals were not protected activities, that he suffered no adverse action in that he was not discharged, and that he voluntarily quit his job on August 7.

II.

Discrimination Issues

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir.); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

The Commission has held that a miner's refusal to perform work is protected under section 105(c)(1) of the Mine Act if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula,

supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-36 (February 1982) See also Secretary on behalf of Cameron v. Consolidation Coal Co., v. FMSHRC, 7 FMSHRC 319, 321-24 (March 1985), aff'd sub nom. Consolidation Coal Co. v. FMSHRC, 795 F.2d 364, 366-68 (4th Cir. 1986); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (February 1984), aff'd. sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1985); Miller v. FMSHRC, 687 F.2d 194, 195-97 (7th Cir. 1982). If an operator takes an adverse action against a miner in any part because of a protected work refusal, a prima facie case of discrimination is established. E.g., Dunmire & Estle, supra, 4 FMSHRC at 132-33; Metric Constructors, supra, 6 FMSHRC at 229-30, aff'd, 766 F.2d at 472-73.

We first consider Gilbert's refusal on August 6 to begin cutting coal in the No. 4 kickback. The judge found that Gilbert's safety concerns related solely to roof conditions in the No. 3 entry, conditions to which he would not have been exposed for several hours, and that his refusal to work was premature and evidenced a lack of required good faith and reasonableness. Counsel for both Gilbert and for the Secretary have presented us with extensive evidentiary challenges to these findings, effectively inviting us to decide the case de novo. Our role, however, is to review the record to determine if substantial evidence supports the judge's findings of fact. 30 U.S.C. § 823(d)(2)(A)(ii)(I). In any event, we find it unnecessary to specifically address every contested fact in this regard, for we can assume for purposes of our decision that Gilbert engaged in a protected work refusal on August 6 based on a good faith, reasonable belief in hazardous roof conditions. 5/

Under the Mine Act, a protected work refusal itself does not implicate a violation of section 105(c) of the Mine Act if it does not result in an adverse action motivated by that protected activity. When Gilbert refused to cut coal on August 6, he was not ordered to resume work nor was he suspended or discharged. On the contrary, his foreman heard him out and proceeded to address the complaints by erecting support cribbing in the No. 3 entry. Further, Gilbert was able to leave the mine for additional discussion with the general mine foreman, who

5/ For the sake of clarity, however, we conclude that substantial evidence does not support the judge's finding that Gilbert's concerns on August 6 were limited solely to the No. 3 entry. Rather, his fears regarding roof conditions extended to other work areas as well. Tr. I 23-24, 32, 33, 47, 54. Also, with respect to the events of August 6, we reject any implication in the judge's decision that a miner cannot exercise a valid work refusal until the precise moment of beginning the work that he reasonably fears poses a hazard. In some circumstances a miner properly could refuse work at some point in time in advance of the start of his hazardous assignment. Such a refusal would still be measured against the standards of good faith and reasonableness. As we make clear in our discussion of Gilbert's actions on August 7, however, his refusal on that date was too anticipatory and premature and, therefore, was unprotected.

allowed Gilbert to go home for the remainder of his shift. Substantial evidence supports the judge's findings -- and indeed it is indisputable on this record -- that Gilbert was not discharged or otherwise subjected to adverse action on August 6 or 7 because of his August 6 work refusal. Therefore, even assuming a protected work refusal on August 6, it did not result in an illegal adverse action against Gilbert.

The disposition of this case turns on the events of the morning of August 7. The record leaves no doubt that Gilbert refused to work as miner operator and left the mine premises several hours before his shift was scheduled to begin. The judge found that when Gilbert confronted mine management on the morning of August 7, the precise conditions that he had observed on the previous day had changed significantly. The judge also found because Gilbert had not received any assignment to a specific area of the mine, "he could not at this time have entertained a reasonable or good faith belief that he would have been required to work in a hazardous condition." 8 FMSHRC at 1091. The judge further found that Gilbert's decision most likely was motivated by his desire to be transferred to the day shift or to another mine, and that he was not discharged but "voluntarily gave up his job on August 7, 1985, at a time when he was not faced with any specific hazard." 8 FMSHRC at 1092. Substantial evidence supports these determinations.

By the morning of August 7, as the judge pointed out, conditions in the mine had changed from the previous day. The No. 3 entry had been closed off and the last cut in the No. 4 kickback apparently had been completed on an earlier shift. Therefore, it appears that Gilbert would not be returning to the areas he had examined a day earlier. In any event, Gilbert's refusal occurred some five hours before he was scheduled to return to work on the evening shift of August 7. We agree with the judge's substantially supported finding that Gilbert could not reasonably have known at that time the specific areas of the mine in which he would be working later. Moreover, and importantly, given the dynamics of mining operations, Gilbert could not have known the actual mining conditions that would be present five hours later -- especially in view of the operator's efforts to address the roof problems. In Dunmire & Estle, supra, the Commission held that a failure to examine personally an allegedly hazardous work area did not necessarily indicate bad faith or lack of reasonable belief. 4 FMSHRC at 137. Unlike the situation in the present case, however, the safety hazards in Dunmire & Estle were located in an existing work area to which the complainants already had been assigned and were about to enter to begin their assigned work and which had been recently examined first-hand by other miners. 4 FMSHRC at 128-29, 137-38. In short, substantial evidence supports the judge's conclusion that Gilbert refused work unreasonably and prematurely on the morning of August 7 and that his work refusal at that time accordingly lacked the required basis of a good faith, reasonable belief in a hazard exposing him to a danger.

In reaching this conclusion, we also are persuaded by the fact that Sandy Fork's supervisors and managers did not react to Gilbert precipitately or manifest retaliatory intent. As noted, on August 6 management's reaction was supportive and aimed at correcting the roof conditions concerning Gilbert. On the morning of August 7, both Mine

Superintendent Begley and General Manager Phipps inspected underground conditions being encountered. To deem Gilbert's refusal to work on August 7 to be protected would be to deprive the operator of a reasonable opportunity to fully address complained-of hazards before incurring legal liability.

Finally, we affirm the judge's finding that Gilbert failed to prove that he was, in fact, discharged by Sandy Fork. We disagree with the assertion that Gilbert was faced with a "Hobson's choice" of working under unsafe conditions or quitting. In Metric Constructors, supra, the Commission concluded that "Metric's decision that the men could either work under the unsafe conditions or have their employment terminated was equivalent to discharging them for engaging in protected activity." 6 FMSHRC at 229. The same is not true here. The record supports the judge's finding that Gilbert could have returned to work that afternoon on his regular shift. Had he done so and had the conditions then extant necessitated the "Hobson's choice" of working under demonstrably unsafe conditions or being fired we would be faced with a different case.

Based on our examination of the record, we conclude that substantial evidence supports the judge's finding that Gilbert was not discharged but voluntarily gave up his job at a point in time when he was not faced with a hazard justifying a refusal to work at that time. We therefore affirm the judge's conclusion that a violation of section 105(c)(1) was not established.

III.

Dismissal of Gilbert's Individual Complaint

We further conclude that the judge erred in denying the Secretary's motion to dismiss the complaint that Gilbert filed on his own behalf. As noted, Gilbert's individual complaint was filed pursuant to the last clause of Commission Procedural Rule 40(b)(n. 4 supra), permitting such actions where the Secretary fails to make any determination as to whether a violation of section 105(c) has occurred within the required 90-day period following the filing of the miner's discrimination complaint.

The obvious intent of this procedural rule was to protect miners from prejudicial delay by the Secretary in filing discrimination complaints and to encourage the Secretary to meet his statutory responsibilities under section 105(c) in a timely manner. For a number of years, the Secretary voiced no opposition to the procedure set forth in Rule 40(b). Indeed, as the facts of this case illustrate, the Secretary transmitted letters to complainants in situations where his investigation exceeded the statute's 90-day limit, informing complainants that they could file a private action under under Commission Rule 40(b). In this litigation, however, the Secretary argues that Rule 40(b)'s authorization of a complaint filed by a miner prior to the Secretary's making a determination as to whether the discrimination has occurred conflicts with the enforcement schemes set forth in section 105(c) of the Mine Act. Oral Arg. Tr. 39-48. Upon re-examination, of the statute and our procedural rule, we concur.

Section 105(c) does not provide that complainants may file complaints on their own behalf if the Secretary has not determined whether a violation has occurred within 90 days of the filing of the complaint. To the contrary, section 105(c)(3) expressly provides that the complainant may file his private action only after the Secretary informs the complainant of his determination that a violation has not occurred:

Within 90 days of the receipt of a complaint filed under [section 105(c)(2)], the Secretary shall notify, in writing, the miner ... of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of [section 105(c)] have not been violated, the complainant shall have the right, within 30 days of the Secretary's determination, to file an action on his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)].

30 U.S.C. § 815(c)(3)(emphasis added).

Thus, the statute is clear and express concerning the filing of discrimination complaints. The Secretary is required to investigate all initial discrimination complaints under the Act (30 U.S.C. § 815(c)(2)); if the Secretary determines that the Act has been violated, the Secretary prosecutes a discrimination complaint on the complainant's behalf (id.); if the Secretary finds that the Act was not violated, then the complainant may file a complaint on his own behalf (30 U.S.C. § 815(c)(3)).

Further, the Mine Act's legislative history is consistent with the plain statutory language. S. Rep. No. 181, 95th Cong., 1st Session 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624-25 (1978) ("Legis. Hist."). For example, the Senate Report emphasizes that the investigatory time obligations placed on the Secretary by section 105(c)(2) are not intended to be jurisdictional and that "the complainant should not be prejudiced because of the failure of the Government to meet its time obligations." Legis. Hist. 624. This instruction suggests that what Congress had in mind in enacting section 105(c)(2) was that an individual could file a discrimination complaint with the Commission on his own behalf only upon the Secretary's determination not to prosecute the complainant's claim. Had Congress intended otherwise, it would not have focused upon the prejudice to the complainant because of secretarial inaction, as the self-help remedy of the individual's filing his own complaint would have been available.

Congress has established discrimination enforcement mechanisms in other statutes different from that set forth in section 105(c) of the Mine Act. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982), provides that where the government has not determined within a prescribed period whether unlawful employment

discrimination has occurred, the charging party is so notified and may file his own complaint. 42 U.S.C. § 2000e-5(f)(1). More recently, in the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359, Congress expressly provided that where the government fails to determine within a specified period whether unfair immigration-related employment discrimination occurred, the charging person may file his own private action. 8 U.S.C.A. § 1324b(d)(2)(West Supp. 1987). Hence, Congress has enacted enforcement schemes permitting private actions where the government fails to make the requisite determination of a charged violation within a given period. However, by the express terms of section 105(c) it chose not to do so in the Mine Act. We must respect Congress' choice. See, e.g., UMWA v. Secretary of Labor, 5 FMSHRC 807, 810-16 (May 1983), aff'd mem. sub nom. UMWA v. Donovan, 725 F.2d 126 (D.C. Cir. 1983)(table). See generally Council of Southern Mtns. v. FMSHRC, 6 FMSHRC 206, 213 (February 1984), aff'd sub nom. Council of Southern Mtns. v. FMSHRC, 751 F.2d 1418 (D.C. Cir. 1985).

This Commission already has spoken strongly concerning the importance of the Secretary's making determinations as to violations of section 105(c) within the prescribed 90-day period. Secretary on behalf of Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905 (June 1986). As emphasized in Hale (8 FMSHRC at 908) and as noted above, the legislative history indicates that while Congress intended that the 90-day investigation period not be jurisdictional, it was to be respected and followed by the Secretary. Legis. Hist. 624. Under the Mine Act, the Secretary bears enforcement responsibility of investigating all initial discrimination complaints. See Roland v. Secretary of Labor, 7 FMSHRC 630, 634-36 (May 1985), aff'd mem. sub nom. Roland v. FMSHRC, No. 85-1828 (10th Cir. July 14, 1986). That responsibility is not effectively discharged if the statutory time periods are ignored. At oral argument, counsel for the Secretary represented that the Secretary was undertaking administrative actions to address the problem of investigative delay of discrimination complaints. We welcome all efforts in this regard.

We are aware of potential problems when the Secretary's investigation of initial discrimination complaints is delayed. That concern notwithstanding, the approach suggested by our colleagues usurps the Secretary's primary enforcement responsibility under section 105(c) and cannot be squared with the plain structure and language of that section. Review and redress of continued delays by the Secretary in this crucial area of the Mine Act are more appropriately the subjects of Congressional oversight.

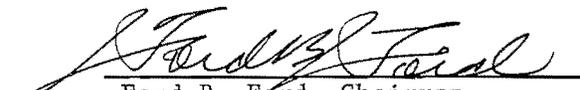
Accordingly, we hereby declare the clause in Commission Procedural Rule 40(b) permitting the filing of individual actions when the Secretary has not made a determination of violation within 90 days to be invalid. A Federal Register notice deleting this clause will appear. Our action here applies prospectively and also to any such individual

discrimination complaints pending presently before the Commission. 6/

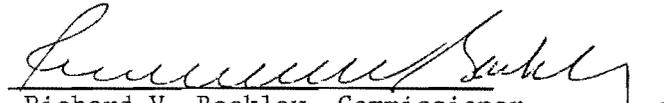
IV.

Conclusion

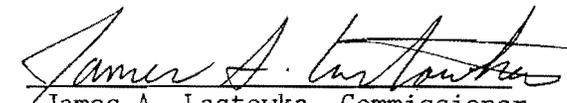
On the foregoing bases, we affirm on substantial evidence grounds the judge's dismissal of the discrimination complaint filed by the Secretary on behalf of Gilbert. We reverse the judge's denial of the Secretary's motion to dismiss the complaint filed by Gilbert in his own behalf.



Ford B. Ford, Chairman



Richard V. Backley, Commissioner



James A. Lastowka, Commissioner

6/ Individual complainants remain free to retain private counsel at any time. However, in Maggard v. Chaney Creek Coal Co., etc., Nos. KENT 86-1-D, slip op. at 8-9, issued this date, we have followed the decision by the United States Court of Appeals for the Fourth Circuit in the absence of contrary judicial authority, disallowing private counsel fees in Mine Act discrimination proceedings except where a complainant has successfully prosecuted a section 105(c)(3) private action following the Secretary's determination not to file a complaint on the complainant's behalf. See Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 644 (4th Cir. 1987).

Commissioner Doyle and Commissioner Nelson, concurring in part and dissenting in part:

We join in that part of the majority's decision affirming the administrative law judge's dismissal of Mr. Gilbert's discrimination claim. We respectfully dissent, however, from the decision to the extent that it invalidates that portion of the Commission's Rule 40(b) that provided claimants the right to bring their own action if the Secretary of Labor failed to act within the statutory time period. Consequently, we would affirm the judge's denial of the Secretary's Motion to Dismiss the individual complaint filed by Mr. Gilbert.

When Mr. Gilbert filed his individual complaint with the Commission, it appeared clear to all concerned that he had the right to do so based on the Secretary's failure to determine, within ninety days after his receipt of the complaint, whether a violation had occurred. The Commission's position was articulated in its own procedural Rule 40(b), which was promulgated in 1979, and provided:

A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary.

29 C.F.R. §2700.40(b)(1986) (emphasis added).

That position was reaffirmed by the Commission as recently as June, 1986. Secretary on behalf of Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905, 907, n. 3.

The Secretary's position was articulated in its letter of November 15, 1985, to the complainant and in similar letters to other complainants whose cases the Secretary had failed to determine within ninety days, as follows:

By the terms of the Act and the Federal Mine Safety and Health Review Commission's procedural rules, you have a right to file your own complaint with the Commission because the Secretary has not completed his consideration within 90 days. Should you desire to file a complaint of discrimination directly with the Commission, it should be addressed ... (emphasis added).

Five weeks after receiving the Secretary's letter, Mr. Gilbert followed the Commission's rule and the Secretary's advice and filed his complaint with the Commission pursuant to section 105(c)(3) of the Mine Act and Rule 40(b). Two months later, the Secretary, having finally made a determination that a violation had occurred, filed his section 105(c)(2) action. He then moved to dismiss Mr. Gilbert's private action, a motion in which the operator did not join and which the administrative law judge denied. Today the Commission has, at the Secretary's urging, reversed the judge's decision and invalidated the portion of Rule 40(b) that permitted a complainant to file his own action if the Secretary failed to act within ninety days after a complaint was filed with the Secretary.

The Secretary's argument to the Commission is twofold: Gilbert's private action was based on an "implied" cause of action and Rule 40(b) conflicts with the enforcement scheme of section 105(c). We find both of these arguments unpersuasive. The action was not based on an implied cause of action but rather on an action explicitly authorized by Rule 40(b). Further, we find no conflict between Rule 40(b) and the enforcement scheme of section 105(c). We believe the rule is a reasonable construction of the Mine Act and see no reason to invalidate it.

The majority bases its decision to invalidate Rule 40(b) on "the plain statutory language" of section 105(c) and states that "the statute is clear and express ..." It should be noted that the language that is today characterized as "clear and express" has now been interpreted by the Commission in two different manners (with its promulgation of Rule 40(b) in 1979 and its reaffirmation in 1986, and today with its finding that the rule is without foundation) and by the Secretary in at least three different manners (that a claimant has the right to bring his own action because the Secretary has not made a determination within ninety days, as set out in the Secretary's letter to Mr. Gilbert, that a private right of action authorized by Rule 40(b) must give way to the Secretary, once he determines that a violation has occurred, as argued in the Secretary's brief to the Commission, Brief for the Secretary of Labor at 11, and that the Secretary has exclusive jurisdiction ad infinitum until he makes a determination, as asserted by the Secretary at oral argument, Record at 72. These various interpretations provide ample evidence that the position enunciated today is not unambiguously expressed in the statute.

While we are in agreement with the majority that section 105(c) does not expressly provide for the filing of a private action by a complainant when the Secretary fails to make a determination within ninety days, we disagree that section 105(c)(3) expressly provides that private actions can be maintained only after the Secretary informs the complainant of his determination that a violation has not occurred. (In fact, the statutory language is "[i]f the Secretary ..."; it is not "only if the Secretary ..."). We find the statute to be silent as to the consequences of the Secretary's failure to make a determination within the ninety day period. This view is apparently shared by the Secretary who, in support

of his motion, stated that the Mine Act "is silent as to the implications of any delays by the Secretary in completing his investigation within the statutorily prescribed time frame." Secretary's Memorandum in Support of Motion to Dismiss at 4.

While the unambiguously expressed intent of Congress must be given effect, it is a well established rule that where the statute is either silent or ambiguous, an agency has the power to formulate policy and make rules to fill any gap left, implicitly or explicitly, by Congress. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). The Commission, in promulgating Rule 40(b) more than eight years ago, filled the gap left by Congress by providing miners with the right to bring their own action where the Secretary failed to act within the statutory period. This was not only a reasonable construction of the statute, but one that effectuated Congress' intent that Mine Act discrimination complaints be processed expeditiously.

The purpose of section 105(c) of the Mine Act is to afford protection to miners who have been discriminated against in the exercise of their statutory rights. It is clear from the language of section 105(c) that the timely institution, investigation and resolution of discrimination complaints were an important part of Congress' plan with respect to these complaints. By Congressional direction, complaints are to be filed with the Secretary within sixty days after the alleged violation; within fifteen days thereafter the Secretary is to commence an investigation; upon application of the Secretary in certain circumstances the Commission, on an expedited basis, is to order temporary reinstatement; and within 90 days of the receipt of a complaint the Secretary is required to notify the miner of his determination whether a violation has occurred. In those instances where the Secretary concludes upon investigation that a violation has occurred, he is required to immediately file a complaint with the Commission. Where the Secretary makes a negative determination, the miner has the right to pursue his own action with the Commission, but must do so by filing his complaint within thirty days of the Secretary's determination. It is apparent that Congress envisioned prompt action aimed toward rapid resolution of discrimination claims. The Commission's reinterpretation of the statute and consequent invalidation of Rule 40(b) at this time endorses a change in policy that is inconsistent with the mandate of Congress and clearly frustrates its intent.

There are a number of reasons (from both the miner's and the operator's point of view) why cases should not be allowed to languish, awaiting a determination by the Secretary. Memories fade and witnesses relocate. Cases can be more easily resolved before positions harden and large sums of money are involved. The miner may be unemployed and without other means of support or he may find his case ultimately dismissed if the operator can show that he has been prejudiced by the delay. Hale, 8 FMSHRC at 908. The operator may have been required to temporarily reinstate a miner whose claim, while not frivolous, is ultimately found to be without merit or he may be faced with a damage award that includes

years of back pay rather than months. It is no answer to assert, as the Secretary did at oral argument, that excessive or chronic delays can be remedied by Congressional oversight of the Secretary's investigation and determination process. We doubt that Congress intended the ninety day determination requirement set forth in section 105(c)(3) to serve only as a yardstick against which Congress could measure the Secretary's performance in oversight hearings. Yet the majority's decision leaves miners and mine operators with no other source of relief from delay by the Secretary except to write to their Congressmen.

While finding the statute "clear and express," the majority nevertheless turns to legislative history and bases its decision in part on the section of the history that indicates that the complainant should not be prejudiced because of the government's failure to act in a timely fashion. They opine that this instruction "suggests" that Congress intended individual filing only upon a negative determination by the Secretary, otherwise Congress would not have focused upon the possible prejudice to the complainant arising from delay by the Secretary. This interpretation is somewhat at odds with the position recently expressed by the Commission when it found that due process considerations might necessitate dismissal of a claim where the operator shows material legal prejudice attributable to delay by the Secretary. Hale, 8 FMSHRC at 908. In any event, we do not read the legislative history to countenance the many and extended delays that have occurred over the years.

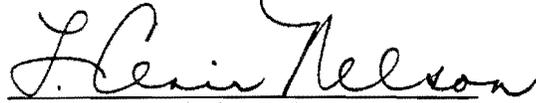
The majority notes that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1982), specifically grants the charging party the right to bring his own action in the event that the Equal Employment Opportunity Commission (the "EEOC") fails to act within a certain period of time. Title VII, however, contains no language requiring the EEOC to act within a specified period. Rather, it indicates that a civil action may be brought by the EEOC under certain circumstances. If the EEOC fails to act within a specified period, the complainant is to be so notified and, if he chooses to bring his own action, the EEOC's further involvement is limited to the status of an intervenor, at the court's discretion. We do not find it remarkable that Congress included express language permitting initiation of a private action where the investigatory agency's action is permissive and did not include such language where the agency's responsibilities are mandatory.

While the more recently enacted Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359, (the "Immigration Act") contains both mandatory language with respect to the time in which the Special Counsel must act and language giving the charging party the right to bring an action if the Counsel fails to act within the required time period, we suspect that this additional language represents a recognition by Congress that at least one investigatory agency now considers time requirements "not as mandatory but rather as 'directory in nature.'" Brock v. Roadway Express, Inc., 55 U.S.L.W. 4530, 4534 (U.S. April 22, 1987) (No. 85-1530). We find it highly unlikely that Congress intended

that discrimination complaints filed under the Mine Act should be prosecuted less expeditiously than those filed under the Immigration Act.

In sum, we find no basis in either the Act or the legislative history to extend the Secretary's exclusive jurisdiction beyond the ninety days in which he is mandated to act and would therefore urge the retention of Rule 40(b), which represented a reasonable interpretation by the Commission of section 105(c). Accordingly, we would affirm the administrative law judge's denial of the Secretary's Motion to Dismiss.


Joyce A. Doyle
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
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July 31, 1987

JOHN A. HARRIS, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. PENN 87-72-D
: MSHA Case No. PITT CD 86-20
BENJAMIN COAL COMPANY, :
Respondent : Benjamin No. 1 Strip Mine

ORDER TO SHOW CAUSE

Statement of the Case

This proceeding concerns a complaint of discrimination filed by Mr. Harris against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was filed on December 30, 1986, after Mr. Harris was advised by the Secretary of Labor (Mine Safety and Health Administration), that his complaint filed with that agency would not be pursued further.

In his complaint filed with the Commission, Mr. Harris states "I am requesting reinstatement and back pay and clearing of my name by Benjamin Coal Company. I feel my letter of termination was very unfair." In response to an order issued by me on July 10, 1987, Mr. Harris furnished me with a copy of his termination letter of August 12, 1986. He also furnished me with a copy of a memorandum report prepared by a Commonwealth of Pennsylvania Department of Environmental Resources supervisory mine inspector concerning a fatal surface mine blasting accident which occurred at the respondent's mine on June 17, 1986, and a copy of a "Civil Penalty Worksheet" proposing a civil penalty assessment in the amount of \$7,750 against the respondent for a violation of a state regulation concerning "casting blasting debris."

The information supplied by Mr. Harris reflects that he was employed by the respondent as a blaster, and that he was the blaster who detonated the shot which resulted in fatal injuries to a mine foreman who was killed by fly rock from the blast. As a result of this incident, Mr. Harris' state blaster's license was suspended, and he was subsequently

discharged by the respondent on August 12, 1986, for violation of company safety rules and for "a pattern of disregard" for company safety procedures and practices.

Mr. Harris takes issue with his discharge and asserts that no other blasters have ever been terminated by the respondent because of fly rock, and that numerous incidents of vehicle damage caused by fly rock, and one incident of personal injury requiring treatment by a doctor, have not resulted in any terminations or reprimands. He further asserts that his discharge does not comport with the state civil penalty assessment findings that the accident was "a freak incident" and that the respondent's culpability was "questionable."

Discussion

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

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Upon review of the complaint filed by Mr. Harris, I find nothing to suggest that his termination was the result of any

rights or protections afforded him under section 105(c) of the Act. In short, it would appear from his complaint and the pleadings filed in this matter that Mr. Harris does not state a claim for which relief can be granted under section 105(c)(1) of the Act.

ORDER

In view of the foregoing, the complainant John A. Harris IS ORDERED TO SHOW CAUSE within fifteen (15) days as to why his complaint should not be dismissed for failure to state a claim for which relief can be granted under section 105(c)(1) of the Act.


George A. Koutras
Administrative Law Judge

Distribution:

Mr. John A. Harris, RD 1, Box 118, Irvona, PA 16656
(Certified Mail)

Mr. John B. Martyak, Manager Personnel/Safety, Benjamin Coal
Company, Benjamin #1 Strip, RD, LaJose, PA 15753
(Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 3 1987

ROBERT H. CHEYNEY, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 86-179-DM
HECLA MINING COMPANY, : MD 86-27
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

The parties have reached an amicable resolution of this matter. The terms of the agreement are that Complainant, in return for the payment of \$300.00, agrees to accept the same in full satisfaction of all rights and remedies he may have under the Federal Mine Safety and Health Act of 1977; Respondent in no manner admits the violation of any provisions of said Act; Complainant withdraws the Complaint herein; and the parties jointly move for an order dismissing these proceedings with prejudice.

In the premises, this settlement appears appropriate and is approved. Accordingly, Respondent, if it has not previously done so, is ordered to pay Complainant the sum of \$300.00 immediately upon receipt of this decision. It is further ordered that these proceedings are dismissed with prejudice with each party to bear his (its) own costs.


Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Mr. Robert H. Cheyney, Route 2, P.O. Box 5212, Twin Falls, ID 83301 (Certified Mail)

Fred M. Gibler, Esq., Evans, Keane, Koontz, Boyd & Ripley, P.O. Box 659, Kellogg, ID 83837 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 4 1987

LOCAL UNION 1810, DISTRICT 6, : COMPENSATION PROCEEDING
UNITED MINE WORKERS OF :
AMERICA (UMWA), : Docket No. LAKE 87-19-C
Complainant :
v. : Powhatan No. 6 Mine
NACCO MINING COMPANY, :
Respondent :

DECISION

Appearances: Earl R. Pfeffer, Esq., Washington, DC,
for Complainant
Thomas C. Means, Esq., Washington, DC,
for Respondent.

Before: Judge Fauver

This proceeding was brought by the UMWA under § 111 of the Federal Mine Safety and Health of 1977, 30 U.S.C. § 801 et seq., for compensation for miners idled by a modification of a § 104(d)(2) order.

The parties have filed cross motions for summary decision. Oral arguments were heard on the motions and the parties have filed briefs.

The facts are not in dispute. On December 10, 1984, MSHA (the Mine Safety and Health Administration, United States Department of Labor) found that an intake escapeway in the north mains area was not being maintained to ensure safe passage of personnel, including disabled persons. The inspector issued Order No. 2329934 pursuant to § 104(d)(2) of the Act, citing a violation of 30 C.F.R. § 75.1704. The order closed all areas in the north mains inby the two main east junction. A civil penalty of \$500 was assessed by MSHA and the fine was paid, without contest, in March, 1985.

The closure effect of the order was lifted about 30 minutes after its issuance on December 10, 1984, when the order was modified to permit Nacco to continue normal mining operations in "Main north while the work of rehabilitating the intake escapeway ... is being done." The modification also provided that: "The

operator is to work at least 25 manshifts per week on this effort until this work is completed." Normal mining operations resumed at this point, and all previously withdrawn miners returned to work; at least 25 manshifts of work were devoted to rehabilitating the intake escapeway each week thereafter. Neither the company nor the union contested the original order or any of its modifications.

On January 25, 1985, the Ohio Division of Mines ("DOM") issued Nacco its own order finding that the escapeway was not being maintained to a required width of six feet in certain locations and requiring that this condition be abated within 60 days. On March 22, 1985, the DOM issued a new order requiring the intake escapeway to be moved from the No. 4 entry where it had been to the No. 2 entry, requiring that Nacco continue working at least 25 manshifts per week on the new designated escapeway on the old escapeway in the No. 4 entry.

Nacco continued to do rehabilitation work in the No. 2 entry, working at least 25 manshifts per week rehabilitating the intake escapeway. On October 2, 1986, MSHA issued a new modification of the 1984 order, requiring that the escapeway and all active sections inby be closed, because the MSHA inspectors found that the escapeway was still in violation in several locations and determined that the time for abatement should not be extended further. By reallocating the affected work force, Nacco was able to continue operating without idling any miners during the shift on which the modification was issued. However, on the next shift, and for the rest of the week, Nacco laid off 87 miners, on October 6, 7, and 8, as a result of the October 2, 1986, modification of the December 10, 1984, order. On October 8, the job of rehabilitating the intake escapeway was completed, and MSHA modified the 1984 order by providing that the intake escapeway and the active working sections inby could again be reopened.

This case arises on a complaint for compensation under § 111 of the Act, claiming that 87 miners were idled on October 6, 7, and 8 as a result of MSHA's October 2, 1986, modification.

§ 111 of the Act provides:

Sec. 111. If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the

period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.

Nacco makes the following principal arguments:

1. Section 111 does not provide a right to compensation to miners who are idled by a modification of a previous order.
2. The order was invalidated by the effect of the initial modification on December 10, 1984, because the Act does not authorize MSHA to impose affirmative duties on an operator in exchange for non-withdrawal of miners under § 104(d).
3. MSHA's attempt to modify the order to require a withdrawal of miners 22 months after the order had been

modified to reopen the mine area exceeded MSHA's authority under the Act.

To understand the parties' actions and responses, and the effect on their statutory rights, one must look at the sequence of events. At 1:30 p.m., on December 10, 1984, MSHA issued a § 104(d)(2) order to Nacco stating that the intake escapeway was not being maintained to ensure safe passage and therefore was in violation of 30 C.F.R. § 75.1704. Thirty minutes later, MSHA modified the order to permit Nacco to continue normal mining operations while rehabilitation work on the intake escapeway was being done. The modification also provided that Nacco was to work at least 25 manshifts per week on the rehabilitation work until it was completed. The order was modified a number of times over a two year period. Neither Nacco nor the union contested the original order or any of the modifications. Also, Nacco paid a civil penalty of \$500 for the violation cited in the order.

On October 2, 1986, MSHA determined that a violation still existed, that it should have been abated by then, and that the period of time for abatement should not be further extended. MSHA therefore modified the order to specify the existing violative conditions and to withdraw the miners from the affected area of the mine until the violative conditions in the escapeway were corrected. Neither party contested the October 2, 1986, modification.

In December, 1986, the union filed this claim. The claim arises under the third sentence of § 111, which reads:

If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

This language of § 111 requires that an operator's contest rights under § 105(d) be either exhausted or waived before the Commission may order compensation.

There are significant procedural differences between a hearing of a third-sentence claim and a claim under the first two sentences of section 111. In the latter case, the hearing may be

scheduled immediately because the miners' entitlement to compensation is independent of any subsequent review of the order upon which the claim is based. The hearing of a third-sentence complaint, however, may not be held until after the order upon which the claim is based has become "final." Thus, an award of one week's compensation may not be ordered by the Commission until either the operator has waived its contest rights or the underlying order has been upheld in a contest proceeding under § 105(d). It is only when the underlying order becomes final that a third-sentence claim under § 111 may be adjudicated by the Commission.

The Commission's review of all orders and modifications is governed by procedures provided by §§ 105(d) and 107(e), not § 111. Thus, in a third-sentence claim under § 111, the validity of the order is not an issue, but it is the "finality" of the order that triggers jurisdiction to hear the claim. In such a proceeding, the Commission must determine whether or not an order is final. That determination must be based upon whether the order was contested under § 105(d) and, if so, whether the subsequent review deemed it to be valid. If the underlying order was not challenged it is, as a matter of law, final and not subject to further review.

The finding of a violation of 30 C.F.R. § 75.1704 became final when Nacco paid the civil penalty, since the fact of a violation cannot continue to be contested once the penalty proposed for the violation has been paid. Old Ben Coal Co., 3 FMSHRC 1685 (1985). In addition, since neither the order nor the subsequent modifications were contested by any party, they became final and are not subject to Commission review. See Pocahontas Fuel Co., 1 FMSHRC 1580, 1582-83 (1977); and Turner Brothers, Inc. 3 FMSHRC 1649, 1650 (1984). Nacco is therefore statutorily barred from contesting the validity of the order, its four modifications, and the charge of a violation of 30 C.F.R. § 75.1704. Its arguments (summarized above) attacking the validity of the October 2, 1986, modification are thus not cognizable in this proceeding.

Since Nacco concedes that the lay-off of the 87 miners was caused by the modification of the order on October 2, 1986, there is no issue as to a nexus between the modification and the lay-off.

The union is therefore entitled to summary decision, and Nacco's motion for summary decision will be denied.

ORDER

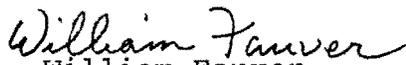
WHEREFORE IT IS ORDERED that:

1. Nacco's motion for summary decision is DENIED. The Complainant's motion for summary decision is GRANTED.

2. The affected miners are entitled to compensation at their last regular pay rates for wages lost on October 6, 7, and 8, 1986, with interest computed from October 8, 1986, until paid.

3. Within 15 days of this Decision, the parties shall confer in an effort to stipulate a final order awarding compensation and interest, computed in accordance with the Commission's decision in Arkansas Carbona, 5 FMSHRC 2042 (1983). Within 5 days of their conference, the parties shall file a report of their conference with the Judge, submitting either a joint proposed order for relief or a statement of the issues between the parties as to the relief to be granted. Respondent's stipulation of the terms of a relief order will not prejudice its rights to seek review of this Decision.

4. This Decision shall not be made final until a Supplemental Decision on Compensation is entered herein.


William Fauver
Administrative Law Judge

Distribution:

Earl R. Pfeffer, Esq., United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)

Thomas C. Means, Esq., Crowell & Moring, 1001 Pennsylvania Ave., N.W., Washington, DC 20004 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

AUG 4 1987

WESTERN FUELS-UTAH, INC., : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. WEST 86-113-R
Order No. 2830082; 3/3/86
SECRETARY OF LABOR, : Docket No. WEST 86-114-R
MINE SAFETY AND HEALTH : Citation No. 2830083; 3/4/86
ADMINISTRATION (MSHA), :
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 86-245(A)
Petitioner : A. C. No. 05-03505-03524
v. : Deserado Mine
WESTERN FUELS-UTAH, INC., :
Respondent :

DECISION

Appearances: Karl F. Anuta, Esq., and Nancy E. VanBurgel, Esq., Duncan, Weinberg & Miller, P.C., Denver, Colorado, for Contestant/Respondent; Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Maurer

This consolidated proceeding concerns the contestant, Western Fuels-Utah, Inc.'s, challenge pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act) of Order No. 2830082 dated March 3, 1986, and Citation No. 2830083 dated March 4, 1986, as well as the related civil penalty proceeding.

Order No. 2830082, as modified, was issued under § 104(g)(1) of the Act and alleges a violation of § 115(a) of the Act. Additionally, § 104(a) Citation No. 2830083, issued the following day, cites the operator for a violation of 30 C.F.R. § 48.7. The gist of the violation in both cases, however, is that the company failed to task train a particular section foreman, one Carson Julius, on the roof bolting machine, prior to his operation of that machine.

Since the citation was issued in conjunction with the § 104(g)(1) withdrawal order and is based upon the same event, only the citation was assessed by MSHA. The Secretary contends that a civil penalty of \$180, as proposed, is appropriate for the violation.

These cases were heard in Denver, Colorado, on April 2, 1987, and both parties have subsequently filed post-hearing briefs which I have considered in the course of writing this decision.

ISSUE

The ultimate issue in these cases is whether the Department of Labor (MSHA) training regulations require supervisory mine personnel subject to MSHA approved State certification requirements to be task trained under 30 C.F.R. § 48.7 prior to actually performing mining work involving operation of machinery, such as here, a roof bolting machine.

STIPULATIONS

The parties have made the following joint stipulations of facts in these proceedings:

1. Western owns and operates the Deserado Mine, Identification No. 05-03505, which is located in Rangely, Colorado.
2. The mine is subject to the Federal Mine Safety and Health Act of 1977.
3. The Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge have jurisdiction over these proceedings.
4. Carson Julius, a section foreman with nine years of prior mining experience at other mines, had worked at the mine since November 1, 1985. On November 1, 1985, Julius completed eight hours of training under 30 C.F.R. § 48.6 for newly employed experienced miners. Before becoming a section foreman at the mine, Julius had worked at the mine as a miner helper, on utility, and on various machines, including the shuttle car, the pack rat, and the Wagner scoop tram.
5. Julius was promoted to section foreman at the mine on February 3, 1986. Supervisors at the mine are subject to MSHA approved State certification requirements. The written criteria applied by Western in selecting section foremen included that the person should be able to operate face equipment in order to properly direct the workforce and that the

individual have on-the-job experience in underground operation of a coal mine, Colorado mine foreman papers, and supervisory skills. Western required that section foremen be capable of training the hourly workforce in the operation of underground face equipment in a safe and productive manner. Julius was certified as a mine foreman by the State of Colorado on May 15, 1980. Julius met all of Western's criteria for promotion to section foreman.

6. The Training Plan of the Mine submitted under 30 C.F.R. § 48.3 and approved by the District Manager on May 2, 1984, does not state that supervisors must take task training. The Training Plan does require task training under 30 C.F.R. § 48.7 for roof bolters.

7. In the 12 months preceding March 1, 1986, the specific items of equipment on which Julius had been "task trained" under 30 C.F.R. § 48.7 were the shuttle car, the pack rat, and the Wagner scoop tram. Julius had operated roof bolting machines in the past under both production and non-production conditions and circumstances. Julius had operated the Lee Norse TD-43-5-4F twin boom roof bolting machine briefly on prior occasions.

8. On February 28, 1986, Julius was section foreman for a crew assigned to mine in the entries and connecting crosscuts off the East Mains working section of the mine. Julius instructed roof bolter Sky Havens to go to lunch and filled-in to operate the right hand boom of the Lee Norse roof bolting machine, working with left boom operator Austin Mullens.

9. At all times relevant to these proceedings, Federal Coal Mine Senior Special Investigator Theodore L. Caughman and Federal Coal Mine Inspector Ervin J. St. Louis were duly authorized representatives of the Secretary.

10. On March 3, 1986, Senior Special Investigator Caughman issued Order No. 2830082 and the accompanying Modification No. 2830082-2. The order as modified was issued pursuant to § 104(g)(1) of the Act and charged a significant and substantial violation of § 115(a) of the Act.

11. The order as modified was terminated by Termination No. 2830082-1.

12. On March 4, 1986, Senior Special Investigator Caughman issued Citation No. 2830083. The citation was issued pursuant to § 104(a) of the Act and charged a significant and substantial violation of 30 C.F.R. § 48.7. The citation was issued in conjunction with the order as modified.

13. The citation was terminated by Termination No. 2830083-01.

14. In February 1982 MSHA distributed to all MSHA district and subdistrict managers and field supervisors a statement in question-and-answer format concerning the extent of the supervisory personnel training exception under Part 48. On November 27, 1984, MSHA issued Policy Memorandum No. 84-2 EPD entitled "Training Requirements of 30 C.F.R. Part 48 for Mine Supervisors who Perform Non-Supervisory Work. On July 1, 1985, MSHA published the "MSHA Administrative Manual 30 C.F.R. Part 48 - Training and Retraining of Miners" which incorporated on page 2 MSHA's position relative to supervisors who do non-supervisory work.

15. Western had 38 assessed violations during the 24-month period prior to the issuance of the order and citation at the subject mine, 32 of which have been paid.

16. The assessment of the penalty will not affect Western's ability to continue in business.

17. Western abated the violation in good faith.

18. Western is a large operator with 810,078 tons of production in 1986.

APPLICABLE REGULATIONS

The two particular regulations that are herein involved are reproduced in their entirety below for the convenience of the reader.

30 C.F.R. § 48.2(a)(1) provides as follows:

(a)(1) "Miner" means, for purposes of §§ 48.3 through 48.10 of this Subpart A, any person working in an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works underground on a continuing, even if irregular, basis. Short term, specialized contract workers, such as drillers and blasters, who are engaged in the extraction and production process and who have received training under § 48.6 (Training of newly-employed experienced miners) of this Subpart A may,

in lieu of subsequent training under that section for each new employment, receive training under § 48.11 (Hazard training) of this Subpart A. This definition does not include:

(i) Workers under Subpart C of this part 48, including shaft and slope workers, workers engaged in construction activities ancillary to shaft and slope sinking, and workers engaged in the construction of major additions to an existing mine which requires the mine to cease operations;

(ii) Supervisory personnel subject to MSHA approved State certification requirements; and,

(iii) Any person covered under paragraph (a)(2) of this section.

30 C.F.R. § 48.7, the herein cited standard, provides as follows:

(a) Miners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof and ground control machine operators, and those in blasting operations shall not perform new work tasks in these categories until training prescribed in this paragraph and paragraph (b) of this section has been completed.

This training shall not be required for miners who have been trained and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. The training program shall include the following:

(1) Health and safety aspects and safe operating procedures for work tasks, equipment, and machinery.

The training shall include instruction in the health and safety aspects and the safe operating procedures related to the assigned tasks, and shall be given in an on-the-job environment; and

(2)(i) Supervised practice during nonproduction.

The training shall include supervised practice in the assigned tasks, and the performance of work duties at times or places where production is not the primary objective; or

(ii) Supervised operation during production. The training shall include, while under direct and immediate supervision and production is in progress, operation of the machine or equipment and the performance of work duties.

(3) New or modified machines and equipment. Equipment and machine operators shall be instructed in safe operating procedures applicable to new or modified machines or equipment to be installed or put into operation in the mine, which require new or different operating procedures.

(4) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

(b) Miners under paragraph (a) of this section shall not operate the equipment or machine or engage in blasting operations without direction and immediate supervision until such miners have demonstrated safe operating procedures for the equipment or machine or blasting operation to the operator or the operator's agent.

(c) Miners assigned a new task not covered in paragraph (a) of this section shall be instructed in the safety and health aspects and safe work procedures of the task, prior to performing such task.

(d) Any person who controls or directs haulage operations at a mine shall receive and complete training courses in safe haulage procedures related to the haulage system, ventilation system, firefighting procedures, and emergency evacuation procedures in effect at the mine before assignment to such duties.

(e) All training and supervised practice and operation required by this section shall be given by a qualified trainer, or a supervisor experienced in the assigned tasks, or other person experienced in the assigned tasks.

DISCUSSION

During the investigation of an otherwise unrelated fatal roof fall accident at the Deserado Mine, it was discovered that Mr. Carson Julius, a section foreman at the mine, had instructed one of his miners to go to lunch while he took his place operating one boom of the roof bolting machine. The other boom of the twin boom machine was being operated by Mr. Austen Mullens, who was killed by the roof fall. Mr. Julius had not, at that time, been task trained on this piece of equipment. Although both the order and the citation subsequently issued both recite that this failure to be task trained did not contribute to the cause of the accident, the Secretary nevertheless took and takes the position that under the mine's training plan, Julius should have been task trained as a roof-bolter under § 48.7, and the failure of the operator to so train him prior to his operation of the equipment amounts to a significant and substantial violation of the Act and § 48.7.

The real dispute in the case, however, concerns the language contained in § 48.2(a)(1)(ii) which on its face purports to except supervisory personnel subject to MSHA approved State certification requirements from the definition of "miner", and therefore from the task training requirements of § 48.7.

MSHA's Arguments

In support of its position in these proceedings MSHA argues that to come within the above exception, a person must be "supervisory" and subject to MSHA approved State certification requirements. While the Secretary concedes that Julius met the latter requirement, he maintains that a person is "supervisory" only so long as he "supervises." Once that person diverts from supervising to running mining machinery, that person is no longer "supervisory" but rather is a "miner," regardless of his job title. It is argued that MSHA's use of the adjectival form "supervisory" rather than the noun "supervisor" emphasizes that it is the quality about a person and what a person does, i.e., the act of supervising, that is important and not his job title.

Further, MSHA argues that this interpretation of the exception preserves the statutory objectives pertaining to the training of miners because when a person performs a miner's work, such as operating heavy equipment normally operated by a miner, that person, even though perhaps nominally a "supervisor," is plainly exposing himself and others to the hazards incident to mining and is for all practical purposes, a "miner." Therefore, the argument goes that the supervisory personnel exception contemplates that such persons stick to supervising in the narrow sense of the word with only "incidental" assistance to a miner performing a mining task being allowed without Part 48 training.

Additionally, the Secretary argues that MSHA's interpretation of the regulatory exception has been consistent, long-standing and widely noticed to the mining community.

Since the training regulations were initially published in 1978, there have been several publications generated by MSHA to assist its training specialists in helping operators set up and maintain training programs under Part 48. One such early question-and-answer (Q-A) issue on the subject stating that "a state certified supervisor performing the work of a miner would be required to be trained under Part 48." On November 27, 1984, MSHA issued MSHA Policy Memorandum No. 84-2 EPD concerning the "Training requirements of 30 CFR Part 48 for Mine Supervisors who Perform Non-Supervisory Work." This memorandum was distributed to all mine operators

and in pertinent part states that the "exception applies only to the extent that supervisory work is being performed." Specifically, it advises the operators that:

When supervisors perform or are expected to perform mining tasks, they are "miners" under Part 48 and must receive the required training. For example, if a supervisor operates mining equipment...that supervisor must have completed task training as specified by [section] 48.7....

Thereafter, on July 1, 1985, MSHA published the "MSHA Administrative Manual 30 C.F.R. Part 48 - Training and Retraining of Miners." This publication includes on page 2 MSHA's position with regard to the herein-involved exception. Like the aforementioned memorandum, the Manual specifically states that "if a supervisor operates mining equipment, or performs extraction, production and maintenance work, that supervisor is a 'miner' when performing this work and must have been given task training under section 48.7."

Once this interpretation of the "supervisory exception" is accepted, then it is factually argued in this case that Julius became a "miner" for purposes of the training requirements when he stepped in to take over the roof bolting machine operation for the lurching miner. More specifically, it is argued that Carson Julius was working in an underground mine, personally engaged in the extraction and production process doing roof bolting, a non-supervisory task. He therefore at that particular time was working as a "miner" as that term is defined at 30 C.F.R. § 48.2(a)(1). Accordingly, he was a "miner" under that section for purposes of task training and it is stipulated in this record that roof bolters are slated in the Mine Training Plan to receive the § 48.7 task training. It is also stipulated that Julius was not task trained on the roof bolting machine prior to his operation of it on February 28, 1986, nor had he been task trained on that type of roof bolting machine in the twelve months preceding February 28, 1986. Thus, because Julius was required to be task trained under § 48.7 and plainly was not, violations of 30 C.F.R. § 48.7 and § 115(a) of the Act are proven.

The Secretary goes on to argue that such violation was a significant and substantial one since by the terms of the Act a miner who has not received the requisite training under the Act is "a hazard to himself and to others." Further, there was a reasonable likelihood that the hazard contributed to would result in injury because statistically supervisors who divert to do nonsupervisory work suffer a disproportionate rate of injury in comparison to coal miners in general and roof bolters in particular have incurred the highest risk of

injury among key mining occupations. The argument goes on that there was a reasonable likelihood that the injury would be of a serious nature or even a fatal injury because roof fall accidents tend to be fatal accidents such as the one that killed Austen Mullens and precipitated the investigation out of which the instant Order and Citation arose.

Finally, based on consideration of the statutory criteria, the Secretary contends that a civil penalty of \$180, as proposed, should be assessed against the operator on account of this violation.

Operator's Arguments

The operator concedes that Carson Julius was not task trained on the roof-bolter, but nevertheless maintains that no violation has occurred because the regulations (30 C.F.R. § 48.2(a)(1)(ii)) specifically exclude supervisory personnel who have been State-certified from the task training requirement. Julius was State-certified. The operator also concedes that the Secretary has from time to time by various and sundry vehicles promulgated policy statements concerning this particular regulatory exclusion to the effect that the exception applies only to the extent that supervisory work is being performed. However, the operator denies ever actually receiving copies of these documents and in any event characterizes them as nothing more than general statements of policy issued by the agency. None of these policy statements were ever published in the Federal Register or Code of Federal Regulations; nor were they ever explicitly brought to the attention of this operator prior to the issuance of the Order and Citation at bar.

The bottom line of this argument is that the published regulation clearly states the rule, and according to the operator, they complied with the rule, as written. The agency cannot modify the rule and lay additional requirements on the operator by "interpreting" the rule to mean something other than what it clearly states. If MSHA wishes to amend the rule to mandate what may in fact be a reasonable requirement they must first comply with the procedural provisions of the Act regarding adoption and promulgation of regulations. Accordingly, the instant Order and Citation should be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I accept the stipulated facts that the parties have agreed to in this matter as true for purposes of this decision. I also find as a fact that Carson Julius, while engaged in operating the roof bolting machine was primarily engaged in a

nonsupervisory task in the extraction and production process although he nominally retained his role as a "supervisor," i.e., a section foreman, throughout the period of this incident.

The Secretary acknowledges that Julius was a generally knowledgeable miner with many years of experience, who was State-certified by Colorado and was a qualified section foreman at the Deserado Mine, but argues that this hardly qualifies one as an experienced operator of a particular piece of mining machinery, such as a roof bolting machine. I agree, and in fact, if Julius cannot be brought within the coverage of the regulatory exception contained in § 48.2(a)(1)(ii), he should have been task trained on that roof bolter before he undertook to operate it.

The Secretary urges that MSHA's interpretation of the regulatory exception is reasonable, preserves statutory objectives, has been consistent and longstanding and has been broadly noticed to the industry.

It is well settled in the law that an agency's interpretation of its enabling statute and its own regulations is entitled to great deference. See, e.g. Emery Mining Corp. v. Secretary of Labor ("MSHA"), 744 F.2d 1411 (10th Cir. 1984).

MSHA's interpretation of the exception is certainly reasonable. To require all persons to be task trained on a particular piece of mining machinery before being responsible for its safe operation has a lot of common sense appeal. Just because a person is a "supervisor," even a State-certified one, does not in my opinion confer on that person the technical skill and ability to operate every piece of mining machinery he might encounter in the mine.

MSHA's interpretation of the exception also preserves the statutory objectives of the Act pertaining to the training of miners, that is, that the safety training required by section 115 of the Act is a very important remedial aspect of the Act and that all persons regularly subjected to the hazards of mining should be well trained. It follows then that any exception carved out of the general definition that "any person working in an underground mine and who is engaged in the extraction and production process or who is regularly exposed to mine hazards" is a "miner," and therefore subject to the task training requirement, should be narrowly construed. MSHA's interpretation of the exception that only those "supervisors" who are actually "supervising" are exempt reasonably comports with the proposition that "a regulation must be interpreted so as to harmonize with and

further and not to conflict with the objective of the statute it implements." Emery, supra, at 1414; (quoting, Trustees of Indiana University v. United States, 23 Ct. Cl. 88, 618 F.2d 736, 739 (1980)). I specifically find that MSHA's interpretation is consistent with and obviously furthers the objectives of the Act and is to be preferred.

I further find as a fact that this supervisory personnel exception has been consistently interpreted by the agency from the beginning and as of at least November 1984, when MSHA issued MSHA Policy Memorandum No. 84-2 EPD which was distributed to all mine operators, the operators have been on notice that MSHA's interpretation of the exception was to the effect that it applied only to the extent that supervisory work was being performed.

Therefore, I find that viewed in light of the Act's emphasis on the importance of training for those individuals exposed to the hazards of mining, the regulatory exception at bar must be limited to those supervisors who are actually primarily engaged in supervision. The operator's proposed construction of the instant regulatory exception, to the effect that all supervisory mine personnel who have been State-certified are thereafter forever exempt from the task training requirement no matter the mining equipment they might undertake to operate in the future is specifically rejected. That construction is plainly at odds with the clearly intended training objectives of the Act, even though I concur with the operator that it is arguably within the ambit of reasonable interpretation of the regulatory language itself.

Since at the time in question Carson Julius was primarily engaged in operating the roof bolting machine, not supervision, I find that he was required to be task trained on that roof bolting machine prior to undertaking the operation of it in the extraction and production process. Because he was not so trained, violations of 30 C.F.R. § 48.7 and § 115(a) of the Act stand proven.

A violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary... must prove: (1) the underlying violation of a

mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission has explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). (Emphasis deleted). They have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. 6 FMSHRC at 1836.

In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event. The Commission has consistently held that proof that the injury-causing event is reasonably likely to occur is what is required. See, e.g., U.S. Steel Mining Co., 7 FMSHRC at 1125; U.S. Steel Mining Co., 7 FMSHRC 327, 329 (March 1985).

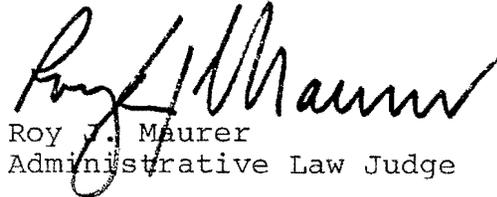
The violation contributed to a discrete safety hazard. In my view, an untrained or undertrained miner or section foreman is a potential hazard to himself and others assigned to work around him. There was also a reasonable likelihood that the hazard contributed to would result in a serious or even fatal injury. Statistically, supervisors who divert to do nonsupervisory work suffer a disproportionate rate of injury and roof bolters suffer the highest rate of injury among key mining occupations. Here we had a case of a section foreman performing the function of a roof bolter, operating a roof bolting machine, without the requisite task training. I find that operating this particular Lee Norse roof bolting machine is a relatively complex task in a generally high risk area of coal mining. Therefore, I find that his lack of task training could significantly and substantially contribute to the cause and effect of a coal mine safety hazard which could result in serious injury. Therefore, the violation was significant and substantial. The fact that the instant violation had nothing to do with the roof fall death of Austen Mullens, the co-operator of the bolter with Julius, is hardly evidence to support the contention that the lack of training did not or could not contribute to a hazard likely to result in injury.

The violation was serious and resulted from the operator's negligence. I further find that Western Fuels is a large operator with a favorable history of prior violations. The violation here was abated in timely fashion and in good faith. Therefore, based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$180, as proposed.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2830082 and Citation No. 2830083 ARE AFFIRMED. The operator's notices of contest of same ARE DISMISSED.
2. Western Fuels-Utah, Inc., shall within 30 days of the date of this decision pay the sum of \$180 as a civil penalty for the violation found herein.
3. Upon payment of the civil penalty, these proceedings ARE DISMISSED.


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 4 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 87-19-M
Petitioner : A.C. No. 04-04746-05503
v. : Atkinson Quarry
PAUL HUBBS CONSTRUCTION, CO., :
Respondent :

DECISION

Appearances: Theresa Kalinski, Esq., Office of the Solicitor,
U.S. Department of Labor, Los Angeles, California,
for Petitioner;
Mr. Tony T. Paredes, Paul Hubbs Construction Co.,
Rialto, California,
pro se.

Before: Judge Cetti

Statement of the Case

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Mine Act"). The Secretary on behalf of the Mine Safety and Health Administration charges Paul Hubbs Construction Company with violating three regulatory safety standards. The charges are based upon citations issued as a result of an August 6, 1986 inspection of respondent's Atkinson Quarry which is located in Riverside County, California.

The respondent filed a timely answer contesting the existence of the violations. After proper notice to the parties this case came on for hearing before me at Riverside, California. The only issue was the existence of the violations charged in the three citations. The parties stated that there was no issue as to the penalty i.e., that if the violations were found the appropriate penalty was the penalty proposed by the Secretary. The parties introduced oral and documentary evidence and requested that the matter be held open 30 days for filing post-hearing briefs. The Secretary submitted a post-hearing brief, the respondent did not.

The Atkinson Quarry is referred to in the industry as a "grizzly" plant. It consists of a screening plant which separates the rocks by size, the scale house where loaded trucks are weighed and the surrounding quarry where the raw material is mined.

The screening plant, also referred to as the rock plant or grizzly plant, has a box hopper where dirt and rocks are fed into the plant with front end loaders. The dirt and rocks are then fed through a screen which separates the dirt and segregates the rocks by size. Conveyor belts transport the segregated material to different areas. The rock material is then separated and stockpiled by loaders. The material is sold to contractors who use it for various projects including flood control.

A 250-kilowatt generator is housed in a trailer located adjacent to the screening plant.

Review of Evidence and Discussion

Citation 2675008 - Fire extinguisher not fire-ready

Citation 2675008 charges a violation of 30 C.F.R. § 56.4200(b)(2) which requires onsite fire fighting equipment to be maintained in fire-ready condition. The citation alleges that the fire extinguisher located inside the generator trailer which housed the 250-kilowatt generator was not maintained in a fire-ready condition.

Federal mine inspector Dale Cowley, observed the fire extinguisher in its proper bracket, strategically located, and readily accessible and with its pin properly inserted in the handle but in a completely discharged condition. It was therefore not in fire-ready condition.

The federal mine inspector was accompanied by the employer's representative, Jeff Hubb, the foreman in charge that day. Jeff Hubb, who is the adult son of the quarries manager, said nothing to the inspector that indicated the fire extinguisher had recently been discharged or vandalized.

There was no other fire extinguisher located in the area. An employee was sent out to get a properly charged fire extinguisher. Later as the mine inspector was on the road leaving the quarry he was stopped by the employee who was coming back with a replacement fire extinguisher.

The trailer in question houses a 250-KW generator which generates all the electrical power to run the plant. The trailer is located just adjacent to the grizzly. Evidence was presented that the generator is a potential fire hazard because the electrical circuitry could short out and cause a fire. The mine inspector testified "its a very logical place for a fire to break out" (Tr. 12).

The testimony of the federal mine inspector was straight forward and credible. On the basis of his testimony as to what he observed and what was said by the employer representative during the course of the inspection I find that the fire extinguisher located in the trailer that housed the 250-kilowatt generator was not maintained in a fire-ready condition. The respondent offered no persuasive evidence to the contrary.

The only witness to testify on behalf of respondent was its operations supervisor who supervises and trouble shoots several different quarries that are owned and operated by respondent. This witness was not at the Atkinson Quarry on the day of inspection nor had he been there for several days prior to that date nor the day after.

Respondent offered into evidence a police report which indicated its water truck had been tampered with and taken for a joy ride. Wires had been pulled from trucks and locks broken. The operations supervisor speculated that vandals may have broken into the trailer and discharged the fire extinguisher but he offered no persuasive evidence to indicate that vandals discharged the fire extinguisher.

Citation 2675009 - Tail pulley not guarded

Citation 2675009 charges that the self cleaning tail pulley on the plant's waste conveyor was not equipped with a guard to prevent contact with belt and pulley.

30 C.F.R. § 56.14001 provides "head, tail, and takeup pulleys . . . and similar exposed moving machines parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

The federal mine inspector testified that during his inspection of the plant he observed that there was no guard on the self cleaning tail pulley on the conveyor belt. The unguarded tail pulley was in an area where employees had access to it while it was operating.

Respondent speculated that the guard may have been taken off and stolen by vandals, but offered no persuasive evidence to indicate that this had occurred. The mine inspector testified that he observed evidence that indicated the plant had been running without the guard in place. He looked very closely to see if the tail pulley guard had been taken off recently for repairs or some other reason, and inadvertently not replaced. He found none of the usual evidence that would indicate that the conveyor belt and tail pulley had been operating with a guard or that the guard had been recently taken off.

On the basis of the federal mine inspector's credible testimony it is found that, the tail pulley on the plant's waste conveyor was not guarded and therefore, in violation of 30 C.F.R. § 56.14001.

Citation No. 2675011 - Generator not grounded

Citation 2675011 alleges a violation of 30 C.F.R. § 56.12025 which mandates all metal enclosing or encasing electrical circuits be grounded or provided with equivalent protection.

The mine inspector testified that the 250-kilowatt generator which provided the electrical current to operate the entire plant was not grounded. The mine inspector asked the foreman in charge if the generator was grounded. The foreman replied "I guess not".

The inspector indicated that an acceptable ground for the generator would be a ground rod driven into the ground with a conductor coming from the generator attached to the grounding rod. He stated that an appropriate grounding rod would be a solid rod about one-half inch to three-quarters of an inch in diameter and eight feet long. It is generally driven all the way into the ground except for the top two inches. The mine inspector explained that if the rod is in the ground any length of time it can be covered up with litter. That this is why he walked around the trailer a couple of times kicking the ground, looking and asking questions. The mine inspector testified that he did not observe any evidence indicating that the generator was grounded or had recently been grounded.

The employer's representative, foreman Hubbs, said nothing during the inspection to indicate that he thought that this failure to ground the generator might be due to recent vandalism.

Respondent's representative at the hearing speculated that the grounding rod may have been stolen by vandals. However, he offered no evidence whatsoever to show that the lack of grounding had anything to do with vandals or that the generator had ever in fact been grounded.

Federal mine inspector Dale Cowley's testimony was credible. Respondent's offered no persuasive contrary evidence.

Findings and Conclusions of Law

1. Paul Hubbs Construction Company is the owner and operator of the Atkinson Quarry which is located in Riverside County, California.

2. The Atkinson Quarry is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, U.S.C. § 801, et seq.

3. The Federal Mine Safety and Health Review Commission has jurisdiction in this matter.

4. The fire extinguisher in the trailer which housed the 250-kilowatt generator was a part of the onsite fire fighting

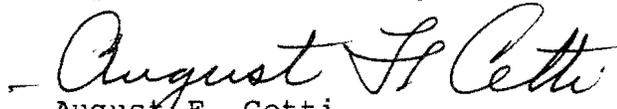
equipment for fighting fires in their early stages and it was not maintained in fire-ready condition. This constituted a violation of 30 C.F.R. § 57.4200(b). Citation No. 2675008 is affirmed and the civil penalty of \$20 proposed by the Secretary is assessed.

5. The tail pulley on the plant waste conveyor was not guarded. This constituted a violation of 30 C.F.R. § 56.14003. Citation No. 2675009 is affirmed and the civil penalty of \$54 is assessed.

6. The metal enclosing the 250-kilowatt electric generator was not grounded nor provided with equivalent protection. This constituted a violation of 30 C.F.R. § 56.12025. Citation No. 2675011 is affirmed and the \$20 civil penalty proposed by the Secretary is assessed.

ORDER

Based upon the above findings of fact and conclusions of law it is ordered that respondent shall pay within 30 days of this decision the above civil penalties totaling \$94.


August F. Cetti
Administrative Law Judge

Distribution:

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Paul Hubbs Construction Company, Mr. Tony T. Paredes, 140 West Valley Boulevard, Rialto, CA 92376 (Certified Mail)

/bls

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 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 86-400
Petitioner : A.C. No. 46-06042-03518
: :
v. : Patriot Coal Mine
: :
PATRIOT COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On July 20, 1987, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at \$250 and the parties propose to settle for \$200.

The motion states that Respondent's negligence was less than originally believed in connection with the alleged violation cited, namely the absence of a backup alarm on a pickup truck. Respondent believed that the truck in question was a service vehicle and not subject to the standard requiring backup alarms. 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, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of \$200 within 30 days of the date of this order.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

AUG 6 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 87-6
Petitioner : A.C. No. 15-13862-03523
v. :
ANLO ENERGY, INC., : Peacock Mine No. 1
Respondent :

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville,
Tennessee, for the Petitioner.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Petitioner seeks civil penalty assessments in the amount of \$156 for two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations.

The respondent filed a timely notice of contest and requested a hearing. Pursuant to notice served on the parties, a hearing was convened in Owensboro, Kentucky. The petitioner appeared, but the respondent did not. Under the circumstances, the hearing proceeded without the respondent.

Issues

The issues presented in this proceeding are whether the respondent has violated the cited mandatory safety standards, and if so, the appropriate civil penalty to be assessed for those violations based on the criteria found in section 110(i) of the Act. The matters concerning the respondent's failure

to appear, and its bankruptcy status, are discussed in the course of the decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Discussion

Respondent's Failure to Appear at the Hearing

Respondent, who is pro se, failed to appear at the scheduled hearing in Owensboro. Information in the file reflects that the respondent's president, Mr. Jack Anderson, resides in Houston, Texas. During the course of the hearings in several other cases in Owensboro immediately prior to the scheduled hearing in this case, petitioner's counsel advised me that she had spoken with Mr. Anderson, and he informed her that he would not appear at the hearing. I placed a telephone call to Mr. Anderson's home in Houston and he confirmed that he would not appear. Mr. Anderson explained that he is in bankruptcy and that he could not afford the expense of travelling to Owensboro.

Mr. Anderson stated that the Peacock No. 1 Mine is idle, and that it is not closed. He also informed me that he intended to re-open the mine after the conclusion of the bankruptcy proceedings. I informed Mr. Anderson that in view of his failure to enter an appearance, the hearing would proceed without him and that pursuant to the Commission's Rules, he would be defaulted. Mr. Anderson acknowledged and understood that he would be defaulted, had no objection to proceeding in this manner, and he expressed his apology for not appearing at the hearing.

It seems clear to me that the failure of a party-respondent to appear at a hearing pursuant to a duly served order and notice issued by the judge is sufficient ground for the judge to hold the respondent in default and to proceed without him, Williams Coal Co., 1 FMSHRC 928 (July 1979); White Oak Coal Company, 7 FMSHRC 2039 (December 1985); Neibert Coal Company, Inc., 7 FMSHRC 887 (June 1985); Pollard Sand Company, 8 FMSHRC 973 (June 1986).

The respondent has been given an ample opportunity to refute the alleged violations and proposed civil penalties

filed by the petitioner. However, it seems obvious to me that the respondent does not wish to litigate this matter further because he is in bankruptcy. Under the circumstances, I find the respondent to be in default, and I have treated its failure to appear at the hearing as a waiver of its right to be heard on the merits of the violations.

Respondent's Bankruptcy Status

The fact that the respondent is in bankruptcy does not divest the Commission or its judges of jurisdiction to proceed with the adjudication of this case. Leon's Coal Company, et. al., 4 FMSHRC 572 (April 1982); Oak Mining Company, 4 FMSHRC 925 (May 1982); Stafford Construction Company, 6 FMSHRC 2680 (November 1984). Accordingly, I conclude and find that I have jurisdiction to adjudicate this matter.

Section 104(a) non-"S&S" Citation No. 2837468, issued on June 25, 1986, cites a violation of 30 C.F.R. § 75.1204, and the cited condition or practice is as follows: "Peacock Mine No. 1 ID 15-13862 has been permanently closed. The operator has not filed with the Secretary a copy of the mine map revised and supplemented to the date of closure."

The inspector fixed the abatement time as 8:00 a.m., July 25, 1986. Subsequently, on July 25, 1986, at 10:00 a.m., he issued a section 104(b) withdrawal order, No. 2837470, and noted that "a reasonable time was given and the citation issued has not been abated."

Section 104(a) non-"S&S" Citation No. 2837469, issued on June 25, 1986, cites a violation of 30 C.F.R. § 75.1711, and the cited condition or practice is as follows: "Peacock Mine No. 1 ID 15-13862 has been permanently closed and the drift openings have not been sealed in a manner prescribed by the Secretary."

The inspector fixed the abatement time as 8:00 a.m., July 25, 1986. Subsequently, on July 25, 1986, at 10:05 a.m., he issued a section 104(b) withdrawal order, No. 2837471, and noted that "a reasonable time was given and no action was taken to correct the citation."

MSHA Inspector and Ventilation Specialist Paul O. Lee testified that he visited the mine in January, 1986, and spoke with the operator, Mr. Jack Anderson, and another individual. The mine was not in operation, the fan was down, and the power was off. Mr. Lee stated that he advised Mr. Anderson that he needed to file a ventilation plan, and Mr. Anderson advised

him that he would do so. Since the mine was temporarily abandoned, Mr. Lee informed Mr. Anderson that if he did not start up again, he needed to file a final mine map and a mine sealing plan. Mr. Anderson advised him that he hoped to put the mine back into operation within a week and that a Mr. Woody Sutton would be in touch with him regarding the plans. Mr. Lee stated that the mine had been temporarily abandoned "off and on" for approximately a year prior to January, 1986, and while "sporadic work" was done for a week or so, it would then be abandoned.

Mr. Lee identified an MSHA Mine Status Data Form 2000-122, signed by Inspector Larry Cunningham on April 28, 1986, showing the mine as "Temporarily abandoned." He also identified a second form signed by Inspector George W. Siria on May 23, 1986, showing the mine as "Permanently Abandoned." Mr. Lee surmised that Mr. Siria had visited the mine for an inspection and could find no one working there. Mr. Lee stated that subsequently, in June, 1986, he visited another mine operated by Mr. Sutton and discussed the plans for the respondent's mine. Mr. Sutton advised Mr. Lee that he had no connection with the respondent's mine (Tr. 7-9).

Mr. Lee confirmed that he went to the respondent's mine site on June 25, 1986, and found the gate locked. However, he walked to the mine and found that the pit had begun to fill with water. He then returned to his office and prepared the two citations in question, and mailed them to Mr. Anderson by registered mail to his last known address in Madisonville, Kentucky, as shown on MSHA's mine legal identify form. However, they were returned by the post office and Mr. Anderson did not accept them (Tr. 9, 16).

Mr. Lee stated that he learned through hearsay that the only work which may have taken place at the mine between January and June 25, 1986, was the recovery of a continuous miner from the mine by a company which had leased it to the respondent, and "maybe a little pumping." Mr. Lee stated that it is MSHA's position that as of June, 1986, the mine had been temporarily, if not permanently abandoned for 90 days (Tr. 10).

Mr. Lee confirmed that Mr. Anderson has never informed his office that he was going to close the mine, and that he is required to notify MSHA "one way or the other or submit a final map and sealing plan," but this has not been done (Tr. 12). Mr. Lee described the mine as an underground "open pit type," and that at the present time it has 20 to 25 feet of water in the pit. He stated that when a mine is temporarily

abandoned, an operator will still show that people are working there. However, when it is permanently abandoned, not one is working there (Tr. 14). Mr. Lee did not know whether or not Mr. Anderson operated any mines other than the one in question, and MSHA's counsel had no information that this was the case (Tr. 15). He confirmed that the citations are not "significant and substantial" because there is no one at the mine site (Tr. 15).

Petitioner's Arguments

MSHA's counsel argued that during her telephone discussions with Mr. Anderson concerning the citations, he informed her that he was searching for more investors to invest in his company, and that when he is through with the bankruptcy matter and pays off the debts, he will go back into mining. However, counsel took the position that this does not affect the citations because the cited mandatory standard requires a mine operator to file a final mine map and seal it even if it is temporarily abandoned for over 90 days. She asserted that the facts in this case clearly establish that the mine has been at least temporarily abandoned for over 90 days. Assuming that an operator anticipates re-opening the mine at some future time, if it is in an abandoned status for over 90 days, an operator is required to comply with the standard (Tr. 14-15).

With regard to Mr. Anderson's receipt of the citations, MSHA's counsel stated that it seems clear that he received them since he signed the MSHA proposed civil penalty "blue card," and wrote in his telephone number in Texas, and that is how she contacted him there (Tr. 17). With regard to Mr. Anderson's bankruptcy status, counsel asserted that there are distinctions in Chapter 11 and 13 bankruptcy proceedings. In a Chapter 11 proceeding, MSHA would consider this as impacting on the respondent's ability to pay the proposed civil penalty assessments and his ability to continue in business, as well as whether or not he may be able to go back into the mining business. Under Chapter 11, it is considered a final proceeding that would dissolve the corporation, as contrasted to a Chapter 13 proceeding which is merely a reorganization plan and a way to stretch out the corporate debts (Tr. 17). She confirmed that the respondent is in Chapter 11 bankruptcy (Tr. 18-19).

MSHA's position is that on the facts of this case, it is clear that the mine was either closed or abandoned for more than 90 days, and since the inspector found no evidence that the respondent has complied with the requirements of the

cited standard, the violations have been established and the citations should be affirmed. She confirmed that the subsequent section 104(b) orders were issued because there has been no compliance and the citations have not been abated (Tr. 19-20).

Respondent's Arguments

Although the respondent did not appear at the hearing, I have considered the arguments presented by Mr. Anderson in his answer of November 20, 1986, to the civil penalty proposals filed by the petitioner. In that answer, Mr. Anderson takes the position that the mine was not permanently closed, and he states in pertinent part as follows:

The Citation/Order Number's 2837468 and 2837469 are both based on the Peacock Mine No. 1, I.D. 15-13862 being alledged (sic) to be permanently closed. That is not the case. A dispute concerning the validity of the coal subleases held by Anlo Energy prevented continued mining and forced Anlo Energy to declare Chapter 11 Bankruptcy and submit the dispute to an adversary proceeding. Consequently, the Peacock Mine No. 1 has been idled, not permanently closed, until a judicial disposition of the dispute issue is made. The bench trial on this issue occurred on April 28, 1986 with no ruling as of this date.

Findings and Conclusions

An initial matter to be addressed is whether or not the respondent received notice of the citations and proposals for assessment of civil penalties. The inspector testified that the citations which were mailed to Mr. Anderson were returned by the post office because Mr. Anderson had moved to another address. On the facts of this case, it seems clear to me that the respondent received the citations and the notice concerning the petitioner's proposed civil penalty assessments for the violations in question. It is also clear that he received the notice of hearing advising him of his opportunity to personally appear and present his case. Further, the record establishes that the respondent, by and through its corporate president, contested the proposed civil penalty assessments and filed a timely answer. Under the circumstances, I conclude and find that all of the statutory and regulatory notice requirements have been met in this case.

Fact of Violations

Citation No. 2837468, issued on June 25, 1986, charges the respondent with a violation of mandatory safety standard 30 C.F.R. § 75.1204, which provides as follows:

§ 75.1204 Mine closure; filing of map with Secretary.

[STATUTORY PROVISIONS]

Whenever an operator permanently closes or abandons a coal mine, or temporarily closes a coal mine for a period of more than 90 days, he shall promptly notify the Secretary of such closure. Within 60 days of the permanent closure or abandonment of the mine, or, when the mine is temporarily closed, upon the expiration of a period of 90 days from the date of closure, the operator shall file with the Secretary a copy of the mine map revised and supplemented to the date of the closure. Such copy of the mine map shall be certified by a registered surveyor or registered engineer of the State in which the mine is located and shall be available for public inspection.

Citation No. 2837469, issued on June 25, 1986, charges the respondent with a violation of mandatory safety standard 30 C.F.R. § 75.1711, which provides as follows:

§ 75.1711 Sealing of mines.

[STATUTORY PROVISIONS]

On or after March 30, 1970, the opening of any coal mine that is declared inactive by the operator, or is permanently closed, or abandoned for more than 90 days, shall be sealed by the operator in a manner prescribed by the Secretary. Openings of all other mines shall be adequately protected in a manner prescribed by the Secretary to prevent entrance by unauthorized persons.

The regulatory criteria and procedures for the sealing of mine shaft openings, and slope or drift openings pursuant to section 75.1711, are stated in sections 75.1711-1 and 75.1711-2.

The respondent takes the position that the mine has not been permanently closed, but simply idled pending final resolution of its bankrupt status. Mr. Anderson has indicated his intent to start mining again sometime in the future, contingent on the availability of investor capital. Respondent's position seems to be that since the mine has not been permanently closed, he need not comply with the requirements of section 75.1204 for the filing of mine map, or the requirements of section 75.1711 requiring the sealing of the drift openings as prescribed by the regulations.

I take note of the fact that on the face of the citations issued in this case, Inspector Lee stated that the mine has been permanently closed. Under the circumstances, one can reasonably conclude that Mr. Anderson has focused on the inspector's assertion that the mine has been permanently closed. However, it seems clear to me that the regulatory language found in section 75.1204 and 75.1711, is not limited to mines which have been permanently closed. The requirements equally apply to mines which have been abandoned or temporarily closed for a period of more than 90 days. Although Mr. Anderson has stated that he intends to start mining again, on the facts of this case, it seems clear to me that the mine has been temporarily closed or abandoned for more than 90 days, and that the petitioner's position constitutes a reasonable interpretation and application of the regulatory requirements found in the cited mandatory standards.

Section 75.1204, requires a mine operator who has temporarily closed or abandoned a mine for a period of more than 90 days to promptly notify MSHA of such closure. It also requires the filing of a mine map with MSHA upon the expiration of a 90-day period from the date of any temporary closure. Respondent has done neither. Section 75.1711 requires sealing of any mine which has been declared inactive by the operator or is abandoned for more than 90 days. In this case, it is clear that the mine has not been sealed. It is also clear from the credible evidence produced by the petitioner in this case that the mine has not been an actively producing coal mine for a period exceeding 90 days. The inspector found no evidence of any active mining, the gate was locked when he visited the mine, the pit was filled with water, and a posthearing mine production computer print-out filed by the petitioner reflects no production or work hours at the mine from 1984 to 1986. Although Mr. Anderson has not specifically declared the mine to be inactive, and takes the position that it is simply idle, I find no reasonable basis for making any distinctions between the terms "idle" and

"inactive." I further conclude and find the credible evidence produced by the petitioner also establishes that the mine has been abandoned for a period exceeding 90 days. Accordingly, I conclude and find that the petitioner has established both violations, and the citations ARE AFFIRMED.

History of Prior Violations

No testimony was forthcoming from the petitioner with respect to the respondent's prior history of violations. However, an MSHA Proposed Assessment Form 1000-179, dated September 24, 1986, and attached to the pleadings in this case reflects 27 prior assessed violations for 141 inspection days during the preceding 24-months. Absent any further explanation, I find no basis for concluding that the respondent's prior history of violations warrant any additional increases in the civil penalties I have assessed for the citations which have been affirmed.

Good Faith Compliance

Although the violations remain unabated and the inspector issued section 104(b) orders after the expiration of the time fixed for abatement, I have considered the fact that the respondent has financial difficulties which apparently forced him to abandon his mining operation, and the possibility that lack of funds prevented the physical sealing of the mine. As for the filing of the mine map, while I have some doubts that this presented a monumental task on the part of the respondent, I have taken into consideration the fact that the respondent may have believed that compliance was only required if the mine were permanently closed.

Negligence

The inspector found "moderate negligence" with respect to both citations. I agree, and I conclude that the respondent knew or should have known of the requirements for filing a map and sealing the mine when it is temporarily closed or abandoned for more than 90 days. However, I have also considered the fact that the respondent may have believed that the requirements of section 75.1204 and 75.1711 only applied to mines which have been permanently closed. I conclude and find that the violations were the result of ordinary negligence by the respondent.

Gravity

The inspector found that both violations were not significant and substantial, and that it was unlikely that any injury would result. Further, the evidence establishes that the mine in question has been non-productive for a long period of time, that the gate is locked, and during several visits by MSHA's inspectors, they found no one there. Under all of these circumstances, I cannot conclude that the violations presented any particular serious hazard to miners.

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

The respondent is no longer actively engaged in the mining of coal, and while the 27 prior citations which were assessed sometime during the 24-month period prior to the issuance of the two citations on June 25, 1986, suggest some mining activity, it would appear to me that the respondent had a small mining operation when the mine was productive.

It seems clear to me that the respondent is no longer in business at the mine in question. The petitioner has presented credible documentation confirming the respondent's financial inability at this time to continue in business. The petitioner has furnished a copy of the respondent's 1985 tax return which shows an income loss of \$591,763. Petitioner has also furnished copies of records from the United States Bankruptcy Court for the Western District of Kentucky, dated March 13, 1986, confirming the fact that the respondent is in Chapter 11 bankruptcy. Under the circumstances, I have considered the respondent's financial status in mitigation of the proposed civil penalty assessments of \$78 for each of the violations, and have reduced them accordingly.

Penalty Assessments

In view of the foregoing findings and conclusions, I believe that civil penalty assessments in the amount of \$20 for each of the two violations in question are appropriate and reasonable in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$40 for the violations in question

within thirty (30) days of the date of this decision. Upon receipt of payment by the petitioner, this case is dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 12 1987

GREENWICH COLLIERIES, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 87-62-R
	:	Order No. 2691006; 11/26/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION (MSHA) Respondent	:	Docket No. PENN 87-63-R
	:	Order No. 2691007; 11/26/86
	:	Docket No. PENN 87-64-R
	:	Order No. 2691008; 11/26/86
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. PENN 87-109
	:	A.C. No. 36-02405-03664
ROCHESTER & PITTSBURGH COAL COMPANY Respondent	:	Greenwich No. 1 Mine

DECISION

Appearances: Joseph Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Secretary of Labor; Joseph Yuhas, Esq., and Joseph Kosek, Jr., Esq. Ebensburg, Pennsylvania for Greenwich Collieries and Rochester and Pittsburgh Coal Company.

Before: Judge Melick

These consolidated cases are before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq., the "Act", to challenge three withdrawal orders issued by the Secretary of Labor under Section 104(d)(2) of the Act and for review of civil penalties proposed by the Secretary for the violations alleged therein.

At hearing the Secretary filed a Motion for an Order Approving Settlement with respect to two of the orders at issue, Order Nos. 2691006 and 2691008, proposing a reduction in penalties from \$1,500.00 to \$1,200.00. I have considered the representations and documentation submitted in connection with

the motion and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The motion is accordingly granted. In light of the settlement the mine operator requested to withdraw its contests of the same orders. The request is granted and Contest Proceedings Docket Nos. PENN 87-62-R and PENN 87-64-R are dismissed.

The remaining order at issue, No. 2691007, charges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.202 and states as follows:

"Loose not adequately supported roof was present in the belt entry in the D8-1 active working section 50 ft. outby spad 12106. A cutter extended from the L-1 entry through the cross cut and across the belt entry. The roof in the belt entry was broke [sic] and loose some of which previously fell out. The roof in the L-1 entry was caving. Torque tests of the bolts in the belt entry indicated that some had bled off and some were loading up. The area was bolted with four foot conventional bolts. This area was pre-shifted by James Hartzfeld on the 12:01 to 8:00 a.m. shift."

The cited standard requires that "loose roof and overhanging or loose faces and ribs shall be taken down or supported."

The evidence shows that Samuel Brunatti an inspector for the Federal Mine Safety and Health Administration (MSHA), was inspecting the D8-1 section of the subject mine in the early morning of November 26, 1986, when he discovered that some roof in the area of the L-1 entry had fallen from a "cutter". (See Exhibit No. 1). As described by Brunatti a "cutter" is a visual break in the roof. In this case the "cutter" passed from the roof of the L-1 entry through a crosscut and across the roof of the belt entry. Some rock had fallen out of the cutter in the belt entry. In Brunatti's presence the union escort then "torque tested" approximately ten of the roof bolts around the "cutter" in the belt entry. As he reported to Brunatti some of the bolts had "bled off" and were taking no pressure at all while others were "overloaded". Brunatti observed that the roof had also broken off from the plates around 3 or 4 of these suspect bolts.

Donald Sewalish, the day shift section foreman on the D8-1 section on November 26, also observed these roof conditions at the time of the inspection. He agreed that the roof had indeed caved in the L-1 entry, that rock had fallen from the roof of the belt entry and that additional roof support was needed in the belt entry. Sewalish directed his crew to set supplemental posts to support the roof around the "cutter" in the belt entry.

Within the framework of this essentially undisputed evidence it is clear that the violation is proven as charged. It is undisputed that loose and unsupported roof was found hanging in the "cutter" in the belt entry and a significant number of roof bolts were not providing any support in the area. The testimony of Inspector Brunatti that fatal injuries were also likely for workers passing beneath the unsupported "cutter" is also essentially undisputed. Brunatti observed that the cited area was in a retreat mining section thereby placing additional stress and pressure on the subject roof. Brunatti also observed that the mobile bridge operator would be expected to travel beneath the danger area during the course of his workshift. Within this framework I find that the violation was indeed of high gravity and "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

I do not however find that the Secretary has met his burden of proving that the violation was the result of the "unwarrantable failure" of the operator to comply with the cited mandatory standard. Ziegler Coal Corporation, 7 IBMA 280 (1977); United States Steel Corporation, 6 FMSHRC 1423 (1984). Inspector Brunatti in support of his finding of "unwarrantable failure" relied upon unwritten hearsay recollections of a statement by a miner of uncertain identity to the effect that the cited "cutter" had been "working" the day before. Brunatti also relied on his recollection of the absence of roof material from the "cutter" in the belt entry leading to the conclusion that debris had previously been removed. Brunatti concluded that the materials must have been removed on a prior shift because the belt was not operating at the time of his inspection and other unidentified miners reported that they had not loaded any rock material on that shift. Thus, according to Brunatti, the operator must have been aware of the bad roof at least since the previous shift.

On the other hand I find the testimony of Frederick Bender, a union employee who had worked on the preceding shift (the midnight to 8:00 a.m. or third shift) in the D8-1 section under James Hartzfeld to be particularly credible. Bender saw no evidence that the "cutter" had been working during this shift and testified that the condition of the "cutter" had not changed since the 24th. Bender found that the roof around the "cutter" had been solid when he checked it at the beginning of his shift. Bender further testified that when he left D8-1 section around 7:15 a.m. on the 26th the roof was neither loose nor working.

James Hartzfeld, the section foreman on that shift, testified that he performed an on-shift examination on November 26th, covering the area of the "cutter" and found conditions to be "normal". Hartzfeld further testified that no one on his crew

reported any dangerous conditions in the area. Finally Hartzfeld testified that he completed a pre-shift examination between 5:00 a.m. and 7:00 a.m. on November 26th and during this exam had passed through the cross-cut in which the "cutter" existed. He did not find any abnormal conditions at that time.

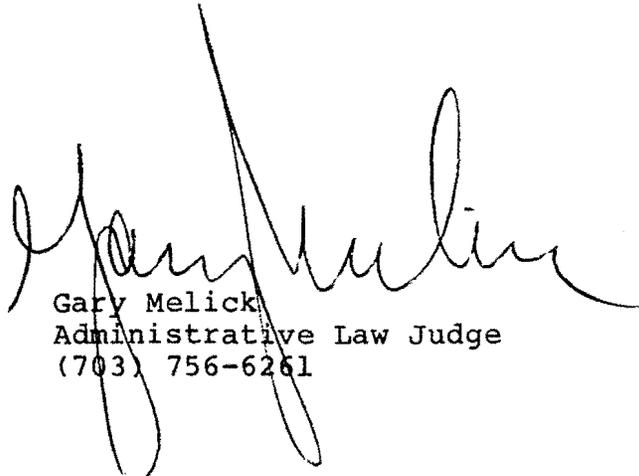
Donald Sewalish was, as previously noted, the D8-1 section foreman on the 8:00 a.m. - 4:00 p.m. day shift. He had not yet completed his pre-shift examination of the face areas when he met Inspector Brunatti near the "cutter" where some rock had fallen. Brunatti had not yet examined the area in L-1 entry where the roof had caved. He and Brunatti then discovered that problem together. Sewalish was in the same area on November 25th performing both a pre-shift and on-shift examination and found no unusual roof problems. Moreover none of his work crew complained about roof conditions that day.

Within this framework of evidence I am constrained to find that the roof fall in the belt entry at the location of the "cutter" had occurred sometime after the preshift examination performed at the end of the third shift but before the commencement of the day shift and the discovery of the fall by Brunatti. Under these circumstances I cannot attribute significant negligence or determine that the violation was due to the "unwarrantable failure" of the operator to comply with the standard. Accordingly the order at bar must be modified to a citation under Section 104(a) of the Act.

In determining the appropriate penalty in this case I have also considered that the operator is of moderate size and has a significant history of violations. I also observe that the violation was abated within the limits prescribed by the Secretary.

ORDER

Order No. 2691006 is affirmed with a civil penalty of \$700. Order No. 2691008 is affirmed with a civil penalty of \$500. Order No. 2691007 is modified to a "significant and substantial" citation under section 104(a) of the Act with a civil penalty of \$200. The civil penalties are to be paid within 30 days of the date of this decision. Contest Proceedings Docket Nos. PENN 87-62-R and PENN 87-64-R are dismissed. Docket No. PENN 87-63-R is granted to the extent that Order No. 2691007 is modified to a "significant and substantial" citation under Section 104(a) of the Act.



Gary Melick
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 12 1987

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 86-133-M
Petitioner	:	A.C. No. 15-00034-05512
v.	:	
	:	Docket No. KENT 86-134-M
GREENVILLE QUARRIES,	:	A.C. No. 15-00034-05514
INCORPORATED,	:	
Respondent	:	Docket No. KENT 86-155-M
	:	A.C. No. 15-00034-05516
	:	
	:	Greenville Quarry

DECISIONS

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville,
Tennessee, for the Petitioner;
Brent Yonts, Esq., Greenville, Kentucky, for
the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These civil penalty proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petitioner seeks civil penalty assessments for seven alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests, and hearings were held in Owensboro, Kentucky. The respondent filed posthearing arguments, but the petitioner did not. I have considered these arguments in the course of these decisions, and I have also considered the oral arguments made by the parties on the record during the course of the hearings.

Applicable Statutory and Regulatory Provisions

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

Issues

The primary issues presented are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory standard, and (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are disposed of in the course of these decisions.

The parties stipulated to the following:

1. The respondent is a Kentucky Corporation incorporated on May 27, 1948, and it owns and operates a quarry and mill located on State Highway 171 in Muhlenberg County, Kentucky.
2. The respondent produces crushed and broken limestone for sale in interstate commerce and is subject to MSHA's jurisdiction, as well as the Commission's Administrative Law Judges.
3. The respondent averages a production of 650,000 to one million tons of crushed limestone per year at its quarry and mill, and it is a medium class operation.
4. The respondent employs 30 persons at its quarry and mill, working one shift, 8 hours per day, and 5 days per week.
5. Federal Metal/Nonmetal Inspector Eric Shanholtz, a duly authorized representative of the Secretary of Labor, conducted a regular inspection of the Greenville Quarry and Mill from January 7, 1986 to January 9, 1986.
6. The following vehicles were in operation at the Greenville Quarry and Mill from January 7, 1986 to January 9, 1986:

one (1) 275 B Michigan Loader
two (2) 475 B Michigan Loaders
two (2) 35 ton Euclid Pit Haul trucks
two (2) 20 ton Plant Stockpile Haul trucks
one (1) Powder truck

7. The Euclid Pit Haul trucks in operation in January and February, 1986, were Euclid Model R35 trucks. These trucks had been in operation for several years.

8. The respondent's history of prior violations for the 2-year period prior to January, 1986, is reflected in an MSHA computer print-out which has been made a part of the record in this case (exhibit P-3).

Procedural Ruling

At the hearing, respondent's counsel moved for a continuance on the ground that he was retained by the respondent on Thursday, May 14, 1987, and that it was difficult for him to prepare for the hearing on such short notice. Counsel stated that he mailed me a letter requesting a continuance, and that he also spoke with my secretary on Friday, May 15, 1987, concerning a continuance.

The parties were informed that since I was on leave status on Friday, May 15, 1987, I was unaware of the letter requesting a continuance until the morning of the hearing. After consideration of the request, it was denied from the bench (Tr. 13). Respondent was reminded of the fact that the original notice of hearings in these cases was issued on January 8, 1987, and that the cases were scheduled to be heard on April 7-8, 1987, but were continued at the request of the petitioner until May 19-20, 1987. In my view, the respondent had more than ample time to obtain counsel if it so desired, and I concluded that its request for continuance was untimely.

The issues presented in these cases are not that difficult. Respondent's vice-president, Mr. John Stovall, who represented the respondent until the retention of counsel, appeared to be thoroughly familiar with all of the citations, and he was present and testified at the hearing on the respondent's behalf. In addition, the record reflects that Mr. Stovall discussed some of the citations with MSHA's district supervisor, and had previously attempted to settle these cases with MSHA.

Counsel's letter requesting a continuance reflects that he received the respondent's record on Thursday, May 14, 1987, including copies of the petitioner's hearing exhibits. Although no witness list was included, none was required by my pre-trial notice. However, petitioner's witnesses were identified at the hearing, and the respondent's counsel had ample opportunity to cross-examine them. Although the petitioner presented an "expert witness" who was apparently not previously known to the respondent, his testimony was not critical or pivotal to the petitioner's case, and I cannot conclude that the respondent has been prejudiced by the petitioner's failure to disclose the identity of its expert witness until the morning of the hearing. Further, I take note of the fact that the respondent failed to avail itself of any of the Commission's pretrial discovery procedures. I also take note of the fact that the respondent's answers filed in these proceedings suggest that the respondent's principal concern was its belief that MSHA's proposed civil penalties were excessive and unreasonable, and its offer to settle the violations for 50 percent of the assessments was rejected by the petitioner's counsel.

Discussion

DOCKET NO. KENT 86-133-M

Section 104(a) "S&S" Citation No. 2657368, issued on January 7, 1986, cites a violation of 30 C.F.R. § 56.12016, and the cited condition or practice is described as follows:

An safe, established lock-out procedure had not been established at the Greenville Quarry. The present procedure was to simply turn off the equipment and shut the door to the switch-house. The equipment could at any-time be energized while being worked on. A procedure shall be established to physically lock-out the equipment.

MSHA Inspector Eric Shanholtz testified as to his education, experience, and background, including a B.A. degree in mine safety, and an M.S. degree in safety from the Marshall University, Huntington, West Virginia. He identified exhibits P-1 and P-2 as sketches which he made of the respondent's Greenville Quarry and Mill property. He also identified exhibit P-4 as a series of photographs which are

representative of the plant area, the terrain, and the roadways, and he described the areas shown in the photographs (Tr. 19-30).

Inspector Shanholtz confirmed that he issued the citation after finding that the quarry had no established lockout procedure for electrical equipment. He stated that quarry superintendent Burdette Fox advised him that the procedure used at that time was to simply turn off the equipment and shut the door to the switch house (Tr. 31). Mr. Shanholtz stated that during his inspection of January 7, 1986, no locks were available or shown to him, and as far as he knew no provisions were made to use locks. The switch house contained the electrical switch gear for the plant area, and it also contained a partitioned-off control booth area from which the plant was operated by means of "push button starts." The switching gear consisted of standard electrical "square D" manual switches (Tr. 32-34).

Mr. Shanholtz stated that when he returned to the mine on February 26, 1986, on a follow-up inspection, he observed an electrician working on some electrical cables by the crusher area. The system being worked on was a 480 volt system, and no locks were being used. The electrician admitted that he had not locked out the equipment, and Mr. Shanholtz stated that he personally observed the system switches, and while there was a lock lying on top of the electrical switch box which would fit the box, the lock was not used to lock out the switch box (Tr. 35, 37). Under these circumstances, he issued a section 104(b) withdrawal order, No. 2657191, and petitioner's counsel confirmed that he did so because of the failure by the respondent to timely abate the previously issued citation of January 7, 1986 (Tr. 36).

Mr. Shanholtz was of the opinion that it was highly likely that the failure to have a lock-out procedure or to lock out the equipment would result in an accident. His opinion was based on the fact that there were other employees in the area and the electrical switch was not locked out. With 480 volts, one person would be exposed to a fatal injury or accident (Tr. 38). Mr. Shanholtz stated further that he was aware of one accident which occurred after the citation was issued, during the summer of 1986, when the superintendent was working on some electrical switches and came into contact with some energized switch components and the resulting flash or arc caused burns to his face and hands. This incident involved the same switch house (Tr. 39).

On cross-examination, the inspector confirmed that the power source to the switch house is from a nearby pole. In response to a question as to whether or not he had determined that the main power disconnect at the power pole was disconnected, during his inspections of January 7 and February 26, the inspector stated that he assumed that it was not because had the power been disconnected at the power center, it would have shut down the entire plant, and that did not happen (Tr. 44). The individual who operated the switches in the switch house on February 26, was not the same person doing the electrical work, nor was he the person supervising the work (Tr. 44).

The inspector testified that while there are two switch houses on the property, containing a total of 30 switches, his citation addressed the switch house at the plant area which contains 15 switches. He confirmed that he issued the citation because mine management did not have an established procedure for locking out electrical equipment or circuits while they were being worked on, and not because the 15 switches in the switch house in question did not have locks (Tr. 48). He further explained his reasons for issuing the citation as follows at Tr. 51-52:

THE WITNESS: The citation was issued because there was no procedures provided to physically lock out the equipment. There had been work done in the past. As with any quarry, there will be downtime and that downtime encompasses removing motors, taking -- climbing down into crushing areas.

And you have to understand that they have to reasonably show me a way that they are physically lockout this equipment as they work on it. At the time this citation was issued, no, there was no actual work being done that would require the equipment to be locked out.

But in the same sense, you rely on your experience, that they take out these motors. They replace them as they burn up, as they go. They change screens in the screening equipment. They're down in these crushing areas. It's a procedure that a good, safe manager would provide, that as they work on this equipment, that it is going to be locked out.

Now, I asked him at that time if they had any lockout procedure or any locks. I was told, no, they didn't. As a matter of fact, they had to go to town and buy them.

Mr. Shanholtz could not recall how much time he gave the respondent for abatement of the citation, but he indicated that he usually fixes less than a week as the abatement time on citations such as the one in question (Tr. 53). He confirmed that the electrical equipment being worked on by the electrician on February 26, was not energized, and while locks were near the switches, they were not used to lock out the switch. He stated that he spoke with the electrician and the control room operator. However, the control room operator was in the control room and not with the electrician who was doing the work, and while the control room operator could not see the electrician from the switch house control room, he was aware that the electrician was doing some work (Tr. 60).

Mr. Shanholtz stated that he abated the order after the switch was locked out, and after a lockout procedure was established in writing and the employees were instructed in its use (Tr. 59-61). However, when he issued the citation on January 7, he spoke with several employees who worked on the equipment, and they had no knowledge about any lockout procedures (Tr. 61). The employees were aware of a procedure for de-energizing the power source by turning off electrical equipment which was being worked on, and this procedure was in effect (Tr. 62). Mr. Shanholtz stated that MSHA "doesn't recognize simply throwing a switch as a safe procedure" (Tr. 63). He reiterated that when he spoke with superintendent Burdette Fox on January 6, Mr. Fox advised him that they had no locks to physically lock out the switches and simply shut the door to the switch house (Tr. 65).

Mr. Shanholtz stated that he observed a large number of burned out motors in the yard when he was at the mine on January 7, and he believed that they were from electrical equipment in the switch house. Based on this, he assumed that since no lock-out procedures were established that work on these motors had been conducted prior to January 7 without locking out the electrical equipment (Tr. 67-68).

Mr. Shanholtz stated that a lock would add to the safety of the equipment if it de-energized because it would prevent the equipment from being energized or turned on electrically

or mechanically. When asked what would happen if the equipment were turned on while someone was working on it, he responded as follows (Tr. 70):

A. Essentially the same thing that happened in our last fatality in the Southeast District, that a person came by and noticed the crusher wasn't on. It wasn't locked out. He turned it on and it crushed the guy that was inside the crusher.

As long as you have people who are in that general area of that electrical switch, there is a potential that somebody is going to turn on that piece of equipment.

Q. And I believe you've already testified you saw employees in the area of that electrical equipment --

A. Yes.

Q. -- on January 7th.

A. Yes.

Q. And in February when you issued the (B) order.

A. Yes.

John Stovall, respondent's vice-president and general manager testified that the mine in question is a union mine which has been represented by the United Steel Workers, and that a three-person mine safety committee composed of two union representative and one management representative has been functioning since a safety committee clause was added to the contract approximately 15 years ago. He stated that the safety committee chairman has always accompanied MSHA inspectors during their inspections, and that this was the case during January, February, and March, 1986. He also stated that mine procedure calls for the safety committee to discuss any safety problems with their supervisors, and if they cannot be resolved at that level, he was to be personally contacted (Tr. 136-139). Mr. Stovall also stated that he has a good working relationship with all of his employees, that he knows them all by name, and in the event they wish to speak with on the job they may do so by "flagging him down" (Tr. 140).

With regard to the citation for failure to have an electrical equipment lock-out procedure in place, Mr. Stovall stated that prior to January, 1986, he had no electricians on the mine payroll and all electrical work was done by contractors. However, since February, 1986, a certified electrician was hired and he is now on the payroll (Tr. 148). Mr. Stovall stated that there have never been any electrical fatalities at the mine, and that prior to January, 1986, no one ever reported to him that any electrical equipment was not turned off while it was being worked on. He confirmed that the then existing procedure when work was to be performed on any equipment was to disconnect the switch in the switch house. If an electrical problem existed, the outside electrician would disconnect the switch himself and then proceed to do the work. Since the electrician was a certified electrical contractor, Mr. Stovall assumed that "the man knew what the rules of the game were and did what was necessary to protect himself" (Tr. 149).

With regard to the burned out motors observed by the inspector, Mr. Stovall stated that they did not all come from his operation, and that some were either purchased from other operators, or obtained from some of his other operations at the plant site (Tr. 150).

Mr. Stovall stated that he had problems in January, 1986, because his equipment superintendent Don Joines suffered a heart attack and was off the job for about 5 months, and he was not on the job during the February, 1986, compliance inspection. He also stated that the citations which were issued in January were discussed with the inspector and Mr. Joines and crushing foreman Burdette Fox, and not with him. He discussed them with the inspector during his subsequent inspection in February 26 (Tr. 152).

Mr. Stovall stated that after the citation was issued, he immediately purchased locks, and the four or five people who had the ability and skills to perform electrical work were told to use the locks. The locks were available and "laying there in the switch house" in February, and he had no idea why they were not being used. He reiterated that the electrician and switch house operator were told to use them (Tr. 153). He confirmed that the prior oral instructions to use the locks was reduced to writing to abate the violation, and that this was accomplished by typing a two-sentence memorandum advising personnel to use the locks when they worked on electrical equipment, and the memorandum was taped to the wall of the switch house (Tr. 153).

With regard to the burns suffered by Mr. Fox, Mr. Stovall stated that his injuries had nothing to do with the lack of a lock-out since the injury "wasn't past the switch" and "he was injured behind the switch when the electricity in the box itself arced and burned his hands." Mr. Stovall was of the opinion that any lock would be "absolutely useless" in that incident. Mr. Stovall stated that at no time during prior inspections was he ever told that the lock-out procedures were inadequate (Tr. 154).

On cross-examination, Mr. Stovall stated that the work being performed by Mr. Fox at the time of his injury was not work typically performed by him, and that the work should have been performed by someone else because it was union classified work. Mr. Stovall identified the individuals who were told to use locks as Mr. Fox, the secondary plant operator who "is the guy that pushes the buttons up there," Tim Rogers, an electrician, and two welders who sometimes assisted but did not do electrical work. Mr. Stovall stated that all of these individuals acknowledged to him that they were aware of the fact that locks were provided in the switch house. He confirmed that the secondary crusher operator, and others in similar jobs, would have reason to turn on and off electrical equipment in order to perform mechanical work (Tr. 155-156).

Mr. Stovall confirmed that sometime in 1985, the secondary crusher operator was involved in an electrical accident at the plant, and while he was not sure, he indicated that the individual suffered burns to his hands similar to the incident involving Mr. Fox (Tr. 156).

Section 104(a) Citation No. 2657373, issued on January 8, 1986, cites a violation of 30 C.F.R. § 56.9003, and the cited condition or practice is described as follows:

The Michigan 275 front-end loader had several defects which affect the safe operation of the loader; (1) the front windshield was cracked and broken which affect the operator's vision. (2) The back-up alarm provided on the loader was not functioning, the view to the rear was obstructed, (3) the loader did not have an operable emergency brake. The brake would not function when tested, (4) the primary braking system was slow to stop the loader when tested, in an emergency condition the operator might not be

able to stop in time, (5) the loader was not provided with a fire extinguisher.

Inspector Shanholtz stated that he issued the citation after finding that the front-end loader in question had "quite a few defects that affected safety." He stated that the front windshield was cracked, broken, and shattered so much that it would impair the operator's vision. He determined this by leaning into the operator's cab and looking through the windshield (Tr. 75). He also determined that the backup alarm was not functioning in that when the operator put the loader in reverse, the alarm would not come on (Tr. 77). He also determined that the loader emergency brake was inoperable. He had the operator test the lever operated hand emergency brake by applying it and then putting the loader in gear, and the brake would not stop the loader (Tr. 77). He also determined that the primary braking system on the loader "was slow" and that it took "more than the usual length of area to stop the loader." He had the operator test the brakes on a flat surface by putting it in both forward and reverse gears, and in each case "the unit was slow to stop" (Tr. 78). He also determined that the loader did not have a fire extinguisher (Tr. 78).

Mr. Shanholtz stated that the loader was operated throughout the mine property in the stockpile area, around the jaw crusher at the primary plant, as well as at the secondary plant area. The loader was also required to cross a state highway separating the primary plant area from the secondary plant area, and he observed the loader being used in both areas (Tr. 78-79). He stated that the loader was used to load customer trucks at both plants, and it was used at the primary crushing area and the stockpile. He described the traffic on the highway on the day of his inspection as "light to medium," and the traffic around the other plant areas where the loader operated as "quite a bit" (Tr. 79). Except for one curved road which turns at the jaw crusher, the loader operator's visibility would not be limited by the road conditions at the other locations where it travelled (Tr. 80-81).

Mr. Shanholtz stated that when he returned to the mine on February 26, 1986, he determined that the loader had no service brakes. However, the windshield, emergency brake, and the back-up alarm had been repaired, and a fire extinguisher had been provided (Tr. 83). He stated that sometime between January 7, when he first issued the citation, and his return on February 26, the primary brakes had failed. He observed the loader in operation on February 26, loading

trucks at the riprap plant on the primary side of the highway. He believed that repairs were made by installing a new head on the braking system air compressor, and he further believed that this accounted for the weakness of the braking system when he first inspected the loader, and for the total loss of brakes when he returned (Tr. 84).

On cross-examination, Mr. Shanholtz stated that it would take the loader approximately 50 feet before it would stop when he had the operator test the brakes on January 7. He also indicated that the loader worked "all over the plant, wherever it was needed," and not just on flat surfaces (Tr. 87-88). He had no knowledge that the state highway department had issued a permit allowing the loader to cross the state highway at the crossover in question, and he acknowledged that a sign was posted at that location warning of equipment crossing the road (Tr. 89). He also indicated that during the general operation of any loader, the bucket is raised or elevated off the ground to allow free movement, and that the raising of the bucket does "prevent vision of what is out there" (Tr. 89-90). Mr. Shanholtz stated that while the bucket on the loader in question was not completely up in the air, it is raised enough so that the view directly in front of the loader is obstructed (Tr. 90). He did not know whether the raised bucket would be contrary to or consistent with the manufacturer's recommendations for loader travel with a loaded bucket (Tr. 90).

Mr. Shanholtz stated that the loader operator who was operating the loader on February 26, when he next returned to the mine advised him that nothing had been done to repair the brakes since he first issued the citation on January 7, and this is what prompted him to issue a section 104(b) order (Tr. 93). Mr. Shanholtz stated that the operator told him that he had verbally reported the fact that the loader had no brakes on February 25, the day before his return to the mine, and that his report was made to the acting maintenance superintendent Tom Nelson (Tr. 94, 96). Mr. Shanholtz confirmed that the gist of the citation which he issued on January 7, lies in the fact that the loader had inadequate brakes which would not completely stop it, and a totally inoperative hand brake (Tr. 97).

Mr. Stovall stated that the cited front-end loader was used to load "over-the-road trucks out of the stockpile, trucks that haul up and down the public highways." These trucks were used by commercial purchasers of rock, and he estimated that the loader would be used to load 100 trucks a day. At no time prior to January 6, 1986, did he ever receive

any reports that the loader was running into any trucks, and no supervisor or the safety committee ever report to him that there were problems with the brakes (Tr. 162). Mr. Stovall confirmed that he has a state permit to cross highway 171 with his equipment, that there are three designated crossings, and warning signs are posted north and south of the highway warning motorists of equipment crossing the highway (Tr. 163). He stated that the highway leads mainly to the quarry, that it is not highly travelled, and he estimated that three or four cars an hour may pass the property on the highway (Tr. 164).

Mr. Stovall described the haul roads and entrances and exists to the mine property, and he estimated that from the two north crossing, one can see traffic for approximately a half mile up the highway, and from the south crossing, one can see for a quarter of a mile (Tr. 165). He confirmed that the loader crosses the road, but that its operation is limited to the stockpile area loading material out of the stockpile, and it does not operate throughout the quarry. When the loader travels or crosses the road, the bucket is approximately 6 inches or a foot off the ground, or just high enough to clear the ground, and if it were in the air it would be top heavy. He has operated a loader, and while seated high in the cab over the bucket with the bucket raised as described, "you can absolutely see everything in front of the bucket." He has never had a moving vehicle accident at the mine (Tr. 166-167).

Mr. Stovall stated that he first learned that the loader brakes had totally failed in February when he went to the quarry and met the inspector. During the January inspection, he learned that the loader had been cited for "slow brakes" and the lack of an emergency brake. However, he believed that the emergency brake had been repaired and the brakes adjusted prior to February 26, and while he assumed that the loader stopped quicker after the brake adjustment, he did not personally test brakes, but believed that attention was given to the braking system after the January inspection, and some of the work may have been done before Mr. Joines had his heart attack (Tr. 168). Prior to the February inspection, a compressor head which generated air and controlled the braking system had blown and it was promptly replaced (Tr. 169).

With regard to the inspector's assertion that he was told that the brake condition had been reported a day before the February 26 inspection, Mr. Stovall stated that he could not confirm this. He stated that he spoke with two mechanic's helpers who did not admit that the loader operator had reported the lack of brakes and simply got into the loader and

started work. Mr. Stovall stated that "the first time we knew that he had no brakes was when the inspector stopped him and tested him" and shut the machine down. Mr. Stovall denied that anyone told the loader operator that he had to operate the loader, and stated that two spare machines were available that day. The safety committee had not reported the condition (Tr. 168-169).

On cross-examination, Mr. Stovall confirmed that the safety committee has the authority to shut a piece of equipment down if it believes it constitutes an imminent danger. To his knowledge, this has never been done (Tr. 170). He conceded that the loader could also have been operating in the area of the riprap plant since that is a stockpile area, and he confirmed that there are 12 or 14 stockpiles of different sized stones at difference locations at the mine (Tr. 171). Mr. Stovall stated that he learned about the brakes being repaired on the loader after the January inspection after reviewing the citation which was sent to his office by the scaleman after it was given to him by Mr. Joines and Mr. Fox (Tr. 174). Mr. Stovall could not recall any posted speed limit signs on the mine property (Tr. 175).

Donald Joines, respondent's equipment superintendent and supervisory mechanic, stated that his responsibilities include the maintenance of all equipment at the mine site, but do not include anything connected with the electrical operation of the plant. He confirmed that until his heart problem on February 8, 1986, he helped do the maintenance work in addition to his supervisory work, and since that time "I just oversee now" (Tr. 191-193).

Mr. Joines stated that prior to January 8, 1986, no one reported any problems with the emergency brake or primary braking system on the Michigan 275 end loader, and no report was made that the loader was not stopping while it loaded trucks. He was not aware of any customer complaints that the loader had ever run into any trucks, nor was he aware of any damage claims in this regard. Mr. Joines confirmed that he was not with the inspector when he tested the loader, did not observe him test it, and he did not know how slow it stopped (Tr. 203). After the inspection, parts were ordered to repair the emergency brake, and new pads were installed and the brake was adjusted. The primary brakes were adjusted and cleaned up, and he estimated that repairs were completed within 3 or 4 days after the citation was issued. The brakes were working before he left work because of his heart problem, and he stated that they failed after this time

because he tested them to make sure the loader stopped (Tr. 204-205).

Mr. Joines stated that while the loader is loading from the stockpile, the operator can see over and through the bucket as it is raised and lowered, and that while travelling for a distance, such as across the state highway, the bucket would be almost to the ground so as to allow the operator to see in front of him, and the loaders are never operated with the buckets raised in such a position to obstruct the operator's vision (Tr. 206).

Mr. Joines stated that the terrain over which the loader operated was virtually level, although there are "a couple of hills, small grades." Other than the trucks being loaded, there are no other vehicles in the area where the loader is loading, and normally, other than a supervisor, people would not be walking around where the loader is loading. The operator can see approximately one-half a mile down the state highway at the first crossing, and a little less at the other crossing. In the event of a total brake failure, the operator would "slap that bucket to the ground" to stop it, and it would stop "so fast it will throw you out of the cab." This would be the case while going forward or backward with the loader, and if the bucket were loaded, it would stop faster (Tr. 206-207).

On cross-examination, Mr. Joines stated that dropping the bucket to stop a loader is not a permissible alternative to brakes, but if the brakes completely fail that may be the only reasonable alternative (Tr. 208). Mr. Joines agreed that the loader may load 100 trucks over a normal 8-hour work shift, and that the loader may cross the state highway 20 to 25 times a day (Tr. 209). He confirmed that the air compressor head is constructed of aluminum and one cannot predict when one will fail and "it just happened" (Tr. 210).

Section 104(a) "S&S" Citation No. 2657377, issued on January 8, 1986, cites a violation of 30 C.F.R. § 56.9001, and the cited condition or practice is described as follows: "An equipment inspection, check-off list was not being utilized at the Greenville Quarry. Equipment operators have known of defects on equipment without reporting them. The inspection list shall be kept for 6 months."

Inspector Shanholtz confirmed that he issued the citation after determining that equipment operators were not utilizing any equipment checkoff lists to report equipment defects.

Mr. Shanholtz stated that during the course of regular inspections he had found a lot of equipment defects in the maintenance of the respondent's rolling stock which had not been reported, and he gave the respondent until January 21st to initiate a procedure to insure that such lists were made available to the equipment operators and used to report defects. Mr. Shanholtz stated further that section 56.9001 requires that such records recording defects be kept on file at the mine office for a period of 6 months. When he asked to review the records, he found that none were on file at the office, and none were filled out and turned in by the operators (Tr. 98).

Mr. Shanholtz stated that no one advised him of the existence of any union safety committee, and he saw no evidence of any union safety reporting procedure in existence (Tr. 99). He stated that he informed the respondent's representatives Donald Joines, Tom Nelson, and Burdette Fox that he was issuing the citation because of the lack of checkoff lists. At that time, Mr. Joines advised him that he had the lists, and he opened a cabinet next to his desk and Mr. Shanholtz observed "several stacks of unused checkoff lists" (Tr. 100).

Mr. Shanholtz stated that when he returned to the mine on February 26, he found that the checkoff lists were not being used and that the respondent had not instructed the employees in their use, and this prompted him to issue a section 104(b) order for noncompliance (Tr. 100). Mr. Shanholtz confirmed that he found reportable defects affecting safety on both January 8, and February 26, which should have been found during the inspection of the equipment, but that no reports had been filed. He stated that no one from management told him of any existing procedure for reporting any safety defects (Tr. 100).

Mr. Shanholtz stated that his finding that it was "reasonably likely" that a fatality would result from the lack of a reporting procedure was based on the fact that he was finding a large amount of equipment defects, and had the checkoff lists been utilized, it was his belief that many of these defects would have been corrected. He stated that the equipment operators were not supplied with the lists, nor were they instructed in their use, and he believed that such instructions should be a part of any checkoff list procedure (Tr. 101). Mr. Shanholtz stated that even if the respondent supplied the lists to the equipment operators, the fact that they were not used would still prompt him to issue a citation for a violation of section 56.9001 (Tr. 102). Mr. Shanholtz believed that the lists were not utilized because equipment

operators were aware of defects on equipment and did not report them (Tr. 104-105).

On cross-examination, Mr. Shanholtz was asked whether or not he made any inquiry of the equipment superintendent or anyone else in the mine office as to what had been reported to them and what was done about it. His response was as follows at (Tr. 106):

A. I talked to just about all of the operators on that property, of mobile equipment. And I was informed by them that these defects had existed for a long time, that they were told to operate the equipment or else.

Mr. Shanholtz stated that he would have accepted any informal written record of equipment being checked and defects being reported (Tr. 110). He stated further that he asked maintenance superintendent Donald Joines whether or not any reporting system or records were being kept, and Mr. Joines simply opened a cabinet door and showed him the supply of checkoff lists, but he did not produce any list which had been turned in (Tr. 111). Mr. Shanholtz suggested that the equipment operators did not report equipment defects because they were intimidated (Tr. 114).

Mr. Shanholtz confirmed that he abated the order after the respondent posted written procedures instructing equipment operators as to the procedures for the use of the checkoff lists (Tr. 114). He confirmed that the lists were being used (Tr. 116). He also confirmed that the respondent was previously cited in 1985 for not having any checkoff lists, and that was the reason why it had them at the office (Tr. 116).

Mr. Stovall described the equipment defects reporting procedure in place at the time of the January inspection as follows (Tr. 175-176):

A. Every employee on the job knew that Don Joines was the equipment superintendent and he was totally in charge of the equipment. Any equipment defects were reported by these employees to Don Joines.

Q. Were there, in fact, reports?

A. Yes.

Q. How were those reports logged?

A. Don would note the reports himself on his caterpillar calendar, or whatever it was, as they were reported to him.

Q. A calendar hanging on the wall -- is that what you're speaking of -- or on a desk or someplace?

A. I think it was his desk calendar. It was a desk calendar.

Q. Then would safety committee people report this or any employee report this, or how was it reported?

A. It was reported verbally by the safety committee or the individual employees. And, of course, being around myself, too, I have discussed -- not what I would call equipment -- necessarily safety, but maybe a EUC. Engine doesn't have enough power. The operator might tell me, "I need more power out of his engine." and I'll say something to Don about it. But it's all verbal though.

Q. Now, that system, how long had it been in effect?

A. Ever since I, you know, could remember. We tried to keep up -- not only from a safety standpoint, but from a maintenance standpoint, we tried to keep up with our equipment defects the best we could.

Mr. Stovall stated that the procedure he described was in place during prior MSHA inspections. He indicated that the verbal system of reporting defects had been accepted on previous inspections, and while the checklist forms were available, he found that the verbal system worked better than any written system (Tr. 177). He stated that after speaking with the inspector after the February inspection, "we was more or less ordered to go to the checkoff system," and he complied because "that is what it took to satisfy the inspector" and not because it was a better system (Tr. 177). In response to further questions, Mr. Stovall stated as follows (Tr. 181-183):

JUDGE KOUTRAS: * * * But in this particular case, Mr. Stovall, obviously, the inspector found absolutely no record keeping at all and that is what prompted him to issue the citation.

THE WITNESS: Well, the records were being kept, because I discussed with Don Joines after the January inspection -- and they were not being kept to suit him, but other inspectors had accepted them as acceptable when Don showed them the calendar.

* * * * *

On January 9 when the inspector issued this citation -- on January 8 -- did you have check lists, printed check lists?

THE WITNESS: We had printed check lists in the storage cabinet at Greenville Quarries, yes, but we were not using them.

JUDGE KOUTRAS: Let me ask you this. Aren't the individual equipment operators required to at least walk around their equipment and give it a preshift examination or at least check it before they get in and operate it?

THE WITNESS: Yes, there are and another problem we had with two or three of our operators, they couldn't read or write. So a check list was -- number one, they couldn't fill it out. Number two, they didn't know what they had.

JUDGE KOUTRAS: Were these particular check lists for that purpose, for the ones that were literate?

THE WITNESS: No. It had to be verbal with them.

JUDGE KOUTRAS: The ones that could read and write, I'm saying. In other words, did you use these check lists for anything?

THE WITNESS: We tried them one time, but then went away from them because we felt like they were not working.

JUDGE KOUTRAS: In other words, you had this supply of check lists you had used before the inspector here came in on January 8.

THE WITNESS: Right.

JUDGE KOUTRAS: But you stopped using them because you felt they didn't work.

THE WITNESS: Right.

JUDGE KOUTRAS: The verbal system worked better.

THE WITNESS: That is right.

JUDGE KOUTRAS: Were you there when the inspector issued this citation on January 8?

THE WITNESS: No.

Donald Joines stated that prior to February of 1986, equipment defects were reported to him verbally, and he would write them down on a calendar. He would record the date that the condition was reported and the date that repairs were made. He stated that he maintained his records in this way after discussions with Inspector Lloyd Cloyd from MSHA's Knoxville office, and that Mr. Cloyd found this to be sufficient (Tr. 193). Mr. Joines stated that he had previously used a written checkoff list but found that system to be less effective than the verbal system because it generated "misunderstandings," and in some instances an operator would check off something and then turn in the list a week later. With the verbal system, when equipment was down, it was reported and repaired" as quick as we could repair it" (Tr. 194).

Mr. Joines explained the circumstances of the inspection conducted by Mr. Shanholtz as follows (Tr. 195-197):

Q. Did he question you about your reporting system for defects?

A. Yes, sir. At the time, he came in and wanted to know if I had a checkoff list,

period. I said, "Yes, sir." That is when I showed him the checkoff list.

Q. What happened then?

A. That was it. He started writing again.

Q. Did you have the opportunity to show him your calendar?

A. Well, at the time, really, I didn't.

Q. Why not?

A. Things was moving pretty fast.

Q. Explain that. That doesn't tell me anything.

A. Well, he had his pencil warmed up. I reckon he was going to keep going.

Q. Did you say, "Hey, wait a minute. I've got a calendar right here that says. . . ."

A. Well, really, I didn't -- I didn't -- you know, I didn't really get that far. But I had the calendar there. It was there in the desk.

Q. That was the system that had been previously used --

A. Yes.

Q. -- and was effective and had been approved.

A. Yes. Because this guy from out of the Knoxville office, every time he came he wanted to see it. And, you know, and he understood what was happening and we had no problem with it.

Q. Did there get to be any heated debate between you and the inspector?

A. There was a few heated words, yes.

Q. What happened to your calendar?

A. While I was off, I guess they figured I wasn't going to make it, so they cleaned out a whole lot of stuff.

Q. You don't have your calendar today. Somebody threw it --

A. No. I wish I did have.

* * * * *

Q. Are you saying you didn't have the opportunity to tell the inspector about your calendar? Is that what you're saying, or you weren't allowed to?

A. I felt like I didn't have, yes.

Mr. Joines stated that the present system in use at the mine is the checkoff list. However, he still believes it is less effective than the verbal system because equipment operators may hold the lists for 3 or 4 days before turning them in, and many times 3 or 4 days pass before he sees them (Tr. 197).

On cross-examination, Mr. Joines stated that he could not remember a prior citation issued on March 13, 1985, by an inspector from MSHA's Franklin, Tennessee office because of the lack of a reporting system for equipment defects. He also denied that he had ever been advised by anyone from MSHA that his reporting system was less than adequate (Tr. 198).

When asked why he did not tell the inspector that he was using a calendar to record defects, Mr. Joines responded "maybe there was a miscommunication" (Tr. 199). Mr. Joines could not recall whether he had recorded the cracked windshield condition on the front-end loader on his calendar (Tr. 199). MSHA's counsel confirmed that Inspector Lloyd Cloud works out of MSHA's Franklin office, and she did not have a copy of the prior citation of March 13, 1985, available at the hearing (Tr. 201). Mr. Joines stated that he was not aware of any brake problems on the vehicles at the mine and none were ever reported to him (Tr. 202).

Section 104(a) "S&S" Citation No. 2657386, issued on April 22, 1986, cites a violation of 30 C.F.R. § 56.4100(a), and the cited condition or practice states as follows:

Cigarette butts were observed inside the oil storage shed, on the floor. This is a posted no smoking area. A high fire potential existed in this area due to oil spillage and accumulation of oily rags, employees utilizing the oil storage area shall be instructed in the hazards of smoking in this area.

Inspector Shanholtz confirmed that he issued the citation after observing approximately five cigarette butts on the floor of an oil storage shed which is adjacent to and connected to the main outside shop. The shed is a three-sided structure, with one front opening, and it contained approximately 20 55-gallon drums of 10 and 30 weight oil, and some hydraulic fluid. The shed area is a posted no-smoking area, and the floor area was saturated with oil spillage to the point where one could smell it and leave footprints in the cement floor. Also present were oily rags and paper, and litter. The butts were fresh, and he did not believe they were there long since they were not soaked in oil (Tr. 119-120).

Mr. Shanholtz stated that he had previously cited the area for not having a "No Smoking" sign posted, and had previously discussed the matter with either Mr. Joines or Mr. Burdette (Tr. 120)

Mr. Shanholtz stated that the oil stored in the shed was a Class II combustible liquid which emitted a vapor at 100 degrees. In his opinion, a thrown cigarette, or one which was not extinguished properly, could have ignited any vapor and started a fire. He also believed that a "flash fire" could occur or propagate because of the oil spillage and saturation, and the only means of escape would be out of the front of the shed (Tr. 121-122). His assumption that someone had been smoking was based on his observation of the cigarette butts (Tr. 122-123). He found no matches anywhere (Tr. 123).

Mr. Shanholtz stated that no employees are regularly assigned to the shed area, and employees simply come and go from the area while servicing their vehicles (Tr. 124). Abatement was achieved by posting a letter warning employees about smoking in posted "No Smoking" areas (Tr. 126).

On cross-examination, Mr. Shanholtz confirmed that the oil was stored on both sides of the inside of the shed, and that the large front opening was not obstructed. He observed people coming and going to service their vehicles, and he

observed no one smoking (Tr. 128). He did not believe the cigarette butts were tracked in, blew in by the wind, or dumped in from another area. Since they were fresh and were located inside the middle of the shed, he believed they were extinguished where he found them by someone who had been smoking (Tr. 130).

Mr. Shanholtz confirmed that he also issued a citation on April 22, 1986, for a violation of section 56.4102, because of spillage and leakage of flammable or combustible liquid in the same shop where he found the cigarette butts (Tr. 131-132). MSHA's computer print-out of prior violations, exhibit P-3, reflects a prior violation of section 56.4100(b), issued on January 7, 1986, for smoking in an area where flammable or combustible liquids are stored or handled, but Mr. Shanholtz could not recall the details of that citation (Tr. 132).

Mr. Stovall confirmed that a large "No Smoking" sign was posted at the oil storage shed in question and that he has never seen anyone smoking in the shed. He assumed that all employees understood the posted sign. He described the shed as a "room" located behind the metal shop building, and he stated that the south end is composed of doors which provide a 20-foot opening when they are opened. He stated that all employees have access to the shed while obtaining oil, and they park in a circular roadway that goes around the shed and simply walk in to get what they need. Mr. Stovall confirmed that smoking is prohibited only in posted areas, and he could not explain the presence of the cigarette butts on the floor (Tr. 188-189).

Mr. Joines stated that he has never observed anyone smoking in the oil shed, and he had no knowledge as to how the cigarette butts got there (Tr. 210-211). He confirmed that he was not at work when the citation was issued and that he had installed the "No Smoking" sign (Tr. 211-212).

DOCKET NO. KENT 86-134-M

Section 107(a)-104(a) "S&S" Order No. 2657189, issued on February 26, 1986, cites a violation of 30 C.F.R. § 56.9003, and the cited condition or practice is described as follows:

The Euclid 35 ton haul truck, S/N 69035 did not have a functional emergency brake. The emergency brake had been cited on 1/8/86 during the course of a regular inspection. Upon this compliance inspection it has also

been found that the rear brakes also do not operate on the haul truck and have not operated for several years. The fluid reservoir that provides braking fluid to the rear brakes was empty with scum like material in the reservoir, indicating that fluid had not been added for some time. The haul truck shall be parked until such time that the primary and emergency brakes are properly repaired.

Section 107(a)-104(a) "S&S" Order No. 2657190, issued on February 26, 1986, cites a violation of 30 C.F.R. § 56.9003, and the cited condition or practice is described as follows:

The Euclid 35 ton haul truck S/N 69036 was observed being operated without adequate brakes. The primary braking system would not stop the haul truck when tested. The emergency brake when tested would not hold the truck. When inspected it was found that the haul truck had only 1 functional wheel brake. Upon inspection of the fluid reservoir to the braking system it was found that the reservoir to the rear brakes were empty. The hoses leading from the reservoir to the brakes had been disconnected. Dirt and oil on the hose connections indicate that the hoses had been disconnected for sometime.

Inspector Shanholtz confirmed that he cited haul truck No. 69036 because the emergency brake would not hold and the primary braking system or service brakes were also not functioning. When the truck was tested on a decline going from the primary crusher down into the pit area, he told the driver to put it in low gear and to stop and put the emergency brake on. The driver began driving down the incline but he could not stop the truck and had to put it in reverse gear to stop. The inspector checked the braking system and found that it had only one functional brake on the right front.

Inspector Shanholtz stated that he also followed the same testing procedure with the No. 69035 truck and found that "it was slow to stop" when driven down the incline." This truck had been previously cited on January 7, 1985, for lack of a functional emergency brake, but he did not check the service brakes at that time because the driver told him that they were working, and he took him at his word.

Inspector Shanholtz described the truck braking system, and stated that upon visual inspection of both trucks, he found that the rear braking system reservoirs were empty and the hoses had been disconnected. Dirt had built up on the hydraulic hoses, and there was a thick "scum-like" substance in the hydraulic reservoirs which led him to believe that the brakes had not been functional for some time. He estimated that the brakes had been in that condition for a year (Tr. 6-12).

Referring to petitioner's photographic exhibits P-4, at pages 5 and 6, the inspector described the areas and service roads over which these trucks were operated, including a public highway, and he estimated that the trucks crossed the highway on an average of four times a day. He confirmed that the trucks operated primarily from the jaw crusher to the pit area, and that they travelled from 15-20 miles an hour over the service roads. Utility pick-up trucks and some public traffic would also be operating in these areas. The trucks were equipped with seat belts, and he cited no other truck defects during his inspection of February 26 (Tr. 12-14).

On cross-examination, Inspector Shanholtz confirmed that he had previously inspected both of the cited trucks during the inspection of January 7, 1985, but did not cite the No. 69035 truck for anything other than a non-functional emergency brake because he took the operator's word that the other brakes were operational, and he failed to inspect them more thoroughly (Tr. 15). During his inspection of February 26, he determined that the 69035 truck had no rear brakes, and when they were actuated during the testing there was no action on the brakes. He then traced out the lines and checked the reservoir (Tr. 17).

Inspector Shanholtz stated that the truck operator told him that he had reported the condition of the truck. He also stated that when he discussed the brake conditions with Mr. Stovall, he denied that the conditions had been reported (Tr. 17).

Kazimer Niziol, Mining Engineer, MSHA Technical Support Group, testified as to his background, education, and experience as a miner, maintenance superintendent, automobile mechanic, and prior work with a manufacturer of hydraulic braking systems. He confirmed that he has been involved in MSHA accident investigations involving haulage truck and underground equipment, and that he has discussed the braking systems on the 35 ton Euclid haul trucks in question with the manufacturer and different engineers (Tr. 23-25). Mr. Niziol

described and explained the braking systems on the trucks in question (Tr. 27-29). MSHA's counsel conceded that Mr. Nizioł did not inspect the cited trucks in question, and that his testimony generally covers the truck braking systems (Tr. 28, 30).

John Stovall confirmed that on February 26, 1986, the emergency brake on the No. 69035 truck was not functional. When he checked the truck after it had been ordered out of service by the inspector, he found that the emergency brake did not work and he agreed with the inspector's finding that it was inoperative (Tr. 32). With regard to the rear brakes on that truck, Mr. Stovall stated that he spoke with the driver, Wayne Kiddinger, who informed him that when the truck was tested on the hill by the jaw crusher, it "would stop, but not fast enough to suit the inspector." Since the truck had been taken out of service, and he was instructed to take it to the shop for repairs, the truck was not tested again on the hill. When the truck was driven into the shop on a level concrete floor, the driver jammed on the brakes and the front wheels locked and skidded on the floor, but the rear wheels did not skid (Tr. 34).

Mr. Stovall stated that in his opinion, there was "approximately 50% brake on the rear wheels" of the No. 69035 truck, but that the front brakes were 100 percent. Nothing was done to repair the front brakes, but the rear brakes were repaired, and by the time the parts arrived and the work was finished, it took 3 days to complete the repair job. Mr. Stovall confirmed that there was a leak in the rear braking system, and he conceded that 50 percent of the rear brakes were not working (Tr. 35).

Mr. Stovall stated that Mr. Kiddinger informed him that he had not reported the brake conditions to anyone, and that he believed the brakes were sufficient (Tr. 35). Mr. Stovall also stated that when the brakes were applied on the level concrete floor of the shop, "he stopped quick enough that the front wheels skidded . . . the complete truck stopped just immediately, but he was on level" (Tr. 36).

With regard to truck No. 69036, Mr. Stovall stated that he checked its stopping power by having the mechanic drive it on a slight grade rock incline next to the shop, and that "the truck did hold on the hill," and that "both front wheels would scoot on the ground, the loose rock." Work was only done on the rear brakes of that truck and it was completed in 3 days (Tr. 37). Mr. Stovall could not explain why the brake hose was disconnected, and in his opinion, the disconnected

hose had no bearing on the operation of the truck. The driver of the truck, Norris Johnson, informed him that he had not reported any "bad brakes" on that vehicle (Tr. 38). Mr. Stovall confirmed that he recorded several notes concerning the citations on the face of his record copies and they were made a part of the record in this case (Tr. 38, exhibits R-1 and R-2).

With regard to the abatement work on the No. 69036 truck, Mr. Stovall confirmed that new brake shoes and wheel cylinders were installed on the rear wheels, and the hoses were reconnected (Tr. 41). He also confirmed that he did not check the emergency brake on that truck after it was cited, and had no basis for disputing the inspector's finding that the emergency brake would not hold the truck (Tr. 42).

In response to further questions, Mr. Stovall stated as follows (Tr. 42-43):

JUDGE KOUTRAS: So when you get down to the bottom line on both of these citations, at least to some degree, the inspector's findings here that the truck brakes were defective was true, wasn't it, to one degree or another?

THE WITNESS: They were not a hundred percent (100%), yes, sir.

JUDGE KOUTRAS: They were not a hundred percent (100%).

THE WITNESS: That is right.

JUDGE KOUTRAS: So would you agree, then, that the brakes were less than adequate? At least the emergency brakes were less than adequate if you agree they were both inoperative.

THE WITNESS: The emergency brakes on those of trucks, of course, is something -- the driver might drive it for weeks and not know it was --

* * * * *

JUDGE KOUTRAS: What I'm saying is you at least concede that these brakes weren't a hundred percent (100%), what they were supposed to be.

THE WITNESS: That is right.

JUDGE KOUTRAS: So they were less than adequate. The standard says they have to be with adequate brakes.

THE WITNESS: My opinion of adequate brakes might be something less than a hundred percent (100%).

Inspector Shanholtz was called in rebuttal, and he stated that his contemporaneous notes made at the time of his inspection on February 26, reflect that Mr. Kiddinger, the driver of the No. 69035 truck told him that the brakes on that truck "had been that way for years, that they had never operated and that he was told by Donald Joines never to fill the two reservoirs because the brakes didn't work. He also stated the truck was like this for approximately three years that he had worked there" (Tr. 52).

Mr. Shanholtz stated that the operator of the No. 69036 truck, Norris Johnson, told him that he too was advised by Mr. Joines not to fill the two reservoirs because they had been disconnected and the fluid would run out. Mr. Johnson also informed him that "they had been that way for several years" (Tr. 53). Mr. Shanholtz also stated that Mr. Joines told him that the operator would continually burn the emergency brakes off and that they could operate the equipment the way it was (Tr. 53).

Mr. Shanholtz confirmed that he has taken MSHA training classes covering the operation of hydraulic braking systems, and in his opinion, rear brakes which are only 50 percent operational would be inadequate to stop a truck, even though the front brakes were fully operational (Tr. 55).

Vernon Denton, MSHA Supervisory Inspector, Lexington Field Office, testified as to experience, education, and background, including work as a state mining inspector, and he confirmed that he has worked for MSHA for 17 years. Mr. Denton stated that Mr. Stovall came to his office to discuss the braking citations with him and with sub-district manager Fred Jouppery, but that Mr. Stovall did not tell him that the brakes had been repaired or were in the process of being repaired (Tr. 60-62).

Mr. Denton stated that Mr. Stovall told him that he had a letter from someone informing him that the brakes on the

cited trucks were adequate with the rear brakes disconnected. Mr. Denton stated that he told Mr. Stovall that he could not accept anything less than the designed brakes, and that Mr. Stovall said nothing to him about the rear brakes operating at 50 percent efficiency (Tr. 63). Mr. Denton stated that as an enforcement policy, truck brakes must be maintained as they are originally equipped by the manufacturer, and if they are not, the designed safety of the vehicle is lost. In his opinion, one cannot do away with half of the designed braking capability and expect to have a safe vehicle under all conditions. Although the vehicle may be able to operate at one mile an hour with one or two brakes, consideration must be given to the fact that the trucks are operated up and down hills during reasonable mining conditions, and in order to be adequate the brakes must be at least as safe as they were designed (Tr. 64). The fact that the trucks in question may have operated with 50 percent rear brakes over a 3-year period with no reported accidents is no reason for inferring that an accident will not occur with brakes in those conditions (Tr. 65). Mr. Denton stated that "adequate brakes," in terms of enforcement of the safety standard in question means brakes which are maintained to their design specifications (Tr. 65).

On cross-examination, Mr. Denton stated that he and Mr. Stovall discussed a number of matters during their meeting, including negligence and gravity, and Mr. Stovall expressed concern that he was being singled out for unusually strict enforcement (Tr. 66). Mr. Denton stated that even if the brakes were at 100 percent efficiency, this would not support a reasonable inference that one will never have an accident. However, he believed the chances were better that no accident would happen with 100 percent brakes, and that this would be a "judgment call" (Tr. 67).

Mr. Nizio was recalled, and he identified exhibit P-15 as a schematic drawing depicting the rear truck braking system with one set of operative lines to the rear wheel, and one set of inoperative lines to the wheel. In his opinion, if one wheel had a problem and lost pressure, the remaining two front wheels and the one other rear wheel should be able to stop the vehicle within the stopping distances established by the Society of Automobile Engineers (SAE), and that is what the system is designed to do. However, if the truck is used in that condition without being repaired, it will result in further brake abuse and the braking system will be overheating and will cause a loss of friction in the lining. While the condition may be good enough to provide a stop, it is not good for further use (Tr. 70). In his opinion, while the brakes may stop the truck on this one occasion, they

would be inadequate for continued day-to-day use (Tr. 71). The parking brake does no good for dynamic braking, and it will only hold the vehicle in a stationary position on a grade (Tr. 72).

Mr. Niziol stated that a truck with only two functional front brakes may be capable of stopping when it is first operated, but after the brakes heat up, they may not work at all due to overheating of the system and that this is very common (Tr. 76).

Mr. Donald Joines was called in rebuttal by the respondent, and he denied that he ever instructed the truck drivers in question not to fill the brake fluid tanks. He also denied that he had told the drivers not to properly maintain the brakes or not to report the braking conditions. He also denied that he ever instructed the drivers to operate the trucks when the brakes did not work because to do so would damage the transmissions which are expensive (Tr. 79).

DOCKET NO. KENT 86-155-M

Section 104(a) No. 2657392, issued on April 23, 1986, cites a violation of 30 C.F.R. § 56.9020, and the cited condition or practice is stated as follows:

Adequate berms were not provided for the elevated roadway where it crosses the stream at two places in the crushing plant. Rock berms had been provided at one time but had slipped down the embankment. Haul trucks and front-end loaders utilize these crossover points.

Inspector Shanholtz confirmed that he issued the citation on April 23, 1986, after observing that the material used to berm two road crossovers of a dry stream bed that runs through the mine property had eroded and slipped down into the stream bed. There were several areas where there was either a very low berm or no berm at all. Mr. Shanholtz stated that the correct standard which should have been cited is section 56.9022, rather than 56.9020.

Mr. Shanholtz identified photographic exhibit P-4, page 2, as representative of the appearance of the two crossovers and the stream bed, but not the berms. The crossovers were approximately 10 to 11 feet wide, and the average width of the trucks crossing at those locations was 8 or 9 feet.

Mr. Shanholtz stated that customer trucks, and company utility, pick-up, and 22-ton stockpile trucks used the crossovers, and that the crossover shown in the exhibit was the primary crossover and heavily travelled, while the other crossover was used less. The conditions at both cited locations were the same.

Mr. Shanholtz estimated that the cited conditions had existed for at least several months. He confirmed that berms had existed at both locations at one time, but that the rocks had slipped over the bank. He identified the lower photographic exhibit P-4 page 2 of 11, as the rock which had slipped over the bank.

Mr. Shanholtz stated that abatement was achieved by providing more rock at the locations in question, and he confirmed that the crossovers are drawn in on the map of the main plant site, exhibit P-2 (Tr. 6-9).

On cross-examination, Mr. Shanholtz stated that the crossover shown in the photograph was approximately 15 feet wide, and that the ditch is about 8 feet deep. He confirmed that when he issued the citation he made a finding that an injury was unlikely and that the violation was not significant and substantial. He changed these findings later on April 29, 1986, when he modified the citation to reflect the gravity as "reasonably likely," and that the citation was "significant and substantial." When asked why he had changed his mind, he responded "it was simply a clerical error on my part" (Tr. 11).

Mr. Shanholtz believed that the berm conditions which he observed on April 23, were a "fairly serious and major problem." When asked why he had not cited the conditions previously during his inspections of January 8, February 26, or March 4, 1986, he responded "I have no idea. I'm human, I guess." He did not believe that the rocks which apparently slipped into the creek "just happened," and he was certain that the berm conditions had existed for several months even though they were not previously cited (Tr. 12).

Mr. Shanholtz stated that the roadway at the cited crossover locations was "elevated" at that portion where it crossed the stream bed in that there was a drop-off on both sides. The roadway at those locations was elevated above the stream bed (Tr. 15-17). Mr. Shanholtz believed that those elevated portions of the roadway created a hazard.

In response to further questions, Mr. Shanholtz stated that berms were required at the crossovers to prevent a vehicle from going into the stream bed and overturning (Tr. 21). He considered the fact that vehicle traffic was heavier in April when there was more production than in January (Tr. 22). He believed that any ditch over 4 feet in depth could easily cause the dump trucks or a front-end loader using the crossovers to turn over (Tr. 22).

Mr. Shanholtz stated that with the berms in place, the width of the roadway was adequate for daily truck usage (Tr. 23). The berms are constructed from whatever material is available, such as rock or fill dirt (Tr. 25).

Mr. Shanholtz stated that the three people exposed to the hazard would be the two stockpile truck drivers and the loader operator who crosses the crossover to load customer trucks or to clean up (Tr. 27). Access to the crossovers by the vehicles would depend on the direction of vehicle traffic. The flow of traffic varies, and some trucks may approach the crossovers straight across, while other vehicles could approach it at an angle or by turning into the crossovers (Tr. 28). Customer trucks also used the crossovers (Tr. 29).

Mr. Shanholtz confirmed that the width of the crossovers only allowed for one truck at a time to cross, and he made no inquiries as to the respondent's traffic procedures or controls (Tr. 29).

In response to further questions, Mr. Shanholtz stated as follows (Tr. 29-32):

Q. You indicated on here that you thought that negligence was high in this case. Why did you mark it high?

A. Okay. At that time, I didn't feel the crossover berm was being maintained. It had been established and had been allowed to deteriorate. The operator knew that berms were needed in that area, that they had been provided once before and that they had been allowed to deteriorate.

Q. There were some berms there, weren't there?

A. Partial, yes.

Q. So that is why you thought the negligence was high?

A. Yes.

Q. And you said initially the S&S -- when you found non S&S, it was strictly a clerical error?

A. Yes, sir.

Q. You talked to nobody on the 29th?

A. No, sir.

Q. This is not a case of your just not thinking it was S&S and then maybe your supervisor may have suggested, "Hey, this is a berm citation. This can't be non S&S."

A. No, because the citation was issued on 4/23 and the report probably wasn't issued until 4/29. So it was just a clerical error that I caught.

Q. What about the gravity part where you said initially it was unlikely and later reasonably likely, was that also a clerical error?

A. Yes, sir. That was changed due to the volume of traffic across that crossover.

Q. When did you determine the volume of traffic, at the time you issued the citation?

A. Yes, sir.

Q. And the citation of 9020, was that clerical?

A. Yes, sir.

John Stovall stated that he "paced off" the primary crossover location and found that it was 27 feet wide without the berm in place, and 20 feet with the berm. The distance across and through the crossover was 15 feet. The widest truck and end loader using the crossovers was 14 feet, and the smallest were the customer truck and pick-ups, which were 8 feet wide. He estimated that there would be 3 feet on each

side of the largest vehicle as it passed over the crossover (Tr. 34-36). He stated that several years ago an MSHA inspector requested him to lay a couple of rocks on each side of the roadway, and he is not aware of any truck going into a ditch since he has operated the mine from 1962 to the present (Tr. 37).

Mr. Stovall described the crossovers as a natural drainage ditch. A drain pipe was placed in the ditch to allow water to flow through, and fill was dumped over the pipe to construct the crossover. During the prior inspections of January, February, and March, no mention was made of the ditch. The vehicles crossing the ditch travel at an average speed of 5 miles per hour, and most traffic that crosses is unloaded (Tr. 41).

On cross-examination, Mr. Stovall confirmed that the drainage ditch is cleaned out every 3 or 4 years to keep the drain tiles free of debris. He also confirmed that there is not enough clearance to permit two vehicles to pass each other over the crossovers, and this is not done (Tr. 42).

Mr. Shanholtz stated that he has observed vehicular traffic approach the crossovers from different directions, including right and left turns into and across the crossovers (Tr. 47). Mr. Stovall indicated that access to the primary crossover is by an approach of a "100 feet straight shot either side" (Tr. 48).

Mr. Shanholtz was called in rebuttal, and he stated that he had issued another citation for lack of berms over a crossover ditch by the jaw crusher, and the condition was abated. He also indicated that in that instance it was reported to him that a hydraulic hose had broken on a Euclid 35 ton haul truck and that the truck lost its steering and went into the ditch beside the haul road. However, this incident occurred "on the other side" of the location where the citation was issued, and it was not at the same location (Tr. 51).

Mr. Shanholtz stated that the "rule of thumb" for compliance with the berm standard in question is that a berm be constructed so that its height is mid-axle to the largest piece of equipment using the roadway (Tr. 52). He also stated that assuming the width of the roadway and the depth of the ditch at the crossover were as stated by Mr. Stovall, it would not change his opinion as to whether berms were required at the cited locations (Tr. 53).

Mr. Shanholtz reiterated that he observed vehicular traffic approaching and using the crossover from both directions and at different angles, and that there was no posted set traffic pattern (Tr. 53). Although he confirmed that he issued another citation for employee over-exposure to "nuisance dust" on the roadway near the secondary crushing plant, and indicated that this dust "could very well possibly" have contributed to a truck driver's visibility and could affect the gravity of the situation, he conceded that he did not consider this dust to impact on the gravity of the citation which he issued for inadequate berms (Tr. 54-57).

Findings and Conclusions

DOCKET NO. KENT 86-133-M

Fact of Violation

Citation No. 2657368, January 7, 1986, 30 C.F.R. § 56.12016

The respondent is charged with a violation of mandatory safety standard section 56.12016, which provides as follows:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

In North American Sand and Gravel Company, 2 FMSHRC 2017 (July 1980), the judge affirmed a violation of section 56.12016, after finding that a mine operator simply removed fuses when electrical equipment was down for repairs, and had no lock-out procedure to insure that anyone working on the equipment would not be injured by someone inadvertently starting the equipment. Likewise, in Brown Brothers Sand Company, 3 FMSHRC 734 (March 1981), a violation was affirmed where it was found that an employee working on a pump deenergized the equipment by opening the power "knife" switch, but failed to lock out the switch to prevent it from being energized without his knowledge.

In Price Construction Company, 7 FMSHRC 661 (May 1985), a welder with 25 years experience lost a leg when he was injured by the rollers of a crusher he was working on. The accident occurred when the plant foreman misunderstood the welder's instructions and engaged a switch which had not been locked out and simply left in the "on" position. The plant superintendent admitted that he did not require padlocks to lock out roller switches, and the existing "lock-out" procedure was accomplished by merely turning off the generator and cutting the switches. The judge found a violation of section 56.12-16, and found that the company safety director admitted that he knew that a padlock had to be used on the roller switch to conform with the required lock-out procedure, and that it is a generally understood practice in the mining industry that a "lock-out" requires the use of a padlock.

Section 56.12016, requires that power switches be locked out before work is performed on any electrically powered equipment, and the locks may only be removed by the person who installed them or by other authorized personnel. In this case, the inspector found that the mine had no established lock-out procedures and the evidence establishes that no locks were available or being used to lock out the switching equipment located in the switch house. Further, the respondent has not rebutted the inspector's testimony that the quarry superintendent admitted that no locks were available to physically lock out the switches, and that the only purported "lock-out" procedure in effect called for turning off the equipment and shutting the switch house door. Although the inspector testified that several employees told him that electrical equipment was de-energized at the power source when it was worked on, they also told him that they were unaware of any established lock-out procedures.

While there is no evidence that anyone was performing any work on electrical equipment at the time the inspector noted the violation on January 7, the inspector noted some burned out motors stored in the yard and he assumed that they came from the switch house. Since he found no evidence that locks were available or used to lock-out electrical equipment, he further assumed that any prior work on the motors was done without locking out the power switches. Further, the inspector determined that motors were routinely changed out as they burn out, and that crushing and screening equipment were similarly serviced periodically, and he also assumed that this work was done without locking out the power switches.

In his posthearing brief of June 30, 1987, respondent's counsel argues that it was using independent contractors for its electrical work before hiring an in-house electrician. Counsel asserts that a lock-out policy was adopted and locks were purchased, but apparently on the occasion when the inspector was at the mine the individual doing the work did not use any locks. Counsel asserts further that the employee had been told to use a lock but failed to put it back on as required.

The citation at issue in this case is the one issued by the inspector on January 7, 1986, and the petitioner seeks a civil penalty proposal for that violation. The incident concerning the electrical work being done by an individual who did not use the locks which had been purchased by the respondent to abate the January 7, citation, occurred on February 26, 1986, when the inspector re-inspected the mine and issued a section 104(b) order. That violation is not at issue in this case, and it is not the subject of this case. Accordingly, the fact that an employee was not using a lock which had been provided on February 26, is not material to the citation issued on January 7.

The testimony and evidence advanced by the respondent does not rebut the inspector's findings with respect to the lack of a lock-out procedure mandating the use of locks to physically lock out the power switches on January 7, 1986. Mr. Stovall candidly admitted that at the time of the inspection no locks were available at the plant to lock out the switches, and only after the citation was issued was any effort made to purchase locks and make them available to service personnel. Although Mr. Stovall alluded to the fact that all prior electrical work at the site was performed by contractors who "knew what the rules of the game were and did what was necessary to protect himself," and that outside electricians would disconnect the switch itself before doing work on electrical equipment, the fact remains that respondent presented no credible evidence that any switches were ever locked out as required by the standard. With regard to the burned out motors observed by the inspector, Mr. Stovall simply suggested that not all of them came from the switch house. This suggests that some of them did.

I take note of the fact that the citation, on its face, makes no mention of the fact that locks were not provided or used to lock out the power switches in the switch house. I also note that the inspector conceded that he issued the citation because he found no written established lock-out procedure requiring the physical lock out of electrical equipment,

and not because there were no locks available to lock out the equipment.

I find nothing in section 56.12016 that specifically requires a mine operator to promulgate written procedures for locking out electrical equipment. Although one may reasonably conclude that such established procedures in writing may be a desirable safety practice, I find nothing in the standard that requires it. However, on the facts of this case where the preponderance of the credible evidence clearly establishes the total lack of locks to physically lock out the electrical equipment during maintenance work, and an inadequate system in place which simply required the turning off of equipment and simply shutting the door to the switch house, I conclude and find that a violation of section 56.12016 has been established. Although the inspector confirmed that the respondent had a procedure for de-energizing the power source by turning off electrical equipment which was being worked on, this only establishes possible compliance with the first sentence found in section 56.12016. It does not comply with the requirement that power switches be locked out while the work is being performed. The citation IS AFFIRMED.

Citation No. 2657373, January 8, 1986, 30 C.F.R. § 56.9003

The respondent is charged with a violation of section 56.9003, which provides as follows: "Powered mobile equipment shall be provided with adequate brakes."

The inspector testified that when the loader operator tested the loader emergency brake in his presence by applying the brake while the loader was in gear, the brake would not stop the loader. The operator also tested the primary braking system on a level surface with the machine in gear, and the inspector found that while operated in both forward and reverse gears, the loader "was slow to stop" and that it took more than the usual length of area to stop the loader.

In its posthearing brief, at page 2, the respondent maintains that the loader operator did not complain about the condition of the windshield, and that the inspector never got into the operator's cab to determine whether there was any problem with operating the loader with a cracked windshield. Further, the respondent points out that it received no complaint from union safety committee concerning the condition of the loader, and that it operated on level ground with "adequate" brakes notwithstanding the inspector's findings. At page 3 of his brief, respondent's counsel states that the inspector had previously inspected the loader 2 or 3-months

prior to the time he issued the citation, but failed to cite it for any defects. Counsel suggests that the inspector's assertion that the equipment had operated in this condition for years defies credibility because he failed to cite it in the past.

In this case, the issue presented is whether or not the petitioner has presented credible evidence to support the inspector's findings that the cited loader had inadequate brakes. Although the condition of the windshield, the inadequate back-up alarm, and the lack of a fire extinguisher may have been contributory factors to the hazard presented, the gist of the violation lies in the inspector's finding that the brakes were inadequate, and the respondent's counsel agreed that this was the case (Tr. 97). Thus, the condition of the windshield is not particularly relevant to the question of a violation of section 56.9003, for inadequate brakes.

I believe that counsel has confused the inspector's testimony with respect to any assertion that the cited condition may have existed for years. I believe that the inspector's testimony concerning any pre-existing brake conditions came about during his testimony regarding two citations that he issued for inadequate brakes on two haulage trucks (Docket No. KENT 86-134-M). In any event, such testimony goes to the question of negligence, and not to the question as to whether the brake condition found by the inspector constitutes a violation of the cited standard. Further, the fact that the safety committee failed to report any defective brake condition is irrelevant to the question of whether a violation has been established.

On the facts here presented, the respondent has not rebutted the credible findings by the inspector with respect to the condition of the brakes on the cited loader in question. Mr. Stovall stated that he first learned about the condition of the loader brakes when he reviewed a copy of the citation after it was issued. Equipment superintendent Joines confirmed that he was not with the inspector when the loader was cited, and he had no knowledge as to how slow it may have stopped. However, he confirmed that new pads were ordered and installed to repair the emergency brakes, and that the primary brakes were adjusted and cleaned.

I conclude and find that the credible evidence adduced by the petitioner establishes that the emergency and primary brakes on the cited loader were less than adequate when the inspector inspected the loader and issued the citation. I

further find and conclude that a violation of section 56.9003 has been established, and the citation IS AFFIRMED.

Citation No. 2657377, January 8, 1986, 30 C.F.R. § 56.9001

The respondent is charged with a violation of section 56.9001 which provides as follows:

Self-propelled equipment that is to be used during a shift shall be inspected by the equipment operator before being placed in operation. Equipment defects affecting safety shall be reported to, and recorded by the mine operator. The records shall be maintained at the mine or nearest mine office for at least 6 months from the date the defects are recorded. Such records shall be made available for inspection by the Secretary of Labor or his duly authorized representative.

The second sentence of section 56.9001 requires that equipment defects affecting safety be reported to, and recorded by, the mine operator. The citation charges that the respondent's equipment operators knew of equipment defects but did not report them, and that the respondent failed to utilize an "equipment check-off" list for the reporting and recording of such defects.

I find nothing in section 56.9001, that requires a mine operator to have any formalized written check-list system for the reporting and recording of equipment defects. The standard simply requires the pre-operational inspections of equipment, and the reporting and recording of any defects noted during that inspection. I take note of the fact that MSHA's Metal and Nonmetal Mine Safety and Health Inspection Manual, 1981 Edition, which contains guidelines and applications of the standards found in Parts 55, 56, and 57, Title 30, Code of Federal Regulations, makes no reference to any particular methods or systems which must be used for reporting and recording equipment defects.

In United States Steel Corporation, 6 FMSHRC 1435 (June 26, 1984), the Commission affirmed a judge's finding of a violation of the identical standard at issue in this case. The facts in that case reflect that the mine operator was using an oral system of reporting equipment defects, but had failed to record an oral report made with respect to certain brake defects on a truck. The violation was affirmed because the evidence established that a defect had in fact existed,

but that the person who received the oral report forgot to record it and act on it, and not because of the failure to utilize any particular written check-list form.

In the instant case, there is support in the record for a reasonable conclusion that the inspector believed that section 56.9001 required a mine operator to utilize a formalized written equipment check-off list for the purpose of reporting equipment defects. The inspector readily admitted this during the course of the hearing. He testified that "I issued a citation on 1/8 for failure to have an operator's checkoff list utilized by the company. And I gave them till the 21st to initiate a procedure that they would make the list available and utilize it" (Tr. 98). And, at transcript page 99, where he states that "when I issued the citation and Donald Joines was in the office there and there was Donald Joines, Tom Nelson and Burdette Fox. I told them at that time I was issuing a citation for the checkoff list." He also confirmed that while the respondent had the forms available and therefore "satisfied the first requirement," they were not being used (Tr. 103).

In addition to the inspector's testimony, the record establishes that the inspector subsequently issued an order after finding that the check-off lists were not being used, and it was terminated, and the violation abated, only after it was established to the inspector's satisfaction that the respondent had established a procedure for the use of written check-off lists and issued written instructions to its employees as to their use.

During the hearing, it was suggested that the respondent had the written check lists available because it had been previously cited for a violation of section 56.9001, on March 13, 1985. However, no evidence was forthcoming with respect to this prior violation, and petitioner's counsel did not produce a copy of the citation. Respondent's evidence suggests that as a result of the prior citation, a supply of written formalized check-list forms were obtained but were not used because they proved to be ineffective. It also suggests that the respondent began using an oral system for reporting and recording equipment defects on a desk calendar kept in the equipment supervisor's office, and that another MSHA inspector somehow approved of this practice as acceptable compliance with section 56.9001. However, neither party called that inspector to testify.

In further clarification of his interpretation of section 56.9001, the inspector testified that he would have

accepted any written proof that equipment defects were being reported and that such a reporting or recording system need not be formalized (Tr. 110). He confirmed that when he inquired of the respondent and asked for proof that defects were being reported and recorded, nothing was shown to him in writing (Tr. 117). In this regard, Mr. Stovall admitted that when the citation was issued on January 8, 1986, printed check-list forms were available and stored in a cabinet in the mine office but they were not being used. Mr. Stovall confirmed that he was not present when the inspector issued the citation and did not discuss the matter with him.

Respondent's equipment supervisor Donald Joines also admitted that while the check-off lists were available on January 8, 1986, they were not being used. He contended that the inspector simply asked him if he had such a list, and that he showed him the blank printed forms. Even though Mr. Joines claimed that he had his "calendar check-list" available at the time of the inspection, he did not tell the inspector about it and did not show it to him. Mr. Joines at first testified that he did not believe that the inspector gave him an opportunity to explain about his calendar system and insinuated that the inspector was pre-disposed to write the citation, but later testified that there may have been some miscommunication between him and the inspector and that they had some "heated words" over the citation. Mr. Joines could not produce the purported calendar in question during the hearing, and he confirmed that it was destroyed during the time he was off the job recovering from heart surgery, and Mr. Stovall also confirmed that this was the case.

The respondent has produced no evidence as to what may have been recorded on the calendar, nor has it produced any credible evidence or proof to establish that equipment operators were reporting equipment defects or that such reported defects were being recorded so that they would be available for inspection during the required 6-month period pursuant to section 56.9001. I note that neither party in this case saw fit to call any of the equipment operators to testify in this case. I also find it amazing that the respondent would destroy the purported calendar which could have provided proof that equipment defects were being reported and recorded, and that Mr. Joines did not even mention it or show it to the inspector at the time the citation was issued.

As a condition precedent to establishing a violation of section 56.9100, the petitioner must present some credible evidence that the kinds of equipment defects required to be

reported and recorded so that repairs could be timely accomplished in fact existed. Some proof must be forthcoming that defects affecting safety existed but were not being reported or recorded prior to the time the inspector issued the citation on January 8, 1986.

The petitioner's proof that prior reportable equipment defects existed consists of the inspector's testimony that the condition of the equipment as he found it indicated a need to use a check-list, his assertion that since he found many defects which needed attention during his inspections, it was obvious that they were not being reported, recorded, or corrected, and his testimony that he talked to "just about all of the mobile equipment operators on the property and was informed that these defects had existed for a long time" (Tr. 106; 98; 101). The inspector also testified that even though the check-list forms were available to the respondent on January 8, 1986, they were not being used because the equipment operators were not reporting any equipment defects (Tr. 105).

As indicated earlier, none of the equipment operators were called to testify in this case. It seems to me that these operators would be the best evidentiary source concerning equipment defects, the length of time that they existed, and the fact that they were being reported or not reported, recorded or not recorded, or ignored. The inspector suggested that the equipment operators were intimidated and instructed to operate the equipment with known defects. However, there is a total lack of evidence in the record to support these conclusions. Further, since such charges raise the possibility of section 110(c) violations, it seems to me that if the inspector had any evidence that operators were instructed to operate equipment with known safety defects that were in violation of any mandatory safety standards, he had an obligation to report this so that MSHA could pursue the matter further. There is no information that this was done. Although petitioner's counsel expressed some reluctance about identifying the source of this information, she could have subpoenaed the equipment operators to testify about their knowledge of any safety defects, but she did not do so.

Another available evidentiary source to establish the existence of reportable equipment defects prior to the issuance of the citation on January 8, 1986, is MSHA's computer print-out listing prior violations. However, petitioner's counsel did not pursue this during the hearing, and she failed to provide any further information with regard to the prior violation of section 56.9001 which was issued on

March 13, 1985. Further, no testimony was elicited from the inspector as to his knowledge of these violations, whether or not he issued them, or whether they involved equipment safety defects required to be reported and recorded pursuant to section 56.9001. Although the inspector did refer to his observation of equipment operating with no brakes, that notation was made on his subsequent order of February 26, 1986, and he indicated that they were observed "during this compliance inspection." I take this to mean the inspection of February 26, 1986, which was subsequent to the January 8, 1986, inspection.

A review of MSHA's computer print-out, exhibit P-3, listing the respondent's prior violations, reflects a total of 49 violations during the period April 23, 1984 to April 22, 1986. Seventeen of these violations were issued subsequent to January 8, 1986. Eight were issued in 1984 and 1985, more than 6-months prior to January 8, 1986. Six listed violations are the subject of the instant proceedings. With the exception of the instant citation, three of these violations were issued subsequent to January 8, 1986. One was issued on January 7, 1986, and did not concern equipment defects, and one was issued on January 8, 1986, and it concerns the defects noted on the front-end loader which was cited on violation No. 2657373. The remaining violations, with two exceptions, concern mandatory standards which do not involve self-propelled equipment defects. The two exceptions concern a citation issued on January 7, 1986, for a violation of section 56.6042 for failure to provide a fire extinguisher on self-propelled equipment for which the respondent paid a \$20 "single penalty assessment," and one issued that same date for a violation of section 56.9003, for inadequate brakes on mobile equipment for which the respondent paid a penalty assessment of \$206.

After distilling the information reflected on the computer print-out, it would appear that the two prior violations issued on January 7, 1986, concerning the lack of a fire extinguisher on self-propelled vehicles, and inadequate brakes on self-propelled equipment, which were paid, involved equipment defects which were required to be reported pursuant to section 56.9001. However, the petitioner failed to introduce these citations, provided no information with respect to the circumstances under which they were issued, and presented no testimony or evidence that Inspector Shanholtz conducted the inspections which resulted in the issuance of those citations, or that he was even aware of them at the time he issued the citation of January 8, 1986. Under the circumstances, I cannot conclude that these citations were among the "many

unreported equipment defects" that the inspector claims formed the basis for the issuance of the citation in issue.

The only available credible evidence of the existence of any equipment defects affecting safety which were present on January 8, 1986, is the front-end loader citation (No. 2657373) which was issued that same day (exhibit P-7). It is the subject of this proceeding, and the cited violation has been affirmed. The citation reflects that it was issued at 8:45 a.m., during the same inspection, and prior to the time the reporting citation in issue here was issued. During his testimony in connection with the loader violation, Inspector Shanholtz confirmed that he found "quite a few defects that affected safety" on the loader, including a cracked, broken, and shattered windshield that would impair the operator's vision, a non-functioning back-up alarm, an inoperable emergency brake, inadequate service brakes, and the lack of a fire extinguisher. Under the circumstances, I find that the inspector had reasonable cause to support his belief that equipment defects were not being timely reported or addressed by the respondent. Coupled with the fact that the respondent could produce no evidence that such defects were being reported or recorded as required by the regulations, I further conclude and find that the petitioner has established a violation of section 56.9001. Accordingly, the citation IS AFFIRMED.

Citation No. 2657386, April 22, 1986, 30 C.F.R. § 56.4100(a)

The respondent is charged with a violation of mandatory safety standard section 56.4100(a), which provides as follows: "No person shall smoke or use an open flame where flammable or combustible liquids, including greases, or flammable gases are; (a) used or transported in a manner that could create a fire hazard; or (b) stored or handled."

The inspector issued the citation after finding approximately five fresh cigarette butts on the floor inside a storage room or shed used to store combustible motor oil and some hydraulic fluid. The area was a posted "No Smoking" area, and the shed was used by employees to service their vehicles. The inspector saw no one smoking, and the presence of the tell-tale cigarette butts led him to conclude that someone had been smoking.

In its posthearing brief, the respondent maintains that the citation should be dismissed "for a total want of proof." Respondent's assertion in this regard is rejected. The respondent does not deny the presence of the cigarette butts inside the shed, and it offered no reasonable explanation as

to how the butts may have gotten there. .On the other hand, the petitioner has established that fresh cigarette butts were present inside the oil storage shed in question. While it may be true that the inspector did not observe anyone smoking, I conclude and find that the tell-tale fresh cigarette butts found by the inspector, while circumstantial, is sufficiently adequate to support a reasonable inference that someone had been smoking in or around the posted "No Smoking" area, and put out the butts on the floor where they were found by the inspector. Under the circumstances, the citation IS AFFIRMED.

DOCKET NO. KENT 86-134-M

Fact of Violations

Order Nos. 2657189 and 2657190, February 26, 1986, 30 C.F.R. § 56.9003

The respondent is charged with two violations of section 56.9003, which requires that powered mobile equipment be provided with adequate brakes. In these instances, the inspector found that a 35-ton haul truck had an emergency brake which did not function, and rear brakes which were inoperative. On a second truck, he found that the primary braking system had only one functional brake and an emergency brake which did hold the truck. Further, the inspector found that the brake fluid reservoir providing fluid to the rear brakes of the first truck was empty, and that the reservoir on the second truck was empty and that the brake hoses were disconnected.

In support of the violations, the inspector testified that both trucks were tested during the inspection. With regard to the truck No. 69036, the inspector stated that when it was tested on a decline, the driver could not stop the truck with the brakes and he had to put it in reverse gear to stop it. Upon checking the braking systems, he found that the emergency brake would not work, and that only the right front service brake was functioning properly. With regard to truck No. 69035, the inspector stated that the emergency brakes were not functioning, and that the truck "was slow to stop" when tested on a decline.

Mr. Stovall conceded that the emergency brake on truck No. 69035 was not functioning, and that 50 percent of the rear braking system was defective or inoperative and that there was a leak in the system. With regard to truck

No. 69036, Mr. Stovall did not dispute the inspector's finding that the emergency brake would not hold the truck. He also did not dispute the fact that the brake hoses were disconnected, and he confirmed that new brake shoes and wheel cylinders were installed on the rear wheels and that the hoses were reconnected. He also confirmed that the rear brakes on the No. 69035 truck were overhauled.

In addition to the testimony of the inspector who issued the violations after inspecting the cited trucks, the petitioner also presented testimony from a supervisory inspector who testified that brakes which are not maintained as they were originally equipped, or which are not maintained to their design specifications, are less than adequate within the meaning the requirements of section 56.9003. This inspector also testified that a truck which has lost half of its established rear braking capacity has lost the designed safety of the vehicle and cannot be expected to be operated safely under all conditions.

The petitioner also presented testimony from an MSHA braking expert who confirmed that while a truck with a partial operative braking system may be capable of stopping when first operated, it is common for such brakes to be rendered inoperative as they heat up, and operating the trucks in such a condition will result in further brakes abuse and render the brakes inadequate for continued use.

The respondent's defense is based on Mr. Stovall's belief that even though the service brakes may not have been "one-hundred percent," they were still adequate within the meaning of the cited section. This contention is rejected. It seems clear to me from the credible evidence presented by the petitioner, that the emergency braking system on both cited trucks were not functioning at all. With respect to the primary braking systems, the credible evidence establishes that the brake fluid reservoirs on both trucks were empty and the brake hoses on one of the trucks were disconnected. Further, the evidence establishes that the driver of one of the trucks had to put it in reverse gear to stop it, and that the only functioning service brakes were those on the right front. The rear brakes on the second truck were only 50 percent functional, and there was a leak in the system.

I conclude and find that the petitioner has established the violations in question by a clear preponderance of the credible evidence adduced in this case. Accordingly, the violations and the orders ARE AFFIRMED.

Fact of Violation

Citation No. 2657392, April 23, 1986, 30 C.F.R. § 56.9022

Although the citation as issued cites a violation of mandatory safety standard section 56.9020, the inspector confirmed that this was a "clerical error," and that he intended to cite section 56.9022 which provides that "Berms or guards shall be provided on the outer bank of elevated roadways." I cannot conclude that the respondent has been prejudiced by the erroneous citation, and take note of the fact that the record establishes that the respondent was well aware of the fact that it was being cited for having inadequate berms, and ultimately abated the violation. Further, the factual basis for the issuance of the citation is the "condition or practice" stated by the inspector on the fact of the citation, and the petitioner has the burden of proof. Under the circumstances, I conclude that the inspector's reference to another standard was no more than a clerical error which has not prejudiced the respondent, Old Ben Coal Co., 2 FMSHRC 1187 (1980), and the respondent has raised no objection, nor has it claimed any prejudice.

The respondent is charged with a failure to provide adequate berms at two roadway locations which crossed a dry stream bed which ran through the mine property. The inspector testified that berms consisting of rock and other fill dirt material had been provided at one time, but it had eroded and slipped down into the stream bed. He issued the citation after finding no berms, or very low berms, at several locations along the two crossovers in question.

The inspector testified that photographic exhibit P-4, pg. 2 of 11, depicts the cited primary crossover which was more heavily travelled than the second cited crossover, and he confirmed that the photograph is representative of both locations. The crossovers were described as a natural drainage ditch or dry stream bed which ran through the property. Drain pipes were placed in the ditch to allow water to flow through, and fill dirt was dumped over the pipes to construct the crossovers. The inspector estimated the depth of the ditch as 10 to 12 feet, and "possibly 8 feet" (Tr. 8, 10).

The inspector confirmed that his conclusion that the roadway was "elevated" was based on the fact that at the crossover locations where the roadway passed over the ditch where "drop-offs" existed on either side of the road, the

roadway was in fact elevated above the stream bed. He also confirmed his belief that the lack of adequate berms at the elevated locations above the stream bed created a hazard on each side of the crossovers in that a truck could go into the ditch and overturn, and he believed that adequate berms were required to prevent this from happening (Tr. 21). He further believed that a ditch over 4 feet deep created a hazard in that the trucks and front-end loaders using the crossovers could easily overturn if they ran into the ditch (Tr. 22).

When asked to explain his understanding of the application of the berm standard in this case, the inspector replied that if the depth of the ditch at the crossover is such that it is reasonably likely to cause an accident, such as a vehicle overturning in the ditch, he would cite a violation of section 56.9022, and that this is a "judgement call" (Tr. 32-33). The inspector stated that the "rule of thumb" is to require berms as high as the mid-axle height of the largest piece of equipment using the roadway, and that "we hope it helps to stop them" (Tr. 52).

In its posthearing brief, respondent's counsel takes the position that the cited crossovers are not an elevated roadway. Recognizing the fact that "the berms are supposedly there to prevent the equipment from going off into the ditch," counsel asserts that "very little danger, if any," existed in that the equipment using the road has adequate room for crossing and no more than one vehicle at a time crosses over the cited locations.

In United States Steel Corporation, 5 FMSHRC 3 (January 1983), the Commission held that proof of "inadequate" berms requires evidence as to what type of berm a reasonably prudent person would install under the circumstances. In fashioning a test for determining the adequacy of a berm, the Commission stated in part as follows at 5 FMSHRC 5:

We hold that the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard. See Alabama By-Products, supra. See also Voegele Company, Inc. v. OSHRC, 625 F.2d 1075, 1077-79 (3rd Cir. 1980). The definition of berm in section 77.2(d) makes clear that the standard's protective

purpose is the provision of berms and, by implication, guards that are "capable of restraining a vehicle." (Footnote omitted).

With regard to the question as what constitutes an "elevated" roadway, I take note of several berm decisions rendered by Commission judges and the Commission on this issue. In W. B. Coal Company, 3 FMSHRC 193, 201-201 (January 1981), Judge Bernstein held that a roadway with "drops on both sides" was an elevated roadway. In Golden R Coal Company, 1 FMSHRC 1843, 1848 (November 1979), I held that the location of an unprotected roadway where trucks were required to back up to begin their ascent up an incline was of sufficient height above the adjacent terrain to create a hazard in the event a truck ran off the unprotected elevated portion of the roadway and was in fact "elevated." In that case, the inspector testified that if a truck were to run off the road, it was likely to overturn, and he was aware of an accident where a truck overturned when the driver backed into a 2-foot hole.

In Cleveland Cliffs Iron Company, 1 FMSHRC 1965, 1969 (December 1979), Aff'd by the Commission at 3 FMSHRC 291 (February 1981), Judge Broderick held that a cited roadway location which had 10 to 12 foot drop-off to a ledge below the roadway was of sufficient height above the adjacent terrain to create a hazard in the event a vehicle ran off the roadway, and therefore was elevated.

In Burgess Mining and Construction Corporation, 3 FMSHRC 296 (February 9, 1981), Judge Fauver held that while a bridge could reasonable be found to be an elevated roadway, the cited berm standard found at 30 C.F.R. § 77.1605(k), was limited to roads cut along the side of mountain, hill, pit wall, or earth bank, and not to a bridge crossing a river. The Commission reversed, and stated as follows at 3 FMSHRC 297:

Nothing logically suggests why a roadway ceases being such when it crosses a bridge. A bridge is nothing more than that part of a road which crosses a stream. * * * Further, the hazards addressed by the standard are certainly no less serious and in need of prevention when a vehicle is elevated over a body of water that when it runs along elevated ground.

In the instant case, Mr. Stovall estimated the distance of the roadway crossovers through and across the point where it crossed the drainage ditch as 15 feet, and a sketch of the area which he prepared reflects that the depth of the ditch

from the roadway surface to the bottom of the ditch is 8 feet (exhibit R-3; Tr. 35). The inspector's estimate of the depth of the ditch at the points where the roadway crossed at 10 to 12 feet, and possibly 8 feet. While it is true that the roadway in question was generally on level ground, I conclude and find that the 15 foot portion of the roadway crossovers which continued across the ditches were elevated within the scope and meaning of section 56.9022, and the respondent's assertions to the contrary are rejected.

With regard to the alleged inadequacy of the berms which were in place, I find the inspector's testimony that portions of the berms had eroded or slid over the roadway to the point where they were either non-existent or too low to restrain a vehicle from going into the ditch to be credible. The respondent has not rebutted or denied the fact that the berms had slipped or eroded away. Further, I agree with the inspector's assessment of the potential hazard presented at the cited locations at the points where the elevated roadway crossed over the adjacent ditch areas which were 8 to 12 feet deep. I conclude and find that the inspector's belief that a vehicle driving across those locations would likely overturn and cause an accident with resulting injuries to the driver if it went into the ditch was reasonable. I further conclude and find that the petitioner has established that the eroded and non-existent berms at the cited locations adequately and reasonably support the inspector's conclusion that the berms were inadequate. Accordingly, the citation IS AFFIRMED.

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

The parties have stipulated that the respondent is a medium-sized operator. Respondent has advanced no argument or evidence to establish that the payment of the civil penalties which have been proposed will adversely affect its ability to continue in business. I conclude and find that the civil penalties which have been assessed for the violations will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The computer print-out summarizing the respondent's compliance record for the period April 23, 1984 through April 22, 1986, reflects that the respondent paid civil penalty assessments totalling \$8,672, for 43 violations, 17 of which are paid "significant and substantial" (S&S) violations. For an operation of its size and scope, I cannot conclude that the

respondent's compliance record is such as to warrant any additional increases in the civil penalty assessments which I have made for the violations which have affirmed in these proceedings.

Negligence

In Docket No. KENT 86-133-M, the inspector found a "high" degree of negligence at the time he issued the citations in question, and he marked the appropriate box on the citation form to reflect this finding.

With regard to the lock-out citation, I take note of the fact that no prior citations were issued for violations of section 56.12016, and the respondent established that it at least de-energized the electrical equipment before work was performed on it, and that it also used the services of a contract electrician. With regard to the citation for failure to report and record equipment defects, the evidence establishes that the equipment operators themselves were not reporting these defects, and that the respondent did have the check-list forms available at the mine but apparently chose not to use them because it believed that its "oral" reporting system was more effective and had previously been approved by another inspector. Although the record shows one prior citation for a violation of section 56.9001, the petitioner failed to produce that citation and furnished no further details as to the circumstances under which it was issued.

With regard to the smoking violation based on the existence of the cigarette butts which the inspector found, although one prior violation of section 56.4100(b), is noted in the respondent's prior history of violations, no further explanation of that citation was forthcoming from the petitioner, and the record establishes that the respondent did have the area posted with a no-smoking sign.

The petitioner has advanced no arguments to support the inspector's "high" negligence findings, and I find no credible testimony from him in the record to support these findings. In any event, I conclude and find that the three violations in question resulted from the respondent's failure to exercise reasonable care to insure compliance with the requirements of the cited mandatory safety standards. I further find and conclude that the respondent knew or should have known about the cited conditions and that its failure to address those conditions constitutes moderate and ordinary negligence.

With regard to the inoperative hand brake and inadequate primary brakes on the front-end loader, since the loader had several other defects which were readily observable and detected, a reasonable and prudent operator would have taken the loader out of service for a thorough inspection. If this were done, I believe the lack of an operable handbrake and inadequate primary brakes would have been detected. Under the circumstances, the inspector's finding of a high degree of negligence is affirmed.

In Docket No. KENT 86-134-M, the inspector's negligence findings for the two braking violations reflect findings of "reckless disregard." With regard to one of the trucks, the inspector indicated that the non-functional emergency brake condition had previously been cited during an inspection on January 8, 1986, and that the defective rear brakes had been inoperative "for several years." He also found that the brake fluid reservoir was empty, and the condition of the reservoir led him to believe that fluid had not been added for some time. With regard to the second truck, he found an empty brake fluid reservoir, and that the brake hoses had been disconnected.

I find no credible evidence to support the inspector's belief that one of the trucks had operated with defective rear brakes "for several years." However, I find his testimony to be credible as to the condition of the brake fluid reservoirs and the fact that the brake hoses on one of the trucks were disconnected and that the emergency brake on the truck had been previously cited. Under these circumstances, although I cannot conclude that the evidence supports the inspector's "reckless disregard" negligence findings, I do conclude and find that it supports a finding of a high degree of negligence as to both violations, and supports a finding that the respondent knew or should have known of the cited defective braking conditions.

In Docket No. KENT 86-155-M, concerning the berm citation, the inspector found a "high" degree of negligence. The evidence establishes that rock berms were provided but had slipped down an adjacent embankment. Although the inspector testified that the conditions had existed for "several months," he did not cite the condition on prior inspections, and I find no credible evidence to support his high negligence finding. However, I do conclude and find that the respondent failed to exercise reasonable care by failing to add additional materials to reconstruct the berms, and that this omission on its part constitutes moderate and ordinary negligence.

Gravity

I conclude and find that all of the violations which have been affirmed in these proceedings were serious. Failure to provide locks and to have an established lock-out procedure for electrically powered equipment presented a hazard in that the equipment could have inadvertently energized while someone was performing work on it. In this event, I conclude that it was reasonable likely that anyone working on the equipment would be exposed to an electrocution hazard with serious resulting injuries.

All of the braking violations presented an accident potential which would reasonably and likely be expected to result in injuries to the vehicle operators as well as to other equipment operators and miners exposed to such hazards. The failure to report and record defective equipment would result in delays in correcting any hazards, as well as permitting equipment to continue to operate with defects. One can reasonably conclude that in such a situation, there was a reasonable likelihood of accidents, with resulting injuries to those mine personnel who were expected to operate the equipment, as well as to other miners in close proximity to the equipment.

The smoking violation presented a potential fire hazard, particular in light of the evidence which established the presence of combustible oils, hydraulic fluid, fumes, and accumulated oily rags and oil spillage. In the event of a fire, I believe it is reasonably likely that miners in or around the shed would be exposed to hazards resulting in serious injuries. The lack of adequate berms presented a hazard in that a truck or other vehicle operator approaching the edge of the crossover, particularly those in large haulage trucks, would have an inadequate warning that they were close to the adjacent drainage ditch. If a truck were to drive over the edge of the ditch, it could possibly overturn, thereby exposing the driver to an accident hazard, with resulting injuries.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the

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

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

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

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

Incorporating by reference my gravity findings, and applying the principles of a "significant and substantial" violation as articulated by the Commission in the aforementioned decisions, I conclude and find that with one exception (Citation No. 2657392--lack of adequate berms), the remaining violations were all significant and substantial, and the findings by the inspector in this regard ARE AFFIRMED.

I conclude and find that in terms of continued normal mining operations, the hazards noted in my gravity findings support a conclusion that there was a reasonable likelihood that the cited conditions could contribute to the hazards resulting from the violative conditions in question. In each of these instances, had the events noted occurred, I believe it is reasonable to conclude that the injuries produced could be of a reasonably serious nature.

With regard to the inadequate berm citation, the respondent's evidence, which I find credible, establishes that the roadway widths at the crossover points were wide enough to more than adequately accommodate the largest vehicle using that road, with more than adequate clearance on either side of the vehicle. Further, there is no evidence of any speeding or vehicles passing each other on the crossovers, and I believe that the respondent's testimony that the vehicles approached the crossovers on a "straight line" rather than cutting corners or approaching it at an angle to be more credible than that of the inspector. I also note that the inspector initially found upon inspection that an injury was unlikely and that the violation was not significant and substantial, but later changed his mind and modified the citation accordingly because of a purported "clerical error." I reject the inspector's explanation as to why he later changed his mind as less than credible. Although I have concluded that the violation was serious, I cannot conclude that the petitioner has established that it was significant and substantial. Accordingly, the inspector's finding in this regard IS VACATED.

Good Faith Abatement

With regard to Citation Nos. 2657189 and 2657190, concerning the defective brakes on the cited 35-ton haul trucks, the record reflects that they were taken out of service when the inspector issued the violations. Both violations were terminated on March 4, 1986, after repairs were made. Respondent's credible testimony reflects that parts were ordered and that the repairs were completed within 3 days of the issuance of the orders. Under the circumstances, I conclude and find that these violations were timely abated in good faith by the respondent.

The smoking violation was timely abated when the respondent posted a letter advising employees not to smoke in posted areas, and the berm citation was terminated one day prior to the time fixed by the inspector. As to these citations, I

conclude and find that the respondent exercised good faith in timely abating the violations.

The lock-out violation (No. 2657368), front-end loader violation (No. 2657373), and check-off list violation (No. 2657377) were all initially issued as section 104(a) citations. Upon subsequent inspections, the inspector found that the cited conditions had not been timely abated within the time fixed, and this resulted in the issuance of section 104(b) orders. In each instance, the inspector noted on the face of the orders that "no apparent effort" was made by the respondent to timely abate the violative conditions cited in the notices. No information was forthcoming as to whether or not the orders were contested, and it is clear that they are not the subject of these civil penalty proceedings.

With regard to the lock-out citation, the evidence establishes that after the citation was issued, the respondent did purchase locks. However, upon his subsequent inspection on February 26, 1986, the inspector found that they were not being used, and that a lock-out procedure had not been formulated and adopted by the respondent. He also found that electrical and mechanical work was being performed without locking out the equipment. Under these circumstances, he issued the section 104(b) order. Although it is true that the purchase of locks indicates that the respondent made some effort to timely abate the violative conditions, the fact remains that total abatement was not achieved by the time the inspector returned on his subsequent inspection. Under the circumstances, I conclude and find that the respondent exhibited less than total good faith compliance in timely abating the citation.

With regard to the inoperable emergency brake and inadequate primary brakes on the front-end loader, the inspector's subsequent inspection on February 26, 1986, which resulted in the issuance of an order, indicated that the emergency brake was still inoperative, and that the primary braking system had completely failed. However, the order, on its face, reflects that a new emergency brake had been installed, and both Mr. Stovall and Mr. Joines confirmed that work had been done on the brakes shortly after the citation was issued, and Mr. Joines confirmed that repairs were completed within 3 or 4 days of the issuance of the citation. They attributed the subsequent loss of braking power after the repairs were made to a defective air compressor which subsequently blew out and had to be replaced. I find their testimony to be credible, and find no credible evidence by the inspector to support his conclusion that the respondent "made no apparent effort" to

correct the cited conditions. To the contrary, I conclude that the respondent did make a good faith effort to correct the originally cited conditions, and that after the order was issued, additional repairs were timely made to abate the conditions cited in the order.

With regard to the equipment check-list citation, when the inspector returned on a subsequent inspection on February 26, 1986, he found no evidence that the available check-lists were being used and that instructions as to their use had not been given to the equipment operators. He also found some defective brakes on equipment, and this led him to believe that the lists were not being used and that defects were still going unreported. Since the inspector found that compliance had not been achieved by February 21, 1986, the date fixed for abatement of the citation, he issued the order. Under the circumstances, I conclude and find that the respondent exhibited less than good faith compliance in timely abating the citation, and that it did so only after the order issued.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed by me for the violations which have been affirmed.

DOCKET NO. KENT 86-133-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2657368	01/07/86	56.12016	\$ 500
2657373	01/08/86	56.9003	\$ 450
2657377	01/08/86	56.9001	\$ 375
2657386	04/22/86	56.4100(a)	\$ 150

DOCKET NO. KENT 86-134-M

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2657189	02/26/86	56.9003	\$ 500
2657190	02/26/86	56.9003	\$ 600

DOCKET NO. KENT 86-155-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2657392	04/23/86	56.9022	\$ 150

ORDER

The respondent IS ORDERED to pay the civil penalties in the amounts shown above within thirty (30) days of the date of these decisions. Payment is to be made to MSHA, and upon receipt of same, these proceedings are dismissed.



George A. Koutras
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Brent Yonts, Esq., 114 Mill Street, P.O. Box 195, Greenville, KY 42345 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 13 1987

BILLIE D. MARTIN, : DISCRIMINATION PROCEEDING
Complainant :
v. : KENT 87-64-D
: :
GABRIEL MINING COMPANY, INC., : BARB CD 87-05
Respondent :
:

DECISION

Appearances: Billie D. Martin, Evarts, Kentucky, Pro Se.

Before: Judge Weisberger

Statement of the Case

On February 2, 1987, Complainant filed a complaint with the Commission, pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, alleging, in essence, that he was fired by Respondent because he refused to do electrical and mechanical work for which he was not qualified. The records of the Commission indicate that the Complainant sent Respondent, via certified mail, return receipt requested, a letter containing his complaint. Respondent did not claim the letter and it was returned to the Complainant.

On April 7, 1987, Chief Judge Paul Merlin sent Respondent, via Certified Mail, return receipt requested, an order directing Respondent to answer the Complainant within 30 days. The order further notified Respondent that failure to comply with the order will be deemed cause for the issuance of an order of default. The Respondent did not claim this letter, and it was returned to the Commission. The Respondent did not answer the order dated April 7, 1987.

On July 8, 1987, a notice sent to Respondent, via Certified Mail, return receipt requested and via regular mail, scheduling a hearing in the above matter for July 30, 1987 in Knoxville, Tennessee. The Respondent did not claim the Registered Letter containing the notice of hearing, and it was returned to the Office of Administrative Law Judges. The notice sent regular mail was not returned. At the hearing, on July 30, 1987, the Complainant appeared and testified on his on behalf. The Respondent did not appear.

On August 6, 1987, an Order was issued finding the Respondent in default.

Inasmuch as the Respondent has been found to have been in default, the only issue presently to be decided is the scope of relief that Complainant is entitled. It was the Complainant's uncontradicted testimony that while employed at Respondent's mine in Bailey's Creek, Kentucky, his salary was \$10 an hour. He further testified that he worked 8 hours a day, and 40 hours a week. It was further his testimony that after he was fired by Respondent on October 1, 1986, he was unemployed until mid December 1986, when he entered into a partnership driving a truck. The Complainant's partner uses the receipts of the partnership to pay all obligations of the partnership and the remainder is split between the Complainant and his partner. It was the Complainant's testimony that in the 32 weeks that he has been involved in this partnership, until July 24, 1986, he has earned \$120 a week. The 32 weeks compute from December 8, through July 24. Inasmuch as the Complainant has not requested reinstatement, it is concluded that Respondent is responsible for payment of the Complainant's back wages only during the time that he was unemployed and presumably available for reemployment by Respondent.

Accordingly, it is ORDERED that, within 30 days of the date of this decision, the Respondent pay the Complainant \$12,800 as back pay for the period between October 1 and December 5, 1986. With interest to be calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984).


Avram Weisberger
Administrative Law Judge
(703) 756-6210

Distribution:

Mr. Billie D. Martin, Rt. 2, Box 188, Evarts, KY 40828 (Certified Mail)

Gabriel Mining Company, Inc., Rt. 2, Box 322, Evarts, KY 40828 (Registered 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 13 1987

OTIS M. SCHMOLDT, : DISCRIMINATION PROCEEDING
Complainant :
v. : KENT 87-65-D
: :
GABRIEL MINING COMPANY, INC., : BARB CD 87-06
Respondent :
:

DECISION

Appearances: Otis M. Schmoldt, Le Junior, Kentucky, Pro Se.

Before: Judge Weisberger

Statement of the Case

On March 30, 1987, Complainant filed a complaint with the Commission, pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, alleging, in essence, that he was fired by Respondent because he refused to do electrical and mechanical work for which he was not qualified. The records of the Commission indicate that the Complainant sent Respondent, via certified mail, return receipt requested, a letter containing his complaint. Respondent did not claim the letter and it was returned to the Complainant.

On April 7, 1987, Chief Judge Paul Merlin sent Respondent, via Certified Mail, return receipt requested, an order directing Respondent to answer the Complainant within 30 days. The order further notified Respondent that failure to comply with the order will be deemed cause for the issuance of an order of default. The Respondent did not claim this letter, and it was returned to the Commission. The Respondent did not answer the order dated April 7, 1987.

On July 8, 1987, a notice sent to Respondent, via Certified Mail, return receipt requested and via regular mail, scheduling a hearing in the above matter for July 30, 1987 in Knoxville, Tennessee. The Respondent did not claim the Registered Letter containing the notice of hearing, and it was returned to the Office of Administrative Law Judges. The notice sent regular mail was not returned. At the hearing, on July 30, 1987, the Complainant appeared and testified on his on behalf. The Respondent did not appear.

On August 6, 1987, an Order was issued finding the Respondent in default.

Inasmuch as the Respondent has been found to have been in default, the only issue presently to be decided is the scope of relief that Complainant is entitled. It was the Complainant's uncontradicted testimony that he was unemployed from the date he was fired by Respondent on October 17, 1986 through July 7, 1987, when he obtained a position driving a truck at \$3.35 an hour and working 12 hours a day, 5 days a week. For the first 2 weeks of his job he was paid for 80 hours at \$3.35 an hour and 26 hours at one and half times \$3.35 an hour. It also was the Complainant's testimony that during the period that he was unemployed, from October 17, 1986 to July 7, 1987, the only income that he had consisted of \$2,000 he received as unemployment insurance benefits.

Based upon all of the above it is ORDERED that:

1. The Respondent shall, by August 24, 1987 reinstate the Complainant to the position that he previously held on October 17, 1986, at the previous rate of pay.

2. The Respondent shall, within 30 days from the date of this decision, pay the Complainant the sum of \$13,200 as back pay for the period from October 17, 1986, through July 3, 1987, as reduced by the amount of unemployment insurance benefits received during that period. Interest shall be paid to the Complainant by the Respondent as calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984).

3. The Respondent shall, within 30 days from the date of the decision, pay the Complainant the sum of \$402 as back pay for the period from July 7, 1987, through July 24, 1987. The Respondent shall continue to pay the Complainant at this rate of pay until the Complainant is reinstated.



Avram Weisberger
Administrative Law Judge
(703) 756-6210

Distribution:

Mr. Otis M. Schmoltdt, P. O. Box 57, Le Junior, KY 40849
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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 13 1987

BECKLEY COAL MINING	:	CONTEST PROCEEDING
COMPANY	:	
Contestant	:	Docket No. WEVA 87-204-R
v.	:	Safeguard No. 2575910; 4/24/87
	:	
SECRETARY OF LABOR,	:	Beckley Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

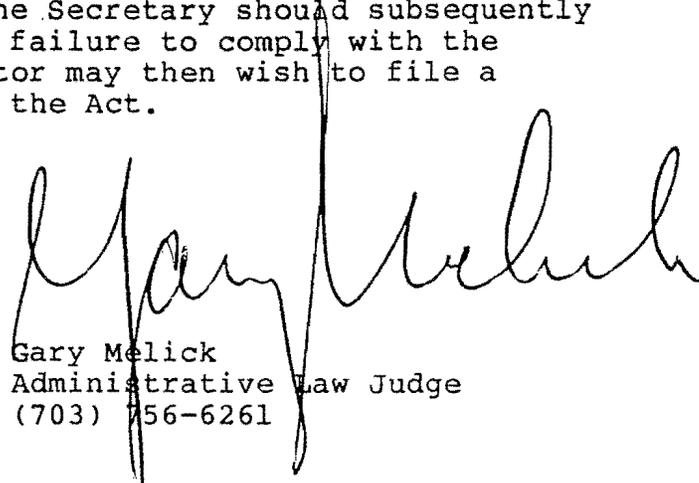
Before: Judge Melick

On April 24, 1987, a notice to provide safeguard was issued by the Secretary under section 314(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," to the Beckley Coal Mining Company (Beckley). On May 26, 1987, Beckley attempted to contest that safeguard notice "pursuant to Section 2700.20 of the Rules of Procedure".

Thereafter, on June 4, 1987, the Secretary filed his Answer and a Motion to Dismiss stating therein that neither section 105(d) of the Act nor Commission Rule 20 provide for the contest or review before this Commission of notices of safeguards. The Secretary noted that Section 101(c) of the Act provides a mechanism for the operator to challenge or contest mandatory safety standards (or a notice of safeguard enforced as a mandatory safety standard) and that such proceedings are not within the Commission's jurisdiction. Beckley did not respond to the Secretary's Motion to Dismiss.

Commission Rule 20 (a) cited by Beckley as authority for its attempt to contest the notice of safeguard at issue, tracks the language of section 105(d) of the Act. Under that section a mine operator may contest an order issued under section 104, a citation or a penalty assessment issued under section 105(a) or section 105(b), or the reasonableness of the length of abatement time fixed in a citation. The safeguard notice here challenged is not within any of these categories.

Accordingly the Secretary's Motion to Dismiss filed in these proceedings is granted and the attempted contest of Safeguard No. 2575910 is dismissed. If the Secretary should subsequently issue a citation or order for a failure to comply with the safeguard notice the mine operator may then wish to file a contest under section 105(d) of the Act.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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npt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

AUG 14 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 87-20-M
Petitioner : A.C. No. 05-02140-05504
 :
 : Docket No. WEST 87-23-M
 : A.C. No. 05-02140-05505
 :
 : Docket No. WEST 87-35-M
 : A.C. No. 05-02140-05506
 :
 v. : Docket No. WEST 87-36-M
 : A.C. No. 05-02140-05507
 :
 : Docket No. WEST 87-37-M
 : A.C. No. 05-02140-05508
 :
 : Docket No. WEST 87-51-M
 : A.C. No. 05-02140-05509
 :
 B & B EXCAVATING, INC., : Docket No. WEST 87-91-M
Respondent : A.C. No. 05-02140-05510
 :
 : Docket No. WEST 87-92-M
 : A.C. No. 05-02140-05511
 :
 : Eaton Pit

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Mark C. VanNess, Esq., Jones, Meiklejohn, Kehl &
Lyons, Denver, Colorado,
for Respondent.

Before: Judge Cetti

STATEMENT OF THE CASE

This consolidated civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (Mine Act). The Secretary of Labor on behalf of the Mine Safety and Health Administration, charges the operator of Eaton Pit with violations of Title 30 C.F.R. safety regulations.

Pursuant to Section 110(a) of the Mine Act the Secretary of Labor filed a petition for assessment of civil penalties in each of the above captioned cases. The Respondent made a timely appeal in each of these cases. After proper notice to the parties the matter came on for hearing before me on June 24, 1987.

At the hearing I granted the joint motion of the parties to consolidate the above captioned cases for hearing.

STIPULATIONS IN ALL CASES

At the hearing the parties stipulated as follows:

1. The Respondent, B & B Excavating, Inc., is engaged in the mining and selling of sand and gravel in the United States and its operations affect interstate commerce.

2. B & B Excavating, Inc. is the owner and operator of the Eaton Pit mine.

3. The Respondent, B & B Excavating, is a sand and gravel operator, producing 120,000 tons per year. It has about 100 employees of which approximately 9 to 12 work in the Eaton Pit area on a seasonal basis.

4. B & B Excavating, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

5. The administrative law judge has jurisdiction in this matter.

6. All the citations in each docket were properly served by a duly authorized representative of the Secretary upon an agent of B & B Excavating, Inc. on the date and place stated in the citation, and are to be admitted into evidence for the purpose of establishing the issuance of those citations.

7. The proposed penalties will not affect the Respondent's ability to continue in business.

8. The operator has demonstrated good faith in abating all citations.

9. Respondent's history of previous violations is shown in the computer printout received in evidence which lists the violations for which citations were issued at Respondent's Eaton Pit for the 2-year period terminating on July 8, 1986.

Docket No. 87-23-M

Citation No. 2634597

Citation No. 2634597 charges a non-significant and substantial violation of 30 C.F.R. § 56.12008 which requires adequate insulation and proper fittings for power wires and cables.

The citation alleges that 10/4 Type 50 power cable entering the motor terminal box for the "Seco" screen drive motor was not provided with a cable entrance fitting. The cable supplied 480 VAC. 3 phase power to the motor and no cable damage was observed at the box.

The violation was abated in a timely manner and the citation terminated when the 10/4 50 cable entering the "Seco" screen motor terminal box was provided with a fitting.

At the hearing Respondent moved to withdraw its notice of contest. The motion was granted.

The parties stipulated that the Secretary's proposed \$20 civil penalty was the appropriate penalty and agreed Respondent should be allowed 90 days to pay the penalty.

Citation No. 2634507

Citation No. 2634507 alleges a non-significant and substantial violation of 30 C.F.R. § 56.12008 in that certain cables were not properly installed where they passed into electrical compartments.

The Respondent showed good faith in abating the violation in a timely manner. The citation was terminated.

At the hearing the Respondent moved to withdraw its notice of contest. The motion was granted.

The parties stipulated that the Secretary's proposed \$20 penalty was the appropriate civil penalty and that Respondent be allowed 90 days to pay the penalty.

Citation No. 2634598

Citation No. 2634598 alleges a non-significant and substantial violation of 30 C.F.R. § 56.12008 in that specified cables entering and exiting electrical enclosures were not properly installed in their respective entrance and exit fittings.

At the hearing the Secretary moved without objection to dismiss the citation for lack of evidence. The motion was granted. The Secretary stated on the record that the basis for the motion was that preparation for hearing has shown that the Secretary has insufficient evidence to support the alleged violation.

Docket No. 87-20-M

This docket consists of thirteen citations. Each citation number, the safety standard allegedly violated, and the proposed penalty are as follows:

<u>Citation/Order</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
2634461	56.12041	\$ 42.00
2634478	56.12001	42.00
2634479	56.12001	42.00
2634487	56.12002	20.00
2634595	56.12008	42.00
2634596	56.12004	50.00
2634599	56.12008	42.00
2634641	56.14001	42.00
2634644	56.12032	42.00
2634462	56.12008	42.00
2634470	56.14026	74.00
2634471	56.12030	85.00
2634473	56.12025	42.00

The Secretary moved to withdraw Citation Nos. 2634461, 2634641, 2634644 and 2634470 for lack of sufficient evidence. The motion was granted.

Respondent then moved to withdraw its notice of contest with regard to the other citations in this docket. The motion was granted. The parties agreed with respect to those citations that the appropriate penalty for each was the penalty proposed by the Secretary and that respondent should be allowed 90 days to pay the penalties.

Docket No. 87-35-M

This docket consists of 20 citations. Ten of the citations allege a violation of the safety standard 30 C.F.R. § 56.12001 which requires circuits to be protected against excessive overload by fuses or circuit breakers of the correct type and capacity. Eight of the citations allege a violation of 30 C.F.R. § 12002 which regulates control of switches used on electrical equipment. Two of the citations allege a violation of § 56.12004 which regulates the size of current capacity of electrical conductors to ensure that a rise in temperature resulting from normal operation will not damage the insulating material.

The citation number, the standard allegedly violated, and the Secretary's proposed penalty are as follows:

<u>Citation/Order</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
2634463	56.12001	\$ 50.00
2634464	56.12002	50.00
2634465	56.12002	50.00
2634466	56.12002	20.00
2634467	56.12002	50.00
2634468	56.12002	50.00

2634469	56.12004	50.00
2634475	56.12001	50.00
2634476	56.12001	50.00
2634477	56.12001	50.00
2634480	56.12001	50.00
2634481	56.12001	50.00
2634482	56.12001	50.00
2634483	56.12001	50.00
2634484	56.12001	50.00
2634485	56.12001	50.00
2634486	56.12002	20.00
2634488	56.12002	20.00
2634600	56.12004	50.00
2634643	56.4102	50.00

Respondent moved to withdraw its notice of contest with respect to all 20 citations. The motion was granted. The parties agreed that the Secretary's proposed penalty for each violation is the appropriate penalty and that respondent should have 90 days to pay the civil penalties.

Docket No. WEST 87-36-M

This docket consists of 20 citations. Each citation number, safety standard allegedly violated, and the Secretary's proposed penalty are as follows:

<u>Citation/Order</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
2634646	56.12013	\$ 50.00
2634647	56.12018	50.00
2634472	56.12041	20.00
2634474	56.12001	85.00
2634648	56.9087	68.00
2634489	56.12041	20.00
2634490	56.12041	50.00
2634491	56.12041	20.00
2634492	56.12041	50.00
2634493	56.12001	50.00
2634494	56.12041	20.00
2634495	56.12002	20.00
2634496	56.12002	50.00
2634497	56.12002	20.00
2634499	56.12002	50.00
2634500	56.12002	20.00
2634502	56.12001	20.00
2634505	56.12001	50.00
2634842	56.12001	50.00
2634843	56.12001	50.00

The Secretary moved to dismiss Citation No. 2634647 for lack of sufficient evidence. The motion was granted. The respondent then moved to withdraw its notice of contest with respect to the remaining citations in this docket. The motion was granted.

The parties stipulated that the Secretary's proposed penalties were the appropriate penalties for the violations and that respondent should have 90 days to pay these civil penalties.

Docket No. WEST 87-37-M

This docket consists of 10 citations. Each citation number, standard allegedly violated and the Secretary's proposed penalty are as follows:

<u>Citation/Order</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
2634844	56.12001	\$ 50.00
2634845	56.12001	50.00
2634846	56.12001	50.00
2634847	56.12001	50.00
2634848	56.12001	50.00
2634849	56.12001	50.00
2634850	56.12001	50.00
2634852	56.12001	50.00
2634854	56.12008	20.00
2634857	56.14001	68.00

Respondent moved to withdraw its notice of contest with respect to all citations in this docket. The motion was granted. The parties agreed that the Secretary's proposed penalty for each violation was the appropriate penalty and that respondent should have 90 days to pay these civil penalties.

Docket No. WEST 87-51-M

This docket consists of citation number 02634498 issued on July 22, 1986 alleging a violation of 30 C.F.R. § 56.12002 for lack of individual motor running overload control protection on specified equipment. Respondent's motion to withdraw its notice of contest was granted. The parties agreed that the Secretary's proposed penalty for each violation was the appropriate penalty and that respondent should be allowed 90 days to pay the civil penalties.

Docket No. WEST 87-91-M

This docket consists of 20 citations. Each citation number standard allegedly violated, and the Secretary's proposed penalty are as follows:

<u>Citation/Order</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
2634649	56.11002	\$ 50.00
2634501	56.12001	50.00
2634503	56.12041	50.00
2634504	56.12001	20.00
2634506	56.12025	50.00
2634841	56.12008	20.00
2634853	56.12032	50.00

2634856	56.12030	50.00
2634508	56.12002	85.00
2634510	56.12013	50.00
2634511	56.12001	50.00
2634512	56.12001	50.00
2634513	56.12001	33.00
2634514	56.12001	50.00
2634515	56.12001	50.00
2634516	56.12001	50.00
2634517	56.12001	50.00
2634518	56.12002	20.00
2634519	56.12002	20.00
2634520	56.12002	20.00

The Secretary of Labor moved to withdraw Citation Nos. 2634649, 2634853 and 2634511 for lack of evidence. The motion was granted. The respondent then moved to withdraw its notice of contest with respect to the remaining citations. The motion was granted. The parties agreed that the penalties proposed by the Secretary of Labor are the appropriate penalties for the violations and that respondent should have 90 days to pay said civil penalties.

Docket WEST 87-92-M

This docket consists of the four citations listed below with the citation number, standard allegedly violated and the Secretary's proposed penalty as follows:

<u>Citation/Order</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>
2634684	56.12001	\$50.00
2634858	56.12008	20.00
2634859	56.12018	50.00
2634860	56.12013	50.00

The Secretary of Labor moved to withdraw Citation No. 2634859 on the basis of insufficient evidence. The motion was granted. Respondent then moved to withdraw its contest with respect to the four remaining citations within this docket. The motion was granted. The parties agreed that the Secretary's proposed civil penalties are the appropriate penalties for each of the violations and agreed that respondent should have 90 days to pay said civil penalties.

FINDINGS AND CONCLUSIONS OF LAW

Based upon the pleadings, stipulations, and the information placed upon the record at the hearing, I enter the following findings and conclusions of law:

1. The Respondent, B & B Excavating, Inc., is engaged in the mining and selling of sand and gravel in the United States and its operations affect interstate commerce.

2. B & B Excavating, Inc. is the owner and operator of the Eaton Pit Mine.

3. Respondent has about 100 employees of which approximately 9 to 12 work in the Eaton Pit area on a seasonal basis.

4. B & B Excavating, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

5. As the Administrative Law Judge assigned by the Federal Mine Safety and Health Review Commission to hear this case, I have jurisdiction to hear and decide this case.

6. Respondent's history of previous violations is shown in the computer printout which lists the violations for which citations were issued at Respondent's Eaton Pit for the 2-year period terminating on July 8, 1986.

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

8. The operator has timely abated each of the citations and has demonstrated good faith in doing so.

9. Each citations, except those listed below as dismissed, is affirmed and its related proposed civil penalty is assessed as the appropriate penalty for each of the violations.

ORDER

1. Each of the citations listed below is dismissed and its related proposed penalty vacated: Citation Nos. 2634598, 2634461, 2634641, 2634644, 2634470, 2634647, 2634649, 2634853, 2634511, and 2634859.

2. All other citations are affirmed and in satisfaction of these citations IT IS ORDERED that Respondent shall within 90 days from the date of this decision pay a civil penalty in the sum of \$3,466 for the violations found herein.


August F. Cetti
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 14 1987

ODELL MAGGARD, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 87-138-D
: MSHA Case No. BARB CD 86-72
CHANEY CREEK COAL CORPORATION, :
Respondent : Dollar Branch Mine

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of discrimination filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainant alleged that after his reinstatement by the respondent as a result of a prior discrimination complaint, he was subsequently forced to quit his job because of harrasment by the respondent. A hearing on the merits of his complaint was scheduled for London, Kentucky, during September 1-3, 1987. However, the parties have now filed a joint motion to dismiss the complaint on the ground that they have settled their dispute in accordance with a settlement agreement which they have filed.

Discussion

Pursuant to the terms of the settlement agreement, Mr. Maggard agrees to withdraw his complaint and to waive his claim to reinstatement and attorney fees in this matter. In return, the respondent agrees to pay Mr. Maggard the sum of \$7,000 in damages. Said damages are to be paid in separate installments of \$1,000 each. The first installment shall be paid on or before July 22, 1987; and the remaining installments shall be paid on or before the 22nd of each succeeding month (with the final installment due on January 22, 1988).

Conclusion

After careful review and consideration of the settlement terms and conditions executed by the parties in this proceeding, I conclude and find that it reflects a reasonable resolution of the complaint. Since it seems clear to me that the 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.


George A. Koutras
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 17 1987

PEABODY COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEST 87-113-R
: Citation No. 2830921; 2/11/87
SECRETARY OF LABOR, : Black Mesa Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :

DECISION

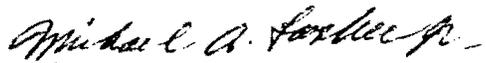
Before: Judge Lasher

The Contestant, Peabody Coal Company, in its Notice of Contest filed herein on March 9, 1987, contested the so-called "significant and substantial" and "unwarrantable failure" allegations of the subject Citation No. 2830921, which was issued under Section 104(d)(1) of the 1977 Mine Act.

Pursuant to agreement reached by the parties, Contestant agrees to pay a reduced, administrative penalty (no penalty proposal has been filed with this Commission) of \$50.00 and withdraw its Notice of Contest in return for Respondent MSHA's agreement to the modification of the Citation in the following respects:

- (a) Deletion of the "unwarrantable failure" nature of the Citation by striking, in line 12 of the Citation, the authority shown for its issuance, "104(d)(1)," and substituting therefor "104(a);
- (b) Deletion of the "Significant and Substantial" designation shown on line 10C of the Citation;
- (c) Changing the degree of negligence (charged at line 11 of the Citation) from "High" to "Moderate".

Respondent agreeing to the above-specified modifications of the Citations, they are so ordered; to effectuate the settlement reached and the prompt and amicable resolution of this matter, and as requested by the parties, the Contestant, Peabody Coal Company, shall forthwith pay MSHA in accordance with its agreement and established procedures a penalty of \$50.00; Contestant's withdrawal of its Notice of Contest is approved (29 C.F.R. 2700.11) and this proceeding is dismissed.


Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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(Certified Mail)

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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 19 1987

HARLEY M. SMITH, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 86-23-D
: :
BOW VALLEY COAL RESOURCES : BARB CD 85-69
INC., :
Respondent : Docket No. KENT 86-84-D
: :
: BARB CD 86-7
: :
: Oxford No. 5 Mine
:

DECISION

Appearances: David M. Taylor, Esq., Smith & Carter Law Officers, Harlan, Kentucky, for the Complainant; Joshua E. Santana, Esq., Brown, Bucalos, Santana & Bratt, P.S.C., Lexington, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

On or about September 18, 1985, Complainant filed a Complaint with the Federal Mine Safety and Health Administration alleging that after making safety complaints to Respondent, commencing on December 13, 1984, he was required to work both as a miner's helper and also as a ventilation man. He also alleged that he was discriminated against unlawfully in that he did not receive benefits "while I was off." On October 21, 1985, Complainant was advised that the Mine Safety and Health Administration determined that a violation of Section 105(c) had not occurred. On or about November 18, 1985, Complainant filed his complaint with the Commission.

On or about November 15, 1985, Complainant filed another complaint with the Mine Safety and Health Administration alleging that he was served a letter, on November 12, 1985, terminating

his employment, and that the termination is related to his discrimination complaint that he filed on September 18, 1985. On February 24, 1986, the Mine Safety and Health Administration advised Complainant that it determined that a violation of Section 105(c) had not occurred. On or about March 7, 1986, Complainant filed his complaint with the Commission.

Subsequent to notice, these cases were scheduled and heard in Harlan, Kentucky on November 18-19, 1986.

On April 14, 1987, I issued a decision that the Complainant had established a prima facie case that a violation by Respondent of Section 105(c) of the Act occurred when it terminated the former's employment. The decision, by its terms, was not to be final until the issuance of a further order with regard to Complainant's relief. In this connection, the decision of April 14, 1987, ordered the Complainant to do the following:

Complainant shall file a statement within 20 days of this decision indicating the specific relief requested. This statement shall show the amount he claims as back pay, if any, and interest to be calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984). The statement shall also show the amount he requests for attorney fees and necessary legal expenses if any. The statements shall be served on Respondent who shall have 20 days from the date service is attempted to reply thereto.

On May 8, 1987, Complainant filed a request to be allowed an additional 10 days to comply with the above Order. This request was granted. In a telephone conference call between Counsel for both Parties and the undersigned, it was agreed that the Complainant would have an extension until June 5, 1987, to file his statement with regard to the relief requested. On May 27, 1987, Complainant filed a letter asking that he be immediately reinstated to his former job. On June 15, 1987, in a telephone conference call between Counsel for both Parties and the undersigned, it was agreed that the time for the Complainant to file his statement for relief shall be extended until June 22, 1987, and the Respondent shall have 10 days from June 22, 1987, to file its response. On June 24, 1987, Complainant filed its statement for relief. On June 29, 1987, Respondent filed depositions of Mary Carroll Burnett taken on June 4, 1987, and a deposition of Harley M. Smith taken on May 5, 1987. On June 29, 1987, Respondent filed a Motion for Reconsideration. On July 2, 1987, Complainant filed its opposition to Respondent's motion. On July 9, 1987, Respondent filed its reply to the Complainant's Statement for Relief.

On July 15, 1987, in a conference call between Counsel for both Parties and the undersigned, Counsel were ordered to submit evidence as to the proper amount of attorney fees to be awarded. Complainant filed a statement on July 15, 1987. On August 3, 1987, Respondent filed a supplement response to Complainant's request for attorney fees. No response was filed by Complainant.

Discussion

I. Reinstatement

Complainant has requested reinstatement, and I find that the Complainant should be reinstated to his former position at Bow Valley Coal Resources, Inc.

II. Back pay

In its response to Complainant's request for back pay, Respondent argues that the latter failed to make a diligent reasonable effort to find new employment. In this connection, Respondent relies on the deposition of Mary Carroll Burnett, a vocational rehabilitation counselor and vocational consultant, who analyzed Complainant's work skills and concluded that he is an excellent candidate for seeking and obtaining employment. She further indicated if a person is truly motivated to obtain work such a person will make a daily effort to seek employment. The Complainant in his deposition indicated that he has searched for employment at least twice a week. Further, in his deposition, as quoted by Respondent on pages two to four of its response to Complainant's request for back pay, the Complainant has detailed some of the sources that he contacted and the frequency with which he contacted them. According to his deposition, in addition to taking two test for Toyota, he applied to nine mines and followed up with these applications at three mines. Thus, I find that the Complainant did make a reasonable effort to obtain employment.

Respondent also argues that the award to Complainant for back pay should be reduced by the unemployment benefits he received during the period of unemployment, in order to avoid unjust enrichment. I reject Respondent's argument and conclude that the Respondent's obligation to make the Complainant whole as the result of the former's acts of discrimination, in violation of Section 105(c) of the Act, should not be reduced by the amount of the Complainant's unemployment benefits. To do so would create a windfall to the Respondent. See Boitch v. FMSHRC and Neal, 704 F. 2d 275 (6th Cir. 1983); NLRB v. Marshal Field and Company, 318 U.S. 253, 255 (1943); NLRB v. Gullett Gin Company, 340 U.S. 361, 369 (1951).

Based on the above, I find that the Complainant is entitled to back pay with interest less earned wages in the amounts set forth and calculated in Complainant's statement filed on June 24, 1987.

III. Attorney Fees

Complainant submitted a statement, on June 24, 1987, which itemizes the time Counsel spent on this case and an "average hourly rate" of a \$100 per hour. Respondent in its reply, which was filed on July 9, 1987, argued that \$100 an hour is excessive inasmuch as Complainant's attorney was admitted to the Kentucky Bar on October 22, 1985, and does not possess any peculiar expertise in the area litigated. Respondent further asserted that there are few experienced Kentucky attorneys who charge \$100 an hour. In a telephone conference call, on July 15, 1987, the Parties were ordered to submit evidence on the issue of the proper attorney fees to be allowed. The only response received from Complainant, a statement filed on July 20, 1987, contains an assertion that \$100 an hour is "...the usual rate for legal services before both the Social Security Administration and the Department of Labor, Federal Black Lung Division." No further documentation of any sort was submitted by Complainant. On August 3, 1987, Respondent filed its supplemental response to Complainant's request for attorney fees, and submitted a copy of an Order of Robert F. Stephens, Chief Justice of the Supreme Court of Kentucky, entered on March 5, 1987, suspending Complainant's Counsel for "nonpayment of dues." Also submitted was an affidavit from Robbin Brock which indicates she is a 1984 law school graduate, and that she has been practicing in Harlan, Kentucky, and that her hourly rate ranges from \$50 to \$75 per hour. Also submitted was an affidavit from Respondent's Counsel indicating that he has been licensed to practice law in the Commonwealth of Kentucky since 1976, and that he is engaged in the practice of law in Lexington, Kentucky and that in the area in which he has particular expertise, his hourly rate is \$90 per hour and that in all other matter his customary hourly rate is \$80 per hour. Further, Respondent has submitted an affidavit from H. Kent Hendrickson, President of the Harlan County Bar Association, in which affiant stated that after contacting other attorneys in Harlan, Kentucky, the range of hourly billing for attorneys in the area of the administrative law with up to 2 years of experience is from \$50 to \$75 per hour. The affiant also stated that he has an excess of 5 years experience in administrative law and bills \$75 per hour for such work.

In calculating the amount of attorney fees to be allowed the reasonable hourly rate must first be considered. See Hensley v. Eckerhart, 103 S.Ct. 1933 (1983); Blum v. Stenson, 104 S.Ct. 1541 (1984); see also 2 Court Awarded Attorney Fees ¶ 16.03.

Inasmuch as Complainant is the party seeking attorney fees, he clearly has the burden of proof on this issue. I find that the Complainant has not met his burden in establishing that \$100 is a reasonable rate for an attorney with his experience. Taking into an account the affidavits submitted by Respondent, the level of Complainant's Counsel's experience as indicated in the uncontradicted statements made by Respondent, and the complexity of this case, it is concluded that \$50 an hour is a reasonable amount.

Respondent also objected to Complainant's billing at one-quarter hour increments. The only evidence submitted on this issue by Complainant's Counsel is contained in a statement filed on July 15, 1987, wherein Counsel stated that the practice of billing by one-quarter hour increments "...is the customary practice in federal litigation, and in fact, is required by the Department of Labor's Division of Coal Mine Workers Compensation, and is also used by the Social Security Administration." Respondent's supplemental response filed on August 3, 1987, contains an affidavit by Respondent's Counsel wherein the affiant indicated that in all matters his customary billing increment is on an one-tenth hour basis. Also in a telephone conference call on July 15, 1987, Counsel for Complainant agreed to delete the last two items contained in the time sheet which were filed along with Complainant's statement on June 24, 1987. Accordingly, Complainant asked for an attorney fee predicated upon 72 total hours.

There were no novel or complex legal issues in this case, and, under the circumstances, I find that the time proffered as expended in this case was excessive, and that a reduction to 50 hours is warranted. Thus I find that Complainant be allowed a reasonable attorney fee of \$2,500 plus cost of \$89.90 as itemized in the statement filed on June 24, 1987.

I further find that the affidavit of Amato Hoskins of June 23, 1987, submitted by Respondent in support of its Motion of Reconsideration, is insufficient to cause me to reconsider my decision of April 14, 1987. Therefore, the Motion for Reconsideration is DENIED

ORDER

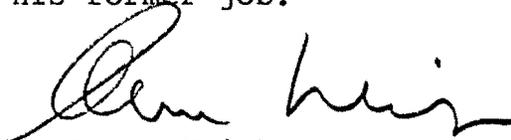
Based on the record in the case, it is ORDERED that:

1. The decision issued April 14, 1987, is CONFIRMED and is now FINAL.

2. Respondent shall, within 5 days of this decision, reinstate Complainant to the job that he formerly held at Respondent's Oxford No. 5 Mine.

3. Respondent shall, within 30 days of the date of this decision, pay Complainant the sum of \$2,500 for attorney fees and \$86.90 for expenses.

4. Respondent shall, within 30 days of the date of this decision, pay the Complainant \$52,880.11 representing back pay and interest from November 8, 1985 through June 30, 1987, less earnings during this period. The Respondent shall, in addition, within 30 days of this decision, pay the Complainant back pay and interest, at the rates set forth in Complainant's statement filed on June 24, 1987, for the period from July 1, 1987, until the Complainant is reinstated at his former job.



Avram Weisberger
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 20 1987

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 86-9-D
ON BEHALF OF BRYAN PACK, :
Complainant : PIKE CD 84-10
: :
v. :
: No. 1 Dredge
MAYNARD BRANCH DREDGING CO., :
and ROGER KIRK, :
Respondents :

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, TN, for
Petitioner;
Hugh M. Richards, Esq., Maynard Branch Dredging
Co., Auxier, KY, for Respondent.

Before: Judge Fauver

The Secretary brought this proceeding on behalf of Bryan Pack under § 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., contending that he was discharged because of a safety complaint to Federal mine inspectors. The Secretary also seeks a civil penalty for the alleged violation. Respondents deny any discrimination against Pack and contend that he was discharged for cause.

Based upon the hearing 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. At all pertinent times Respondents operated a coal dredging and preparation facility in Lawrence County, Kentucky, where they produced about 9,000 tons of coal annually. The coal was regularly sold in interstate commerce.

2. For about a year and a half before his discharge on May 16, 1984, Bryan Pack was employed by Respondents as a night-time security guard and fill-in laborer. He usually worked alone, from 11:00 p.m. to 7:00 a.m.

3. On May 15, 1984, before he left home to go to work, Bryan Pack was told by his brother, Jeffrey Pack, a former employee of Respondents, that the company was storing dynamite in the glove compartment of a school bus used as an office and storage facility at the dredging site. Since Bryan Pack spent most of his time in the school bus as a night security guard, he was very concerned about his safety when he heard that dynamite was being kept in the glove compartment.

4. When he arrived at work, around 11:00 p.m., on May 15, 1984, he carefully checked the glove compartment, where he found dynamite and blasting caps. He slowly and carefully closed the glove compartment, left the bus, and spent the rest of the night in his truck or near it.

5. He did not follow company procedure of telephoning the foreman at home to notify him of any danger or serious condition found at the mine. Also, the next morning, at the end of his shift, he left the mine site without telling management or any of the incoming employees about the dynamite. He left the job site with his father, who drove there to pick him up.

6. He told his father about the dynamite and as they drove by a restaurant his father recognized a Federal mine inspector's car in the parking lot. They pulled in, and Bryan Pack located two Federal inspectors in the restaurant. He told them about the dynamite and blasting caps.

7. One of the inspectors, Bryan Wilson Lawson, went to the dredging site. He told the foreman he had a complaint about improper storage of dynamite. He then inspected the glove compartment, where he found two and a half sticks of dynamite and blasting caps.

8. Inspector Lawson issued a citation to the company charging a violation of 30 C.F.R. § 77.1301(a). The company was assessed a civil penalty and paid it without contest.

9. Respondent Roger Kirk is the president of the company, and owns one-third interest in the business. He personally supervised the dredging facility. Kirk asked the inspector for

the name of the person who had made the complaint about the dynamite. The inspector told him he did not get his name, but described him. Kirk recognized the description very well and stated, "We know who it is." Kirk believed that the complainant was Bryan Pack.

10. After the inspector left the dredge, Kirk told the foreman, Rocky Fitzpatrick, to fire Bryan Pack.

DISCUSSION WITH FURTHER FINDINGS

Kirk testified that, before the dynamite incident, Pack's foreman wanted the company to fire him for a number of incidents, but Kirk gave Pack another chance. Kirk stated that Pack's failure to report the dangerous storage of dynamite and detonators to the company was "the straw that broke the camel's back." He explained this position in the following testimony:

Q. What was there about this one particular incident that caused you to finally fire him?

A. Like I said, it is pretty serious that you have people coming -- he is a security guard, he is a night watchman, he is on the job. He testified a while ago how dangerous and how scared he was. Then you have six or seven guys coming back on the property to go to work, and instead of saying, hey, there's powder in there, do this and do that, he just runs off and leaves them. That is pretty serious in my book. [Tr. 193.]

I find that the seriousness of Pack's misconduct as a security guard--in discovering a very dangerous situation and failing to report it to the foreman or oncoming crew--jeopardized their safety and motivated Kirk to discharge him. I also find that Respondents would have discharged him on that ground alone even if Pack had not complained to the inspectors.

The Secretary made a prima facie case of discrimination. He proved that Pack engaged in a protected activity (notifying the inspectors of a danger and safety violation) and that Respondents were motivated at least in part by such protected activity in discharging him. However, Respondents rebutted the prima facie case by convincing proof that Respondents were motivated by serious unprotected misconduct of the employee and would have discharged him on that ground alone even if he had not complained to the inspectors.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.
2. On balance, the evidence does not establish a violation of section 105(c) of the Act as charged in the complaint.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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kg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 20, 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 87-128
Petitioner : A. C. No. 36-02448-03591
v. :
THE FLORENCE MINING COMPANY, : Florence No. 2 Mine
Respondent :

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This is a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977 (Act). On June 22, 1987 the Solicitor submitted a motion to approve settlements for the four violations involved in this case. The originally assessed amounts totaled \$3,500 and the proposed settlements were for \$2,250.

On July 24, 1987, I informed the parties that the proposed settlements for two of the orders, numbers 2695242 and 2695244, did not satisfy the statutory criteria set forth in section 110(i) of the Act. Accordingly, the parties were informed that the June 22, 1987 motion would not be approved as submitted. The parties agreed to re-negotiate the proposed settlement amounts, and submit an amended motion to approve settlement.

On August 6, 1987, the parties submitted an amended motion which proposed a settlement in the amount of \$2,500. After review of this motion, I am satisfied that the recommended findings and conclusions set forth therein are in accordance with the record and that the settlement amount satisfies the requirements of the Act.

The Solicitor's motion discusses each violation in light of the six statutory criteria set forth in section 110(i) of the Federal Mine and Health Act of 1977. Order No. 2695141 was issued for a violation of 30 C.F.R. § 75.400 because

loose coal and coal dust had accumulated in the No. 17 room of the mine. This penalty was originally assessed at \$800 and the proposed settlement is for \$600. The Solicitor represents that a reduction from the original assessment is warranted for three reasons. First, the primary accumulation developed as a result of a coal spillage stemming from the connection of two cross cuts. Thus, the hazard associated with the accumulation did not exist for a long period of time. Second, the machinery in the area of the accumulation satisfied permissibility standards. Thus, no ignition source was present. Third, only two people, as opposed to six cited by the inspector, could have been affected by the adverse condition. I accept the Solicitor's representations and approve the recommended settlement which remains a substantial amount.

Order No. 2695160 was issued for a violation of 30 C.F.R. § 75.400 because there was an accumulation of loose coal and float dust in the No. 2 main belt entry. The accumulation ranged from a light dusting to eighteen inches in depth. The inspector observed three areas of accumulation around the air locks, belt drives and inby the 4 West over-cast. This violation was originally assessed at \$900 and the proposed settlement is for \$600. The Solicitor represents that a reduction from the original assessment is warranted because no ignition sources were present in any of the cited areas. In addition, the belt drives are monitored by heat activated sensors and are protected by a deluge type sprinkler system. I accept the Solicitor's representations and approve the recommended settlement which remains a substantial amount.

Order No. 2695242 was issued for a violation of 30 C.F.R. § 75.302(a) because the No. 3 and No. 4 rooms in the 1 South East working section were not adequately ventilated. This penalty was originally assessed at \$800 and the proposed settlement is for \$600. The Solicitor represents that a reduction from the original assessment is warranted because the affected areas were inactive. The Solicitor further represents that upon notification of the ventilation problem, the operator promptly installed six check curtains to direct the air current towards the working face. I accept the Solicitor's representations and approve the recommended settlement.

Order No. 2695244 was issued for a violation of 30 C.F.R. § 75.400 because coal dirt and loose float coal dust had accumulated in the No. 1 belt entry. The accumulation ranged from a light dusting to 12 inches in depth. This penalty was originally assessed at \$1,000 and the proposed settlement is for \$700. The Solicitor represents that a reduction from the original assessment is warranted because

no ignition sources were present in any of the cited areas. In addition, the belt drives are monitored by heat activated sensors and are protected by a deluge sprinkler system. The settlement motion also notes that no individuals were scheduled to work at the cited area during the shift. These factors reduce the likelihood and severity of the hazard. I accept the Solicitor's representations and approve the recommended settlement.

Accordingly, the motion to approve settlement is GRANTED and the operator is ORDERED TO PAY \$2,500 within 30 days from the date of this decision.



Paul Merlin
Chief 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 21 1987

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 86-24-D
On Behalf of	:	
JOSEPH GABOSSO,	:	Deserado Mine
Complainant	:	
	:	
v.	:	
	:	
WESTERN FUELS-UTAH, INC.,	:	
Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant; Richard S. Mandelson, Esq., Baker & Hostetler, Denver, Colorado, for Respondent.

Before: Judge Morris

This case involves a complaint of discrimination filed by the Secretary of Labor pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The applicable portion of the Mine Act, Section 105(c)(1), in its pertinent portion, provides as follows:

No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceedings, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties, a hearing on the merits commenced in Glenwood Springs, Colorado on March 3, 1987.

The parties filed post-trial briefs.

Applicable Case Law

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393-413 (1983) (approving nearly identical test under National Labor Relations Act).

Complainant's Evidence

Joseph J. Gabossi, Boyd Emmons, Raja P. Upadhyay, Francis J. Kesting, Arthur Cordova and Daniel Ritter testified for complainant.

JOSEPH J. GABOSSI (sometimes called John Gabossi), started mining in 1964 as a utility man and as a miner's helper on a continuous miner. After a year and a half he moved to California for a different line of work. Two years later he returned to Mid-Continent Resources as a miner operator. He remained for a year and a half. At that point he took a pilot's training course. Thereafter, he started a security service and flew an airplane part time (Tr. 9-11).

In 1971 he returned to Mid-Continent as a miner operator. He was promoted to fire boss, then face boss and later to mine foreman. In 1974 he became the mine superintendent. He remained in this position until 1979. While at Mid-Continent, he received his mine foreman papers. Such papers are issued by the State of Colorado after written and oral examinations. State certification is required to qualify an individual as a mine foreman in Colorado (Tr. 11-15, Ex. C4). A mine superintendent is responsible for all aspects of mining. However, a mine superintendent spends less time underground than a foreman (Tr. 16-18).

Gabossi served as a mine foreman for two years. Thereafter, he worked as a mine superintendent for Black Rock Mining Company

for a year and a half. After that stint he worked as a mine superintendent and foreman for Western Associated Coal Company.

On October 1, 1982 he was hired by Western Fuels-Utah ("Western"), as a mine superintendent/foreman for their coal mine in Rangely, Colorado. He was fired by Western on January 30, 1985 (Tr. 9, 16-18, 117).

At his initial job interview with Western he learned the company was hiring an underground mine superintendent as well as maintenance and surface superintendents. Gabossi was to have control of all underground operations. During Bootle's term as mine manager he did not have total control but he coordinated activities. At that time Gordon Burnett was the maintenance superintendent and John Trygstad was the surface superintendent.

After he started at Western certain personnel changes occurred. Raja Upadhyay replaced John Bootle as the mine manager. Gabossi had also applied for the position. After being appointed Upadhyay requested assistance and Gabossi helped him. Burnett never went underground. Art Cardova, Gabossi's choice to be maintenance foreman, was hired. In June 1984, Burnett was replaced by A.B. Beasley (Tr. 19). Although Gabossi and Burnett had their "ups and downs", Gabossi and Beasley could not get along. Beasley would not coordinate any underground maintenance activities with him. Changes were made underground without informing him. This caused friction and Gabossi continually talked to Upadhyay about it (Tr. 20, 118-121, 155-157, 179).

Shortly after Upadhyay started things became very disorganized; major unauthorized ventilation changes were made underground. In June, July and August, 1983 maintenance workers shut fans off while workers were underground; they failed to notify anyone. A methane buildup can occur in these circumstances (Tr. 21, 123, 132, 133, 180).

Gabossi told Upadhyay that maintenance should notify him and coordinate any changes so people wouldn't be hurt. Upadhyay said maintenance wasn't Gabossi's business; he wasn't to bother with it (Tr. 22).

Gabossi was vaguely familiar with Upadhyay's memorandum of June 1983, which discussed the separation of powers between department heads (Tr. 149, 150, 153, Ex. R1). On February 14, 1984 Upadhyay informed Gabossi that there was a definite separation between the departments (Tr. 149-152).

In October 1984 Gabossi was told he would have a breakdown mechanic on each production shift. But maintenance at the face would be under Beasley (Tr. 23). As mine foreman and superintendent Gabossi felt it was his responsibility to know who is underground and where they are located. This is especially necessary

in the event of an evacuation or a disaster (Tr. 23, 24). On weekends maintenance was working without notifying anyone they were in the mine. High voltage changes were also made without notifying anyone. Gabossi told Upadhyay that he should be advised when this occurred but he received the same reply.

Other instances occurred: In October 1984 miners were hurt underground while operating a 913 EIMCOS; four sets of arches were knocked out. It was three or four weeks before repairs were made (Tr. 24, 25, 135). Gabossi complained; Upadhyay responded to the effect that maintenance was Beasley's function. In short, Gabossi should stay out of it. Gabossi was concerned about safety since someone could be hurt due to the delay in making repairs (Tr. 25, 135). On February 14, 1984, Gabossi showed Upadhyay the Colorado statute 1/ and requested coordination between the two departments. Gabossi expressed concern that if

1/ The relevant Colorado statute provides as follows:

34-24-101. Mine foreman - eligibility - duties - reciprocity. (1) The owner shall employ a certified mine foreman for every mine, except those mines in which no more than three persons including the owner are employed or work underground in which case one man must be at least of the status of a certified shot firer.

(2) The mine foreman shall have full charge of all inside workings and of all persons employed therein, in order that all the provisions of articles 20 to 30 of this title, insofar as they relate to his duties, shall be complied with, and so that the regulations prescribed for each class of workmen under his charge shall be carried out in the strictest manner possible.

(3)(a) Persons certified as eligible to hold positions of mine foreman, assistant mine foreman, mine electrician, strip pit foreman, assistant strip pit foreman, or fire boss by authority of any state in the United States producing coal shall be eligible to act in their respective classes in the state of Colorado. Recognition of a certificate from another state shall be given only where such state issuing such certificate shall make eligible for employment in such state all persons holding certificates of competency issued by the board of examiners of Colorado, and if the certificates of competency have been issued after an examination, which in the opinion of the board of examiners of Colorado shall be the practical equivalent of the of the examination provided for in articles 20 to 30 of this title.

(b) When approved by the board of examiners, any person holding a certificate issued by any other state may act in the capacity for which such certificate is issued in any mine in this state only until the next regular examination held by the board of examiners for Colorado certification.

(4) No certified mine foreman, assistant mine foreman, mine electrician, strip pit foreman, assistant strip pit foreman, or fire boss need be employed in mines where no more than three persons, including the owner, are employed or work underground.

Ex. C1

anyone was hurt he could lose his mine foreman papers. The issue of underground coordination was discussed ten to fifteen times. It got to be a headache. Upadhyay did not seem to be willing to work on the problem (Tr. 26, 126).

Upadhyay's interpretation of the statute was that maintenance was none of Gabossi's business. In addition, he was going to check with Jack Kesting and get back with him. Gabossi believes the statute makes the mine foreman responsible for the safety and health of all employees underground (Tr. 128, 129).

Gabossi wanted jurisdiction over breakdown maintenance and coordination between preventative maintenance and production (Tr. 130, 131).

After their initial confrontation on interpreting the statute, Gabossi next confronted Upadhyay on March 6, 1984 (Tr. 153). Gabossi said he couldn't work under these conditions and he offered to resign if the company bought his house. Upadhyay talked him out of it (Tr. 154). Gabossi raised this issue on several other occasions (Tr. 154, 155). He offered to quit two or three times but the offer to quit was not made after November 9 (Tr. 155).

On November 6, 1984, Gabossi called Boyd Emmons, a state mine inspector. He explained the lack of coordination at the mine and the various happenings, including the ventilation problem. He also expressed concern about losing his papers. Emmons advised him that he was responsible for everything underground including health, safety, haulage ways and mechanical. Further, as mine foreman, he had to be informed of activities underground (Tr. 28, 29). Emmons volunteered to talk to Upadhyay but Gabossi requested a confirming letter. The letter was received on November 7th.

On November 9th while Upadhyay was advising him of certain additional responsibilities, Gabossi presented the letter (Tr. 30, 31). Upadhyay became "instantly" mad and a heated discussion followed. Upadhyay told him if he didn't like it he should quit (Tr. 31, Ex. C5). This exchange occurred on a Friday. On Monday afternoon Upadhyay called him to his office. He said he was "madder than hell" because Gabossi had called the State of Colorado. He was also put on probation because he was not getting along with senior staff members. The witness described the conversation in detail (Tr. 35). Gabossi indicated it was the letter that had made Upadhyay mad; further, Gabossi felt the probation bore no relationship to a failure to get along with other staff members (Tr. 34). Upadhyay said the probation would last indefinitely. A letter of reprimand was put in his file (Tr. 35, Ex. C3). The letter of reprimand mainly addresses Gabossi's inability to work harmoniously under the organizational structure. But it states, in part, that "you have repeatedly objected to the idea of maintenance superintendent being responsible for underground maintenance" (Tr. 36, Ex. C3).

That evening Gabossi called Inspector Emmons. He, in turn, indicated he would talk to Upadhyay; Gabossi declined; it would only make Upadhyay madder. He told Emmons he would try to work it out (Tr. 37). Emmons said he would send another letter to the company outlining the duties of a mine foreman. When Emmons' letter, addressed to Western, was put in Gabossi's mailbox he intercepted it. It was not shown to Upadhyay because he was afraid he would be fired; he was already on probation (Tr. 38, 163, Ex. C9).

In November 1984, Gabossi also talked to Hamlett J. Barry, acting director of the Colorado Division of Mines. He explained the lack of coordination at the mine and indicated he would deny any responsibility if anyone was killed. He agreed when Barry indicated he thought it was a "cover your butt" call (Tr. 41, 42).

Upadhyay was cool between the time Gabossi was put on probation and January 21, 1985. On that date Gabossi brought to his attention that an electrical mechanic was falsifying inspection books. From then until he was discharged on January 30, 1985 there was hardly any communication between the two men (Tr. 42, 43).

From November 12th to January 30th the two men did not argue. There was nothing in that time frame to warrant his termination except for relating to Upadhyay the situation involving the electrical books (Tr. 43). Gabossi was more quiet at staff meetings after being put on probation (Tr. 44).

Gabossi claims he was fired because of his complaints about the ventilation, the EIMCO brakes, the arches, the falsification of the logs and his position as to a foreman's authority as set forth in Emmons' letter. No one was disciplined for the first four incidents although Gabossi had recommended discipline (Tr. 138, 139). He also would have fired the mechanic for falsifying the electrical books (Tr. 139). The miner had admitted the falsification to Gabossi and Art Cordova (Tr. 140, 145). But Upadhyay had not told Gabossi he was going to fire him for mentioning these matters (Tr. 143). Upadhyay did not demonstrate a concern for safety (Tr. 143, 144). At no time did Gabossi file any written complaint with MSHA or with the State of Colorado regulatory body (Tr. 177). Emmons, the state officer, told him he could only investigate if he had a written complaint. He did not file a written complaint because he wanted to work it out with Upadhyay (Tr. 178).

Beasley was still employed at Western when Gabossi was terminated. But about January 28, [1985] Beasley told Gabossi he was leaving for a better job. Gabossi denies that Upadhyay told him that he was being discharged because he had caused him to lose another maintenance superintendent (Tr. 158).

Ritter and Gabossi were discharged on the same day, January 30, 1985. Beasley left January 27th or 28th (Tr. 166, 167).

On January 30th at the termination meeting, Gabossi was called to the manager's office. Upadhyay wanted him to resign. They discussed the issue of the repurchase of Gabossi's home. A heated argument followed. They discussed different matters including Gabossi's telephone call to the State of Colorado over the separation of departments. Gabossi said it was bad that he "got run off" for showing the letter from the Bureau of Mines. But Gabossi could not remember Upadhyay's reply. The termination letter states, in part, that the company needed "Employees who can act together as a team" (Tr. 45, 46, 160, 161, Ex. C2). Other than for a complimentary memorandum from Kenneth Holum, Upadhyay's supervisor, (in January 1984), there had never been a reference concerning Gabossi's ability to work with other people (Tr. 47, 48, Ex. C6).

In December 1983, in an employee appraisal, Upadhyay indicated Gabossi was doing an excellent job (Tr. 48, 49, Ex. C7). When he left Western Gabossi's annual salary was \$52,000.

On January 21, 1985 two people under Gabossi as well as the mechanic foreman and the rest of the people on the payroll received a 5.8 percent pay raise. Dan Ritter didn't get a raise and Gabossi didn't know if the staff in Washington, D.C. received a raise (Tr. 50, 167-169, Ex. C11).

After he was terminated he was next employed on August 15, 1985 by Mid-Continent Resources in Carbondale, Colorado (Tr. 9).

A portion of Gabossi's salary with Western included medical and dental insurance. He incurred medical expenses between his termination on January 30, 1985 and his subsequent employment on August 15, 1985. These expenses, in the amount of \$1,313, were not insured (Tr. 54, 55). However, he failed to present any proof that the insurance carrier refused to pay any claims presented in the 30 day period after he was discharged (Tr. 173).

After he was hired, and before he moved to Rangely, Bootle advised him the company would repurchase his house at what he paid for it if he left the company for any reason within three years (Tr. 55, 56, 169-171). Shortly after leaving Western, Bootle confirmed the agreement in writing. The house loan, financed by Western, was immediately due when Gabossi was fired. In order to prevent a foreclosure Gabossi secured a new loan (Tr. 58, 59, 65). The agreement to buy the house was not a condition when he became employed; it arose before he would buy a house in Rangely (Tr. 65). Gabossi would not have purchased a house if Western had not represented they would repurchase it (Tr. 67). He purchased the house for \$119,000 and sold it for \$114,000 (Tr. 68, Ex. C11, C12). His initial loss was \$6,000, i.e., \$120,000 less \$114,000. Additional expenses included fees for an abstract company at \$223.25 and a real estate agent expense at \$2,500. In addition, he paid interest of \$3,015 for the \$60,000 he had borrowed to prevent the foreclosure (Tr. 72, 73, Ex. C11, C12).

Western had guaranteed the note on the house. When he was terminated Zion Bank automatically started foreclosure (Tr. 73). Gabossi made certain improvements on the property (Ex. C11, C12).

BOYD EMMONS, now retired, was formerly a District Mine Inspector for the State of Colorado. His duties included a broad range of activities relating to coal mines. In 1984 Colorado had enforcement authority over Western only if a written complaint was filed.

The Colorado statute provides for the duties of a mine foreman (Tr. 79-81, 86, 87, 98). Each mine has such a foreman (Tr. 82, 83). The state enforces the statute for the safety of all personnel underground. They seek to eliminate explosions, cave-ins, as well as serious injuries and fatalities (Tr. 84, 85, Ex. C4).

The witness has known Gabossi since 1978.

When the statute refers to "inside workings", it means everything underground. "[i]n full charge" means in charge of everybody and every piece of equipment (Tr. 88). If an explosion occurs it is in the interest of safety to know who is underground. The witness described how safety concerns interface with ventilation and high voltage wiring (Tr. 89).

In October and November 1984, John Gabossi contacted the witness about three times by telephone. He was kind of "hot under the collar" and he wanted to know about what his job was, and he wanted to know about miners going underground.

Emmons quoted him the statute and mailed him a copy (Tr. 90, 91, 105, Ex. C5). Emmons also said he would need a written complaint (none was ever received). Gabossi explained his problem related to people going underground and working on equipment without his knowledge. He also complained about the manner in which equipment, ventilation and gas checks were handled. Emmons told him it was a violation of Colorado law for miners to go underground without notifying him of that fact. Further, in Emmons' opinion, this created safety problems (Tr. 92, 99, 100, 108-111).

About three to five days later Gabossi again called him. This was just after Emmons had written to Western. Emmons had intended that the letter go to Western. When Gabossi learned about the letter he said. "Oh God, I'm dead if they get that" (Tr. 93, 102, 103, Ex. C9). Emmons also offered to go to the mine and talk to Upadhyay, but he did not do so. Gabossi said he would present the law to them (Tr. 94, 104). Emmons told Gabossi he was responsible for everything underground.

In Colorado a foreman's certificate can be revoked and, if so, he would lose his livelihood as a foreman (Tr. 94, 95).

Gabossi could face some kind of disciplinary proceedings if someone went underground without his knowledge (Tr. 96).

Gabossi had always been honest with the witness. In the inspector's opinion Gabossi is a good, safety conscious miner (Tr. 96, 97).

Emmons had never known of a mine organization where the foreman was not in complete charge of the underground workings (Tr. 112). But he was not aware of any complaints filed by any individual because Western's mine foreman did not have complete jurisdiction (Tr. 116).

RAJA P. UPADHYAY, called as a witness by the Secretary, indicated that he had six months of underground coal mining experience in India (Tr. 187, 188).

Western's organizational structure resulted in people working in the mine who did not report to Gabossi. But if he was on shift either he or his foreman would know the location of all individuals underground. Around March 1984 Gabossi started complaining about the company's reporting structure (Tr. 189, 190). Their conversations became heated and it became a long lingering problem between the two men. On November 9th Gabossi told Upadhyay the organizational structure should be changed or he could lose his foreman papers (Tr. 191). Upadhyay considered that Gabossi's complaint about men being underground without his knowledge was a safety related complaint (Tr. 196).

On November 9th Gabossi presented a letter from the state agency. At the meeting he also said his foreman papers were at stake. The meeting, which was on a Friday, was a "big blowup." The next business day Gabossi received his probationary letter (Tr. 196, 197, Ex. C3). At the Friday meeting Upadhyay learned for the first time that Gabossi had gone to a government agency (Tr. 197, 198). Gabossi was orally placed on probation as of the 13th; he was given a letter on November 12th (Tr. 199).

In September Mr. Kesting, Western's safety director, talked to Upadhyay about the effect of the Colorado statute. He indicated the law gives the mine superintendent or mine foreman the total underground authority (Tr. 200). Upadhyay replied to Kesting that the statute didn't require that maintenance be under Gabossi. Upadhyay did not follow the recommendation of his safety director (Tr. 201, 202).

Gabossi avoided Upadhyay after he was placed on probation. Beasley resigned January 29th; Gabossi was terminated the next day. Beasley's resignation triggered Gabossi's termination as did the "blowup" on the 9th.

It was less than a week before he was terminated that Gabossi told him about the falsification of the MSHA permissibility log book (Tr. 203-205). Before he left Burnett stated that one of the reasons he was leaving was his inability to work with Gabossi. He also said Gabossi was going to "stab" Upadhyay in the back (Tr. 206, 207). Beasley and Gabossi had a dispute over control or coordination of underground maintenance. They

brought that dispute to Upadhyay on at least one occasion. Upadhyay would tell them to work it out between themselves (Tr. 211).

FRANCIS J. KESTING, a senior staff member, was Western's director of safety and training from May 1982 to February 1985 (Tr. 213). The senior staff consisted of division heads, namely Kesting, John Gabossi and Gordon Burnett, (succeeded by A.B. Beasley). Additional staff members included Mike Weigand (senior engineer), Doug Wilson (purchasing), Dan Ritter (personnel) and Glen Goodworth (accounting).

The production foreman reported to John Gabossi while the maintenance foreman reported to maintenance superintendent Burnett or Beasley. Everyone on the senior staff reported to the mine manager (Tr. 214, 215).

The witness was aware of the division between underground maintenance and underground production. In his opinion, based on a reading of the Colorado statute, the reporting procedure constituted a real safety problem particularly as it related to ventilation and belts (Tr. 216-220, 241). However, Kesting is not a lawyer nor has he researched the legislative history. Upadhyay was willing to discuss Kesting's interpretation of the statutory provisions (Tr. 239, 240, 242). Kesting did not investigate how other coal mines were structured (Tr. 239). Kesting learned by asking questions that Upadhyay had no coal mining experience. He believed the problem between Gabossi and Upadhyay arose from reporting structure at the mine (Tr. 258, 259).

In September or October 1984 Gabossi brought the issue of reporting problem to the attention of the witness. Gabossi was worried about compliance with state law and the possibility of losing his foreman's license (Tr. 220, 221). The witness expressed the view that the failure to coordinate underground activities was a violation of state law. In sum, there should be one person in charge of the active workings in an underground coal mine (Tr. 221, 222).

Kesting discussed the problem with Upadhyay who said he would look into it. Kesting had nothing further to do with the issue (Tr. 223). Kesting was not aware if Upadhyay took any action on his recommendation (Tr. 224, 225).

Kesting observed the professional dispute between Gabossi and Upadhyay concerning underground jurisdiction and other issues. Kesting himself had a dozen or more disputes with Upadhyay. At some Monday morning meetings Gabossi would ask for a clarification of the problem he had with underground maintenance (Tr. 225, 236, 237). Those in attendance at the production meetings included Kesting, Upadhyay, Gabossi, Trygstad and Weigand (Tr. 226, 227). Gabossi was afraid someone would be hurt and he'd forfeit his foreman's papers. Gabossi was the most senior "papered" man on the mine site (Tr. 227).

Beasley and Gabossi also engaged in a professional dispute concerning underground activities (Tr. 227, 228). The dispute concerned the scheduling of underground maintenance on the equipment and the belt (Tr. 228). A safety problem existed with the underground people reporting to Beasley. The same situation existed when Burnett was maintenance foreman.

During Kesting's tenure as safety director Gabossi requested jurisdiction of the underground breakdown maintenance crew (Tr. 244). One on each crew reported to Gabossi. Also Gabossi didn't want jurisdiction over preventative maintenance; he wanted to know when they were underground (Tr. 245, 246).

Upadhyay was concerned about safety in the mine. He also took an active role in investigating safety (Tr. 246, 247, 249). Upadhyay would say that the mine was going to be run 100 percent "by the book" (Tr. 247). By that he meant no violation was to occur (Tr. 248).

When the safety department made underground inspections the men reported to Gabossi or the foreman in the section (Tr. 249).

Kesting could not recall Gabossi ever complaining about ventilation (Tr. 250).

The safety department investigated the EIMCO brake malfunction incident. The vehicle was red tagged and put in the shop (Tr. 250, 251).

The safety department also determined that the arches should be replaced (Tr. 253).

After Gabossi made him aware of the problem, Kesting investigated the false electrical records. Kesting recommended to Upadhyay that the offending miner be dismissed (Tr. 254, 255). Upadhyay said he would handle it. Kesting thought Beasley's letter of reprimand was inadequate (Tr. 255, 256). He told Upadhyay he disagreed with the discipline (Tr. 257).

Gabossi and Kesting disagreed on many things. Gabossi particularly objected to a mandatory policy requiring safety glasses (Tr. 260, 261). Gabossi and Kesting worked out their problems as they occurred (Tr. 261).

Gabossi, who is a good miner, was concerned that the death of a miner would cause him to lose his foreman's papers (Tr. 262). Further, he has a concern for miner safety.

Upadhyay perceived his problem with Gabossi as a personnel or management prerogative problem. But Gabossi saw it as a safety and legal problem (Tr. 263). In Kesting's opinion it was a safety and regulatory problem (Tr. 264).

During the staff and production meetings or while underground Gabossi was no more insubordinate to Upadhyay than any other man on the staff (Tr. 230, 231). Kesting observed no behavior that would warrant placing Gabossi on probation or warrant

his termination (Tr. 231, 233). Gabossi did not treat Upadhyay with less respect than anyone else on the senior staff (Tr. 232). At production meeting staff members scream, holler and carry on if they don't get what they want (Tr. 233).

When Kesting was hired, John Bootle indicated Western wanted the staff to live in Rangely. Kesting was also told he could build or purchase a house. In addition, if he left within three years Western would buy it back (Tr. 234). In fact, Kesting sold his house before leaving Western, so there was no occasion for the company to buy it back (Tr. 234).

ARTHUR CORDOVA was employed at Western from 1982 to 1985. After starting as a mechanic he was promoted to maintenance foreman in charge of all underground maintenance workers as well as electrical and mechanical repairs (Tr. 268-270). When he first went into maintenance he reported to Gordon Burnett, the maintenance superintendent. When Burnett quit he reported to John Gabossi. Subsequently he reported to maintenance superintendent A.B. Beasley. The maintenance supervisor was in charge of both breakdown and preventative maintenance.

Cordova saw Gabossi every day during inspections and when generally checking the mine (Tr. 270, 271). Cordova originally reported to Gabossi. When Beasley came to Western Cordova was told he would no longer report to Gabossi but only to him (Tr. 271, 272). Gabossi never had control over underground maintenance (Tr. 285).

Cordova holds various papers and has taken safety courses; but Beasley's directive not to deal with Gabossi caused him a safety concern. Cordova followed the directive. When he brought this to the attention of Upadhyay he was told to follow the chain of command and he was not to report to Gabossi (Tr. 273, 274, 281, 282).

Cordova was familiar with the Colorado law. He believed he was not in compliance if he didn't report to Gabossi (Tr. 275, 276).

At the Deserado mine, from the time he started working there, Gabossi ran the mine "to the book" and "whatever the law stated" concerning reporting and repairs (Tr. 276, 277). Cordova considered Gabossi a good miner, foreman and manager. He was also concerned with safety. Gabossi insisted on a good job (Tr. 276-278).

The witness was hired by Dan Ritter, Western's personnel director. Cordova is presently working for Gabossi at Mid-Continent Coal Company and he has worked for him a number of years, beginning in 1975 (Tr. 278, 280).

DANIEL RITTER, a person experienced in management, was employed by Western as Director of Human Resources from October 1981 through January 1985 (Tr. 287).

Ritter was responsible for hiring the senior staff members, including John Gabossi (Tr. 288).

In Western's reporting structure John Bootle, as the mine manager, was senior. John Gabossi was the mine superintendent. The classic mining structure would have maintenance activity reporting to the mine superintendent (Tr. 289, 290). But he did not know the reporting structure at the Powderhorn Coal Company (Tr. 309).

In Ritter's opinion the failure of the maintenance workers to report to the mine superintendent could adversely affect the safety of an underground miner (Tr. 291-293). Ritter had at least one conversation concerning the company's reporting structure with Upadhyay and his supervisor, Don Deardorff and John Bootle. But he never offered his opinion that Upadhyay was violating the statute (Tr. 294, 310). John Gabossi, as mine foreman, was not in charge of the workings at Western's mine (Tr. 296).

Ritter, who attended only senior staff meetings, never observed any behavior by Gabossi that could be characterized as rude, abusive, insubordinate or in any way out of the ordinary toward Upadhyay. Nor did he warrant any behavior that would warrant placing Gabossi on probation or terminating him. However, Gabossi was not impressed with Upadhyay's knowledge of the underground operations and he made disparaging comments about him out of his presence. (Tr. 297, 298, 310, 311). Gabossi generally attacked Upadhyay on a professional level, not in a personal sense (Tr. 312).

Gabossi was not the only person at Western who took exception to Upadhyay (Tr. 312).

Mr. Gabossi was a good miner and respected by the miners who worked for him. He was safety conscious and considerate of the employees who worked for him (Tr. 299). Fifty percent of the payroll people were at the mine because of Gabossi (Tr. 315).

The professional dispute concerning the company's structure surfaced as soon as Gabossi was hired. Burnett and Gabossi, experienced miners, were not hesitant to say something about the structure. Gabossi and Burnett seemed to be able to work out the problems posed by the structure (Tr. 301). When Beasley was hired he and Gabossi attempted to resolve their differences (Tr. 301, 302). The organization structure did not change between 1981 and 1985 (Tr. 320). Under the structure Upadhyay was in charge. In his absence the mine superintendent or the chief engineer would be in charge (Tr. 321, 322). As a personnel relations officer Ritter felt that the men in those two positions should get along (Tr. 322, 323).

There were discussions with Gabossi, Burnett and Kesting about Western repurchasing at their cost any house they might buy in Rangely (Tr. 302-304, 318). These discussions between Gabossi and Bootle took place in the trailer facilities in Rangely (Tr. 304).

Terry Fritz, as part of the engineering function, reported to the chief engineer. Gabossi would not have any contact with the surveyors who were on a different reporting ladder and two supervisory levels lower (Tr. 306).

When Beasley terminated he advised Ritter he was going to a better position, a better location and he would earn more money (Tr. 326).

Ritter resigned from Western on January 31, 1985 after being given the option to resign or be fired. Although he was in charge of Gabossi's personnel file he had not seen his probation letter (Tr. 307, 308, Ex. C3).

Western's benefits package provided insurance for its employees for 31 days after a worker is terminated (Tr. 317).

In Ritter's opinion Upadhyay would consider it traitorous if anyone took problems to a regulatory government official instead of taking them up the chain of command (Tr. 326).

Terry Fritz created the expression of "sand-nigger" as a reference to Upadhyay (Tr. 327). Weigand also used the same term in the same reference more than once (Tr. 328). Ritter had no memory of Gabossi using that term (Tr. 329). Beasley and Gabossi remarked about Upadhyay's lack of mining experience (Tr. 329). The witness himself did not use that term (Tr. 330). Upadhyay is a cordial individual who had a concern for safety (Tr. 331).

Respondent's Evidence

Michael Weigand, Terry Fritz, A.B. Beasley and Raja Upadhyay testified for respondent.

MICHAEL J. WEIGAND has been in Western's employ since 1981. He was hired in 1981 as a planning engineer and promoted to chief mining engineer in 1982 (Tr. 345, 346).

Weigand was one supervisory level above Joe Kracum. The latter was the direct supervisor over Fritz and Langford (Tr. 363).

His duties include planning belt lines, ventilation, new construction, roof controls and all aspects of the property. As chief engineer he is in almost daily contact with John Gabossi. He attended weekly staff meetings but not production meetings (Tr. 346, 347). Those under his jurisdiction included the mining engineer as well as lab and environmental technicians (Tr. 347). In the fall of 1984 Weigand became assistant mine manager (Tr. 376).

Surveyors are underground on a daily basis and in contact with Gabossi's people, Sunstrom and Marquez, as well as with Gabossi himself if he was in the section. The workers under Weigand's jurisdiction would work directly with Gabossi. In

Weigand's view it is abnormal for a constant conflict to exist between operations and the surveying staff (Tr. 348, 349, 364, 365).

Weigand's work with Gabossi involved anything underground. Weigand felt it was necessary to report to Gabossi when he went underground. However, Gabossi did not request such a report when the witness went underground (Tr. 349, 350).

Weigand was not aware of any specific event involving Gabossi but his people complained about how they were treated underground. They complained of verbal abuse as well as complaints about the quality and timing of the work. It became necessary to almost schedule the trips underground on a daily basis just to avoid arguments and complaints. Weigand brought this to Upadhyay's attention on two occasions in 1983 and 1984. Weigand and Gabossi had a couple of shouting matches but normally the two men got along pretty well (Tr. 350, 351, 365, 366, 368). Weigand never observed Gabossi verbally abuse any of the surveyors (Tr. 364, 371).

The basic problem was with the surveyors. Joe Kracum, Weigand's assistant, talked about it. Gabossi made numerous derogatory comments about Upadhyay's decision. The two men had a different philosophy about managing the mine and they had a lot of managerial type disagreements. But Weigand didn't recall Gabossi exploding at Upadhyay at any staff meetings (Tr. 352, 353, 381). Gabossi felt the mine could be better managed; he also felt a lot of Upadhyay's decisions were poor (Tr. 353). In the discussions involving the two men safety was not discussed in particular, only in general. Upadhyay's responses indicated a concern for safety. When it was discussed Upadhyay would state the mine would be run on a safe operating basis (Tr. 353, 354).

At one staff meeting Upadhyay asked the senior staff to keep their vehicles clean so the company could uphold its image in town. Gabossi refused saying he personally would not do that (Tr. 379). In Weigand's view that remark was insubordinate (Tr. 379, 386). On one occasion Gabossi complained about not receiving reports on the construction side but that was none of his business (Tr. 380, 381). In the latter part of 1984 Weigand heard Gabossi slam Upadhyay's office door and as he left he said "that dumb son of a bitch" (Tr. 387).

On June 4, 1984 Weigand received correspondence from Terry Fritz (Tr. 354-356, Ex. R2). They talked; in short, Fritz was leaving because of the verbal abuse and constant complaining by Gabossi (Tr. 358, 359). Fritz was not a malcontent at the mine; however, he was in his relationship with Gabossi (Tr. 368).

Gabossi also complained about the quality of Fritz's work.^{2/} Weigand would investigate and he found the work had been perform-

^{2/} In cross examination the witness indicated Gabossi never complained directly to him about the work of Fritz and Langford (Tr. 369, 372).

ed in a satisfactory fashion (Tr. 359). Weigand conveyed Fritz's conversation to Upadhyay (Tr. 360). Bill Langford, a surveyor working with Fritz, also complained about verbal abuse or problems with Gabossi underground (Tr. 360, 361). Weigand also conveyed this information to Upadhyay. He was concerned he couldn't keep his surveyors (Tr. 361). Weigand's investigation did not disclose any fault about Langford's work.

No one at Western has ever been terminated or disciplined for bringing any safety complaint to Upadhyay's attention (Tr. 362).

Since Gabossi left the company there have been no problems with the surveyors (Tr. 375, 376).

TERRY FRITZ, experienced as a draftsman and trained as a surveyor, was employed by Western in March 1982 (Tr. 389-391). Joe Kracum was Fritz's immediate supervisor. Langford worked with Fritz.

Fritz's duties included mapping the mine, setting sites for entries, surveying surface facilities, checking elevations and establishing bench marks (Tr. 392, 393). In performing his job functions he was underground and interacted with Gabossi, Sundstrom and Marquez (foremen). Fritz primarily dealt with the two foremen. The surveyors were required to set the sites before the shift started. This required him to contact Gabossi and arrange for a foreman to fire boss the area. Usually Gabossi would initially contact the surveyors and advise them they needed sites (Tr. 393, 394, 405).

Fritz would usually contact Gabossi on a daily basis, if he was underground. Their relationship was very stormy; they were unable to establish a working relationship. He said they were not putting in sites correctly or they were hampering production. Gabossi's language was harsh. While profanity is not out of context in a coal mine he referred to them (in the context of their work) as "sons of bitches" and "ass holes". If he requested they do something in a different way they would try, usually unsuccessfully. It seemed they could not do anything to satisfy him.

Gabossi claimed the sites in the belt entry were not properly set. After checking the specifications, a subsequent control survey revealed that the belt was extremely straight (within four seconds). His claim that the belt was not straight was one of Gabossi's constant complaints. Neither Weigand or Kracum said it was a problem. But Operations was concerned that the belt be straight.

In one occurrence the surveyors had secured permission from foreman Sunstrom to set sites as the miners were going to break for lunch. As they started to put in the sites Gabossi appeared. He didn't belittle them and he wasn't abrasive but he told them in no uncertain terms that they were holding up production. When Fritz explained the situation Gabossi became very upset and stormed off.

Fritz tried to work out his problems directly with Gabossi. When this was unsuccessful they started going directly to their supervisor, Kracum (Tr. 395, 396, 404-407). Fritz told Kracum they were being harassed, and accused of setting sites that were wrong and told the belt wasn't straight. On checking they found no problems. So they spent a good deal of time verifying something that was already accurate. At times Kracum, Upadhyay and Langford met underground. Gabossi claimed that they had sites off in one entry, also there were no belt spots. They were able to show them that the sites were in line, and that the existing belt spots were marked. Gabossi accepted the explanation (Tr. 396, 397). The surveyors never found that Gabossi's complaints were valid. The complaints by Gabossi were also brought to the attention of Steve Magnuson, Fritz's new supervisor, and Mike Weigand (Tr. 397, 417). Weigand said to relax and calm down; he was satisfied with the work (Tr. 397). The surveyors began to ignore Gabossi and they wouldn't recheck on minor things that they knew they had done. If they did a followup they would tell Magnuson, and to a limited extent, Weigand.

Fritz personally discussed his letter of resignation with Weigand. In the letter he did not mention Gabossi by name but he indicated that more influential factor in his decision to leave was "the constant unwarranted harassment he was subjected to by Operations (Tr. 398, 409, 419, 420, Ex. R2). Fritz got along with other people in Gabossi's department (Tr. 399). Fritz also resigned because he thought Western's wages were inadequate.

About June 4th or 5th Fritz also talked to Upadhyay about the letter. They discussed the harassment, the failure to deal with Gabossi's unreasonable and unwarranted demands, and the fact that this was one of the few mines where they weren't allowed to set sites on shift. This required them to stay late or come early. Survey sites are almost always set during shifts. Other things they discussed concerned setting belt spots a dozen different ways. Gabossi also complained about minor things: the color of the paint and the methods they were using. Upadhyay responded that he knew there were some problems and he was sorry to see Fritz leave (Tr. 400, 410, 412, Ex. R2).

Gabossi complained to Weigand and Kracum about Fritz's work from about two months after Gabossi arrived until he left. Fritz was offended because Gabossi's attacks were without any basis. Fritz considered it just harassment if they were requested to make a change and the change itself did not amount to anything substantial. However, the mine superintendent, and not the engineer, is in charge of an underground mine.

Fritz had no problems with the mine superintendent at his previous mine; there was a cooperative atmosphere (Tr. 402, 412, 414).

A. B. BEASLEY is currently employed as maintenance and surface superintendent for Energy Fuels, an underground coal mine. He worked for Western as maintenance superintendent from June 1964 to January 1985 (Tr. 423, 424).

When Beasley was interviewed by Western he learned he would be responsible for surface and underground maintenance at the mine (Tr. 425). Gabossi, one of the interviewers, never indicated he would not have control of underground maintenance nor did he discuss his job function (Tr. 426).

Gabossi asked Beasley if he and Upadhyay had discussed underground maintenance. When Beasley response was negative Gabossi suggested he should get his job duties straight (Tr. 427, 428). Beasley then read and attempted to perform his duties as outlined in the company memorandum of June 29, 1983 (Tr. 427-429, Ex. R1).

His duties placed him in daily contact with Gabossi. A definite conflict evolved as Beasley worked in areas that Gabossi considered within his realm of responsibility. Heated arguments or discussions involved the mechanics; however, except for reporting, they didn't have anything to do with the maintenance department. Gabossi was not using the best judgment to get the most out of the maintenance people on the section (Tr. 430, 431). They disagreed over whether the primary job of mechanics underground was to service equipment or to run errands, or stack a bolter or set miner bits. If a miner is idle for any time he should be doing something besides setting miner bits. They also disagreed concerning maintenance operations involving equipment being overhauled or rebuilt. They also disagreed as to whether things were being done in a manner to Gabossi's liking or whether maintenance people were doing things in his job priorities. Gabossi was a hard man to coordinate with (Tr. 431, 445).

Gabossi never accused Beasley of interfering with his job function at the mine other than to the extent that he couldn't mine coal because everything was always down (Tr. 431, 432). Gabossi criticized Beasley's maintenance of the equipment (Tr. 432).

At the beginning of Beasley's employment, he and Gabossi were social friends. At the very end, in nine months, they hardly spoke at work (Tr. 432). On several occasions Upadhyay told him to work it out when he brought it to his attention (Tr. 432, 433, 441). This didn't come about since Gabossi never attempted to meet him half way. Upadhyay demanded that all department heads work together. Upadhyay did not realign any responsibilities in an effort to solve the problem except to assign some mechanics by name (Tr. 433, 443, 444). At times Beasley was upset with Upadhyay because of his inability to coordinate between the departments (Tr. 446).

Beasley suggested to Gabossi how maintenance needs at the mine might be solved. But since he was blocked there was not much room to coordinate (Tr. 447, 448). Beasley sent mechanics underground to do a specific job on an idle piece of equipment if the area had been fire bossed or pre-shifted (Tr. 449-450). Gabossi complained about that (Tr. 450). He wanted Beasley to ask his permission to do anything underground (Tr. 451).

Beasley could not fault Gabossi's knowledge of mining but he faulted his management style. At the previous hearing of the case he described him as a good foreman. In addition, men will follow him into the mines where he works. Further, there are men who think highly of him in the mining industry (Tr. 451, 452).

Beasley submitted a letter of resignation to Upadhyay on January 29th (Tr. 434; Ex. R4).

Beasley gave Upadhyay his letter of resignation. He was upset because Beasley was leaving. He read the letter and they discussed his new job. Beasley said he didn't need the hassle with Gabossi. About 15 or 20 minutes of the half hour meeting involved a discussion of Gabossi. The letter of resignation does not specifically mention Gabossi; slander is not one of Beasley's strong suits and he didn't want to include that in a letter of resignation. Beasley felt he didn't need the innuendoes and the derogatory remarks (Tr. 436, 437).

There was a subsequent conversation with Upadhyay when he learned Gabossi was leaving the company. Upadhyay inquired if Beasley would reconsider his resignation. Beasley declined and he left February 8th (Tr. 438, 439). Beasley indicated his decision would have been more difficult if Gabossi had been fired earlier (Tr. 438, 439).

RAJA UPADHYAY, a mining engineer, attained a master's degree at the University of Arizona. In 1976 he was hired by Western as a senior mining engineer (Tr. 453, 455).

In June 1983 he replaced John Bootle and assumed the duties of acting mine manager in Rangely. He was familiar with the operations and organizational setup at the mine. Upon arriving he talked to all division heads, including John Gabossi (Tr. 456, 457).

Upadhyay authorized the company's June 29th organizational memorandum (Tr. 458, Ex. R1). The memorandum reiterated the responsibilities for four operating division heads. Gabossi failed to comment when the memorandum was discussed at staff meetings (Tr. 459).

In March 1984 Gabossi asked Upadhyay for total authority of the mine. He would like the maintenance people to report to him. At another meeting, (November 9th) he brought up the possibility of losing his papers. He was concerned about authority; he wanted the breakdown maintenance people to work for him (Tr. 500, 501).

In August 1983 Gabossi discussed with the witness the house buy back arrangement. He also brought up the issue of whether he had total authority of the mine, including maintenance and operations; both had been promised to him. Upadhyay disputed Gabossi's claim; he explained that the organizational setup had

been as it was since the mine started. Gabossi then said he would leave if the company would buy back his house (Tr. 460). Upadhyay said he didn't want Gabossi to quit but the company wasn't going to buy back his house. This conversation repeated itself with some regularity (Tr. 461).

In March 1984 Gabossi confronted him with the Colorado statute. Upadhyay indicated to him that when it came to safety and health Gabossi had full authority. Gabossi was not satisfied. Upadhyay then checked with Powderhorn Coal Company. That company's structure was setup in the same manner as Western (Tr. 462, 498). When Gabossi brought it up again Upadhyay said the company was abiding by the law. However, he granted that some people did not report to Gabossi. These included the mine manager and the chief mining engineer. At one point he indicated preventative maintenance could report to the maintenance superintendent, but he (Gabossi) wanted the breakdown maintenance under his authority (Tr. 463). Gabossi already had responsibility over the face mechanic. Preventative maintenance occurs underground almost daily. But Gabossi didn't want control over preventative maintenance (Tr. 464). Gabossi didn't say if he was satisfied as a result of this discussion (Tr. 464, 465).

When Upadhyay would occasionally leave the mine site Gabossi would be in charge (Tr. 465). Upadhyay took away this responsibility on October 1, 1984, when Gabossi indicated he didn't want to be his assistant. Gabossi's single reason was that Upadhyay failed to take action when Gabossi reported to him. On the same day Upadhyay prepared a memorandum changing the job (Tr. 466, 467).

About the end of September, Gabossi and Upadhyay were engaged in a conversation regarding Western advancing a cash payment for Art Cordova's disability injury. Gabossi "blew up", got hot, upset and left the office (Tr. 468). At that time, before the first of October, Upadhyay concluded that in view of all of the previous problems with Gabossi he was going to seek approval from his superior (Lloyd) to terminate him (Tr. 469, 510, 511).

Upadhyay carried a handwritten memorandum to his superior, Lloyd Ernst, manager of operations, in Washington. He didn't have it typed because he didn't want anyone at the mine to know about it. Lloyd read the memorandum; Upadhyay was recommending that Gabossi be fired. Lloyd preferred Upadhyay's alternative suggestion. He recommended that Gabossi be directed to work underground all day. It was thought this would create dissatisfaction which might lead to his resignation. On returning to the mine he told Gabossi that he wanted him to spend more time underground (Tr. 471, 502, 530, Ex. R5). Gabossi agreed (Tr. 471, 472).

On November 9th a meeting with Gabossi took place in the change house. Upadhyay was talking to Gabossi about a monitoring system they had installed. Upadhyay indicated it would be Gabossi's responsibility. Gabossi then asked if Western was

going to buy his house, also he brought up the matter of a pay cut and a bonus. Upadhyay said Western was not going to buy his house (Tr. 472, 473). Gabossi then said Upadhyay was the worst mine manager that he had ever worked for. He further indicated that a caste system didn't work in the United States. Gabossi then handed Upadhyay a folded letter (Emmons letter to Gabossi citing the Colorado statute) (Tr. 473, 474, Ex. C5). Upadhyay replied that the letter didn't say they were doing anything wrong. As Gabossi kept raising his voice Upadhyay became upset and stated he didn't think much of Gabossi. He then left taking the letter with him. He later filed the letter (Tr. 474).

After the meeting on November 9th Upadhyay contacted Lloyd. He advised him things were not working and he requested Lloyd's approval to discharge him. Lloyd said to put him on probation. The next morning Upadhyay put Gabossi on probation until he changed his attitude and became a good employee for Western. The main thing Upadhyay and Gabossi discussed was his failure to work with other people (Tr. 476). The matters verbally discussed were later reduced to writing (Tr. 476, Ex. C3).

Gabossi only questioned a reference in the memorandum about what Upadhyay had heard from "other companies". Upadhyay explained that the "other companies" were the power plant people Gabossi had taken underground. He had complained to them about Western's management, its ability to mine coal and its manager, Upadhyay (Tr. 477, 478).

At a subsequent staff meeting with Gabossi, Beasley and Kesting allegations were made that a mechanic had falsified a record. Upadhyay asked Beasley to investigate the matter. After the investigation Beasley reprimanded the miner by letter. Gabossi wanted to fire him; Upadhyay refused because disciplinary action had already been taken (Tr. 478, 479).

Gabossi brought to Upadhyay's attention the matter of the maintenance people shutting down a fan. On that occasion he directed Beasley to have a mechanic immediately restart the fan.

Upadhyay didn't feel compelled to get back in touch with Gabossi everytime something had been brought to his attention for action.

The ventilation items were investigated, resolved and discussed with Gabossi (Tr. 480, 481).

Concerning the arches: Gabossi said an EIMCO had damaged some arches. Upadhyay immediately went to the area. Both he and Gabossi concluded there was no hazard although a leg had to be fixed. The following day the engineering people investigated (Tr. 482). It was decided the maintenance department would fix it (Tr. 483). The safety department also investigated and concluded there had not been a brake failure on the equipment. No one knows the cause of the accident. The only safety matters

Gabossi talked about were ventilation, the miner, falsification of records, the arches and the coordination of underground duties (Tr. 483, 484).

When Terry Fritz resigned in June 1984 he told Upadhyay that his letter of resignation referring about "constant and unwarranted harassment" was to only reflect on Gabossi. In later discussing Fritz's resignation, Upadhyay told Gabossi he would have to change his attitude because people were leaving but he didn't mind this one (Tr. 489, 498, Ex. R2).

Upadhyay was totally surprised by Beasley's resignation of January 29, 1985 (Tr. 484, Ex. R4). He related he couldn't work with Gabossi (Tr. 484, 485). In the next couple of minutes Upadhyay decided to recommend Gabossi's termination. Too many people were leaving because of Gabossi's inability to work with them. He wanted to avoid having to rehire after losing another maintenance supervisor (Tr. 485, 486, 505).

In pursuing his decision to terminate Gabossi he learned that Lloyd was hospitalized. He then talked to Lloyd's boss, Ken Holum. The superior was knowledgeable about the situation. Upadhyay described that he had lost another maintenance superintendent. Holum authorized Gabossi's termination. The company attorney, Mr. Mandelson, drafted the termination letter. The next morning Gabossi declined an option to resign and he was fired. Gabossi said "Bullshit". Further, he could not "get away with it" and Upadhyay was the worst mine manager Gabossi had ever worked for (Tr. 485-488, 505, 531).

The department heads continuously complained about Gabossi's performance. During Upadhyay's tenure the engineering department (Mike Weigand) complained they were harassed and not appreciated. The probation letter refers to Gabossi's inability to get along with division heads (Tr. 491, 492). Upadhyay had tried many times to counsel Gabossi.

Neither the witness nor anyone else at the Deserado mine had ever seen Emmons' second letter of November 14 (Tr. 492, 493; Ex. C9). Nor was there ever any conversation concerning the statute (Tr. 493). Nor was he ever contacted by MSHA relative to the statute. The Deserado mine continues to operate under the same organization structure it did on January 30, 1985 (Tr. 493).

The mine has never received any MSHA or state complaints (Tr. 494). The witness's handwritten recommendation that Gabossi be fired was not typed by Upadhyay's secretary. Nor was the document entered in a log. The original was hand carried by the witness to Washington (Tr. 494-497, Ex. R5).

During his tenure Upadhyay never disciplined, terminated or placed any employee on probation for filing a safety complaint (Tr. 535).

Upadhyay is current manager of operations for Western (Tr. 536).

Francis Kesting, Daniel Ritter and Joseph Gabossi were called as rebuttal witnesses by the Secretary.

FRANCIS KESTING testified that he was told by Burnett that he was leaving because he had another job, also he felt stagnated and didn't think Western's mine was ever going to produce coal (Tr. 539, 540). The power plant was the only company contracting for its coal (Tr. 540).

Upper management at Western, including Upadhyay, would be furious if someone went to a government regulatory agency. Such action would end a person's career (Tr. 541, 542). However, Kesting based his opinion on management at other mines (Tr. 542, 543). In fact, no worker at Western had ever complained to a state regulatory body (Tr. 543).

DANIEL RITTER indicated that Burnett left Western because the mine was static and he had a better future where he was going. Western's only contract was to sell coal to a power plant at Bonanza (Tr. 545, 546).

As Human Relations Director Burnett occasionally came to him with complaints about the inability of he and Gabossi to work under the structure (Tr. 546, 547).

In rebuttal, John Gabossi indicated he didn't treat Fritz differently from any other employee, nor was he harsh with him (Tr. 548).

Gabossi complained to Fritz, as well as Upadhyay, about belt spots put in the ceiling for chain hangers. He, Upadhyay and Deardorff examined the condition. They all agreed it was a poor installation job (Tr. 549). Deardorff was Upadhyay's superior but in engineering and not in production (Tr. 549).

John Sundstrom also had problems with sites underground. The condition described by the witness involved spots and spads. Gabossi concluded Sundstrom's complaint was justified (Tr. 550).

When Fritz resigned Upadhyay told Gabossi that he wasn't very good anyway and it didn't make any difference (Tr. 550, 551).

Gabossi expressed concern to Upadhyay about the arches. It was agreed Beasley was to change the arches immediately (Tr. 551, 552). It was not done immediately. When Gabossi complained Upadhyay said it was Beasley's decision and none of Gabossi's business (Tr. 552).

Upadhyay did not discuss with Gabossi any of the complaints against him made by eight of the nine department heads. The only ones they talked about involved Beasley and possibly the purchasing department (Tr. 553, 555). The on-going complaint with Beasley involved coordinating efforts underground (Tr. 553). Every one had problems with Doug Wilson, the company purchasing agent (Tr. 554).

Upadhyay did not admonish him about not getting along with division heads prior to receiving the adverse performance report of November 16, 1984 (Tr. 554, 555, 558, Ex C3).

Gabossi only queried Upadhyay about his reference to "other companies" in paragraph 3 of his memorandum (Tr. 555, 556).

Gabossi also disagreed with the analysis of the engineering department that the arches were safe. Until the hearing he hadn't known that the arches had been investigated (Tr. 557).

Discussion

In this case of first impression the facts clearly establish that complainant, Joseph Gabossi, was fired because of his continuing and extensive conflict with mine management over the company's failure to coordinate underground mining activities. This conflict came about because the company's reporting structure placed underground mechanics under the jurisdiction of the maintenance supervisor. Safety concerns arose and Gabossi expressed his opposition to the company's procedures. He further attempted to have management alter its position and to, at least, coordinate such maintenance activities with the mine foreman.

Gabossi believed his authority to either control or at least coordinate with the underground mechanics arose from Section 34-24-101 of the Colorado Revised Statutes. The section, in its pertinent part, provides the certified mine foreman (Gabossi was such a foreman) "shall have full charge of all inside workings and all persons employed therein."

Complainant's tenacity and concern for the safety of the miners are to be complimented.

However, the cornerstone of Section 305(a)(1) is that a miner is engaged in a protected activity when he has "filed or made a complaint under or related to this Act." Four separate references are made in the section to the protection afforded "by this Act".

The legislative history reflects that Congress intended the scope of protected activities be broadly interpreted. But, again the history also shows the Congressional view that such protected activities are within the framework of the Federal Act.

The Congressional view is noted in Senate Report No. 95-181. It states in part, that:

The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints seeking inspection under Section 104(f) or the participation in mine inspections under Section 104(e), but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which

are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

The listing of protected rights contained in section 106(c) (1) is intended to be illustrative and not exclusive. The wording of section 106(c) is broader than the counterpart language in section 110 of the Coal Act and the Committee intends section 106(c) to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.

Senate Report No. 181, 95th Cong., 1st Sess. 14 (1977) reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 623, 624 "Legis. Hist."

Neither the federal Act nor MSHA regulations contain a provision on a mine foreman's duties corresponding to Section 32-24-101(2), CRS. Accordingly, the complaints lodged herein by the mine foreman could not be an activity "under or related to" the federal Act. In sum, while Gabossi's complaints concerning the company's reporting structure were safety related they were not an activity protected under the federal Act.

There are, however, several instances where Gabossi's activities were protected. These involve the complaints about ventilation, the EIMCO brakes, the arches, his concern about the falsification of electrical logs and finally his contacting the Colorado Division of Mines and his presentation of a letter from the Colorado Bureau of Mines to the mine manager.

The first three items involved a protected activity but the company took no adverse action and, in fact, remedied the problems. The last two items occurred after November 9, 1984. But on October 1, 1984 the mine manager had decided to fire Gabossi. The company had refused him permission at that time. Subsequently, however, when Beasley resigned the manager again sought and secured the company's permission to terminate Gabossi. Beasley's resignation again involved the long standing conflict over the company's reporting system. I conclude that the company was motivated by Gabossi's unprotected activity and would have taken the adverse action for such unprotected activity alone. In short, his unprotected activity, insofar as the federal Act is concerned, was his continual clash with management over the reporting structure.

Evidentiary Ruling

During the hearing the judge sustained respondent's objection and excluded evidence of Burnett's testimony from a prior hearing, heard by Commission Judge John A. Carlson (Tr. 512-520, 527, 531, 552).

The evidence, even if received, would not affect the result in this case, because the principals, Gabossi and Upadhyay, clearly establish the focus of the case. Accordingly, it is not necessary to rule on Complainant's offer of proof.

Conclusions of Law

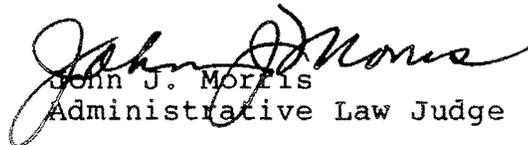
Based on the entire record and the factual findings made in this decision the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Complainant did not prove he was discriminated against in violation of Section 105(c).
3. Respondent did not discriminate against complainant in violation of the Act.

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

ORDER

The complaint herein is dismissed.


John J. Morris
Administrative Law Judge

Distribution:

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Richard S. Mandelson, Esq., Baker & Hostetler, 303 East 17th Avenue, Suite 1100, Denver, CO 80203 (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 21 1987

UTAH POWER AND LIGHT COMPANY, : CONTEST PROCEEDINGS
Contestant :
 : Docket No. WEST 87-31-R
v. : Citation No. 2928408; 10/9/86
 :
SECRETARY OF LABOR, : Docket No. WEST 87-32-R
MINE SAFETY AND HEALTH : Citation No. 2928409; 10/9/86
ADMINISTRATION (MSHA), :
Respondent : Little Dove Mine
 :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 87-100
Petitioner : A.C. No. 42-01393-03546
 :
v. : Little Dove Mine
 :
UTAH POWER AND LIGHT COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

The parties have reached a settlement of these two contest matters and the related penalty proceeding which collectively involve two citations which, in turn, were each administratively assessed \$20.00 penalties.

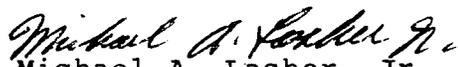
Pursuant to the settlement, the Secretary has agreed to vacate Citation No. 2928409, which was contested in Docket No. WEST 87-32-R. The mine operator, Utah Power and Light Company has agreed to voluntarily withdraw the contest of Citation No. 2928408 in Docket No. WEST 87-31-R and to voluntarily pay the \$20.00 civil penalty in full for that violation. The mine operator also agrees in the future to accept the Secretary's position that chiropractic treatment constitutes "other professional treatment" under 30 C.F.R. 50.20-3(a)(8)(ii) and is therefore reportable under 30 C.F.R. Part 50.

Information contained in the settlement motion reflects that Utah Power and Light Company Mining Division, is a large mine operator with an average history of prior violations and that the violation reflected in Citation No. 2928408 involved low degrees of both seriousness and negligence and was abated in good faith.

ORDER

The various provisions of the settlement appearing to be fully justified, it is Ordered:

1. Utah Power and Light's withdrawal of its contest in Docket No. WEST 87-31-R is approved and that proceeding is dismissed;
2. The Secretary's request for vacation of Citation No. 2928409 is approved and such Citation is vacated;
3. With respect to Citation No. 2928408 (Docket No. WEST 87-31), Utah Power and Light, if it has not previously done so, is ordered to pay the Secretary of Labor a penalty of \$20.00 within 30 days from the issuance of this decision.


Michael A. Lasher, Jr.
Administrative Law Judge

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Mr. Dave Lauriski, Utah Power & Light Company, P.O. Box 310, Huntington, UT 84528

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 24 1987

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Complainant	:	
v.	:	Docket No. WEVA 86-409-R
	:	Order No. 2703894; 7/14/86
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Ireland Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 86-454
Petitioner	:	A. C. No. 46-01438-03651
v.	:	
	:	Ireland Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Complainant/Respondent; David T. Bush, Esq. and Mark Swirsky, Esq., (on the brief), Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Operator (Respondent) seeks to challenge a citation issued to it by the Secretary (Petitioner) for an alleged violation of 30 C.F.R § 70.207(e)(7). The Secretary seeks a Civil Penalty for an alleged violation by the Operator of Section 70.207(e)(7), supra. Pursuant to notice, the cases were heard in Wheeling, West Virginia on May 12, 1987. John Dower testified for Petitioner, and John Russell and Steve Perkins testified for the Respondent. Petitioner and Respondent filed proposed Findings of Fact and Briefs on July 27, 1987 and July 29, 1987, respectively. No reply briefs were filed.

Regulatory Provision

30 C.F.R. § 70.207(e)(7) provides for follows:

(7) Longwall section. On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner.

Issues

1. Whether Respondent violated section 70.207(e)(7), supra.
2. If a violation of section 70.207(e)(7), supra, occurred, was it of such a nature as could have significantly and substantially contributed to the cause and effect of a safety hazard.
3. If the Respondent violated section 70.207(e)(7), what is the proper penalty to be assessed?

Findings of Fact and Conclusions of Law

The essential facts herein are not in dispute. In Respondent's Ireland Mine, in the 6D longwall section coal is mined by a shear which is operated by two miners who are called shear operators. There is no distinction, in terms of work assignments or pay, between the two shear operators.

In the extraction phase, when the shear is traveling from the headgate to the tailgate, one miner is assigned to operate the headgate drum of the shear and the other miner is positioned in the tailgate end of the shear and operates the tailgate drum. When the shear travels from the tailgate to the headgate, the two miners operating it remain at their positions until the shear reaches shield number 113, at that point, the miner who was working at the tail drum "floats out," and goes to the headgate in order to obtain fresh air, and take a break from working in the cramped quarters in proximity to the shear. The two miners working on the shear will alternate "floating out" to the headgate each time the shear, on its pass from the tailgate to the headgate, reaches shield number 113. The remaining miner will stay at the shear operating the controls of the head drum while the shear travels from shield number 113 to the headgate. During this phase of the operation, most of the coal is cut, and 90 to 95 percent of the dust is generated.

John Dower, a mining engineer for MSHA, testified on direct examination that "routinely" after the tailgate operator has "floated out" to the headgate, the headgate operator would have to go to the tail drum to readjust it because of face rolls. In

contrast, John Russell, Respondent's dust and noise supervisor of the Eastern Region, testified that it would be "very rare" for the headgate operator to move to the tail position after the tail operator has "floated out." This appear to be consistent with the testimony of Dower, on cross examination, that there is no need for the head drum operator to go to the tail position unless there is a "severe problem." However, Dower explained, on redirect examination, that such severe problems could occur if there are massive stones under the machine or if there is a mechanical malfunction of the drum. In the same connection, Russell indicated that if the shear comes in contract with a shield, the shear will stop and the head shear operator would then have to go the tailend to fix it. Based on the above, I conclude that, as part of the normal mining process, there are occasions when the head shear operator, after the tail operator has "floated out," would be required to go to the tail drum position.

Prior to May 1986, it was the policy of MSHA that a dust sampling device be given to the tail drum operator who wore it constantly even when he "floated out" to the headgate. In practice, Respondent conformed to this policy. On May 13, 1986, MSHA District Manager, Ronald L. Keaton, in response to an inquiry from William Schlaupitz, Respondent's Regional Manager-Safety, set forth a policy quoting from the Coal Mine Health and Safety Inspection Manual, for underground mines dated March 9, 1978, that "If the operator's mining procedures result in the changing of miners from one occupation to another during a production shift, the sampling device must remain on or at the 'high risk' occupation." On July 14, 1986, Dower observed the tailgate shear operator wearing the dust sampling device on the entire shift, including the time when he "floated out" to the headgate on alternate passes.

Russell testified that after the May 13, 1986 letter from the District Manager was received, he talked to an MSHA employee, Ellis Mitchell, who informed him that when the tailgate shear operator "floated out" to the headgate, it was not to be considered a "rotation" as no one replaced the tailgate shear operator. Russell testified, in essence, that accordingly Respondent did not take any action to change its procedure of having the tailgate drum operator wear the dust testing device throughout the shift, even when "floating out."

The evidence is clear that the tailgate drum operator is exposed to a certain amount of coal dust from the cutting drums, conveyor chain, and debris falling from the ribs or roof. His exposure to the coal dust is considerably more than that of the headgate drum operator, as the former is nearest the return air side, and as such is in the path of the airborne coal dust. It

is also clear that most of the time he is the miner who works nearest the return air side of the longwall working face. However, on every other shift, when the tailgate operator "floats out" to the headgate, the headgate operator then becomes the miner working nearest the return air side. It would thus appear, from the plain reading of the language of section 70.207(e)(7), supra, that, accordingly, when the tailgate operator has "floated out" the remaining headgate operator is required to wear the dust testing device.

It is true that requiring the tailgate operator to continuously wear the dust sampling device would give an accurate reading of the dust exposure to this miner who, as noted above, is at a higher risk than the headgate shear operator. However, the time the operator spends in the fresh air of the headgate must be considered. This has the effect of reducing the amount of his average exposure to coal dust. Further, by having the tailgate shear operator wear the dust sampler, even in the headgate, has the effect of not providing an accurate indication of exposure of coal dust to the headgate operator who may, in the ordinary course of the mining operation, be required to perform some work in the tailgate position, thus enhancing his exposure to coal dust, as being in the path of the airborne coal dust. Hence, I hold, that section 70.207(e)(7), supra, requires that the headgate shear operator wear the testing device when the tailgate operator "floats out." Furthermore, I find that the policy statement of the MSHA District Manager, of May 13, 1986, does not contain any contrary direction. It is clearly the intent of the District Manager to protect the person in a "high risk" occupation by requiring him to wear the dust sampler. This policy would clearly be thwarted in not requiring the headgate operator to wear the dust sampler during portions of the pass when he is alone at the shear and may be required, in the normal course of mining operations, to go to the tail position and perform duties where there is a "high risks" of exposure to coal dust. For all the above reasons, I conclude that Respondent herein has violated section 70.207(e)(7), supra.

It was the uncontradicted testimony of Dower, in essence, that if there is coal dust in the subject section above the maximum permitted, and the coal dust is not being monitored because the testing device is on the tailgate operator, who is in the headgate area, then it is potentially likely that a miner could be exposed to dust which could result in black lung disease or a permanent disability of a very serious nature. Accordingly, based on this testimony, I find that Respondent's violation of section 77.207(e)(7), supra, was significant and substantial (See, Consolidation Coal Company v. Federal Mine Safety and Health Review Commission, Slip. Op., July 24, 1987 (D.C. Cir.); Mathies Coal Co. 6 FMSHRC 1 (January 1984)).

I have considered all the factors set forth in Section .110 of the Act. Specifically I note that the Respondent was not negligent in violating Section 771207(e)(7), supra. I conclude that the proposed penalty of \$112 is appropriate.

ORDER

It is ORDERED that the Notice of Contest filed July 28, 1986, be DISMISSED. It is further ORDERED that Respondent pay the sum of \$112, within 30 days of the date of this decision, as a civil penalty for the violation found herein.



Avram Weisberger
Administrative Law Judge

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Mark Swirsky, Esq., Office of the Solicitor, U. S. Department of
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Philadelphia, PA 19104 (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 1987

ROGER HALL, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 87-51-D
JERICOL MINING, INC., :
Respondent : BARB CD 86-80
: Creech No. 2 Mine
:

ORDER OF DISMISSAL

Before: Judge Weisberger

On August 17, 1987, Complainant filed a Motion to Dismiss predicated upon an assertion that the matter in issue had been settled.

Accordingly, it is ORDERED that the above case be dismissed with prejudice.

It is further ORDERED that the stenographic notes and recordings made during the trial of this matter on June 16 - 18, 1987, be DESTROYED.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 28 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 86-137-M
Petitioner : A.C. No. 09-00022-05515
v. :
GALITE CORPORATION, : Galite No. 1 Mine
Respondent :

DECISION

Appearances: Larry A. Auerbach, Esq., Office of the
Solicitor, U.S. Department of Labor, Atlanta,
Georgia, for Petitioner;
Kenneth P. Mayeaux, General Manager, Galite
Corporation, Rockmart, Georgia, for
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of \$147 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.9002. The respondent filed an answer denying the violation, and a hearing was held in Marietta, Georgia, on June 30, 1987. The parties waived the filing of posthearing briefs. However, I have considered the oral arguments made by the parties on the record during the course of the hearing.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory safety standard, and (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found

in section 110(i) of the Act. Additional issues raised by the parties are discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to jurisdiction, and that during 1986 the subject plant and quarry, including office personnel, worked 143,705 man-hours. They also stipulated that any civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business (Tr. 5).

The parties agreed that exhibit P-1, a computer print-out of prior violations for the respondent's controller corporation reflects the controller's history of violations for the period July 9, 1984 through July 8, 1986. The print-out reflects 50 paid violations, 22 of which are "significant and substantial" violations. Petitioner's counsel asserted that for this same time period, the respondent's Galite No. 1 Mine received civil penalty assessments for nine citations which were "other than single penalty items," and that they were timely paid (Tr. 6-7).

Discussion

Section 104(a) "S&S" Citation No. 2848584, July 9, 1986, cites a violation of 30 C.F.R. § 56.9002, and the condition or practice is described as follows: "One bolt was missing and others loose on the plate that connects the drive shaft to the transmission on the R-22 Euclid haulage truck."

Petitioner's Testimony and Evidence

MSHA Inspector Bobby A. Underwood confirmed that he issued the citation. He described the truck as an R-22 U model used to haul material from the pit to the primary crusher, and he confirmed that it was used daily during the full shift. The route of the truck took it over level ground, but there were declines where the truck entered and exited the pit. The truck had a 25-ton capacity and was approximately 20 years old (Tr. 11-12).

Inspector Underwood described the truck drive shaft, and he stated that the front of the universal joint had a flange which attached to the transmission with approximately eight one-half inch bolts. He found that one of the bolts was completely missing, and that the others which he examined were loose to the point where "you could actually turn them with your fingers," and they were "backed out halfway" (Tr. 13).

Inspector Underwood stated that he was alerted to the condition of the drive shaft when he noticed a "shiny spot" in the area next to the differential which appeared to have been caused by some rubbing action. He checked the drive shaft and found the loose and missing bolts which "was making the transmission work up and down." Based on what he observed, he concluded that it would have taken several days for the bolts to work loose. He confirmed that upon inspection of the truck he also issued two additional citations, one for an inoperative horn, and one for a badly worn tie rod for the steering cylinder (Tr. 15-16; exhibits P-2 and P-3). The condition of the tie rod was such that it had the potential for breaking, and if it did, the truck would lose its steering capability. Both cited conditions were repaired (Tr. 16). He also observed that two bolts were missing from the left rear transmission hangar plate, but did not issue a citation for this condition. Although he did not believe that this condition in and of itself would cause an accident, "it would contribute to this drive shaft because it would move back and forth" (Tr. 17).

Mr. Underwood described the hazard associated with the cited conditions as follows (Tr. 18-19):

Q. What kind of hazard did you see associated with this problem with the drive shaft?

A. The drive shaft -- with the lost motion in it, if the bolts didn't come out, there was a good possibility of snapping those bolts, but this truck doesn't have a cross member underneath. The drive shaft would fall down, possibly sticking into the ground and throwing the truck out of control, or wham around and possibly hit the brake line and breaking it where you would lose your braking system.

Q. What would cause it to go around? What would cause the drive shaft to fly around like that?

A. Well, the front end would be loose and the differential would turn the drive shaft around.

Q. The differential is hooked onto the rear end of the drive shaft? Is that right?

A. Right.

Q. The back wheels?

A. Right.

Q. And that would still be turning as the truck is moving. Is that right?

A. Right. Yes.

Mr. Underwood stated that it is not unusual to use the transmission to help brake the truck while it is on a grade or an incline (Tr. 20). He identified a copy of an MSHA fatal accident report involving another mine operator where a drive shaft on a haulage truck gave way and the operator lost control of the vehicle (Tr. 21; exhibit P-4). Petitioner's counsel asserted that this incident is a representative example of what could happen when a truck loses its transmission (Tr. 21). Respondent's representative took the position that the report is not particularly relevant because it states that "the direct cause of the accident could not be determined" (Tr. 23).

Mr. Underwood believed that the violative conditions which he cited with respect to the drive shaft could result in serious injuries or a fatality in the event the truck overturned or collided with another vehicle or individual. He believed that the condition was observable and that the lost transmission motion and noise from the rubbing action should have alerted the respondent. Since the result of the rubbing action was observable, a routine further inspection under the truck would have detected the loose and missing bolts (Tr. 24). Mr. Underwood confirmed that the truck was taken to the shop, and that when he next saw it, it was repaired. To his knowledge, the truck was not used after the citation was issued (Tr. 24).

In response to further questions, Mr. Underwood stated that the truck operator is required to inspect his truck before operating it. Although one would have to be under the

truck to observe the drive shaft flange, the results of the rubbing action of the drive shaft against the transmission was noticeable to anyone simply walking around the truck. The truck was being operated when he stopped it to inspect it, and he observed the area which had been rubbing and wanted to know what caused it. The truck was empty and the driver did not seem to know anything about the conditions in question (Tr. 26-27). He believed that the driver should have been alerted to the condition in the normal course of his driving (Tr. 28).

On cross-examination, Mr. Underwood confirmed that the condition of the bolts, the wear on the side of the transmission where it had been working up and down, the loose bolts on the flange, and the missing bolts on the left rear of the transmission, led him to believe that the cited condition had existed for 2 or 3 days (Tr. 30). He could not state how long it would have taken to work the drive shaft loose (Tr. 31). He confirmed that he was aware of a prior accident at a mine where he once worked which was caused by a loose drive shaft which turned a haulage truck over on a decline (Tr. 31).

Mr. Underwood stated that in the event the drive shaft on the cited truck had come loose, it was possible that the driver could have stopped it safely with the brakes if he had the opportunity to do so. Although the brakes were adequate, if the drive shaft had fallen down while the truck was operating in loose dirt and rock and the end of the shaft caught on this material, it could have pulled the truck out of gear (Tr. 32).

In response to further questions, Mr. Underwood stated that the truck was used to haul expanded shell rock which was being mined, and that other company vehicles used the roadway. Pedestrians did not usually use the roadway, and the trucks normally travelled 35 miles an hour empty and approximately 10 miles an hour loaded (Tr. 34). Respondent's representative stated that the posted speed limit is 15 miles an hour for trucks which are empty and loaded, and that the distance from the pit to the quarry is about half a mile, and from the quarry to the crusher about half a mile. He concluded that the trucks do not attain much speed in the half mile of travel (Tr. 35). Mr. Underwood agreed with these distances, but suggested that the drivers exceeded the posted speed limit (Tr. 35). He also agreed that the haulage road is 80 feet wide for most locations over which the trucks are driven, except for an area directly where they enter the quarry. At

that point the roadway is 50 feet wide for a distance of 100 feet (Tr. 36).

Respondent's Testimony and Evidence

Although the respondent's safety director was present during the hearing, he was not called to testify, and the respondent presented no testimony or evidence in defense of the citation other than the arguments of its representative (Tr. 36).

Arguments Presented by the Parties

The parties waived the filing of posthearing briefs and relied on their oral arguments made on the record during the close of the hearing (Tr. 43). Respondent takes the position that the cited standard, 30 C.F.R. § 56.9002, as worded, does not apply to the cited condition of the drive shaft. Respondent points out that the standard speaks in terms of "defects affecting safety," and that since the alleged truck defect was in the drive mechanism rather than on the truck's safety equipment, the standard is inapplicable. Respondent concedes that a steering mechanism may affect safety, but not necessarily a drive shaft, especially one that is still intact and operating. Respondent also believes that the condition of the drive shaft was something that could have happened after the equipment was started and not prior to its operation. In this regard, respondent asserted that the bolts could have been in place and fallen off in the 3 hours that the truck was in operation prior to its being inspected and that "it's very hard to say that this did happen during the operating period" (Tr. 8-9; 37). Since the condition was not noted by the driver during his inspection, respondent concludes that it occurred during the operation of the truck immediately prior to the inspection (Tr. 41). However, respondent agreed that "we do not go over the truck completely every day" (Tr. 41).

The petitioner takes the position that the cited truck defect involving the drive shaft of a large haulage truck with a 25-ton capacity was in such a condition that it was subject to coming loose, causing lack of control of the vehicle, which could result in serious injury or death, and that it is in fact a defect which directly and perhaps substantially affected the safety of the employees (Tr. 8). The petitioner points out that it was not difficult for the inspector to observe the clue that led him to find the defect, and that he simply walked around the truck and observed this clue. Under the circumstances, petitioner believes that had

the operator of the truck conducted the same type of inspection, he would have detected the defect and taking appropriate corrective action (Tr. 38).

Petitioner asserted that while the cited condition indicates a possible maintenance problem, such problems, as reflected by the defect found by the inspector, directly affects safety. Petitioner pointed out that the inspector found another maintenance problem during his inspection, but did not cite it because it was not, of itself, a safety defect. With regard to the respondent's suggestion that the cited condition may have occurred during the 3 hours that the truck was operated prior to the inspection, the petitioner submits that the unrefuted testimony by the inspector is that the condition of the drive shaft simply cannot reasonably happen in 3 hours. In any event, petitioner asserts that this issue goes to the question of negligence rather than to the existence of any violation (Tr. 39). In further support of its case, the petitioner cites a decision by the Commission in Allied Chemical Corporation, 3 MSHC 1544, August 28, 1984, 6 FMSHRC 1854 (August 1984), affirming a violation of an identical surface mining standard found in 30 C.F.R. § 57.9002, in which the Commission held that "Defects affecting safety in equipment continuously in operation, including those occurring during the course of operation, must be corrected before the equipment is used any further," 3 MSHC 1584 (Tr. 40).

Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.9002, which provides that "Equipment defects affecting safety shall be corrected before the equipment is used."

In Ideal Basic Industries, Cement Division, 3 FMSHRC 843 (April 1981), the Commission affirmed a violation of section 56.9002, and stated as follows at 3 FMSHRC 144 with respect to its interpretation of the standard:

[W]e hold that use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation * * *. This interpretation is more likely to prevent accidents, a primary goal of the Act. * * *

United States Steel Corporation, 4 FMSHRC 616 (April 1982), concerned a violation of an identical standard found in 30 C.F.R. § 55.9-2. In that case, a driver of a 2-1/2-ton

pick-up truck detected that the dual rear wheels of the truck had shifted in the rear wheel-well while he was driving it. He reported the condition to his foreman, but the condition was not corrected. Two days later, another driver visually inspected the truck, and believing that it had been repaired, proceeded to drive it with a crew of men in it. On a straightaway, the driver noticed that the rear tires were smoking in the rear wheel-wells. Within seconds the rear end started to steer itself around the cab, and when the driver let up on the gas pedal, the truck's drive shaft dropped loose, and the truck overturned injuring the occupants.

The operator advanced an argument similar to that of the respondent in this case. The operator contended that the term "defects affecting safety" should be intended to cover defects which are normally associated with the safe operation of the vehicle, and that the question of whether the mechanical problem cited by the inspector constituted an equipment defect affecting safety should be interpreted in light of the knowledge and understanding of the operator's personnel at the time it was first observed, rather than after the truck had rolled over under circumstances which had never previously been known to cause a truck to turn over. Judge Steffey rejected this argument, and found that the shifting rear end of the truck constituted a "defect affecting safety" which was not corrected before the equipment was used, and he affirmed the violation.

The Commission affirmed Judge Steffey's decision, and observed as follows at 6 FMSHRC 1434-1435:

Substantial evidence also supports the judge's conclusion that the shifted rear end of this truck was a defect affecting safety * * *. There is evidence in the record that a shifted rear end is a sign of mechanical defect, with a potential to cause an accident. Also, at some point, a shift in a vehicle's rear end will affect safety. * * * In this particular instance, the shifted rear end caused the spring package to break, a punctured rear tire, the broken drive shaft to separate from the vehicle, and the truck to roll over. * * * All of these facts point to a defect affecting safety.

The Allied Chemical Corporation case cited by the petitioner involved two missing bolts on a chock leg used for roof support on a longwall system. In affirming the judge's

finding that the missing bolts constituted an equipment defect affecting safety, the Commission stated as follows at 6 FMSHRC 1857-1858:

In both ordinary and mining industry usage, a "defect" is a fault, a deficiency, or a condition impairing the usefulness of an object or a part. Webster's Third New International Dictionary (Unabridged) 591 (1971); U.S. Department of Interior, Bureau of Mines, A Dictionary of Mining, Mineral, and Related Terms 307 (1968).

* * * * *

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

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

And, at 6 FMSHRC 1859:

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

Fact of Violation

In this case the inspector issued the citation because of his belief that the loose and missing bolts on the flange plate which connected the front universal joint to the transmission presented a potential for the drive shaft to come loose, thereby resulting in loss of control of the truck. He found one missing bolt and several other bolts which were loose to the point where they could be turned with his fingers. These conditions resulted in the transmission moving up and down, and the inspector believed that even if the loosened bolts had not come completely out as the truck was driven, there was a good possibility that they would snap off, thereby causing the drive shaft to fall out. If this had occurred, and since the underside of the truck had no restraining cross-member on its undercarriage, the fallen drive shaft could possibly stick into the ground causing gear loss and a loss of control of the vehicle. Since the truck differential is hooked to the rear end of the drive shaft at the back wheels of the truck which would be turning, had the drive shaft come loose at the front end, it could whip around and possibly strike the brake lines, thereby resulting in a loss to the truck braking system.

The inspector's testimony is un rebutted, and the respondent presented no testimony or evidence to refute his contentions with respect to the cited conditions. Further, the respondent has not refuted the testimony of the inspector, which I find credible, as to the potential consequences which may flow from the loosened and missing bolts in question. There was a real potential for the drive shaft to come loose and whip around freely under the truck while it was being driven, thereby contributing to the loss of control and possible loss of braking power. Under the circumstances, and in light of the conditions which were described and cited by the inspector, I conclude and find that the missing and loose bolts in question were equipment defects affecting safety within the meaning of section 56.9002, and the citation IS AFFIRMED.

The respondent's suggestion that section 56.9002 is inapplicable because the cited conditions related to a mechanical drive mechanism, rather than a safety component of the truck is rejected. The standard makes no such distinctions, and the decisions which have been discussed with respect to the interpretation and application of this standard hold otherwise.

The respondent's assertion that the bolts could have been loosened and fallen off during the 3-hour period that the truck was in operation immediately prior to its inspection is not relevant to the fact that a violation occurred. As noted by the Commission in Allied Chemical Corporation, supra. "Defects affecting safety in equipment continuously in operation, including those occurring during the course of operation, must be corrected before the equipment is used any further" (emphasis added).

History of Prior Violations

I conclude and find that the respondent's past compliance record is not such as to warrant any additional increase in the civil penalty which has been assessed for the violation which has been affirmed.

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

I conclude and find that the respondent is a relatively small operator, and that the civil penalty which has been assessed for the violation in question will not adversely affect its ability to continue in business.

Gravity

I conclude and find that the cited conditions constituted a serious violation. Although the inspector found that the brakes on the cited truck were adequate, and that it was possible that the driver could have stopped the truck in the event the drive shaft came loose, he nonetheless believed that a loose drive shaft whipping freely under the truck could have pulled the truck out of gear, sheared the brake lines, or caused loss of control by sticking in the ground.

Negligence

While it is true that the inspector had to look under the truck to detect the cited defects, his un rebutted testimony is that the shiny spot caused by the rubbing action of the transmission which alerted him to look under the truck was readily observable to anyone walking around the truck. Given the fact that the truck driver is required to inspect the vehicle prior to placing it in operation, and given the admission by the respondent's representative that "we do not go over the truck completely every day" (Tr. 41), I conclude and find that the violation resulted from the respondent's

failure to exercise reasonable care, and that this constitutes ordinary negligence.

Good Faith Compliance

The inspector confirmed that the truck was taken to the shop after the citation was issued, and that when he next saw it the conditions had been corrected. I conclude and find that the respondent exercised good faith in abating the violation.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

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

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result

in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

I agree with the inspector's finding that the cited conditions constituted a significant and substantial violation. Based on the facts of this case, I conclude and find that it was reasonably likely that the continued operation of the truck with loosened and missing bolts which obviously affected the drive shaft would cause the drive shaft to come loose, thereby contributing to a loss of control of the vehicle and a potential accident of a reasonably serious nature. The inspector's "S&S" finding IS AFFIRMED.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the petitioner's proposed civil penalty assessment of \$147 is reasonable and appropriate.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$147 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision. Upon receipt of payment, this case is 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 31 1987

LITTLE SHEPHERD, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 87-29-D
BIG ELK CREEK COAL COMPANY, : BARB CD 86-84
Respondent :
No. 2 Deep Mine
:

ORDER OF DISMISSAL

On August 27, 1987, Respondent filed an Agreed Order executed by Respondent's Counsel, Complainant's Counsel and Complainant. The Agreed Order set forth the terms of the settlement which disposes of this matter. I approve of the terms of the settlement.

Accordingly, it is ORDERED that the Parties comply with the terms and provisions of the Agreed Order filed on August 27, 1987. It is further ORDERED that this case be DISMISSED.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

August 31, 1987

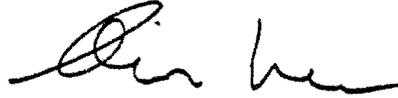
ORVILLE SPARKS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 87-181-D
	:	
SANDY FORK MINING COMPANY,	:	BARB CD 87-18
INC.,	:	
Respondent	:	No. 10 Mine
	:	
SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ON BEHALF OF	:	Docket No. KENT 87-189-D
ORVILLE SPARKS,	:	
Complainant	:	BARB CD 87-18
v.	:	
	:	No. 10 Mine
SANDY FORK MINING COMPANY,	:	
INC.,	:	
Respondent	:	
	:	

ORDER OF DISMISSAL

On January 29, 1987, Orville Sparks filed a complaint, with the Mine Safety and Health Administration, alleging that on December 2, 1986, he had been discharged by Sandy Fork Mining Company, Inc., in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977. The Secretary, by letter dated April 29, 1987, advised Mr. Sparks that the investigation of his complaint had not been completed, and that it had not yet been determined whether or not a violation of Section 105(c) had occurred. On June 12, 1987, Mr. Sparks filed his own complaint, with the Commission, pursuant to Commission Rule 40(b), 29 C.F.R. § 2700.40(b). Subsequently, on June 25, 1987, the Secretary filed his own complaint with the Commission on behalf of Mr. Sparks against Sandy Fork Mining Company, Inc. under Section 105(c)(2) of the Act. On July 23, 1987, the Secretary filed an amendment to the complaint. On July 17, 1987, the Secretary filed a Motion to Dismiss arguing that Mr. Sparks' complainant, Docket No. KENT 87-181-D, should be dismissed. In its Motion, the Secretary argued that the Federal Mine Safety Act, created a private right of action only in situations where the Secretary reaches a negative determination regarding the miner's complaint. The Secretary further argued that once it determines that a violation of the Act has occurred, the Commission no longer has jurisdiction over the private cause of action.

On August 25, 1987, the Commission, in Gilbert v. Sandy Fork Mining Co., Inc. (Slip. Op. August 25, 1987), in essence, sustained the position of the Secretary. Based on Gilbert, supra, as applied to the facts herein, the complaint of Mr. Sparks must be dismissed.

Accordingly, Docket No. KENT 87-181-D is DISMISSED.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 31 1987

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 87-15-M
Petitioner	:	A. C. No. 33-03825-05502
v.	:	
	:	Con-Ag Crushing Plant
CON-AG, INCORPORATED,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 87-51-M
Petitioner	:	A. C. No. 33-03825-05503 A
v.	:	
	:	Con-Ag, Inc.
ROBERT E. HIRSCHFIELD,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 87-84-M
Petitioner	:	A. C. No. 33-03825-05504 A
v.	:	
	:	Con-Ag, Inc.
LEE KUCK,	:	
Respondent	:	
	:	

ORDER OF CONSOLIDATION
AND
ORDER OF DISMISSAL

In the interest of justice, the unopposed Motion of Respondent to consolidate the above cases is GRANTED. It is accordingly ORDERED that the above cases be CONSOLIDATED.

On August 26, 1987, Counsel for both Parties filed a Motion for the "termination of the above captioned proceedings." Their memorandum submitted along with the Motion indicates that all Respondents have agreed to pay in full the proposed civil penalties.

Accordingly, and in the interest of justice, the above cases are DISMISSED.



Avram Weisberger
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 31 1987

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 86-230-M
Petitioner	:	A.C. No. 04-01616-05504
	:	
v.	:	Santa Margarita Mine
	:	
KAISER SAND & GRAVEL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Mr. Clair E. Hay, Manager, Kaiser Sand & Gravel Company, Pleasanton, California, pro se.

Before: Judge Cetti

STATEMENT OF THE CASE

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (Mine Act). The Secretary of Labor initiated this proceeding by the filing of a petition for assessment of a civil penalty pursuant to section 110(a) of the Mine Act. The respondent Kaiser Sand and Gravel Company (Kaiser) filed a timely answer contesting the existence of the violation, its classification as significant and substantial, and the amount of the penalty. After notice to the parties, an evidentiary hearing on the merits was held before me on May 21, 1987. The parties presented oral and documentary evidence and submitted the matter for decision waiving their right to file post-trial briefs.

On June 10, 1986, Mr. Dale Cowley an MSHA inspector conducted an inspection of respondent's Santa Margarita Quarry and Mill located at Santa Margarita, San Luis Obispo County, California. As a result of that inspection the federal mine inspector issued a citation charging the respondent with a significant and substantial violation of Title 30 C.F.R. safety standard. The citation originally alleged a violation of Title 30 C.F.R. § 56.14001. Prior to the hearing I granted the Secretary's motion to amend the citation to allege a violation of 30 C.F.R. § 56.14003, which requires guards on conveyor drive pulleys to extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley.

Stipulations

The parties stipulated as follows:

1. Kaiser Sand & Gravel is a large company and operates a moderate-sized facility. The company has close to a four million man hours' work per year as a company with about 23,000 man hours work per year at the facility.
2. Respondent has an average history having had four violations in the previous two years.
3. Imposition of the penalty will not affect the ability of respondent to continue in business.
4. The violations were abated in good faith.

Review of Evidence and Discussion

The Citation as amended by the Secretary charges Kaiser with violating 30 C.F.R. § 56.14003 which provides as follows:

Guards at conveyor drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley.

The mine inspector testified that in the course of his June 10, 1986, inspection of the secondary plant at the Santa Margarita mine he observed the guard for the V-Belt drive pulley on the wet shaker screen. He concluded the top portion of the guard did not extend a distance sufficient to prevent a miner from accidentally reaching behind the guard and getting his fingers caught between the belt and the pulley. The top portion of the guard was about three feet high and extended horizontally a distance of three-feet parallel to an adjacent designated walkway. The mine inspector concluded that if an employee were walking down the walkway and he became unbalanced or slipped he could accidentally reach behind the guard and get his fingers caught between the belt and the pulley. The violation was abated by extending the top portion of the guard towards the back a distance of three-inches. This narrowed by three-inches the gap that existed between the outer edge of the shaker screen and the inner edge of the guard through which a hand could accidentally reach behind the guard and become caught in the pinch point between the belt and the drive pulley.

Evidence was presented that just beneath the top horizontal portion of the guard are three C-120 V-belts and drive pulleys that shake the wet screens. Fingers caught in the pinch points could be amputated.

Kaiser contends that the shaker screen is not a conveyor and that therefore 30 C.F.R. § 56.14003 is not applicable and no violation existed.

The Federal Mine Inspector testified that the wet shaker screen is a conveyor of materials. As it separates the material by size, it conveys the material from one end of the screen to other. The plant manager described the screen as a "finished" shaker that screens and separates material of different sizes. The screened material drops below into a series of four bunkers. He stated that it is an inclined screen that moves material down the conveyor or screen by shaking it down. It vibrates and the material advances.

Mr. Cowley has been a mine inspector with MSHA the past eleven years and all together has had 32 years mining experience. He testified that the Dictionary of Mining, Minerals and Related Terms is the standard reference material for defining terms in the industry and is often used by his contemporaries and his supervisors. This dictionary is referenced in many court cases to define mining terms. The Secretary's counsel read into the record from page 260 of this dictionary the definition of a "conveyor vibrating type" as follows:

Conveyor, vibrating type. A conveyor consisting of a movable bed mounted at an angle to the horizontal, which vibrates in such a way that the material advances.

It satisfactorily appears from the record that the shaker screen in question is a conveyor within the meaning of the safety standard and that the safety standard is applicable.

The preponderance of the evidence establishes that the guard at the conveyor (screen shaker) drive pulley did not extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught in the pinch point and between the belt and the pulley. I therefore find that there was a violation of the guarding requirements of 30 C.F.R. § 56.14003. However, I do not find from the evidence presented that the violation was significant and substantial.

A violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of

danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission pointed out that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834 at 1836 (August 1984). The Commission has further explained that in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial, 6 FMSHRC 1836.

While it is possible that the hazard contributed to will result in an event in which there is an injury this possibility is relatively remote. Even though the guard as it existed in place at the time of the inspection was not sufficient to fully satisfy the requirements of the safety standard, it was sufficient to reduce the likelihood of injury to "unlikely". It is therefore found under the evidence presented in this case that it is unlikely that the hazard contributed to by the violation will result in injury.

The mine inspector testified that the V-Belt and drive pulleys were guarded on all sides and ends except the back. He stated "the hazard was not obvious just by walking by observing".

The plant manager testified that he has walked around with each of the mine inspectors on all inspections of the site since he became manager eight or nine years ago. He stated that the area where the guard in question is located has been inspected before and mine inspectors have never issued a citation or made any comment about this particular guard.

The violation was easily and completely abated by extending the top of the guard three-inches. While the fact that no prior MSHA inspection found that the guard was inadequate is of no weight or value on the issue of the existence of the violation, it is consistent with the finding that the violation was not a significant and substantial violation and also with a finding that the operators negligence was low.

The gravity of the violation is high with respect to the seriousness of the injury which could result if one's fingers became caught in the pinch point of the V-Belt drive pulley but is evaluated as low with respect of the likelihood of such an accident. I accept the stipulation of the parties with respect to the remaining statutory criteria set forth in section 110(i) of the Mine Act.

Based upon my consideration of the six statutory penalty criteria in section 110(i) of the Mine Act I conclude that the appropriate penalty for this violation is \$50.00.

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

Conclusions of Law

1. The Santa Margarita Quarry and Mill operated by Kaiser Sand & Gravel Company at Santa Margarita San Luis Obispo County, California is subject to the provisions of the Mine Act.
2. The Commission has jurisdiction to decide this case.
3. The respondent violated safety standard 30 C.F.R. § 56.14003.
4. The violation was not significant and substantial and said allegation is stricken from the citation.
5. The citation as modified is affirmed and a civil penalty of \$50.00 assessed.

ORDER

Accordingly, the citation as modified is affirmed and Kaiser Sand and Gravel Company is ordered to pay within 30 days of the date of this decision a civil penalty of \$50.00.


August F. Cetti
Administrative Law Judge

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