AUGUST 1989

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

AUGUST 1989

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

Secretary of Labor, MSHA v. Mountain Parkway Stone, Inc., Docket No. KENT 89-27-M. (Judge Weisberger, July 14, 1989)

There were no cases in which review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 21, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 89-86-M
INDUSTRIAL CONSTRUCTORS CORPORATION	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). On June 13, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Dismissal, stating that the Commission had been informed by the Secretary that the proposed penalty in this case had been paid. By letter dated July 24, 1989, addressed to counsel for the Secretary and copied to Judge Merlin, Industrial Constructors Corporation ("Industrial Constructors") states that its payment of a different civil penalty, for Citation No. 3065456, appears to have been mistakenly applied to Citation No. 2876658, the subject of the present proceeding. The operator requests that this matter be reopened. A copy of this letter was received by the Commission on July 27, 1989. We deem the operator's letter to constitute a request for relief from a final Commission order, incorporating a late-filed petition for discretionary review. For the reasons set forth below, we grant review, vacate the judge's dismissal order, and remand this matter for further proceedings.

The judge's jurisdiction in this matter terminated when his order of dismissal was issued. 29 C.F.R. § 2700.65(c). Because the judge's decision has become final by the operation of law (30 U.S.C. § 823(d)(1)), we can consider the merits of Industrial Constructors' request, received by the Commission after the judge's decision became final, only if we construe it as a request for relief from a final Commission decision incorporating a late-filed petition for discretionary review. See, e.g., A.H. Smith Stone Company, 11 FMSHRC 796, 797-98 (May 1989), and authorities cited.

Here, Industrial Constructors asserts in its letter that the reason that its request for relief from the judge's dismissal order was late was because it did not receive the judge's order or it was misplaced in the company's office. Under the circumstances, we excuse the late filing, and consider the letter as a petition for discretionary review. See generally, M.M Sundt Construction Co., 8 FMSHRC 1269, 1270-71 (September 1986). See also Ten-A-Coal Co., 10 FMSHRC 1132, 1133 (September 1988).

An operator's payment of a civil penalty extinguishes its right to contest the penalty and the underlying alleged violation, except where payment has been made by genuine mistake. Old Ben Coal Co., 7 FMSHRC 205, 207-10 (February 1985). The operator's request for relief questions the basis upon which the judge's dismissal order rests. The operator's letter suggests that the operator should be heard with respect to the correctness of the Secretary's prior notification to the Commission that the proposed civil penalty for the citation in issue had been paid. See Coal Junction Coal Co., 11 FMSHRC 502, 503 (April 1989).

Accordingly, we grant the operator's petition for discretionary review, vacate the dismissal order, and remand this matter to the judge for further proceedings.

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 21, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of JOHN W. BUSHNELL	:	
v.	:	Docket No. WEVA 85-273-D
CANNELTON INDUSTRIES, INC.	:	

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

ORDER

BY THE COMMISSION:

This discrimination case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), is before us on remand from an opinion of the United States Court of Appeals for the District of Columbia Circuit reversing our prior decision in this matter. Secretary of Labor on behalf of John W. Bushnell v. Cannelton Indus., Inc., 867 F.2d 1432 (1989), rev'g, 10 FMSHRC 152 (February 1988). At issue is the scope of the pay protection afforded miners with evidence of pneumoconiosis (Black Lung disease) by relevant provisions of the Mine Act and the Secretary of Labor's regulations at 30 C.F.R. Part 90.

The discrimination complaint filed by the Secretary of Labor on John W. Bushnell's behalf in this matter alleged that Cannelton Industries Inc. ("Cannelton") discriminated against Bushnell, a "Part 90 miner," in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), when, after a job transfer occurring as part of a company-wide work force reduction and realignment, he was paid at a rate lower than the rate he was receiving immediately prior to his transfer. The transfer at issue occurred several years after Bushnell's initial transfer without loss of pay to a low-dust job pursuant to 30 C.F.R. Part 90. Commission Administrative Law Judge William Fauver determined that Cannelton unlawfully discriminated against Bushnell when it failed to compensate him after his second transfer at the same rate of pay that he had received prior to that transfer. 8 FMSHRC 1607 (October 1986)(ALJ). In essence, Judge Fauver concluded that the Part 90 pay protection provision set forth at 30 C.F.R. § 90.103(b) applies whenever

a Part 90 miner is transferred and is not limited only to transfers as a result of exposure to respirable dust. 8 FMSHRC at 1608-09. The judge awarded Bushnell back pay of $161.14 plus interest on that sum to be "computed in accordance with the Commission's rulings concerning interest" and assessed Cannelton a civil penalty of $25. 8 FMSHRC at 1609-10. We granted Cannelton's petition for discretionary review, which was limited to the sole issue of the judge's construction of the pay protection afforded to Part 90 miners by the Secretary's regulations.

In our prior decision, we disagreed with the judge. We concluded that both the general pay protection provisions of section 101(a)(7) of the Mine Act, 30 U.S.C. § 811(a)(7), and the regulations set forth in Part 90 applied only to exposure-related transfers, not to all transfers. 10 FMSHRC at 155-59. Finding that Bushnell was transferred as part of a bona fide, non-discriminatory work force reduction and realignment, we held that the immediate pay protection right enjoyed by Bushnell when he was initially transferred to a low-dust position did not obtain on the occasion of his later, nonexposure-related transfer. 10 FMSHRC at 159. In this regard, we stated that "the pay protection provisions of the Mine Act and the Part 90 regulations do not grant Part 90 miners a vested pay entitlement that insulates them against all negative business and economic contingencies affecting their employers." 10 FMSHRC at 154-55 (emphasis in original). Accordingly, we reversed the judge's decision, dismissed Bushnell's discrimination complaint, and vacated the backpay award and civil penalty.

The Secretary appealed our decision, and the Court, reversing our decision, stated:

> We hold that the Commission failed to extend the appropriate deference to the Secretary's interpretation of her own regulations and of the Mine act. The Commission erred insofar as it held that section 90.103(b) protects the Part 90 miner's wage only upon dust-related transfers and that a contrary interpretation would violate the Mine Act. Accordingly, we reverse the Commission's decision and remand this case to the Commission with directions to adopt the ALJ's decision in favor of Bushnell.

867 F.2d at 1439.

Accordingly, the judge's decision and assessment of civil penalty are reinstated. Cannelton is directed to pay Bushnell the back pay awarded by the judge, with interest calculated in accordance with the formula set forth at 54 Fed. Reg. 2226 (January 19, 1989). See Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988), pet. for review filed, No. 88-1873 (D.C. Cir. December 16, 1988).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

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 21, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	
UNITED MINE WORKERS OF AMERICA	:	Docket No. WEVA 87-272
v.	:	
BIRCHFIELD MINING COMPANY	:	

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

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), counsels for petitioner Secretary of Labor and respondent Birchfield Mining Company ("Birchfield") have filed a Joint Motion for Approval of Settlement. The motion states that counsel for the United Mine Workers of America ("UMWA") has no objection to the proposed settlement. For the following reasons, the parties' settlement is approved and this matter is dismissed.

In January 1989, acting on Birchfield's petition for discretionary review, we affirmed the decision of Commission Administrative Law Judge Gary Melick (9 FMSHRC 2209 (December 1987)(ALJ)), which found that Birchfield had violated 30 C.F.R. § 75.303(a) and that the violation resulted from Birchfield's unwarrantable failure to comply with that mandatory standard. 11 FMSHRC 31 (January 1989). A majority of the Commission reversed Judge Melick's finding that the violation was of a significant and substantial nature; a minority of the Commissioners dissented on that point. Birchfield had also contended that the judge had erred in assessing a $400 civil penalty for the violation. In view of its determination that the violation was not significant and substantial, the majority remanded the case to the judge for reconsideration of the appropriate civil penalty.

Judge Melick issued a decision on February 2, 1989, assessing a revised penalty of $300. 11 FMSHRC 198 (February 1989)(ALJ). The Secretary filed a petition for discretionary review, arguing, in essence, for reconsideration of the Commission's prior determination with respect to the significant and substantial issue. The UMWA, which had not previously

participated in this proceeding as a party, intervenor, or amicus also filed a petition for review similarly seeking reconsideration of the significant and substantial issue. By order issued March 14, 1989, we granted both petitions and again directed review. In the meantime, on March 10, 1989, Birchfield had paid to the Secretary the civil penalty of $300 assessed by the judge, which payment the Secretary subsequently accepted.

Following the Commission's Direction for Review, the National Coal Association ("NCA") and Bituminous Coal Operators Association ("BCOA") jointly and the American Mining Congress ("AMC") individually filed motions to intervene. Concurrently with their motion, the NCA and BCOA, joined by Birchfield, filed a motion to dismiss the Secretary's and the UMWA's review petitions. The AMC, also joined by Birchfield, filed a similar motion to dismiss. In turn, the Secretary and the UMWA opposed both motions to intervene and both motions to dismiss.

On June 22, 1989, Birchfield filed a Renewed Motion to Dismiss and Offer of Judgment. Birchfield asserted that the case was moot due to its payment of the $300 civil penalty. Birchfield further stated that it "d[id] not wish to incur further litigation expenses...." Pursuant to Fed. R. Civ. P. 68, Birchfield also "offer[ed] to have a judgment entered against it and in favor of the Secretary of Labor for $400 ..., raising the total payment by Birchfield to the amount of the original penalty proposal." Following the filing of this motion, settlement discussions ensued among the parties.

On July 17, 1989, the Secretary and Birchfield filed a Joint Motion for Approval of Settlement. Noting the Commission's prior divided opinion with respect to the significant and substantial issue, the parties state that they "recognize that final resolution of the [significant and substantial] issue ... is a matter that is not free from doubt...." The parties further "recognize that extensive resources have been expended in the litigation to date and that additional resources will be expended in further pursuit of the litigation should it continue." The motion asserts that "[i]n light of the above considerations, the operator has determined that it no longer wishes to contest the [underlying] citation, its significant and substantial or unwarrantable failure findings, or the assessment of civil penalty."

As part of the settlement, Birchfield agrees to pay a penalty of $400, the amount originally proposed by the Secretary and first assessed by Judge Melick. Birchfield also agrees to withdraw its previous petition for discretionary review that was the subject of our prior decision. In turn, the Secretary agrees to withdraw her present petition for review. The parties request the Commission to vacate its initial direction for review of Birchfield's petition, its January 1989 decision, its subsequent direction for review of the Secretary's and UMWA's petitions, the judge's original December 1987 decision, and the judge's February 1989 decision on remand. The motion indicates that counsel for the UMWA has authorized counsel for the Secretary to state that the UMWA "does not object to the settlement" and that, upon Commission approval of the stated settlement terms, "agrees to vacation" of the Commission's direction for review of the UMWA's review petition. Birchfield's earlier Offer of Judgment represented that the NCA and BCOA

had no objection to the relief sought and, subsequent to the filing of the joint settlement motion, the AMC submitted a statement of non-objection to the settlement motion.

Oversight of proposed settlements of contested cases is an important aspect of the Commission's adjudicative responsibilities under the Mine Act (30 U.S.C. § 820(k)), and is, in general, committed to the Commission's sound discretion. See, e.g., Pontiki Coal Corp., 8 FMSHRC 668, 674-675 (May 1986). As we have observed, "our 'responsibility under the Mine Act is to ensure that a contested case is terminated, or continued, in accordance with the Act.'" Southern Ohio Coal Co., 10 FMSHRC 1669, 1670 (December 1988)("SOCCO"), quoting, Youghiogheny & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985). The Commission has granted motions to vacate citations and orders and to dismiss review proceedings if "adequate reasons" to do so are present. E.g., SOCCO, supra, and authorities cited. Here, the real parties in interest, the Secretary and Birchfield, have stated their mutual desire to terminate a course of litigation that has become expensive and onerous to them. The operator has agreed to pay in full the civil penalty originally proposed by the Secretary. None of the parties who have filed petitions for review or motions to intervene have raised any objection to the proposed settlement.

In the past, the Commission has vacated enforcement actions and directions for review in granting dismissal motions on review. We conclude that the nature of the relief sought here is not inconsistent with the Commission's inherent powers as an adjudicative body under section 113(d) of the Act, 30 U.S.C. § 823(d), and lies within its zone of discretion in this legal area. We further conclude that, in light of the unique circumstances of this proceeding, adequate cause exists to grant the parties' joint dismissal motion.

Therefore, upon consideration of the motion, it is granted. Our two directions for review in this proceeding are vacated and the underlying petitions for review are dismissed. Our prior decision and the judge's decisions are also vacated. In view of this action, all other pending motions are dismissed as moot.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 24, 1989

RUSHTON MINING COMPANY	:	
	:	
v.	:	Docket No. PENN 88-99-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

At issue in this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"), is whether a violation by Rushton Mining Company ("Rushton") of 30 C.F.R. § 75.1704-2(a), requiring that escapeways follow the "safest direct practical" route out of a mine, was significant and substantial in nature. 1/ Commission Administrative Law Judge Avram Weisberger concluded that Rushton violated the regulation but that the violation was not significant and substantial. 10 FMSHRC 713 (June 1988)(ALJ). We granted the Secretary of Labor's petition for discretionary review, which was limited to the issue of whether the judge erred in finding that the violation was not significant and substantial. For the reasons

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1/ 30 C.F.R. § 75.1704-2(a) provides as follows:

> In mines and working sections opened on and after January 1, 1974, all travelable passageways designated as escapeways in accordance with § 75.1704 shall be located to follow, as determined by an authorized representative of the Secretary, the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners. Escapeways from working sections may be located through existing entries, rooms, or crosscuts.

that follow, we affirm the judge's finding.

Rushton owns and operates the Rushton Mine, an underground coal mine in Pennsylvania employing approximately 257 miners. On December 8, 1987, Donald Klemick, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the 2N-3 section of the mine. Approximately seven miners were working in rooms 11-15 of that section. Klemick found that the primary escapeway designated for those miners was approximately 2,100 feet in length, was roundabout in nature, and contained four 90 degree turns. See Exh. JX-4.

Klemick believed that Rushton could have designated a shorter, more direct practical route out of rooms 11-15 of the 2N-3 section. Tr. 29-30. Accordingly, he cited Rushton for violating section 75.1704-2. 2/ The citation alleged:

> The designated intake escapeway from the 2N-3 002 section to the intake shaft escape facility was not located to follow the safest, direct practical route. The escapeway was designated outby from the section to station 7737, through crosscuts to station 7792, then inby to the shaft a distance of about 2100 feet. The safest, direct practical route would be from the section traveling in a direct route to the shaft of about 500 feet.

Klemick designated the violation to be of a significant and substantial nature because he believed that there would be a reasonable likelihood of serious injury in an emergency situation.

After consultation with MSHA, Rushton abated the violation by designating a new escapeway route from the 2N-3 working section to the No. 2 shaft. This new route was approximately 500 feet in length and involved only one turn. Exhibit JX-4. In the Secretary's view, this new escapeway was not only the most direct route but also the safest and most practical.

After Rushton's mining of rooms 11-15 was completed, mining went outby room 11 to a second set of five rooms, and then continued further outby to a third set of rooms. For these rooms, Rushton reverted to its designation of the original escapeway route for which it had been cited. Use of the original Rushton escapeway for the second set of rooms involved traveling a distance of 1,600-1,700 feet, while use of the escapeway designated for purposes of abatement of the violation at issue would have involved traveling a route of 800 feet. On mining the third set of rooms, the designated escapeway involved a distance of 1,400

2/ Klemick's citation alleged a violation of 30 C.F.R. § 75.1704-2(b). At the hearing before the judge, the Secretary, without objection, moved to amend the citation to allege a violation of 30 C.F.R. § 75.1704-2(a) in order to conform to the point in time during which the affected area of the mine was opened. The judge permitted the amendment. Tr. 6-7.

feet, while use of the escapeway designated for abatement of the violation would have involved a distance of 1,200-1,300 feet. Mine Manager Raymond Roeder, Rushton's witness, testified that an inspector (not Klemick) examined Rushton's designated escapeway from the second set of rooms and that, to his knowledge, Rushton was not cited for redesignation of the escapeway originally found to be in violation. Tr. 123-24. Roeder also stated that Klemick examined Rushton's designated escapeway for the third set of rooms but did not issue any citations for the escapeway. Tr. 125-26.

In his decision, Judge Weisberger concluded that Rushton's cited escapeway was in violation of section 75.1704-2(a) because it was not a direct route to the shaft. 10 FMSHRC at 718. He also found that the escapeway designated in order to abate the violation was direct and less than one third the distance of the cited escapeway. 10 FMSHRC at 716-18. 3/ The judge stated:

> In the event [of] a hazard necessitating escape from the section, it is clear that an indirect route containing three 90 degree jogs and doubling back on itself, is a greater impediment to a speedy exit from a dangerous situation as opposed to the MSHA escapeway, which is direct and less than one third of the distance of the Rushton escapeway. As such, it must also be considered to be the "safest" within the purview of section 1704-2(a)....

10 FMSHRC at 718. The judge further determined, however, that the violation was not significant and substantial. He stated:

> Klemick testified that the use of the Rushton escapeway, as it is longer than the MSHA one, could result in a fatality by a miner being exposed to smoke or could result in falls occasioned by the rush to leave a dangerous situation. However, in essence, he indicated that in the absence of specific information, as to a specific hazard, it would be difficult for him to tell what would occur if one would have to use the Rushton escapeway. As such, I must find that the Respondent [Secretary] has not met its burden in establishing that the violation herein is to be considered significant and substantial (see Mathies Coal Co., 6 FMSHRC 1 (January 1984)).

10 FMSHRC at 718.

3/ The judge stated that the length of the cited escapeway was approximately 1,700 feet. 10 FMSHRC at 716. The evidence in the record, however, is that the cited escapeway was approximately 2,100 feet, as stated in the citation. See Exhibit JX-4; Tr. 12, 29, 109-10, 123, 158.

No issue as to the fact of violation has been raised before us on review. The only question presented is whether the judge erred in concluding that the violation was not of a significant and substantial nature. The Secretary submits that the seriousness of Rushton's violation of the escapeway standard must be evaluated within the context of the occurrence of an emergency and in comparison to the escapeway subsequently designated. In the Secretary's view, use of the cited escapeway in an emergency situation would create a significantly greater likelihood of serious injury than would the shorter, more direct escapeway designated for purposes of abating the violation. The Secretary focuses on the greater length and less straightforward configuration of the cited escapeway, and on the additional escape time needed for use of the Rushton route.

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. 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:

> 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.

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

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," and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-02 (July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2011-12 (December 1987). Finally, the Commission has emphasized that 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 Co., 6 FMSHRC 1834, 1836 (August 1984).

Under this precedent and based on our review of the record, we conclude that substantial evidence supports the judge's finding that Rushton's violation was not significant and substantial in nature.

The judge's finding of a violation is not at issue on review and, therefore, the first element of the Mathies test has been established. The second element of Mathies requires the Secretary to prove that the violation of section 75.1704 presented a discrete safety hazard. The Secretary submits that the length of the cited escapeway and the purported inability in an emergency situation to exit the mine quickly and directly present a discrete safety hazard. We conclude, however, that the Secretary has failed to show that the distance, travel time, or any inherent qualities of the cited route posed a discrete safety hazard.

The length of a mine escapeway, in and of itself, is not dispositive of the existence of a discrete safety hazard. Insofar as this record reflects, the cited escapeway, approximately 2,100 feet in length, was the shortest escapeway in the Rushton mine. Tr. 109. The length of the primary escapeways to the surface from the other five working sections of the mine were 11,610 feet, 9,600 feet, 7,060 feet, 4,750 feet, and 2,470 feet. Tr. 100-01. The length of the mine's secondary escapeways from all six sections varied from 9,100 to over 14,000 feet. Tr. 101. Nothing in this record indicates that the other escapeways, all longer than the escapeway at issue (some by a quite considerable extent) have been deemed hazardous by MSHA because of their distances. See Tr. 101. Thus, the evidence of the length of the cited escapeway cannot be viewed as establishing per se a discrete hazard 4/.

Additionally, all the evidence of record suggests that the cited escapeway was in safe condition. Klemick's notes on his December 8, 1987 visit to the mine indicate that the cited escapeway was "maintained in good condition." S. Response to Interrogatories. Klemick testified that the escapeway was "in good condition" and that he encountered no obstacles along the course of the escapeway that would impede passage. Tr. 62-63. Further, Klemick did not issue a citation to Rushton for any violation of section 75.1704 requiring that escapeways "shall be

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4/ Moreover, the Secretary did not introduce any evidence comparing the times required to travel the cited escapeway or the subsequently designated route. Rushton's witness Roeder testified, however, that a person in a hurry could traverse the cited route in seven minutes. Tr. 110. The Secretary has not disputed the accuracy of Roeder's testimony on the time required to travel the cited route. Although Roeder conceded that it would take less time to travel the new escapeway (Tr. 140), the fact that there would be some difference between the seven minutes travelling the cited route and an unknown, but lesser amount of time travelling the new route is not, by itself, probative of a "meaningful" delay in reaching the surface. See Florence Mining Co., 11 FMSHRC 747, 755-56 (May 1989).

maintained in safe condition." Tr. 62.

While the cited route contains several 90 degree turns, it resembles a rectangle in shape. That configuration was not established to be so intrinsically confusing as to be a discrete safety hazard. Also, other factors indicated advantages of the cited route. Rushton presented evidence through a member of the mine safety committee that the cited route provided access to the alternative (secondary) escape route and possible transportation, but that such access was lacking with respect to the route that was designated for abatement of the violation. Tr. 169-70; Exhibit JX-4. Furthermore, finding that the cited escapeway was located in an intake entry while the MSHA-designated escapeway relied upon leakage of air from a hole around a door in the escapeway, the judge concluded that the cited escapeway "clearly" provided more air. 10 FMSHRC 716-17.

Finally, with regard to the third and fourth elements of the Mathies test, we conclude that the Secretary also has failed to show that the violation created a reasonable likelihood of reasonably serious injury. The Secretary argues that, assuming an emergency, there was a reasonable likelihood of serious injury due to the violation. The reasons set forth above substantiating the Secretary's failure to prove a discrete safety hazard apply with equal force here. The Secretary has failed to show that differences in distance, travel time, or any inherent qualities between the cited route and the new route posed a threat involving a reasonable likelihood of reasonably serious injury in the event of an evacuation. We emphasize in this regard that, as the judge noted (10 FMSHRC at 718), Klemick was extremely vague as to the type of injury that he believed was likely to occur (see Tr. 23-24, 61) and he shed little, if any, light on the likelihood of any injury or its seriousness. For example Klemick stated that "it's very difficult, if not impossible, to state what kind of injury [might occur]." Tr. 24.

For the reasons set forth above, we conclude that substantial evidence supports the judge's finding that the Secretary did not prove the violation of section 75.1704-2(a) was significant and substantial in nature and we affirm his decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 24, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 87-343
CONSOLIDATION COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), involves three citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Consolidation Coal Company ("Consol") at its Arkwright No. 1 Mine in Osage, West Virginia, for alleged violations of mandatory electrical safety standards. Consol contended before Commission Administrative Law Judge Avram Weisberger that, because the electrical equipment cited for the violations was exclusively owned and operated by its independent contractor, Frontier-Kemper, Inc. ("Frontier"), MSHA should not have cited Consol for Frontier's alleged violations. Judge Weisberger rejected Consol's arguments as to liability and determined, inter alia, that Consol had violated the standards in all three instances. 10 FMSHRC 745 (June 1988)(ALJ). The Commission granted Consol's petition for discretionary review, which asserted that the judge erred in finding Consol liable, without regard to fault, for its contractor's activities. We conclude that Consol could properly be cited for the violations in question, and we affirm.

The underlying facts are not in dispute. Consol contracted with Frontier to construct, by "raise boring" methods, an 830-foot deep mine ventilation shaft in the Jake's Run area of the Arkwright No. 1 Mine. "Raise boring," also referred to as "up-drilling," is a method of shaft building whereby the shaft is drilled to the surface from an underground location, following a small diameter pilot hole. Frontier is one of the

few specialists in this particular method of shaft drilling and construction.

At a preconstruction conference, Frontier and Consol discussed Frontier's requirements for performing the work and apportioned responsibilities for roof/rib control, ventilation, and the conduct of preshift and on-shift examinations. It was agreed that electric power would be brought to the work site via Consol's power center, that Frontier would run its cables from the power center, and that Frontier employees would not leave their work site during the shift. Frontier also agreed that its certified electricians would conduct inspections of Frontier electrical equipment and that Consol would conduct all other required examinations. Subsequently, Consol performed those other examinations, hazard-trained Frontier personnel, transported Frontier personnel in and out of the mine, and instructed Frontier personnel as to escape routes. Consol personnel did not direct the Frontier work force in any way. 1/

On June 9 and 10, 1987, MSHA Inspector Edwin Fetty, accompanied by MSHA Inspector Alex Volek, inspected the Main Butt Section in the Jake's

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1/ Consol management at the Arkwright No. 1 Mine based its relationship with Frontier upon a Consol memorandum, "Inspection of Independent Contractors," issued to mine personnel on or about December 31, 1985. The memorandum provides in pertinent part that:

> [T]he following are recommended when inspecting Consol properties on which independent contractors are working:
>
> No inspection of the workplace of contractor's employees should be made;
>
> If you casually observe contractor's employees either committing an unsafe act or violating state or federal statutes or regulations, the contractor's supervisor may be so informed. Consol personnel should not attempt to require the contractor or the contractor's employees to make corrections, or otherwise take specific actions;
>
> If it appears that Consol employees may be endangered by the actions of contractor's employees, all endangered Consol employees should be withdrawn from the affected area(s) and the contractor's supervisor should be informed of the actions taken and the reasons for taking such actions and;
>
> If it appears that Consol property is endangered by the actions of the contractor's employees the contractor's supervisor should be notified.

Exh. RX-4 (emphasis in original).

Run area of the Arkwright Mine. Fetty, who specializes in electrical/mechanical problems, made the spot inspection because another inspector had informed him of a reported ignition at the Frontier up-drilling site. Inspector Volek had been assigned to "key in" on independent contractors because their accident rate had risen.

Inspector Fetty observed the violative conditions in issue on June 9 and took enforcement actions against Frontier on that date, including issuance of a withdrawal order and citation pursuant to section 104(d) of the Mine Act. 30 U.S.C. § 814(d). Because no responsible Consol official was present at the time, he returned the next day and issued three section 104(a) citations to Consol. Frontier paid the civil penalties proposed by MSHA for its violations but Consol contested the alleged violations issued to it.

With respect to the first violation, Inspector Fetty found that an oil pump motor on a rotary blower was not equipped with a fail-safe device designed to cause a circuit breaker to open when either the pilot or the ground wire was broken. The citation issued to Consol pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleged a violation of 30 C.F.R. § 75.902. 2/ Inspector Fetty also opened the circuit breaker box for a 540 amp, 500 hp. blower motor owned by Frontier and observed that the circuit breaker was set at 12,000 amps. The inspector testified that the proper setting for a circuit breaker is from five to ten times the amperage on the equipment serviced by the circuit, so that the circuit breaker should have been set for a maximum of 5,400 amps. The citation issued to Consol pursuant to section 104(a) of the Mine Act alleged a violation of 30 C.F.R. § 75.518-1. 3/ In addition, the inspector examined the conducting cable to the same blower motor. He determined that the cable was inadequate to carry safely the 540 amps drawn by the blower motor. The citation issued to Consol pursuant to section 104(a) of the Act alleged a violation of 30 C.F.R.

2/ 30 C.F.R. § 75.902 provides in pertinent part:

> [L]ow- and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken....

3/ 30 C.F.R. § 75.518-1 provides in pertinent part:

> A device to provide either short circuit protection or protection against overload which does not conform to the provisions of the National Electric Code, 1968, does not meet the requirement of § 75.518....

§ 75.513-1. 4/

At the hearing, Fetty testified that he issued the above citations to Consol in addition to Frontier because the violations occurred in Consol's mine, Consol employees were working there a portion of the time, and any of the cited conditions could affect other employees and areas of the mine if, for example, a fire occurred. Inspector Volek understood that no Consol people were allowed into the Frontier work area to do anything or to direct the Frontier employees but stated that Consol had overall responsibility for safety of the mine and should have made an effort to ensure Frontier's compliance with standards. Volek indicated that in determining whether to recommend that Fetty issue the citations to Consol, he considered the nature of the violations, Consol's work relationship with Frontier, and the fact that the violations occurred underground and could pose a potential hazard to Consol's own employees. Volek testified that there are some situations where only one party -- the production-owner or the independent contractor -- would be cited, but that in some circumstances, as here, both would be held responsible.

Before the judge, Consol conceded that it was "the rule" of the United States Courts of Appeals for the 4th, 9th and D.C. Circuits that "the production operator can be held strictly liable for the violations of its independent contractor, permitting the Secretary of Labor to cite either the owner or the contractor or both," and asserted that it did not contest the fact that Consol is an "operator" under the Mine Act. Consol Post-Hearing Brief at 12-13. Consol argued, however, that the appropriate inquiry was whether the Secretary's enforcement discretion was properly exercised in this case. Contending that it was not, Consol asserted that Commission precedent, particularly Phillips Uranium Corp., 4 FMSHRC 549 (April 1982), in which the Commission reversed the judge who had upheld the citations against the operator, permitted a Commission judge to consider the circumstances relevant to the citing of a production-operator as opposed to its independent contractor and that the judge should adhere to Commission guidance in this regard.

The judge rejected Consol's arguments and determined that the rationale in Phillips, supra, was inapposite to the instant proceeding. He stated that Phillips involved a situation where only the operator was cited for violations in connection with shaft construction by an independent contractor. The judge held that Phillips was not controlling on the issue of whether the operator and the independent contractor, who had been separately cited for the violations, were jointly liable under the Mine Act. 10 FMSHRC at 749. The judge concluded that Consol was properly cited by the Secretary, based on a line of court and Commission cases holding, in essence, that "the owner

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4/ 30 C.F.R. § 75.513-1 provides in part that:

> An electric conductor is not of sufficient size to have adequate carrying capacity if it is smaller than is provided for in the National Electric Code, 1968....

of a mine is liable for the independent contractor's safety violations without regard to the owner's fault." Id. The judge cited Bituminous Coal Operators Association v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977); International Union, United Mine Workers of America v. FMSHRC, 840 F.2d 77 (D.C. Cir. 1988); Cyprus Indus. Minerals Company v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981); Old Ben Coal Company, 1 FMSHRC 140 (October 1979), aff'd No. 79-2367 (D.C. Cir. January 6, 1981); and Republic Steel Corporation, 1 FMSHRC 5 (April 1979). 10 FMSHRC at 749-50. The judge went on to affirm the three citations and assess civil penalties of $20 for each of the three violations.

On review, Consol does not take issue with the Secretary's authority to cite either the owner, the independent contractor or both for violations of the Mine Act. Rather it challenges whether the Secretary properly exercised that authority in choosing to cite Consol as well as its independent contractor. Court precedent makes clear that the Secretary has retained wide enforcement discretion and that courts have traditionally not interfered with the exercise of that discretion. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986). In this instance, the Secretary pursued enforcement action against both a production operator and its contractor for electrical violations occurring in an underground mine setting wherein the employees of both the production operator and the independent contractor were exposed to potential hazards occasioned by the violations. We have carefully reviewed the record, the judge's decision, and the parties' arguments. We hold that the judge's conclusion that the Secretary's discretion was not abused in citing Consol in addition to Frontier for these particular violations is supported by the record, summarized above, relating to the violations and the inspectors' reasons for citing both parties, and is also supported by applicable precedent. See, e.g., Old Ben, supra, 1 FMSHRC at 1481-86; Intl. U., UMWA v. FMSHRC, supra, 840 F.2d at 83; Brock v. Cathedral Bluffs Shale Oil Co., supra, 796 F.2d at 537-38; BCOA v. Secretary, supra, 547 F.2d at 246.

Accordingly, we affirm.

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

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August 25, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket Nos. PENN 87-94
	:	PENN 87-200-R
BETHENERGY MINES, INC.	:	PENN 87-201-R
		PENN 88-38

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

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act"), and involves three alleged violations of 30 C.F.R. § 75.1704, the mandatory escapeways standard for underground coal mines. 1/ The issue is whether the cited areas are "working sections"

1/ Section 75.1704 essentially restates section 317(f)(1) of the Mine Act, 30 U.S.C. § 877(f)(1), and provides:

> Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of

within the meaning of the standard and, thus, subject to the requirements of section 75.1704.

Commission Administrative Law Judge Roy J. Maurer concluded that the subject areas were not "working sections" and vacated the two citations and the order of withdrawal containing the violations and dismissed the associated civil penalty proceeding. 10 FMSHRC 224 (February 1988) (ALJ). We granted the Secretary of Labor's petition for discretionary review and heard oral argument. For the reasons that follow, we affirm the judge.

I.

The facts underlying the cited conditions in this matter are essentially uncontroverted.

Docket No. PENN 87-94

Several weeks before October 7, 1986, BethEnergy Mines, Inc. officials began rehabilitating the 1 Right Section in the Mine 84 Complex ("Complex") and assigned workers there, on an intermittent basis, to ready the section for resumption of coal production, which had ceased ten months earlier in December 1985. On October 7, 1986, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Lloyd Smith, conducted a regular quarterly inspection of the Livingston Portal area of the Complex. Before he proceeded underground, the inspector was advised by a company official that a crew had been sent into the 1 Right Section. There were several things that needed to be done on that section before coal production could begin, including clean-up work.

Upon arriving at the section, Smith observed the crew, as well as a mechanic and several construction workers. A continuous mining machine, a roof bolting machine, a shuttle car, an air pump, and a belt conveyor were present in the area. A load center was also present but it was not yet operable. Because the load center was not operable, there was no power in the 1 Right Section. In addition, the belt conveyor was inoperable because there was no hopper at the end of the belt to receive coal from the shuttle car. Because of various difficulties, coal production on the section was not actually resumed until December 1986.

Inspector Smith reviewed the section map and travelled the No. 2 and No. 3 entries, the routes identified on the map as the designated

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> the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

(Emphasis added.)

intake air and alternate escapeways. Smith discovered that the escapeways were obstructed by two seven-foot high metal overcasts with no means for traversing them. 2/ Smith, believing the 1 Right Section to be a "working section" requiring two travelable escapeways "maintained to insure passage at all times of any person," concluded that the obstructed escapeways violated section 75.1704, and he cited BethEnergy for a violation of the standard. Subsequently, BethEnergy abated the violation by installing steps with handrails at each overcast.

Docket No. PENN 87-200-R

Some nine months later, on July 27, 1987, MSHA Inspector William Brown conducted an inspection of the same general area of the Complex. This inspection took place at the end of a month long mine shutdown. Prior to travelling underground, Brown was advised by a union safety committeeman that a roof fall had occurred in the designated intake air escapeway for the 53 Parallel Section of the Complex and that miners were working in the section. The roof fall blocked the escapeway at the No. 74 stopping. Inspector Brown went to an area where three miners were grading non-combustible material from the bottom to permit a mantrip to extend into the Complex's new A-Left Section. Two masons were constructing an overcast nearby. Because the mine was at the end of its shutdown status, no coal production was underway, although coal had been mined there previous to the shutdown and further coal production was planned after the shutdown ended. (In fact, production resumed in the A-Left Section approximately eight days later.) The inspector believed that the area where the miners were working was a "working section," and he concluded that the obstructed intake escapeway violated section 75.1704. Therefore, he cited BethEnergy for violating the standard.

Docket No. PENN 87-201-R

After leaving the 53 Parallel area, Inspector Brown proceeded to the 3 Right Longwall Section, which was serviced by the same intake air escapeway as the 53 Parallel section. Arriving there, Inspector Brown determined that miners were installing roof supports and preparing the section for longwall mining. However, coal production was not yet possible because only one half of the roof support shields were installed at the face, the headgate drive and the shear, used for cutting coal, were not at the face (they were in BethEnergy's shops), and, although the pan line was installed, the conveyor was not connected to the mining equipment. In fact, coal production did not commence on the 3 Right longwall section until some eight days after the inspection. Believing the longwall section to also be a "working section" and because the designated intake air escapeway for the section was impassable, the inspector cited BethEnergy for another violation of

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2/ An overcast is defined as an "enclosed airway to permit one air current to pass over another one without interruption." Bureau of Mines, U.S. Dep't of Interior, Dictionary of Mining, Mineral, and Related Terms 780 (1986).

section 75.1704.

II.

After a hearing in Docket No. PENN 87-94 and in Docket Nos. PENN 87-200-R and PENN 87-201-R, Judge Maurer issued his decision holding that in each instance the Secretary failed to prove a violation of section 75.1704. Because section 75.1704 requires escapeways to be provided from each "working section," the judge and the parties agreed that existence of the three alleged violations turned in each instance upon whether the cited area was a "working section" within the meaning of the standard. The judge initiated his analysis of this issue by referring to 30 C.F.R. § 75.2(g)(3), the regulatory definition of "working section." 3/ The judge noted that the definition of "working section" depends in turn upon the definition of "working face," which is defined in the regulations and the Mine Act as "any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle." 30 C.F.R. § 75.2(g)(1); 30 U.S.C. § 878(g)(1). Because the term "mining cycle," as used in the definition of "working face," is not defined in the Mine Act or the Secretary's regulations, the judge considered definitions of the term offered by the witnesses and agreed with those that defined the term "mining cycle" as meaning those mining operations most immediately connected with the extraction of coal -- supporting the roof, cutting and loading the coal, and transporting the coal out of the mine. 10 FMSHRC at 230-32. The judge rejected BethEnergy's argument that actual coal extraction must have commenced in order for a working face or a working section to exist. However, noting that "in order to have a working section one must have a working face," the judge stated that the "term is closely related to actual or at least imminent coal production at the face, i.e., roof bolting, cutting, loading and/or transporting coal out of the mine." 10 FMSHRC at 232.

In analyzing whether each of the cited areas had the capability for imminent production, the judge utilized the test proffered by the Secretary's witnesses John DeMichiei, MSHA District Manager, and MSHA Inspector Lloyd Smith that the operator must at least have assembled the equipment that it needs to produce coal. 4/ 10 FMSHRC at 231-32, 233, 237.

Regarding Docket No. PENN 87-94, the judge found that on October 7, 1986, in the 1 Right Section, although much of the mining equipment necessary to produce coal was present on the section, not all

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3/ 30 C.F.R. § 75.2(g)(3), which restates section 318(g)(3) of the Mine Act, 30 U.S.C. §§ 878(g)(3), defines "working section" as follows:

> "Working section" means all areas of the coal mine from the loading point of the section to and including the working faces.

4/ At the time that he testified, DeMichiei was an MSHA Subdistrict Manager. Subsequently, he was promoted to District Manager.

of the necessary equipment was present or operable. Specifically, he found that there was no bin or hopper at the end of the conveyor belt enabling the shuttle car to unload coal onto the belt. He further found that the load center that would provide power to the mining equipment was inoperable. 10 FMSHRC at 228. In addition, he found that permissibility checks had to be done on the equipment, ventilation had to be adjusted, waterlines established, and rock dusting completed. Id. He also noted that BethEnergy did not actually produce coal in the section until December 1986, some two months after it was cited for the violation. He concluded, therefore, that at the time of citation on October 7, 1986, coal production in the section was not actual, imminent, or even contemplated. 10 FMSHRC at 232. The judge concluded that the 1 Right Section on that date had no working face or loading point and, therefore, that the Secretary had failed to prove a violation of section 75.1704. 10 FMSHRC at 232-33.

Regarding Docket No. PENN 87-200-R, the judge noted that while the Secretary referred to the alleged violation as having occurred in the 53 Parallel Section, BethEnergy referred to the same area as the A-Left Section. The judge held that the nomenclature of the area did not matter, and that the important factors were whether a working face and a load point were present in the area thus qualifying it as a working section. 10 FMSHRC at 234. The judge found that the A-Left faces were "working faces." He also found that there was a loading point that would be used for removing coal from the A-Left faces during production. 10 FMSHRC at 235-36. He concluded, however, that because the miners working in the area of the grading job were working outby this loading point, and the definition of "working section" only encompasses areas from the face to the loading point, they were not working in an area that could be termed a "working section" and, therefore, escapeways were not required. 10 FMSHRC at 235-36.

In Docket No. PENN 87-201-R, the judge reiterated that the term working face "implies at least imminent capability of coal production from that face," and noted the Secretary's concession that at the time of the alleged violation BethEnergy did not have assembled the equipment necessary to produce coal in the 3 Right Longwall Section. 10 FMSHRC at 237. The judge held, therefore, that the Secretary failed to prove a violation of section 75.1704.

III.

On review, the Secretary argues that the judge erred in defining the term "working section" by placing an unduly restrictive definition upon the term "mining cycle." The Secretary contends that the judge's conclusion that "mining cycle activity ... is limited to 'roof bolting, cutting, loading and/or transporting coal out of the mine,'... is error." PDR 7. The Secretary also argues that the judge failed to accord the Secretary's interpretation of section 75.1704 due deference. In addition, the Secretary argues that the judge's holding in Docket No. PENN 87-200-R, that no violation of section 75.1704 occurred because the miners were working outby the working section, improperly focuses upon the location of the miners rather than the existence of the working section.

BethEnergy responds that the judge properly interpreted the meaning of "working section" in holding that an area of a mine does not become a "working section" for the purpose of section 75.1704 until the equipment necessary to produce coal is present in the area and production is imminent. BethEnergy contests the Secretary's claim to deference by pointing to conflicting testimony by the Secretary's witnesses as to the appropriate definition of "mining cycle" and as to when a working section comes into existence. BethEnergy also asserts that substantial evidence supports the judge's finding in Docket No. PENN 87-200-R that the area cited by the inspector at the grading job was not a working section.

IV.

All underground mines have routes of ingress and egress that can be used in emergencies whether or not the miners using them are located in working sections. These routes must be shown on a map posted where all miners can acquaint themselves with them. 30 C.F.R. § 75.1704-2(d). In addition, practice drills must be conducted so that each miner is familiar with the evacuation system. 30 C.F.R. § 75.1704(e). As counsel for the Secretary acknowledged at oral argument, even though the escapeways at issue here were unavailable for use by miners, other routes were available. Oral Arg. Tr. at 17. However, the presence of these various evacuation routes does not relieve an operator from the duty to comply with section 75.1704, i.e., to provide two designated escapeways from each working section of a mine.

Section 75.1704 provides in pertinent part that "at least two separate and distinct travelable passageways ... shall be provided from each working section...." The term "working section" first appears in conjunction with a federal mining escapeways standard in section 6.g. of the 1953 Federal Mine Safety Code for Bituminous Coal and Lignite Mines of the United States, issued by the Bureau of Mines, United States Department of the Interior. Earlier federal mining laws and regulations used the terms "active sections" and "active face areas" to denominate areas of the mine now generally encompassed within the definition of "working section" set forth in section 75.2(g)(3). See, e.g., Federal Coal Mine Safety Act Amendments of 1952, Pub. L. No. 82-552, 66 Stat. 692 (1952).

"Working section" was accorded its present statutory definition in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801, 878(g)(3) (1976)("Coal Act"). The Senate Subcommittee report stated that the Bureau of Mines provided the definition to Congress and advised that the term was one "commonly understood in the coal mining industry." S. Rep. No. 411, 91st Cong. 1st Sess. 86, reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 91st Cong. 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 212 (1975). The Coal Act's definition of working section was also promulgated by the Secretary of the Interior as part of the Coal Act's mandatory safety standards. 30 C.F.R. § 75.2(g)(3). Subsequently, the definition was carried over into the Mine Act, 30 U.S.C. § 878(g)(3), and remains part of the Secretary's mandatory safety standards for underground coal mines. 30 C.F.R.

§ 75.2(g)(3).

A search of the legislative histories of the various mine safety statutes, mine safety regulations, and the Secretary's published interpretations of the regulations reveals no further elucidation of this "commonly understood" term prior to the inception of the controversy now before us.

Notwithstanding the "common understanding" of the meaning of the term and the fact that it has been a part of the federal mine escapeway requirements for over 35 years, the judge in this proceeding was presented with no less than four distinct constructions of "working section," and three of these were propounded by MSHA personnel. MSHA witnesses Smith and DeMichiei testified that a working section comes into existence when the section contains a loading point and mining equipment integral to the coal extraction process, and that actual coal extraction is not required. Contradicting Smith and DeMichiei were the Secretary's other witnesses, former MSHA District Manager Don Huntley and Inspector Brown. Huntley testified that in his view section 75.1704 is applicable when the "first event" that facilitates extraction of coal from an area takes place, however minor that event may be. According to Huntley, the "first event" may not necessarily involve roof bolting, cutting or loading, or the movement of equipment necessary for these operations into the cited area; rather, it may include ancillary activity outby the loading point, such as belt or track installation that will ultimately facilitate the extraction of coal. Huntley stated that his definition could be interpreted to include all areas of the mine. Tr. III at 469. MSHA Inspector Brown asserted that the standard applies once a potential working section is delineated; i.e., by identifying a particular face and its attendant loading point as discrete geographical locations regardless of whether equipment has been moved into the area. On the other hand, BethEnergy's witness, Mine Superintendent Thomas Mucho testified that a "working section" exists for purposes of section 75.1704 only when actual coal extraction has commenced in an area of a mine containing a working face and a loading point. From BethEnergy's point of view, two escapeways need not be established until the operator starts his equipment and commences mining.

In view of the divergent "definitions" of "working section" offered at the hearing by the Secretary's witnesses, we cannot conclude that the further refined interpretation of this term urged by counsel for the Secretary on review -- that "working section" be defined broadly to encompass areas of the mine between the working face and loading point where the work of preparing, maintaining, or disassembling the section is occurring, regardless of whether coal is being produced or the necessary equipment is present (Sec. Br. at 11, 21; Oral Arg. Tr. at 6) -- is a longstanding or consistent departmental interpretation justifying the deference that the Secretary claims is merited here. See, e.g., I.N.S. v. Cardozo-Fonseca, 480 U.S. 421 (1987); American Mining Congress v. EPA, 824 F.2d 1177, 1182 (D.C. Cir. 1987).

Indeed, we note that on January 27, 1988, after this matter had been briefed to the judge, the Secretary published a proposed revision

of the escapeways standard. 53 Fed. Reg. 2704-05 (1988). The revision retains the existing requirement that at least two travelable passageways in each mine be designated and maintained as escapeways from each working section. In connection with this proposed revision, MSHA has set forth, apparently for the first time, a written interpretation of when the requirements of section 75.1704 become applicable. In a Notice of Public Hearings on the proposed revisions the following appears in Section D.: "As under the existing provisions, MSHA intends that the proposal would apply not only to areas where coal is being produced, but to all areas where miners are working underground." 53 Fed. Reg. 16873 (emphasis added). This interpretation of the purported broad reach of the existing escapeway provision was, however, disavowed by counsel for the Secretary at oral argument before us. Oral Arg. Tr. at 10-12, 51. Furthermore, at a public hearing on the proposed standard on June 6, 1988, the following MSHA position was stated:

> MSHA wishes to clarify its position with respect to the proposed requirement on escapeways which would retain from the existing rules that two escapeways be provided to each working section. MSHA believes that the existing rule and the proposal would require escapeways to be maintained during the installation and removal of mining equipment as well as during the actual production and extraction phase.
>
> MSHA intends to clarify the final rule to remove any possible ambiguity with this proposed provision. That is, any ambiguity that the escapeway would not have to be maintained during the process of getting the equipment ready for production.

Submission of counsel for Secretary to Commission, Document 3 (March 17, 1989) (emphasis added). These statements highlight, in our view, the Secretary's failure to articulate a consistent departmental position regarding the circumstances under which the requirements of section 75.1704 apply.

Given these varying interpretations offered by MSHA, an operator could claim with some force that it had no notice of the standard of conduct expected of it by MSHA under the regulation. Indeed, the chronology of events in this proceeding starkly reflects the result of MSHA's equivocal approach to enforcement. The first alleged violation was cited in October 1986, and an evidentiary hearing on the violation was held before the second and third citations were issued in July 1987. District Manager DeMichiei testified at that first hearing regarding the requirements of section 75.1704. When the subsequent violations were being cited, BethEnergy officials argued to the inspector that in determining whether the requirements of section 75.1704 were applicable to the involved area of the mine, they had relied upon the criteria for compliance as testified to by DeMichiei at the previous hearing. Subsequently, at the hearing on the second and third cited violations, the Secretary's witnesses either disavowed or distinguished DeMichiei's criteria. In fact, MSHA witness Huntley testified that he could

understand how BethEnergy officials, relying on DeMichiei's testimony, could reasonably have concluded that escapeways were not necessary until there was "adequate equipment on the section." Tr. III at 461. We believe that the above progression vividly illustrates the difficulties BethEnergy faced in attempting to comply with section 75.1704. BethEnergy cannot lightly be presumed to be aware of what the standard required when the Secretary's own witnesses were so uncertain and in such wide disagreement as to the meaning of "working section." See Jim Walter Resources, 9 FMSHRC 903, 908 (May 1987).

Given the absence of any consistent Secretarial interpretation of the meaning of the standard meriting deference, the standard must be interpreted in a reasonable manner, giving effect to its wording and intended safety purpose. As the judge essentially found, all relevant factors pertaining to the status of the cited area of a mine must be considered. In general, the record suggests that the following broad factors are chief among those bearing on whether an area of a mine is a "working section": the hazards associated with the work being done in the area (hazards); the geographical components of the area (location); the physical components of the area and their functional readiness (capability); and the development of the area with respect to actual production (timeliness).

For example, the hazards associated with the work being done in the area include the increased dangers associated with the ongoing activities in a section. As acknowledged by counsel for the Secretary at oral argument, the activities associated with reasonably imminent coal production introduce increased hazards to the particular area of the mine where production takes place. Oral Arg. Tr. at 12. It is the presence of the increased hazards to miners attendant to actual or reasonably close coal production that form a pragmatic basis for the two escapeways requirement of section 75.1704. It is then that methane is more likely to be released in larger quantities during extraction of coal at the face. Also at this time, there may be an increase in the generation of suspended coal dust, an increase in the possibility of sparking, and an increased possibility of exposure to unsupported roof. The geographical components of a working section, as delineated in section 75.2(g)(3), are the existence of an identifiable face from which coal is or will be extracted, as well as a section loading point. The physical components of an area and their functional readiness relate to the presence of those mechanical mining components integral to the method of extraction contemplated in the identified location. In this regard, the presence of a functioning power center, a functional loading point connected to the mine's main haulage system, and necessary roof support equipment (such as shields where longwall mining is involved) are appropriate indicators of a section's capability. On the other hand, the location of equipment that merely has to be trammed into position -- such as a continuous mining machine, roof bolter or shuttle car -- is not necessarily dispositive of the "capability" of a section to extract coal. Timeliness is linked to capability and refers to the imminence of production. We agree with the judge that while actual production is not necessary, the term "working section" is inextricably linked to the term "working face" and that term, we conclude, implies coal production that is reasonably close in time. Once production is

reasonably close, mechanical and electrical problems that temporarily interrupt the otherwise established capability of a section to produce coal do not relieve the operator from compliance with the mandates of section 75.1704. Other relevant factors also include the status of the mine's operations at the time of the alleged violation and any evidence as to the operator's plan for establishing unobstructed escapeways prior to the start of production activities. See Oral Arg. Tr. at 23-24.

V.

Weighing the facts presented in these proceedings in light of such factors, we conclude that substantial evidence supports the judge's finding in each instance that BethEnergy did not violate section 75.1704. We note generally that the mine, or in the case of the first citation, the area of the mine where the alleged violation occurred, was in a state of shutdown at the time of each citation and BethEnergy was maintaining and readying the area for future coal production. Also, there is no evidence that BethEnergy would have begun coal production with the escapeways remaining in their obstructed state. Counsel for the Secretary admitted as much in oral argument before us. Oral Arg. Tr. at 24.

Specifically, the violation alleged in Docket No. PENN 87-94 concerned the 1 Right Section. In this section, there existed identified faces from which coal was to be extracted, as well as a loading point. However, the loading point was not functional because the hopper or bin needed to permit unloading of coal from shuttle cars had yet to be constructed and the power center was inoperable. Further, as the judge noted, mining was not resumed until December 1986. Thus, there is ample support in the record for a finding that at the time of citation the section was not capable of coal extraction and that production was not reasonably close in time. Moreover, setting up the belt, conducting permissibility examinations, and moving equipment -- operations underway when the inspector issued his order -- are not the type of mining activities generally associated with the increased hazards of the traditional mining cycle -- roof bolting, cutting, loading and/or transporting coal out of the mine.

The violation alleged in Docket No. PENN 87-200-R covered an area where miners were grading the entry and two miners were working nearby on overcasts. The judge concluded that the miners were not physically located in an area that could properly be denominated a "working section" for purposes of section 75.1704. He determined that although the A-Left Section had an identifiable face and a loading point, the miners referred to by the inspector in the citation were outby the physical limits of the A-Left Section.

We agree with the Secretary that the judge erred in focusing solely on the location of the maintenance crew in determining whether escapeways were required in the A-left section at the time of citation. As discussed above, the proper focus must be on an assessment of all the relevant factors bearing on whether an area of the mine is a working section. Nevertheless, we conclude that substantial evidence supports the finding that the A-left was not then a working section. In addition

to the fact that the only work being performed in the area was maintenance work during the mine shutdown, the A-left was not capable of coal production because, as part of the maintenance work, the 53 belt conveyor, necessary for removing coal from the section, was disassembled. Tr. III at 485-86, 490. In fact coal was not produced in the A-left until a week after the citation was issued. Id. at 508.

The violation alleged in Docket No. PENN 87-201-R occurred in the 3 Right Longwall Section. The inspector determined that six miners were installing temporary roof supports (shields) and connecting hoses to prepare the section for longwall mining. Tr. 345-46. It is undisputed that only half of the shields were installed at the face, that the headgate drive and shear were in BethEnergy's shops, and that, although the pan line was installed, the conveyor was not connected to any of the mining equipment. Tr. 348-50, 379-81, 517-18. Indeed, the installation of the longwall was not completed and production did not commence on the section until approximately one week after the violation was cited. Therefore, the section was not capable of coal production nor was production reasonably close in time on the 3 Right Longwall section when the violation was cited. Thus, the section was not, as of that date, a working section requiring compliance with the requirements of section 75.1704.

VI.

We thus conclude that the judge's findings that the requirements of section 75.1704 were not applicable to the cited three areas of the Complex are supported by substantial evidence. Accordingly, we affirm the judge's decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 28, 1989

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. PENN 87-121-R
ADMINISTRATION (MSHA)	:	PENN 87-122-R
	:	PENN 87-124-R
v.	:	PENN 87-176
	:	PENN 87-235
TRACEY & PARTNERS,	:	
RANDY ROTHERMEL, TRACEY PARTNERS	:	

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

DECISION

BY: Ford, Chairman; Doyle and Nelson, Commissioners

The issue presented in this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), is whether Tracey & Partners, Randy Rothermel, Tracey Partners ("Tracey") violated section 103(a) of the Mine Act because of its refusals to permit an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") to conduct spot inspections pursuant to section 103(i) of the Act. 1/ MSHA issued Tracey two

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1/ Section 103(a) of the Act states:

> Purposes; advance notice; frequency; guidelines; right of access
>
> Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) deter-

mining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this [Act].... In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this [Act], and his experience under this [Act] and other health and safety laws. For the purpose of making any inspection or investigation under this [Act], the Secretary ... with respect to fulfilling his responsibilities under this [Act] ... shall have a right of entry to, upon, or through any coal or other mine.

30 U.S.C. § 813(a).

Section 103(i) of the Act states:

Spot inspections

Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, "liberation of excessive quantities of methane or other explosive gases" shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot

citations under section 104(a) of the Act and a failure to abate withdrawal order under section 104(b) of the Act, 30 U.S.C. §§ 814(a)-(b), for Tracey's refusals to permit access to its mine. Commission Administrative Law Judge George A. Koutras concluded that MSHA's attempts to conduct the spot inspections under section 103(i) were improper, vacated the contested citations and withdrawal order, and dismissed the Secretary's proposals for assessment of civil penalties. 9 FMSHRC 2127 (December 1987)(ALJ). We granted the Secretary of Labor's petition for discretionary review of the judge's decision. For the reasons that follow, we affirm.

The essential facts were stipulated by the parties. The citations and order were issued at the Tracey Slope Mine, an underground anthracite coal mine located in Schuylkill County, Pennsylvania. The mine employs three to five miners underground and produces approximately 4,000 tons annually. During the 24 months preceding the issuance of the contested citations and orders, the mine was subjected to 142 inspection days and cited for a total of 24 citations. Stipulations 16 and 17, 9 FMSHRC 2131. A methane explosion had occurred at the mine on February 10, 1982, resulting in serious injuries to three miners. As a result, MSHA placed the mine on a five-day spot inspection cycle under section 103(i) of the Mine Act. Section 103(i) mandates, in part, that, whenever the Secretary finds that a methane explosion that results in death or serious injury has occurred in a mine at any time during the previous five years, the Secretary shall provide a minimum of one spot inspection during every five working days, at irregular intervals.

The record reflects that no methane ignitions or explosions that resulted in serious or fatal injury had occurred at this mine since the accident on February 10, 1982, nor had the mine liberated "excessive quantities of methane" as that terminology is defined in section 103(i). The mine did have a methane ignition in 1985 but there were no injuries.

On September 15, 1986, six months prior to the fifth anniversary of the February 10, 1982 explosion, Tracey sent MSHA a detailed letter setting forth its reasons as to why the mine should be removed from the section 103(i) spot inspection cycle when the five years elapsed on February 10, 1987. The letter was prompted in part by Tracey's discovery that a neighboring mine had been removed from the section 103(i) cycle seven years after it had experienced a methane explosion similar to the one that occurred at Tracey's mine in 1982. No written response was forthcoming from the agency and one MSHA witness speculated that Tracey's letter had been lost or mislaid. 9 FMSHRC 2141, 2143, 2146.

On the morning of February 12, 1987, two days after the fifth anniversary of the 1982 methane explosion, MSHA Inspector Victor G. Mickatavage arrived at the mine to conduct a section 103(i) spot

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> inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals.

30 U.S.C. § 813(i).

inspection. Randy Rothermel, an owner and the managing partner of the mine, denied Mickatavage entry to the mine to conduct the section 103(i) spot inspection but stated his willingness to permit any other type of inspection. Mickatavage thereupon issued to Tracey a citation alleging a violation of section 103(a) of the Act for denial of entry. After allowing 45 minutes for abatement, Mickatavage requested entry to conduct the section 103(i) spot inspection and again was denied entry. Mickatavage then issued a section 104(b) withdrawal order for failure to abate the citation, again alleging a violation of section 103(a) of the Act. The withdrawal order did not prohibit entry into the mine.

On February 17, 1987, the inspector returned to the mine and issued a modification to the February 12, 1987, citation and withdrawal order that indicated the entire underground area of the mine was affected. Tracey again denied entry to perform a section 103(i) inspection, but the inspector took no new enforcement action. Two days later, however, when Tracey denied Mickatavage entry to the mine to conduct a section 103(i) spot inspection, the inspector issued a second citation alleging Tracey's failure to comply with the section 104(b) withdrawal order as modified and asserting a violation of section 103(a) of the Mine Act. On March 23, 1987, a section 103(i) inspection on the mine was finally permitted. Tracey filed notices of contest of the citations and order, and the Secretary proposed civil penalties for the alleged violations. These matters were consolidated and proceeded to hearing before Judge Koutras.

At the hearing, Tracey contended that the requested section 103(i) spot inspections were unlawful because none of the criteria set forth in section 103(i) with respect to such inspections were satisfied at the time of its denial of entry. Tracey maintained that section 103(i) inspections are strictly limited by the terms of the statute. In response, it was argued for the Secretary that, under section 103(a), she possesses an absolute right of entry to perform inspections authorized by the Mine Act, and that she has discretion based on the particular conditions present in a mine to determine whether that mine should remain subject to the section 103(i) spot inspections that were originally triggered by a methane ignition resulting in death or serious injury. The Secretary contended that MSHA acted within its statutory authority in continuing the section 103(i) spot inspections beyond the five-year anniversary of the triggering methane ignition, based on its continued concern for methane gas in the mine as well as concern about the mine's ventilation and roof control systems, escapeways, and projected development toward impounded water.

Judge Koutras concluded that, although section 103(a) of the Act gives MSHA a right of entry into the mine for inspection purposes, its specific authority to conduct spot inspections every five days pursuant to section 103(i) is subject to the following conditions delineated in that section: (1) liberation of excessive quantities of methane or other explosive gases during its operations, namely, more than one million cubic feet of methane or other explosive gases during a 24-hour period; (2) a methane or other gas ignition or explosion resulting in death or serious injury at any time during the previous five years; and (3) the existence in the mine of especially hazardous conditions. 9 FMSHRC

at 2145.

Concerning the first and second statutory conditions giving rise to the section 103(i) inspections, the judge noted that MSHA had stipulated "that the mine had not liberated 'excessive quantities of methane' as that term is defined by section 103(i)" and that MSHA had also stipulated that no methane ignitions or explosions resulting in serious injury had occurred in the mine since the accident of February 10, 1982. 9 FMSHRC at 2148, 2157. Regarding the third condition, the judge considered MSHA's concern about the mine's ventilation, roof conditions, escapeways, and planned development, but found that MSHA had failed to show that this concern warranted inspections every five days under section 103(i). 9 FMSHRC at 2149-55, 2156-57. The judge also found there was no credible evidence that MSHA had ever conducted a detailed methane or ventilation survey at the mine to support its generalized and speculative conclusions that methane liberation is, in fact, a hazard at the mine. 9 FMSHRC at 2149, 2152, 2157. 2/

Based on these determinations, the judge concluded that MSHA had failed to establish good cause for maintaining the mine on a five-day section 103(i) inspection cycle and that, accordingly, Tracey's refusal to allow entry into the mine for the purpose of conducting such section 103(i) inspections was justified and not in violation of section 103(a) of the Mine Act. 9 FMSHRC at 2156-57. The judge vacated the citations and order and dismissed MSHA's proposals for assessment of civil penalties. 9 FMSHRC at 2157.

On review, the Secretary argues that the judge erroneously failed to conclude that MSHA had an unlimited right of entry to the Tracey Slope Mine under section 103(a) of the Mine Act. The Secretary also contends that the judge erred in failing to conclude that MSHA properly exercised its discretion in seeking to conduct section 103(i) spot inspections. The Secretary submits that under the second statutory condition or trigger, the terminology as to five-years does not set a ceiling on a section 103(i) inspection cycle triggered by a death or serious injury-causing ignition but, in effect, provides only a minimum floor. The Secretary also argues that further five-day spot inspections were justified because of the existence of other hazardous conditions in the mine. We disagree.

There is no question that section 103(a) of the Mine Act confers upon MSHA a broad right of entry to mines for purposes of inspection and investigation. Section 103(a) expressly grants authorized representatives of the Secretary a right of entry to all mines for the purpose of performing inspections under the Act. E.g., United States Steel Corp., 6 FMSHRC 1423, 1430-31 (June 1984). However, the

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2/ The judge noted that Tracey, in its September 15, 1986, letter seeking removal from the section 103(i) inspection cycle, advised MSHA that recent air samples gathered by MSHA inspectors indicated that the maximum amount of methane liberated at the mine during a 24-hour period was 87,000 cubic feet. This is somewhat less than 10 percent of the amount necessary to invoke the first condition of section 103(i).

Secretary's right of entry is not unlimited or absolute. The Supreme Court has acknowledged a mine owner's right to show, in an appropriate adjudicative forum, that a specific Secretarial "search" is "outside the federal regulatory authority" or to seek accommodation of "any unusual privacy interests." Donovan v. Dewey, 452 U.S. 594, 604-05 (1981). 3/

Moreover, we concur with the judge that section 103(i) clearly defines and limits the Secretary's authority to conduct five-day spot inspections pursuant to the authority of that provision. The parties' stipulations establish that the Secretary sought entry for the purpose of carrying out section 103(i) five-day spot inspections. See 9 FMSHRC at 2130-31; Stips. 10, 13, & 14. The Secretary makes no claim that her efforts to conduct these challenged section 103(i) inspections were justified under the first condition set forth in section 103(i) (liberation of "excessive quantities of methane or other explosive gases"). Like the judge, we discern no warrant on this record for the inspections under either the second or third conditions of section 103(i).

We first examine the Secretary's contention that she possessed discretion under section 103(i) to maintain the Tracey mine on the five-day spot inspection cycle. It is a cardinal principle of statutory construction that, in the first instance, we must seek the meaning of this statute in the language in which it is expressed. If the meaning of that language is plain, the statute is to be enforced according to its terms unless it can be established that Congress clearly intended the words to have a different meaning. See, e.g., Caminetti v. United States, 242 U.S. 470, 485 (1916); Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); Matala v. Consolidation Coal Co., 647 F.2d 427, 429-30 (4th Cir. 1981). See also Western Fuels-Utah, Inc., 11 FMSHRC 278 (March 1989), appeal docketed, No. 89-1258 (D.C. Cir. April 20, 1989).

In our opinion, section 103(i), as relevant here, displays a plain and unambiguous meaning. Whenever the Secretary finds that a methane or other gas ignition or explosion resulting in death or serious injury has occurred at any time during the previous five years, she must provide a

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3/ When entry to a mine is denied, the Secretary may pursue an injunction to gain entry pursuant to section 108 of the Act, 30 U.S.C. § 818 (Dewey, 452 U.S. at 604-05), and/or a civil penalty proceeding before the Commission alleging a violation of section 103(a) of the Act. Waukesha Lime & Stone Co., Inc., 3 FMSHRC 1702, 1703-04 (July 1981). In each instance, the party denying entry is permitted to appear before a neutral judicial forum to defend its action. Entry to the Secretary is denied at one's legal peril. If the adjudicatory body determines that there was no justification for the refusal of entry, injunctive relief and/or civil penalties under the Act may be imposed. On the other hand, if inspection is determined to be "outside federal regulatory authority," the denial of access will not be punished under the Act. MSHA indicated at the hearing that a court injunction was not sought because the violations in issue had been abated when Tracey finally permitted access on March 23, 1987.

minimum of one spot inspection by her authorized representative of all or part of the mine during every five working days, at irregular intervals. After the five-year period has expired without another incident of a gas ignition or explosion resulting in death or serious injury, it is obvious that there is no longer such an event "during the previous five years." By the express language of the statute, therefore, the Secretary is neither required, nor granted "discretion," to continue a minimum of one spot inspection every five working days where she cannot show that such an event has occurred during the previous five years.

The Secretary asserts that her construction of the statute must be accorded deference. While the Secretary must be accorded deference when a statute is silent or ambiguous, effect must be given to the "unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., supra at 843. We believe that Congress, when it drafted section 103(i), was quite specific in setting forth the instances in which it intended the Secretary to deploy her resources in conducting five, ten, and fifteen day inspections under that section. We find no support whatsoever in the statute for the Secretary's interpretation. We conclude that section 103(i) plainly means that, in this instance, the five-day inspection cycle based on the second condition terminates upon the fifth anniversary of the initial ignition, if no further triggering event has occurred during that five-year period.

With respect to the Secretary's various arguments concerning hazardous conditions in the Tracey Slope Mine, it is not entirely clear whether she is suggesting that these conditions support her claim of discretion to continue spot inspections pursuant to the second condition of section 103(i) or whether she is attempting to raise a separate justification for her enforcement actions. We have already demonstrated that, under the circumstances presented here, an exercise of discretion based on the second condition cannot be reconciled with the plain text of section 103(i). A right of inspection based upon the third condition of section 103(i) was explicitly waived by the Secretary at the hearing when her counsel indicated that while "other hazardous conditions" could be a basis for continued section 103(i) five-day inspections, the foundation for the requested inspections was the second statutory trigger. Tr. 95, 131, 133-35, 138, 139, 155, 182. The Secretary's counsel also indicated that there was a procedure used by MSHA for putting a mine on an inspection cycle based on the third statutory trigger, which course had not been followed. Tr. 133-35. 4/

4/ As noted above, a combination of section 103(i) spot inspections and the regular quarterly inspections mandated by the Act resulted in 142 inspection days expended at the Tracey mine during the 24 months preceding the instant dispute. Given the evidence of record that the mine operated an average of four days per week, that translates to more than one inspection every three days. Yet with such heightened inspection activity only 24 citations were issued during that 24-month period, or .17 citations per inspection day. While we are not bound by the Secretary's civil penalty criteria set forth in 30 C.F.R. Part 100,

We turn to the Secretary's alternative argument that further spot inspections under section 103(i) were authorized under the general inspection powers conferred upon her by section 103(a). We agree with the general proposition that all physical inspections of mines under section 103 are conducted pursuant to the basic authority of section 103(a). We further agree that the Secretary has considerable authority to conduct inspections under section 103(a) of the Act. Section 103(a) also grants the Secretary authority to conduct general "spot" inspections, as distinguished from the more specifically described "spot" inspections under section 103(i). See United Mine Workers v. FMSHRC, 671 F.2d 615, 623-24 (D.C. Cir. 1982); Consol. Coal Co. v. FMSHRC, 740 F.2d 271, 273 (3rd Cir. 1984); Monterey Coal v. FMSHRC, 743 F.2d 589, 593 (7th Cir. 1984). (Tracey concedes that "spot" inspections under section 103(a) are authorized. Tr. 151-52.)

All this being stated, however, Tracey has been cited for violating section 103(a) because it did not accede to an MSHA inspector's section 103(i) inspection requests. Although a valid section 103(i) inspection is, to an extent, also an inspection made pursuant to section 103(a) of the Mine Act, we believe that a section 103(i) "spot" inspection must be valid in the first instance under section 103(i) itself. The Secretary is granted the right of entry into a mine only as authorized by the Mine Act. 5/ The Secretary's proffered basis for obtaining entry into Tracey's mine was section 103(i) of the Mine Act and, as discussed, the conditions under which an inspection can be made pursuant to that section were unavailable to the Secretary at the time she attempted her inspection.

We emphasize that denial of access to an MSHA inspector, even in the limited context presented here, is an action not to be taken lightly. As noted in n. 3, the potential consequences of such a unilateral step can be severe. What the record makes abundantly clear, however, is that in this case we have an insistence by the inspector on an inspection of the mine pursuant only to section 103(i). Tracey offered access to the mine under the general authority of the Secretary pursuant to section 103(a). The inspector chose instead to cite Tracey for its refusal to submit to an inspection pursuant to section 103(i), a refusal that was based on its sincere belief that the Secretary's

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we note that section 100.3(c) of those criteria provides that penalties are not increased on the basis of past compliance history unless that history indicates more than .3 violations per inspection day. Thus, by the Secretary's own criteria and in light of a rather pervasive inspection presence at Tracey's mine, we find no objective basis for the Secretary's attempt to extend the five-day cycle.

5/ For example, in Sewell Coal Co., 1 FMSHRC 864 (July 1979)(ALJ), cited in Peabody Coal Company, 6 FMSHRC 183, 186 n.5 (February 1984), the operator's denial of MSHA access to certain business records not required to be maintained by the Mine Act was upheld. Although that case, unlike this one, involved expectation of privacy issues, the right of entry found in section 103(a) was nevertheless circumscribed to the inspection of records required to be maintained and accessible under the Act.

authority to conduct a section 103(i) inspection had expired. 6/ It is significant to note that the inspector could have performed the identical tests under the access proferred pursuant to section 103(a) that he had previously performed under section 103(i). The inspector is not precluded from making spot inspections of the mine at least every five days under the auspices of section 103(a). Therefore, we see no overriding safety issue involved in these proceedings.

Thus, because the Secretary's attempts to conduct section 103(i) inspections under the circumstances presented by this case were "outside the federal regulatory authority," Tracey's denial of access did not violate section 103(a) of the Act. See Donovan v. Dewey, 452 U.S. at 604-05. Tracey indicated its willingness to permit any other type of inspection. The Secretary could have exercised her discretion to conduct spot inspections authorized under section 103(a) for purposes of "determining whether an imminent danger exists" or "determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under [the Mine Act]."

Accordingly, and for the foregoing reasons, we affirm the judge's decision.

Ford B. Ford, Chairman

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

6/ We emphasize that Tracey's limited refusal of access to the inspector under section 103(i) was in large part the result of MSHA's persistent failure to respond officially to the operator's letter requesting that the mine be taken off the section 103(i) cycle and stating its reasons in support thereof. We agree with the judge that MSHA had "the responsibility and obligation to respond in writing to an operator's request of this kind." 9 FMSHRC 2146. Furthermore, after several informal discussions with inspectors regarding the applicability of section 103(i) to Tracey's circumstances, Rothermel testified that the inspectors told him that "if you think that's the law, you have to fight it. So that's what we're doing here today." Id. at 2141.

Commissioners Backley and Lastowka, dissenting:

In its decision, the majority approves a mine operator's denial of entry to an MSHA inspector at a mine to conduct an inspection to determine whether the operator was complying with mandatory safety and health standards. The inspection sought to be performed by the inspector was one authorized by section 103(a) of the Mine Act and the inspector therefore possessed a clear right of entry into the mine to conduct the inspection. 30 U.S.C. § 813(a). Thus, there is no basis in law or fact for the majority's decision upholding the administrative law judge's approval of the operator's denial of access. Accordingly, we dissent.

Section 103(a) of the Mine Act sets forth the Secretary's authority to make frequent inspections and investigations in our Nation's mines. In relevant part, section 103(a) authorizes "frequent inspections" for the purpose of ..." (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act." Id. Section 103(a) further provides that "[f]or the purpose of making any inspection or investigation under this Act, the Secretary ... or any authorized representative of the Secretary ... shall have a right of entry to, upon, or through any coal or other mine." Id. (emphasis added).

The Supreme Court has concluded that "the general program of warrantless inspections authorized by § 103(a) of the [Mine] Act does not violate the Fourth Amendment." Donovan v. Dewey, 452 U.S. 594, 605 (1981). In upholding the Secretary's right of entry, the Court emphasized the "substantial federal interest in improving the health and safety conditions in the Nation's ... mines", and that "the regulation of mines ... is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he 'will be subject to effective inspection'." 452 U.S. at 602, 603 (citation omitted). Consistent with Dewey, the Commission has held that a mine operator's failure to permit inspections authorized by the Mine Act violates section 103(a) of the Act. Waukesha Lime & Stone Co. Inc., 3 FMSHRC 1702, 1703-04 (July 1981); United States Steel, 6 FMSHRC 1423, 1430-31 (June 1984); Calvin Black Enterprises, 7 FMSHRC 1151, 1156 (August 1985).

Supplementing the broad grant of inspection authority provided in section 103(a), the Mine Act specifies certain types of more specialized mine inspections. For example, section 103(i) requires the Secretary to conduct inspections with increased frequency if she finds that certain hazardous conditions, including the presence of excessive levels of explosive gases, have been found to exist at a mine. 30 U.S.C. § 813(i). As relevant here, section 103(i) requires the Secretary to inspect at least once every five working days any mine in which a gas ignition or explosion has occurred during the previous five years that resulted in death or serious injury. Id.

This provision requiring more frequent specialized inspections had its genesis in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801, 813(i)(1976)(amended 1977)("Coal Act"). The legislative history of the Coal Act reveals that the bill that passed the Senate required the Secretary to station an inspector at underground coal mines that liberated excessive levels of explosive gases on a daily basis. Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94st Cong. 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1511 (1975). Comparatively, the House bill required 26 spot inspections per year at such mines, and at other especially hazardous mines including mines that had experienced a gas ignition during any five year period. Id. The Conference Committee adopted the House bill with certain amendments including a minimum inspection frequency of once every five working days at such especially hazardous mines. Id. The House bill, as amended, was adopted because the Senate requirement to inspect excessively gassy mines on a daily basis would have depleted the Secretary's finite resources. Id. at 1347-48. Thus, the legislative history makes clear that subsection (i) of section 103 was adopted to insure that the Secretary would pay particular attention to those mines that Congress determined to be especially hazardous and deserving of increased regulation.

Nevertheless, all inspections of mines conducted by the Secretary for the purpose of determining whether there is compliance with mandatory safety or health standards or whether an imminent danger exists, including those inspections made pursuant to section 103(i), are made pursuant to the basic grant of inspection authority in section 103(a). Section 103(i) does not contain a grant of independent inspection authority; for example, only subsection (a) authorizes the Secretary to make warrantless searches of mines. Donovan v. Dewey, supra. The United States Courts of Appeals for the District of Columbia, Third, and Seventh Circuits have each specifically held that under the Mine Act all inspections, including section 103(i) inspections, are conducted pursuant to section 103(a). In United Mine Workers v. FMSHRC, 671 F.2d 615 (D.C. Cir.), cert. denied, 459 U.S. 927 (1982), the D.C. Circuit stated that "although a spot gas inspection may be required to be conducted with a certain frequency by subsection (i), it is nevertheless conducted 'pursuant to the provisions of subsection (a)' because its purpose is to determine whether an imminent danger exists and whether there is compliance with mandatory health and safety standards." 671 F.2d at 624 n.27.

The Seventh Circuit has agreed with the D.C. Circuit's analysis of the relationship between section 103(a) and (i):

> The only statutory authority for the Secretary to inspect mines without a warrant or prior notice is section 103(a). That fact suggests that any inspection - such as the spot inspection in this case - lawfully conducted without prior notice or a warrant is an inspection conducted pursuant to the provisions of subsection (a). Even the types of inspections having more specific authority, e.g., section 103(g)(1) and (i), are conducted without

warrants and notice and are thus conducted pursuant to the provisions of subsection (a).

Monterey Coal Co. v. FMSHRC, 743 F.2d 589, 593 n.8 (7th Cir. 1984). Accord, Consolidation Coal Co v. FMSHRC, 740 F.2d 271, 273 (3rd Cir. 1984)("We find ourselves in agreement with the District of Columbia Court -- that spot inspections of the type challenged here are authorized by and made 'pursuant to subsection 103(a).'" (citation omitted)).

It is therefore evident that the phrase "103(i) spot inspection" is simply a convenient label to describe inspections made pursuant to section 103(a) at the increased frequency set forth in subsection (i). Such inspections, however, are still inspections authorized by and made pursuant to section 103(a). 1/

We agree with the Secretary that section 103(i) "represents a mandate to, rather than a restriction on, the Secretary in the exercise of her enforcement function." Sec. Br. 10. The language of subsection (i) and its legislative history make clear that the sole purpose of this provision is to require the Secretary to conduct inspections with increased frequency in certain circumstances that Congress determined required increased vigilance. In enacting subsection (i), Congress did not seek to in any manner reduce the Secretary's pervasive inspection authority.

In light of the Supreme Court's upholding in Donovan v. Dewey, supra, of an MSHA inspector's right of entry into a mine to conduct an inspection, the majority errs in concluding that a mine operator can deny an MSHA inspector access based on its belief that its mine no longer meets the criteria of section 103(i). In this case, the owner of the mine stated his willingness to permit any type of inspection other than a section 103(i) inspection and the majority endorses his ability to so control the terms of the inspector's entry. In doing so, the majority fails to recognize that section 103(i) inspections are made pursuant to section 103(a) and that section 103(i) does not limit the Secretary's right to conduct inspections. Contrary to the majority's assertions, the inspection that the inspector attempted to conduct in this case was not "outside the federal regulatory authority." (Slip op. at 9). Rather, the inspection was to be conducted for a basic and eminently lawful purpose, that is, to determine whether the operator was complying with the Secretary's mandatory safety and health regulations.

1/ Analogously, citations issued under section 104(a), which include significant and substantial and unwarrantable failure findings, are frequently referred to as "104(d)(1) citations." Yet, as the Commission has unanimously held, "the commonly used phrase 'section 104(d)(1) citation' is merely a term of convenience and does not indicate a separate basis for issuance of citations independent from section 104(a)." Utah Power and Light, 11 FMSHRC 953, 956 (June 1989).

Our colleagues elevate form over substance in concluding that because the inspector indicated that section 103(i) was the authority for his presence, entry to the mine could be denied if, in fact, the Secretary was no longer required as a matter of law to inspect the mine every five working days under subsection (i). As discussed above, however, all inspections are conducted pursuant to the basic grant of authority in section 103(a). Furthermore, the inspector did not charge the operator with violations of section 103(i). Rather, the citations and withdrawal orders issued in this case charge that the operator violated section 103(a) by denying the inspector entry into the mine. For example, citation No. 2840770 states in part, that "on 02-12-87, Randy Rothermel, partner and mine foreman, refused to allow Victor G. Mickatavage, an authorized representative of the Secretary, entry into the Tracey Slope mine for the purposes of conducting an inspection of the mine pursuant to section 103(a) of the Act." Joint Exh. 1. (Emphasis added).

Thus, it is clear that the essential basis for the Secretary's assertion of authority to inspect the mine was section 103(a). The majority's endorsement of the operator's right to deny entry to the inspector unless the inspector would state that he was conducting a section 103(a) inspection, rather than a section 103(i) inspection, reduces the Secretary's role from enforcer of the Mine Act to participant in an operator-controlled game of "Simon Says"; the inspector is powerless to enter the mine until he says "May I" in a manner satisfactory to the operator. Section 103(a)'s broad grant of inspection authority cannot be so constrained.

In sum, we conclude that the inspection of the Tracey Slope Mine was done for a lawful purpose -- to determine whether the mine operator was complying with the Secretary's safety and health standards. Thus, the inspection was not "outside the federal regulatory authority," but was squarely within it. We would therefore hold that the denial of entry was unlawful. We would reverse the administrative law judge's decision, affirm the citations and order and remand for assessment of civil penalties.

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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AUG 1 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 88-93-M A.C. No. 29-00425-05501
v.	:	Yaple Creek Pit
YAPLE CREEK SAND & GRAVEL, Respondent	:	

DECISION

Appearances: Janice L. Holm, Esq., Jack F. Ostrander, Esq.
Office of the Solicitor, U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Jay Rubin, Esq., Stout & Rubin, Truth or Consequences, New Mexico,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with violating eight safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits was held in El Paso, Texas on July 18, 1989.

The parties waived their right to file post-trial briefs, and waived receipt of the transcript. Respondent submitted its case on oral argument. The parties further requested an expedited decision.

Stipulation

At the commencement of the hearing the parties stipulated that the Commission had jurisdiction to determine the issues herein. Further, it was stipulated that respondent is a sand and gravel operator and is subject to the Act; however, since this operator has only one employee engaged in the actual mining and processing of the sand and gravel, it is asserted that in this unique circumstance the MSHA lacks jurisdiction.

Issues

The issues raised are whether a one-man operation is subject to the Act. Further, should the issues of estoppel and vagueness cause a dismissal of the complaint herein. Additional issues concern whether respondent violated the regulations and, if a violation occurred, what penalty is appropriate.

Threshold Issues

The initial threshold issue is whether a one-man operation is subject to the Mine Safety Act.

The evidence on this issue is uncontroverted. Mr. Robert Huffman is the owner of Yaple Creek Sand & Gravel. He is the sole individual involved in processing the sand and gravel. Mrs. Pat Huffman handles the book work for the company but she does not engage in the actual mining process.

On the foregoing facts I conclude that although the respondent has no employees engaged in the removal of the sand and gravel other than Mr. Huffman, the company is nevertheless subject to the Act.

In Marshall v. Sink, 614 F.2d 37, 1980, the United States Court of Appeals for the 6th Circuit noted that the respondent therein was subject to federal regulations even though he owned and operated a small mine without employees, 614 F.2d at 38.

The foregoing case law, which is now generally established, rests on the broad Congressional definition of a mine. The definition as enacted by the Congress provides:

> (h)(i) "Coal or other mine" means (a) an area of land from which minerals in a non-liquid form ... are extracted. 30 U.S.C. § 802(3).

Further, there is no indication in the Congressional history that Congress intended to exclude a one-man operation from complying with safety and health regulations. To like effect see C.D. Livingston, 7 FMSHRC 1485 (1985).

On the basis of the existing case law I conclude that a one-man operation is indeed subject to the Act.

Respondent also raises the defense that other MSHA inspectors had indicated to the operator that his operation was in compliance with the law. Since no previous citations have been issued, the citations issued here in the instant case should be vacated on the doctrine of estoppel.

The argument is rejected for several reasons. The Commission has ruled that estoppel does not apply against the federal government, King Knob Coal Company, Inc., 3 FMSHRC 1417, 1421. Further, it is clear that lack of previous enforcement does not support a claim of estoppel. See J & R Coal Company, 3 FMSHRC 591 (1981); Burgess Mining and Construction Corporation 3 FMSHRC 296 (1981); Price River Coal Company, 5 FMSHRC 1734 (1983). The defense of estoppel should not prevent the Secretary from enforcing the Act. This is because inspectors have different areas of expertise. One inspector might not consider a factual circumstance to constitute a violation. However, another inspector might clearly conclude a violation exists. For these reasons the doctrine of estoppel in safety and health matters cannot be invoked against the Secretary.

Respondent also raises the issue that the regulations involved in this case are unconstitutionally vague and fail to give a one-man operator fair notice of what is required of him to comply with the regulation. I reject respondent's views. Regulations such as are involved in the instant case are not considered in a vacuum. Generally such safety regulations are examined and must be looked at in light of the conduct to which they are applied. Ray Evers Welding Company v. OSHRC, 625 F.2d 726, 732, 6th Cir. (1980). General terms such as "unsafe or dangerous" frequently appear in federal safety and health regulations. This approach has been recognized as necessary where narrower terms would be too restrictive. Specifically, standards of this type must often be made simple and brief in order to be broadly adaptable to myriad circumstances, Kerr-McGee Corporation, 3 FMSHRC 496 (1981); Alabama By-Products Corporation, 4 FMSHRC 2128 (1982); Evansville Material, Inc., 3 FMSHRC 704 (1981). Specifically, I do not find that the regulations herein are unconstitutionally void.

Summary of the Case

William Tanner, Jr., an MSHA inspector experienced in mining, testified for the Secretary. Inspector Tanner inspected respondent and issued citations on February 18, 1988. On subsequent followup inspections the alleged violations had not been abated. Mr. Huffman, owner of the company, requested that the inspector issue orders so the issues could be contested. In fact, orders were issued under section 104(b) of the Act.

Robert Huffman (owner) and his wife, Mrs. Huffman, testified for the company. It is apparent in the case that the inspector and Mr. Huffman had difficulty communicating during the inspections. Respondent introduced photographs of some of the areas cited by the inspector. The judge considers these photographs to be pivotal to a disposition of the issues.

Citation Nos. 2867903, 2867904, 2867905, 2867906, and 2867908 charge respondent with violating 30 C.F.R. § 56.14001, which provides as follows:

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

Citation No. 2867903

The Secretary's evidence by its inspector indicates that the chain drive assembly on the hopper feeder conveyor belt was not guarded. The drive assembly was 2 or 3 feet off the ground. The inspector considered this hazard to be open and obvious; other inspectors had said that it needed to be guarded. The inspector indicated that the operator would have to get under the hopper in order to contact the chain drive. Injury in this circumstance could result in loss of fingers. The inspector believed the negligence of the operator was moderate. Particularly, the operator had been previously told about this guarding requirement. The operator had further indicated that the machinery had been running on weekends and that he had recently been running it.

Respondent's case consisted of three photographs (Exhibit R-4). These photographs indicated a gate was available to keep people away from the chain drive.

In rebuttal the inspector reviewed Exhibit R-4 and concluded that the gate failed to provide a guard such as the type required by MSHA.

Discussion

In connection with this citation I credit the Secretary's evidence. It is true that Exhibit R-4(a) and R-4(c) show the presence of the gate but it is apparent, particularly from Exhibit R-4(a) that the unguarded chain drive assembly was at least 4 to 5 feet from the gate. I further conclude that the condition was open and obvious and therefore the operator was negligent. However, the gravity is low since the the unguarded assembly is quite low to the ground. This citation should be affirmed.

Citation No. 2867904

The Secretary's evidence in this case shows that the flat belt drive assembly on the crusher was not adequately guarded and the hand control was located between the wheel and the frame.

Inspector Tanner testified that respondent attempted to guard this assembly. The hazards involve a miner becoming entangled in the equipment or being injured if the belt should break. He considered that the level of exposure was reasonably likely and he believed the operator was moderately negligent in that he knew of this violation.

Respondent's evidence indicated that the clutch handle had been moved and he offered a series of photographs (Exhibit R-5).

In rebuttal the inspector reviewed the photographs and he indicated that they showed an attempt to guard the tail pulley. He further clearly identified an unguarded and exposed pinch point, marking it with an "x" on Exhibit R-5(b). Inspector Tanner further indicated that Exhibit R-5 shows an unguarded condition. Exhibit 5(d) shows the head and tail pulley where a person could walk to the area and reach the unguarded portions by hand. Exhibit 5(d), according to the inspector, shows the flat belt guarded in front.

Discussion

The photographic evidence shows the flat belt drive assembly was not adequately guarded; further, the hand control was located between the wheel and the frame. Exhibit R-5(a) shows the hand control. I conclude that the photographs support the testimony of Inspector Tanner and a violation of the guarding standard has been established. Citation No. 2867904 should be affirmed.

Citation No. 2867905

The Secretary's evidence indicates that the head and tail pulleys on the conveyor belt system were not guarded.

The inspector wanted these pulleys guarded because a person could contact them. The hazards would involve persons coming entangled with such pinch points. Hand and arm injuries were possible and the inspector considered it reasonably likely that an injury would occur. He further believed the negligence of the operator to be moderate. He had designated this as an S&S violation. The inspector estimated that the head and tail pulley was 5 to 6 feet off the ground.

Respondent offered photographs of the head pulley and tail pulley. Exhibit R-6(a) seems to indicate that both the head and tail pulley are over 6 feet off the ground. Exhibit R-6(b) shows the unguarded pulley to be 8 feet off the ground and Exhibit R-6(c) shows the head pulley to be 15 feet off the ground.

In rebuttal the inspector reviewed the photographs and indicated that a person could reach the pinch points by standing on the opposite side of the head and tail pulley shown in Exhibit R-6(a). He further marked an arrow to the pinch points in the photographs.

In addition, he indicated that Exhibit R-6(b) shows the head pulley. An arrow was marked to the pinch point. Such a pinch point could be readily reached without using a ladder or by walking up the muck piles. Most operators leave muck piles there so they can get to the pinch point to perform maintenance. In the inspector's view Exhibit R-6(d) possibly shows the head pulley 8 feet high and the inspector agrees that it may be that the head pulley was not covered by the particular citation.

Exhibit R-6(d) shows where the inspector asked the operator to guard the equipment. In his view the head pulley was not guarded.

Discussion

The testimony and the photographic exhibits cause me to conclude that the head and tail pulleys were at least in excess of 6 feet off the ground and, in fact, as high as 15 feet off of the ground. For these reasons I conclude that the unguarded equipment and these moving machine parts are not likely to be contacted by any person nor injure any such person within the meaning of the regulation. For these reasons no violation of the guarding standard occurred and Citation No. 2867905 should be vacated.

Citation No. 2867906

In connection with this citation, the Secretary's evidence showed that the V-belt drive assembly on the jaw crusher was not guarded on the inside and outside. Inspector Tanner considered this the worst of the guarding violations he saw. This was particularly hazardous because at this unguarded point Mr. Huffman poured oil into the machinery. It was 4 to 6 inches from the oil cups to the gears. There was oil dripping on the side. The inspector told Mr. Huffman that this condition must be fixed before he operated the equipment. If a person became caught in the unguarded assembly a fatality could result. The inspector considered this an S&S violation and, further, he believed the operator was negligent because the operator knew of the problem.

The operator offered to write a letter stating if anything happened the inspector would not be responsible.

Respondent's evidence indicated that one guard had been added on the V-belt side since the citation was written. He further offered photographs of the condition (Exhibit R-7).

Exhibits R-7(a), (b) and (c) depict the V-belt drive assembly and show the conditions as they existed in February 1988. The additional guard had in fact been added at the suggestion of respondent's attorney.

In rebuttal, Inspector Tanner reviewed the photographs. Exhibit R-7(a) shows the place where Mr. Huffman checks the bearings and also shows the piece of steel where he stands. Mr. Huffman had added a guard between the cups and the flywheel but in the inspector's opinion the right hand side was still unguarded.

Exhibit R-7(b) shows the outside of the V-belt assembly and shows it to be unguarded. A person would have to reach out to "get it". When the inspector was there these were unguarded.

Inspector Tanner marked an arrow to the unguarded area and indicated a person could reach the motor drive by hand.

Exhibit R-7 shows an area where Mr. Huffman oils the equipment which was unguarded at the time of the inspection. He asked for a guard on the side and indicated that there is a guard on the left hand side.

Respondent agrees that one guard on the V-belt side was added since the citation was written. The photographs, particularly R-7(b) and R-7(a), show the unguarded assembly.

Discussion

This citation should be affirmed. The photographs support Inspector Tanner's testimony.

Citation No. 2867907

Citation No. 2867907 charges respondent with violating 30 C.F.R. § 56.11012, which provides as follows:

> Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

The Secretary's evidence shows that the screw on the sand washer was not protected to prevent persons from falling into it. The evidence further indicated to Inspector Tanner that the sand washer was 2 to 5 feet high and it was necessary to have a cover over the lower half. The equipment was supposed to have a travelway and nearby footprints indicated that someone had been in the area.

In the inspector's view this was a large size screw; the hazard could involve possible loss of leg or hand or an arm. He further considered that it was likely that such an accident could occur. In addition, he considered this to be an S&S violation.

The inspector believed the operator was moderately negligent because the company knew the hazard was there and had been so advised by previous inspectors. The screw conveyor itself was between 6 to 8 feet to a low of 2 feet. The inspector asked that the lower part be covered.

Respondent's evidence consisted of photographs, Exhibit R-8. Respondent indicated that both screens had been taken off the shaker but the Mr. Huffman felt safe with the condition.

In rebuttal Inspector Tanner reviewed the photograph and noted that the cover was not in place on the occasion of his first and second inspections. The inspector required that it be put in place.

Discussion

Mr. Huffman agrees that both screens had been taken off the shaker. Exhibit R-8 was taken after the citation was written. I accordingly credit the inspector's testimony that the violative condition existed at the time of the inspection.

It accordingly follows the citation should be affirmed.

Citation No. 2867908

This citation charges a violation of the guarding standard, 30 C.F.R. § 56.14001.

Inspector Tanner testified the screw drive assembly for the sand screw washer was unguarded. It was unlikely that a person would get into the screw drive assembly but if it occurred he would suffer the possible loss of a hand, fingers, arms, or in any event, lost days.

He believed the operator was moderately negligent since he knew of the violative condition. The assembly was between 2 feet on the wall to a high of 6 to 8 feet off the ground. The bottom of the assembly was filled with sand.

Mr. Huffman indicated that the assembly was at least 8 feet off the ground. In support of his position he offered Exhibit R-9. The photograph shows the end of the screw sand washer which is 8 feet above ground. This is the condition that was depicted in February 1988. The operator believed the condition was safe because it was necessary for him to use a ladder in order to reach it to service it. He usually services the areas that are to be maintained before he to runs his equipment.

In rebuttal Inspector Tanner drew an arrow to the area he believed should have been guarded. Due to the build up of a muck pile underneath, a person could reach it. It was in this same condition in February 1988. He wrote this as a non-S&S violation.

Discussion

I credit Mr. Huffman's version of this condition. The existence of a muck pile is not shown in the photograph nor does the equipment indicate that there would be a build up of such a pile in this particular area. It accordingly follows that workers could not contact or be injured by the exposed parts.

This citation should be vacated.

Citation No. 2867909

Citation No. 2867909 charges respondent with violating 30 C.F.R. § 56.12032, which provides as follows:

> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

The Secretary's evidence shows that the cover on the electrical junction box to the screw drive motor was missing. There were electrical connections inside the box and there were wires sticking out. The hazard involved improper insulation and a fatality could result if a person contacted such equipment. The inspector believed the operator was moderately negligent. The condition was open and obvious, and the box itself was 6 to 8 feet off the ground.

Respondent indicated and concurred that the cover was missing but he did not see that it would make any difference since there were no exposed wires. Exhibits R-10(a)(b) and (c) were received in evidence and the operator indicated he had never had a problem with this particular junction box.

In rebuttal Inspector Tanner drew arrows to the junction box. In Exhibit R-10(b) you can observe where a person could contact the junction box by walking up the muck pile.

Discussion

The operator admits the cover on the electrical junction box was missing and he failed to prove in the inspection that there was testing being done or that repairs were being undertaken.

The particular standard in question, namely § 56.12032, is a mandatory standard. The regulation does not require a potential for contact or injury as does the guarding regulation.

This citation should be affirmed.

Citation No. 2867910

Citation No. 2867910 charges respondent with violating 30 C.F.R. § 56.12028, which provides as follows:

> Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

The Secretary's evidence shows that a test of the continuity of resistance of the grounding systems had not been done on the plant and a record of such test had not been made.

The purpose of the regulation is to insure that plant generators are grounded. The hazard in this situation is that a possible fatal injury could occur and there have been numerous such fatalities.

The inspector considered this to be an S&S violation particularly because of the volume of water in close proximity to the crusher. Water could establish an effective ground.

The inspector believed the operator had been moderately negligent and he should have known that electrical equipment had to be grounded. Mr. Huffman indicated that it had not been tested.

Mr. Huffman testified that he had not had an electrician run a test but he believed the grounding wires were apparent. In connection with this he offered Exhibit R-11(a), (b) and (c) which show the ground wires. This was the condition existing in February 1988.

In rebuttal Inspector Tanner reviewed the photographs and stated that Exhibit R-11(a) does not show if the grounding is adequate and that cannot be determined until a grounding check has been done. Further, Exhibit R-11(b) shows the power cable was wrapped in tape. In addition, Exhibit R-11(c) shows the frame was grounded but it doesn't show, nor does it establish, if the grounding system was effective.

Discussion

The evidence established by the inspector and confirmed by Mr. Huffman is that a test of the continuity of resistance of the grounding system had not been done on the plant nor had a record of such tests been made.

For the foregoing reasons this citation should be affirmed.

Civil Penalties

The statutory criteria to assess civil penalties is contained in section 110(i) of the Act.

One criteria involves the operator's history of previous violations. However, in this case there was no evidence of the prior history. However, inasmuch as the inspection occurred shortly after a start-up, I infer that the operator's history is favorable to the company.

Additional criteria is whether the penalty is appropriate in relation to the size of the business and whether the penalty will affect the operator's ability to continue in business. It is apparent that this is a small operator and in fact only Mr. Hoffman engaged in the actual preparation of the sand and gravel. Mrs. Huffman indicated the company is doing better than breaking even.

Concerning the operator's negligence, the evidence establishes that the operator was negligent in that the conditions were open and obvious.

The Mine Safety Act provides for a credit for good faith in attempting to achieve rapid compliance. However, in this case the operator requested that an order be issued in order that he might litigate the issues involved. However, issues of good faith fall under a broad umbrella and I find

from the credible evidence that Mrs. Huffman was in contact with MSHA in a conference call in an effort to resolve these citations. In addition, she previously advised MSHA of their most recent start-up of the business (Exhibit R-5). I conclude that such activities fall within the broad umbrella of good faith.

The foregoing conditions apply to all of the statutory criteria for assessment of the civil penalty except the criteria of gravity. This criteria is now considered.

Citation No. 2867903 (chain drive assembly): the gravity in this situation is low since a person would have to be within 2 or 3 feet of the ground to contact the unguarded chain drive.

Citation No. 2867904 (flat belt drive assembly): the gravity here is likewise low. The guard did not fully enclose the belt but the pinch points are enclosed by the guard and the position of the hand control as shown in Exhibit R-5(a) would not cause any serious problems.

Citation No. 2867905 (head and tail pulleys on conveyor): this citation is to be vacated.

Citation No. 2867906 (V-belt assembly): the gravity involved in this guarding violation is particularly troublesome in that the operator must pour oil to maintain the equipment while it is running. No doubt the oil in the immediate vicinity would cause a slippery condition. I believe the gravity in this violation is high.

Citation No. 2867907 (sand washer): the gravity connected with this violation is high. Due to the size of the screw involved a person could lose a limb.

Citation No. 2867908 (screw drive assembly for sand washer): this citation is to be vacated.

Citation No. 2867909 (cover for electrical junction box): I consider the gravity for this violation to be low. In addition, the positioning of the box, 6 to 8 feet off the ground, would render likelihood of any serious injury to be remote.

Citation No. 2867910 (checking grounding system): the gravity involved in this violation is high since an inadequate grounding system could result in a fatality.

I conclude that the penalties set forth as to each of these citations in the order in this decision are appropriate.

ORDER

Based on the foregoing findings of fact and conclusions of law it is hereby ordered that:

1. Citation No. 2867903 is affirmed and a civil penalty of $25 is assessed.

2. Citation No. 2867904 is affirmed and a civil penalty of $25 is assessed.

3. Citation No. 2867905 is vacated.

4. Citation No. 2867906 is affirmed and a civil penalty of $100 is assessed.

5. Citation No. 2867907 is affirmed and a civil penalty of $50 is assessed.

6. Citation No. 2867908 is vacated.

7. Citation No. 2867909 is affirmed and a civil penalty of $25 is assessed.

8. Citation No. 2867910 is affirmed and a civil penalty of $50 is assessed.

John J. Morris
Administrative Law Judge

Distribution:

Janice L. Holm, Esq., Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Jay Rubin, Esq., Stout & Rubin, 418 Main Street, P.O. Drawer 151, Truth or Consequences, NM 87901 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 2 1989

DONALD R. BABBS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 89-119-D
PEABODY COAL COMPANY, Respondent	:	MADI CD 89-02
	:	Camp 9

DECISION

Before: Judge Fauver

On June 7, 1989, a show cause order was issued allowing Complainant until June 17, 1989 to show cause why his complaint should not be dismissed for lack of jurisdiction.

Complainant has not filed a response to the show cause order. Accordingly, the complaint will be dismissed for lack of jurisdiction.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Mr. Donald R. Babbs, Route 2, Box 248, Sturgis, KY 42459 (Certified Mail)

Eugene P. Schmittgens, Jr., Esq., P.O. Box 373, St. Louis, MO 63166 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

AUG 3 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF THIRTEEN COMPLAINANTS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 88-142-D
	:	Ada Quarry & Plant
v.	:	
IDEAL BASIC INDUSTRIES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

The parties have reached an amicable resolution of this matter and on July 28, 1989, filed their motion for approval of settlement.

Pursuant to their settlement agreement, the parties reached the following accord:

1. Respondent agrees (a) not to impose requirements or restrictions upon its employees solely due to the employees' filing of State Workers Compensation claims based on disabilities allegedly caused by hazardous conditions existing in their work environment, (b) to comply with the provisions of Section 105(c) of the Federal Mine Safety and Health Act, and (c) that the employment records of the individual complainants will be completely expunged of all references to the circumstances involved in these matters.

2. Respondent agrees to submit to the counsel for Petitioner (Complainant) a certified or cashier's check payable to individual Complainant R. Gene Myers in the amount of $637 less statutory deductions for FICA, state and federal tax withholding in full settlement of a claim for backwages due to R. Gene Myers arising from his five-day suspension for failing to comply with Respondent's work rules regarding respiratory and noise protection. This payment in no way prejudices R. Gene Myers' right to pursue his allegation of discriminatory discharge.

3. Respondent agrees to submit to the "Mine Safety and Health Administration-Labor" (Office of Assessments, 4015 Wilson Boulevard, Arlington, VA, 22203) a certified or cashier's check in the amount of $11,000, which civil money penalty represents the full penalties to be assessed against Respondent in connection with all complained of activity, excluding discharge, asserted by complainants.

4. Petitioner agrees to withdraw from prosecuting its claims of discriminatory discharge. Complainant (Petitioner), i.e., the Secretary of Labor, after further review and evaluation, has determined that there is an insufficient basis for the Secretary to proceed with the claim of discriminatory discharge of any of the complainants. Pursuant to the parties' agreement, the individual complainants have been advised of this decision by the Solicitor's Office and have been informed that they can reserve their statutory rights to proceed independently. Accordingly, upon dismissal of the Secretary's case, the complainants are to be afforded their full statutory rights pursuant to 30 U.S.C. § 815(c)(3) and 29 C.F.R. § 2700.40(b), 41(b) and 42(a). See Roland v. Secretary of Labor, 3 MSHC 1770 (1985).

(Complainant and Respondent have agreed that the Secretary of Labor's withdrawal shall not prejudice the rights of the individual claimants to pursue, pursuant to 30 U.S.C. § 815(c)(3) and 29 C.F.R. § 2700.40(b), 41(b) and 42(a), their allegations of discriminatory discharge).

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

6. The parties have agreed that, except for actions under the Federal Mine Safety and Health Act, none of the foregoing agreements, statements, stipulations and actions taken by Respondent shall be deemed an admission by Respondent of the allegations contained in the Complainant's (Petitioner's) charge or the complaint filed by the Petitioner or the Motion to Approve this settlement agreement. The agreements, statements, stipulations, findings and actions taken herein are made for the purpose of amicably and economically settling disputed issues of fact and law and they shall not be used for any purpose except for proceedings arising under the enforcement of the Federal Mine Safety and Health Act or the terms of their agreement.

It is concluded that the settlement reached is appropriate and such is here approved.

ORDER

(1) The Complaint herein is dismissed with prejudice except as to any charges of discriminatory discharge brought directly by individual complainants which shall be without prejudice to any rights that they may have pursuant to statute, 30 U.S.C. Section 815(c) and 29 C.F.R. Sections 2700.40(b), 41(b) and 42(a).

(2) Within five working days of receipt of this order of the Administrative Law Judge approving the Settlement Agreement, counsel to the Secretary of Labor will send to each complainant a copy of the order and settlement agreement, certified mail, return receipt requested. This action by the Solicitor shall be the formal notification of withdrawal pursuant to 30 U.S.C. § 815(c)(3) and 29 C.F.R. § 2700.40(b).

(3) Respondent, shall pay a civil penalty totaling $11,000.00 to the Secretary of Labor within 30 days from the date hereof.

(4) Within 30 days from the date of issuance hereof, Respondent shall pay to R. Gene Myers back pay described herein ($637.00 less deductions).

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Michael Olvera, Esq., and Terry K. Goltz, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Gallas, TX 75202 (Certified Mail)

Michael Towers, Esq., Fisher and Phillips, 1500 Resurgens Plaza, 945 East Paces Ferry Road, Atlanta, GA 30326 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

AUG 3 1989

BRUCE MITCHELL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 88-244-DM
v.	:	MD 87-59
	:	
ASARCO, INC., Respondent	:	Troy Mine

DECISION

Before: Judge Lasher

The parties have reached an amicable resolution of this matter. On July 17, 1989, the parties, through counsel filed herein a duly executed "Stipulation of Voluntary Dismissal With Prejudice", requesting dismissal of this matter with prejudice based on their settlement agreement. Based on their Stipulation, which inter alia constitutes in essence a withdrawal of Complainant's action herein, pursuant to Commission Rule 11 (29 C.F.R. § 2700.11), this proceeding is DISMISSED with prejudice.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Henry Chajet, Esq., Doyle & Savit, 919 Eighteenth Street, Suite 1000, N.W., Washington, D.C. 20006 (Certified Mail)

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

Mr. Bruce Mitchell, Box 681, Libby, MT 59923 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

AUG 4 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 88-256-M A.C. No. 04-04917-05501
v.	:	Docket No. WEST 88-311-M A.C. No. 04-04917-05502
INDUSTRIAL CONSTRUCTORS, Respondent	:	Colosseum Mine

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Michael Tanchek, Esq., Industrial Constructors Corporation, Missoula, Montana, for Respondent.

Before: Judge Lasher

This matter was commenced by the filing of proposals for assessment of civil penalties by Petitioner, seeking penalties for two alleged violations described in two Citations -numbered 3286940 in Docket No. WEST 88-256-M and 3286684 in Docket No. WEST 88-311-M -issued by MSHA Inspector Vaughn D. Cowley on February 3, 1988 and May 11, 1988, respectively.

Separate discussion of these Citation follows.

Docket No. WEST 88-256-M

Citation No. 3286940, alleging a "significant and substantial" violation was issued pursuant to Section 104(a) of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. Section 801 et seq., and charges Respondent with an infraction of 30 C.F.R. § 56.9022, as follows:

> "The wash water pond located at the shop area was not provided with a berm or guard to prevent equipment from driving into the pond."

30 C.F.R. § 56.9022 provides:

> "Berms or guards shall be provided on the outer bank of elevated roadways."

Respondent concedes that there were no berms around the wash pond in question, but alleges that because it intended to build a fence around the pond and had materials present with which to do, that the "significant and substantial" (S & S) designation on the Citation was not warranted (T. 11-12).

Inspector Cowley described the activities conducted at the shop area which he observed on his inspection on February 3, 1988, as follows:

> "Maintenance of the mining equipment, servicing of equipment, maintenance, breakdowns, hoses break, brakes fail, whatever, they have mechanics working there, service equipment working." (T. 14)

Located in this shop area, which is about 1 acre in size (T. 34), is a "wash pad" where trucks and equipment are washed (T. 15 Ex. P-3). Adjacent to the wash pad is the subject water collection pond or wash pond into which the wash water runs and which is about 28 feet x 28 feet in dimension and 10 feet deep (T. 15, 32, 38, 52, 60, 66). The pond is created by the runoff from wash water (T. 38, 41). The depth of the water in the pond would not have been ascertainable by the operator of a vehicle traveling along an adjacent roadway (T. 32, 33, 38).

Inspector Cowley indicated that running a "complete circle" around the flat shop area is this gravel roadway which extends "right to the edge of the pond" and on which various types of vehicles frequently travel (T. 16, 17., 18, 20, 21, 33, 34, 35, 39). Traffic flows in both directions adjacent to the pond (T. 25, 27) and runs along 2 sides of the pond (T. 33, 35).

At the time of his inspection (a) there was a drop of one to two feet from the roadway to the water level of the wash pond and there was 8 to 9 feet of water in the pond (T. 17, 32), and (b) there were no berms, guards, fences or other obstacles between the roadway and the pond (T. 17, 21, 24). Inspector Cowley observed vehicle tire tracks-rubber tire tracks-- within approximately 3 feet of the northwest corner of the pond (T. 19, 22, 31).

The roadway, which was wide enough to accommodate 4 pickup trucks- or two 15-foot wide haulage trucks -- side by side (T. 43, 70) did not have marked lanes, nor were there "Red lights" or flagmen present to control traffic (T. 47). Respondent did post a 5 mph speed limit for the area and its drivers were instructed in its "left-hand traffic" rule (T. 52, 70).

Inspector Cowley described the hazard presented by the violative condition in this manner:

"A vehicle running off into the pond, overturning, -- seriously injuring a person or even possibly in the event he went in and overturned, was trapped in the cab, he could possibly drown.

Q. So the basic hazard would be going over the edge into the pond and sinking to the bottom?

A. Yes." (T. 17)

It was the Inspector's opinion that a serious injury, i.e., one resulting in "lost time (T. 25, 47), was posed by the hazard (T. 25). He explained further:

"It would be a serious injury if a guy was in the truck and it went into the pond and tipped over, the least that could be expected would be at least a lost time accident, and a very possible fatal if he was trapped in the---cab went under water and the guy was trapped in the cab, it could have been a drowning." (T. 25, 26)

From the outer edge of the pond, the slope of the pond drops off sharply to its maximum depth (T. 36, 37, 65). Because of the severity of the drop off, a vehicle is more likely to flip over (T. 36-38).

The violative condition was abated immediately by Respondent by having a front-end loader put up a berm (T. 22).

Although Respondent contends that it was planning to install a fence around the wash pond, Inspector Cowley did not observe fence materials in the area (T. 23, 44), he was not advised on the inspection day that management was planning to install such a fence (T. 24, 25), and it was his opinion, and conceded by Respondent--that a fence would not have been sufficient to have stopped large equipment having mechanical failure (T. 24, 55, 56).

Respondent's Maintenance Superintendent, Lewis Young, testified that fence materials had been acquired for the pond which were stacked alongside a building (T. 50) on the day the Citation was issued. However, no part of the fence had been constructed (T. 50, 55), and all of the materials for the fence had not been acquired (T. 55) 1/.

1/ It is thus found that even had the fence been in place it would not have complied with the berm/guard standard, and further, by Respondent's own admission, that all the fence materials for the fence had not been acquired on the day the hazard was observed and the violation cited.

Mr. Young offered only the following explanation as to why the fence (not berms or guards) had not been put up:

> "We had been busy, we'd just moved into the new shop. We were trying to get our maintenance program, the equipment, on line. We were still organizing in the building." (T. 50).

Water had been in the pond for approximately two weeks (T. 51).

Respondent established that some of the larger vehicles-because of the height of their cabs-- would not have exposed their drivers to the drowning hazard mentioned by the Inspector had such vehicles tipped over into the pond (T. 26). Nevertheless Respondent's witness, its Maintenance Superintendent, admitted that small vehicles were subject to the hazard described by the Inspector (T. 51) and that such vehicles did traverse the area around the pond (T. 51, 52).

Discussion

It was conceded and the evidence clearly established that there were no berms or guards provided on the outer bank of the roadway at the time the condition was cited. There is no question but that the violation charged did occur and that it was very serious and resulted from Respondent's negligence since it had existed for approximately two weeks without the hazard being recognized. Respondent's primary, if not sole contention, involves the propriety of the "significant and substantial" (S & S) designation to the violation.

A violation is properly designated S & S "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 (1984), the Commission listed four elements of proof for S & S violations:

> 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 (1985), the Commission expounded thereon 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).

It is concluded that Petitioner carried its burden of proof under Mathies, supra, with respect to this violation since the violation was clearly established and the violative condition involved contributed a "measure of danger" to the vehicle operators who were exposed to the hazard credibly described by the Inspector. There is no question but that had an accident occurred, the miners (employees) involved would have been exposed to injuries ranging from broken bones to fatalities. Because of the slope of the pond from its outer edge, the likelihood that a vehicle might overturn was increased. In addition, the likelihood of a vehicle going into the pond was increased not only by the absence of berms and guards, but by the absence of other warning respect to the nature of the hazard posed by the pond. The roadway itself was relatively uncontrolled and a vehicle operator could not visibly determine the depth of the water because of its muddy (T. 33) constituency. Thus, I conclude that there was a reasonable likelihood that the hazard contributed by by the violation would result in an injury, and also that such injury would be of a reasonably serious nature, including fatalities.

The designation of this violation as "significant and substantial" is affirmed.

Docket No. WEST 88-311-M

Citation No. 3286684, also alleging a "significant and substantial" violation was issued pursuant to Section 104(a)of the 1977 Mine Act, and charges Respondent with an infraction of 30 C.F.R. § 56.9087, as follows:

"The backup alarm was not operating on the large service truck."

30 C.F.R. § 56.9087, pertaining to "Audible warning devices and back-up alarms", provides:

> "Heavy duty mobile equipment shall be provided with audible warning devices.

> When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up."

Respondent concedes the occurrence of this violation but challenges its designation as "significant and substantial" (T. 89).

During the course of an inspection of the Colosseum mine on May 11, 1988, Inspector Cowley again inspected the shop area and observed a large flat-bed service truck parked outside the shop area (T. 80, 85). The truck, which travels all over the mine and over grades, carries diesel fuel and oil (T. 80-81).

At this time, the Inspector saw the driver of the truck get into the truck and he asked the driver if his back-up alarm worked. The driver said yes. Inspector Cowley then asked him to put the truck in reverse and the alarm did not work. (T. 82).

The driver's view to the rear was obstructed because of the oil barrels, fuel tanks mounted on the back of the truck (T. 82). There is no question but that the vehicle operator had an obstructed view to the rear. The Inspector actually described the nature of the visibility obstruction in this manner:

> "Standing behind the truck approximately 25 feet looking you could not see either one of the mirrors on the truck at an angle, a "V" shape, from the back of the truck back to where I was standing approximately 25 feet, both mirrors was out of sight. Both mirrors was out of sight, he couldn't see." (T. 82) 2/

The area of the mine most susceptible to the hazard posed by this violation was the pit area (T. 84, 86). The driver told the Inspector at the time that he was on his way to the pit area to service equipment there during the lunch hour (T. 83). During the lunch hour, various employees are in the pit area--normally 6 in number -- and they are free to go where they want (T. 84).

The Inspector gave this description of the hazard posed by the violation:

2/ I infer from this testimony that if one standing behind the truck at a given point cannot see the mirrors that the driver--looking through the mirrors--- could not see the reflected image of someone standing at such point.

"Employees on foot being in the area is the biggest danger of not -- of the truck backing up and them not being -- the alarm not going off, or the bell going off, buzzer, whatever, not making noise to warn whoever was behind the truck that it was backing up. (T. 82-83).

XXX XXX XXX XXX XXX

"Well if the vehicle backed over an employee, hit him, knocked him down and backed over him, it very likely be fatal, or at least broken legs, or if he run over his legs, or whatever.

(Pause)

Judge Lasher: What are the dimensions, weights approximately of this vehicle?

The Witness: Of this vehicle? Well, approximately eight feet wide and maybe 20 feet long, and the weight with a full load on it, probably 30,000 pounds, would that be close? I don't -- I don't know. With a full load of diesel fuel and oil and --? (T. 85).

The Inspector gave this description of the pit area and the service truck's function there:

"The pit area itself depends on which level they're working on. Most of the areas are large, open, flat areas where they're mining ore or waste out of a blast area, there's a large area behind them, possibly in front of them, possibly on three sides of this work area, where the trucks come in, back up, the shovels load them. The trucks will leave the shovel area, come over and park away from the work area. The truck drivers will -- some of them stay in their truck. I talk to them generally. Some of them get out, they walk around their trucks, they generally eat lunch at this time. The service truck comes into the pit area at that time, pulls up and greases, changes oil, pumps oil in or whatever is necessary as far as servicing goes, during this lunch break."

The Inspector was of the opinion that the service truck would be required to back under certain situations obtaining in its operation (T. 93) and he also indicated that there was no alternate means of alerting someone behind the truck when the truck was backing up (T. 100-101).

Other factors bearing on the question of the likelihood of the hazard coming to fruition were the presence of extraneous noise in the pit area beyond that created by the service truck

(T. 101, 103) and the significant level of foot traffic in this area (T. 91, 102-103, 104-106, 113). Thus, the Inspector testified:

> "The fact that the truck in question, the service truck, works in the pit area during the noon hour when there is quite a bit of exposure of employees on foot in the area. Employees not only of Industrial Constructors, but Bond Gold Corporation's engineers and geologists in the area during the lunch hour when the service truck is in the process of servicing the large mining equipment in the pit area."

While Respondent's Maintenance Superintendent, Lewis Young, was of the opinion that there would "normally" (T. 109) be no reason for the service truck to back up while servicing other equipment in the pit area, he also conceded the likelihood of the truck's striking employees had it been put in reverse (T. 112).

Discussion

The issue presented with respect to this Citation is whether the Inspector's determination that the violation was significant and substantial (S & S) should be upheld. Applying the Commission's analytical formula for making such determination -- set forth succinctly in its Mathies decision, supra, it is readily seen that there is no question as to the establishment of three of the four prerequisite elements. Thus, Respondent admits that the violation occurred, and the record strongly supports the finding that the violation contributed a measure of danger to safety. Had the violative condition resulted in an accident, it is equally clear that an injury of a reasonably serious nature would have resulted therefrom (T. 85, 86).

The question remains: Was there a reasonable likelihood that the hazard contributed to by the violation would result in an event in which there would have been an injury?

Here, the record is clear that there was considerable foot traffic in the area in which this large truck was operating -- which must be considered in conjunction with the size of the pit area and the potential proximity of employees to the truck (T. 91, 94, 101-103, 112). The nature of the violation itself inherently carries a considerable threat of risk to the safety of miners: (1) a large piece of mobile equipment, (2) operating without a backup alarm, where (3) the operator's vision is obstructed to the rear. Add to this mix the presence of a considerable number of miners on foot in proximity to the truck, no alternate means of alerting such employees of the vehicle's being put into reverse, extraneous noise, and one must conclude

that a reasonable likelihood existed that the hazard contributed to by the violation would occur and cause an injury. The Inspector's determination that this violation was significant and substantial is affirmed.

Penalty Assessment Factors

The parties stipulated that Respondent, 3/ a large company (T. 73) with a large mine, had no history of assessed violations within the pertinent 24-month period preceding the occurrence of the violations in question (T. 13, 76). It was also stipulated that (1) Respondent, after notification of the violations, proceeded in good faith to abate the same and (2) that assessment of penalties would not jeopardize Respondent's ability to continue in business (T. 13, 76). Both violations involved have been previously found to be "significant and substantial". I have also previously found that the violation charged in Citation No. 3286940 was very serious and resulted from Respondent's negligence.

In connection with Citation No. 3286684, the parties stipulated that the violation resulted from a "low degree of negligence" and I so find. It is also found that this violation was very serious.

Having considered the above mandatory penalty assessment criteria, penalties of $150.00 for Citation No. 3286940 and $100.00 for Citation No. 3286684 are found appropriate and are here assessed.

ORDER

Citations numbered 3286940 (Docket No. WEST 88-256-M) and 3286684 (Docket No. WEST 88-311-M), including the designations "Significant and Substantial" thereon, are affirmed.

Respondent is ordered to pay the Secretary of Labor within 30 days from the date hereof the total sum of $250.00 as and for the civil penalties above assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

3/ Respondent operates a "multiple bench level type" of gold mine and at material times had a payroll of approximately 50 employees (T. 14).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 11 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 89-5
	:	A.C. No. 36-00856-03615
v.	:	
	:	Rushton Mine
RUSHTON MINING COMPANY, Respondent	:	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;
Joseph A. Yuhas, Esq., Greenwich Collieries, Ebensburg, Pennsylvania for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," in which the Secretary has charged Rushton Mining Company (Rushton) with two violations of regulatory standards. At hearings the parties submitted a Motion to Approve a Settlement agreement with respect to Order No. 2885754 in which Rushton agreed to pay a civil penalty of $500 -- a reduction of $100 from the initially proposed penalty. I have considered the evidence submitted in support of the motion and find that it comports with the requirements set forth under Section 110(i) of the Act. Accordingly the motion is approved.

Citation No. 2885977 remains at issue. The citation, issued pursuant to Section 104(d)(1) of the Act[1/], alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.303(a), and charges as follows:

1/ Section 104(d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such

Preshift examinations of the N-14, No. 2 supply haulage entry were not being conducted. The supply haulage entry begins one crosscut inby station 8013 for a distance of approximately 2500 feet. No dates, times or initials were present in the entry to signify that examinations were conducted nor were [sic] any record of preshift examinations available. The No. 2 entry track-trolley haulage ends at station 8032 where the S&S rubber tired battery motor transports the supplies to the section. Within the 2500 feet there were 3 full rubber tired supply cars containing cement blocks, for permanent type stoppings, roof bolts and roof bolt plates. There were others supplies stored in crosscuts that had been removed from supply cars. It was necessary this shift for the S&S tractor to go off the section into the No. 2 entry for roof straps and it was necessary for the section foreman to conduct a preshift examination. This examination was conducted after a discussion about the situation with the safety inspector and section foreman. This entry was identified as the secondary escapeway from the N-14, 016 section, on all mine maps such as temporary notation map, section map, the map posted for the miners and the main map retained in the engineers office.

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

The cited standard, 30 C.F.R. § 75.303(a), provides in part as follows:

> Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require.
>
> * * *
>
> Such mine examiner shall place his initials and the date and time at all places he examines.
>
> * * *
>
> Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or

indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

Rushton admits that its mine examiner did not in fact place his initials and the date and time of his examination within the cited No. 2 supply haulage entry and therefore admits to this extent that a violation of the cited standard was committed. Rushton denies however that a proper preshift examination was not performed and was not recorded in the preshift examination book. Rushton also argues that the violation was neither "significant and substantial" nor the result of its "unwarrantable failure" to comply with the cited standard.

According to the undisputed testimony of MSHA Inspector Donald Klemick, he was present in the cited No. 2 supply haulage entry on both May 8 and May 9, 1988. On May 8, 1988, neither Klemick nor the company representative, Safety Inspector Bob Crain, were able to locate any dates, times or initials within the entry. Again on May 9, 1988, neither Klemick nor Crain (nor on this occassion the miner's representative) were able to locate any evidence of dates, times or initials in the cited entry. According to Klemick there was no evidence of even old dates, times or initials evidencing earlier examinations of the entry.

Dennis Stoltz the section foreman responsible for performing the preshift examination in the cited entry within three hours of the commencement of the 8:00 a.m. to 4:00 p.m. shift on May 9, 1988, testified that he in fact did preshift the cited area between about 6:15 a.m. to 7:00 a.m. He explained at hearing why he was unable to place the date, times and his initials in the No. 2 entry as required by the cited regulation. His testimony was as follows:

> All right. My normal routine because I had done this other, was to travel to the end. Well, I engaged in this pump by myself which weighs hundreds and hundreds of pounds and I got into a mess and got tied up. On the way back, I was negligent and I was in a hurry and did not stop and date my usual areas of datings. (Tr. 63)

Stoltz was unable to satisfactorily explain why the inspection party had been unable to locate any older dates, times or initials anywhere in the cited entry.

I find Stoltz's testimony to be less than credible. He maintains that he conducted all of the examinations required by section 303(a) in the cited entry but was in too much of a hurry to place, the date, time and his initials in the entry. Section 303(a) requires, among other things, tests for accumulations of methane, oxygen deficiency, examination of seals and doors to determine whether they are functioning properly, examinations and testing of the roof and ribs examination of active roadways, etc. In particular I note that the regulation requires not only the examination but also the testing of roof conditions. Stoltz admitted that he was "negligent" and "in a hurry" and made only a visual examination of the roof as he rode through the entry. Thus even if he did perform a cursory observation of conditions while passing through the entry it is clear that he did not properly perform all of the required tests. Indeed I do not find credible that Stoltz had sufficient time to perform a proper preshift examination in the entry yet did not have sufficient time to place the time, date and his initials in that entry. Under the circumstances I cannot find that the a preshift examination was performed on May 9, 1988, in the cited entry.

The testimony of Inspector Klemick regarding gravity and negligence is however largely unhelpful. In this regard the record shows the following colloquy:

> Q [By Government Counsel] Now, looking at what has been admitted as Government's Exhibit Number 1 under Section 10, Gravity. It is checked off as "Reasonably likely to result in lost work days of restricted duty."
>
> Could you explain the lost work days or the restricted duty injury that you were referring to in this citation?
>
> A [Inspector Klemick] More likely from the fall of the roof and anything else. This, up near the section there was some roof that had been supported; however, it was a fall coming through there or a car. It was taking water and throughout the area that the pre-shift examinations are intended to preclude any hazardous situation which from day to day, shift to shift can occur.

Q Why did you rate it as "reasonably likely."

A Because of the fact that as far as evident records or evident that people were in that area pre-shift, there was not any and this was a high negligent situation because the operator is well aware of his requirement.

Q You say that it was a high negligent situation. Why was it a high negligent situation?

A Because of the lack of the operator going into these areas and making pre-shift examinations.

Q Do you or do you not believe that the operator engaged in aggravated conduct in this violation?

A I do, because, I have never encountered a situation like this at Rushton Mine that they did make any examinations of this particular situation or area; especially, pre-shift as important as they are. (Tr. 37-38)

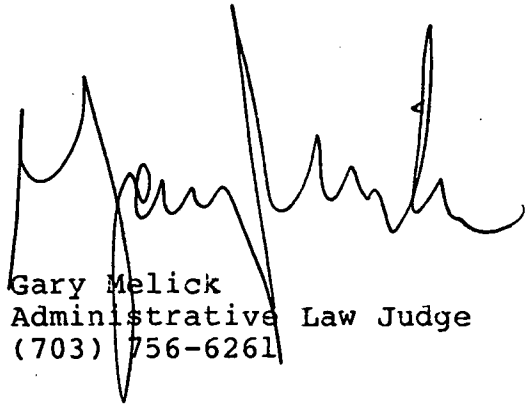
There is nevertheless sufficient evidence elsewhere in the record to conclude that the violation was the result of Rushton's "unwarrantable failure". The evidence is undisputed that company representative Bob Crain, accompanying Inspector Klemick, was unable to locate any dates, times, or initials within the cited entry on May 8, 1988, thereby placing management on notice that pre-shift examinations were probably not being conducted in that entry. On the following day when the citation was issued, again no dates, times or initials were found in the cited entry. It may reasonably be inferred from this evidence that even after notice the operator continued in its failure to conduct required pre-shift examinations in the cited entry. This is evidence of gross negligence and aggravated conduct sufficient to constitute "unwarrantable failure". Emery Mining Co., 9 FMSHRC 1997 (1987), appeal pending (D.C. Cir. No. 88-1019).

The violation was also serious and "significant and substantial". See Mathies Coal Co., 6 FMSHRC 1 (1984). I agree with the Secretary's analysis of this issue in her brief:

The intent of the pre-shift requirement is to prevent miners from entering areas that may contain unexpected or unanticipated hazards. Miners travelled this supply haulageway to move equipment through the haulageway while inspector Klemick was still at the mine, on the day he issued the citation; mine management used this haulageway to transport equipment. The failure to pre-shift this area exposed these miners to any variety of unforeseen hazards. The failure to pre-shift contributed to a discrete safety hazard that would result in a reasonably serious injury. Therefore, the order was properly rated as significant and substantial.

ORDER

Section 104(d)(1) Order No. 2885754 and Section 104(d)(1) Citation No. 2885977 are hereby affirmed. Considering the available criteria under Section 110(i) of the Act Rushton Mining Company is directed to pay civil penalties of $500 and $600 respectively for the violations in the above order and citation within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (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 11 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 89-17 A.C. No. 36-00856-03616
v.	:	Rushton Mine
RUSHTON MINING COMPANY, Respondent	:	

DECISION

Appearances: Linda Henry, Esq., Office of the Solicitor U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;
Joseph A. Yuhas, Esq., Rushton Mining Company Ebensburg, Pennsylvania for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor against the Rushton Mining Company (Rushton) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," in which the Secretary has charged one violation of the regulatory standard at 30 C.F.R. § 75.301. The issue before me is whether Rushton has committed the violation as alleged and, if so, what is the appropriate civil penalty for the violation.

The citation at issue, No. 2884010, charges a "significant and substantial" violation of 30 C.F.R. § 75.301 and alleges as follows:

> The active workings on the outby side of bleeder evaluation point No. 9 was [sic] not being ventilated by a current of air containing not less than 19.5 volume per centum of oxygen as was indicated using and approved MX240 oxygen-methane detector. The detector indicated that 19.1 volume per centum of oxygen was ventilating the immediate outby side of the evaluation point where persons are required to evaluate the 3, 4 and 5 butts

bleeder systems. Bottle sample No. 1 was collected to substantiate the condition.

The citation was subsequently modified on March 21, 1988, as follows:

> Citation No. 2884010 is being modified to reflect the analytical results of the air sample. The per centum of oxygen was 19.2. The per centum of carbon dioxide was 1.4 which was more than the allowable 0.5 per centum. This additional information shall therefore be inclusive in the citation as part of the violation.

The cited standard, 30 C.F.R. § 75.301, provides in part as follows:

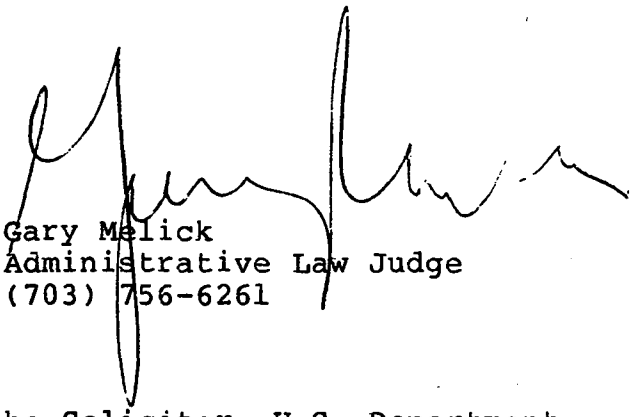
> All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases...

Rushton does not dispute the oxygen and carbon dioxide readings obtained by MSHA Inspector Donald Klemick but maintains that the area in which these readings were obtained, bleeder evaluation point Number 9, was not within the "active workings" of the mine. Indeed it is not disputed that this bleeder evaluation point is part of the bleeder system. If the cited bleeder evaluation point was not within the "active workings" then clearly there was no violation of the cited standard.

The same issue has previously been litigated before several judges of this Commission. In U.S. Steel Corp., 6 FMSHRC 291 (1984) Judge Koutras concluded that "when read together with the other standards in Part 75, a bleeder entry is not active workings is a sound and logical interpretation and application of the cited standard." Recently in Rochester and Pittsburgh Coal Co., ___ FMSHRC ____ (July 18, 1989) (Docket Nos. PENN 88-164-R and PENN 88-288) Judge Weisberger similarly concluded that a bleeder system is not a part of the "active workings" of the mine. These decisions are based on sound logic and policy reasons and are therefore followed here. I therefore find that bleeder evaluation point Number 9 here cited is not within the "active workings" of the subject mine. Accordingly there can be no violation of 30 C.F.R. § 75.301 as charged.

ORDER

Citation No. 2884010 is vacated and these proceedings are dismissed.



Gary Melick
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

AUG 11 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-121 A.C. No. 05-00301-03629
v.	:	Dutch Creek No. 1 Mine
MID-CONTINENT RESOURCES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

Upon motion for approval of a proposed settlement of the 16 Citations and Orders originally involved, and the same appearing proper and fully supported in the record, the settlement is approved.

A summary of the agreement reached follows:

Citation/Order No.	Proposed Penalty	Amended Proposed Penalty	
3043587	$1,400.00	$1,400.00	
3043593	1,300.00	780.00	
3044798	1,100.00	1,100.00	
3944799	1,350.00	810.00	
2504970	1,300.00	500.00	(104a)
2832602	1,000.00	250.00	
2832603	1,000.00	250.00	
2503932	1,100.00	1,100.00	
2503864	1,000.00	1,000.00	
2503867	1,300.00	1,300.00	
2503868	1,000.00	600.00	
2503869	900.00	500.00	(104a)
2334828	1,100.00	660.00	
2334829	1,200.00	0.00	(vacated)
2334830	1,100.00	340.00	
2503874	1,000.00	300.00	

As part of the overall settlement, Respondent Mid-Continent agrees to withdraw all defenses in all pending cases, specifically as to the "MSHA enforcement abuse" issue.

The above settlement actually reflects and incorporates various agreements reached at formal hearing in March, 1989.

Thus, as to two 104(d)(2) Orders listed below, MSHA agreed at the hearing (1) that such did not result from the mine operator's "unwarrantable failure" to comply with the pertinent standard, (2) that such should be modified to 104(a) Citations, and (3) that the penalties should be reduced from the original assessments as follows:

Section/Order No.	Modification	Original Assessment	Agreed Penalty
104(d)(2) Order Order No. 2503869	To 104(a) Citation	$ 900.00	$500.00
104(d)(2) Order No. 2504970	To 104(a) Citation	$1,300.00	500.00

As to two 104(a) Citations, numbered 2832602 and 2832603, since neither violation was charged to be "significant and substantial" or considered serious, Petitioner at the hearing agreed to penalty reductions for both from $1,000.00 to $250.00.

Also at the hearing, Petitioner, after a re-evaluation of its case, withdrew its prosecution of Section 104(d)(2) Order No. 2334829, and moved to vacate such. Such motion was granted on the record, is reflected in the written settlement motion, and is here affirmed.

ORDER

1. Withdrawal Orders numbered 2503869 and 2504970 are modified to 104(a) Citations and withdrawal Order No. 2334829 is vacated.

2. Respondent, if it has not previously done so, is ordered to pay to the Secretary of Labor on or before October 1, 1989, the sum of $10,890.00 as and for the civil penalties agreed on and above assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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

Edward Mulhall, Jr., Esq., Delaney & Balcomb, Drawer 790, Glenwood Springs, CO 81602 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

AUG 11 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-122 A.C. No. 05-00301-03630
v.	:	Dutch Creek No. 1 Mine
MID-CONTINENT RESOURCES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

Upon Petitioner's motion for approval of a proposed settlement of the 7 Orders involved, and the same appearing proper and fully supported in the record the settlement is approved.

A summary of the agreement reached follows:

Order No.	Proposed Penalty	Amended Proposed Penalty
2503875	$1,100.00	$ 660.00
2503876	1,300.00	780.00
2503877	1,100.00	660.00
2503878	1,300.00	810.00
2503879	1,000.00	600.00
2503880	1,100.00	660.00
2334839	1,100.00	660.00

As part of the overall settlement, Mid-Continent agrees to withdraw all defenses in all pending cases, specifically as to the "MSHA enforcement abuse" issue.

Respondent, if it has not previously done so, is ordered to pay to the Secretary of Labor on or before August 1, 1989, the sum of $4,830.00.

Michael A. Lasher, Jr.
Administrative Law Judge

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/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 16 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 89-10 A.C. No. 40-02611-03569-A
v.	:	No. 2 Mine
JUNIOR PHILLIPS, Employed by SCARAB ENERGY CORPORATION, Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Junior L. Phillips, Clinton, Tennessee, pro se.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Junior Phillips as an agent of a corporate mine operator with knowingly authorizing, ordering, or carrying out the corporate mine operator's violation of a mandatory safety standard under 30 C.F.R. § 1725(a).

The alleged corporate mine operator, Scarab Energy Corporation (Scarab), was charged with a violation of the mandatory safety standard at 30 C.F.R. § 1725(a) under Citation No. 2789152. The citation alleged as follows:

> The 488 S&S Scoop (approval No. 2G-2831-5, Serial No. 4481951) was not maintained in safe operating condition in that the 128-volt motor leads and the control cables were run over the top of the scoop, and at the center section on the scoop the bearing-retaining nut and retaining ring were missing allowing the center section to move up and down. The brakes on the scoop were not in operative condition. This condition was one of the factors that contributed to the issuance of Imminent Danger

Order No. 2789161 on 6/15/87. Therefore no abatement time was set. (Defective for one month.)

The cited standard provides that "mobile and stationery machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Section 110(c) of the Act provides in part as follows:

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

The evidence set forth by the Secretary at hearing is essentially undisputed. The Secretary's evidence establishes that Scarab was indeed a corporate mine operator and that Junior Phillips at the time of the alleged violation on June 11, 1987, was an agent of that corporate mine operator. The undisputed evidence further shows that on June 11, 1987, at about 5:15 a.m., shuttle car operator William K. Disney was killed as he was driving a mantrip scoop under an overcast. The work crew had entered the mine at about 4:45 a.m. that day under the supervision of foreman Kenneth Jackson. They traveled on a flat bed rail car to the end of the track then boarded the subject scoop operated by Disney for transportation to the working section. As the scoop traveled under the belt overcast in the No. 2 entry of the 001 section, a powered lead placed on top of the scoop was pinched against an "I" beam supporting the overcast. Disney reversed the scoop and traveled about two feet backward when his head was crushed against a second "I" beam.

According to the undisputed testimony of MSHA Special Investigator Lawrence Layne, Disney's death was caused in part by the defective condition of the scoop. In particular Layne noted that the absence of bushings, retainer rings and nuts on the pin connecting the two sections of the scoop allowed the center section to flex 4 to 5 inches. Because of this flexing the scoop was unable to pass under the protruding "I" beam. It was then necessary for Disney to reverse the scoop thereby causing his head to be crushed against another "I" beam. This deficiency in the scoop was clearly an unsafe condition, a violation of the cited standard and of high gravity as evidenced by the resulting fatality.

The evidence is also undisputed that at the time of the fatality Junior Phillips was second-in-command at the subject No. 2 Mine and had served in that capacity during the time that the scoop had been operating in an unsafe condition. Phillips was also the direct supervisor of foreman Jackson and served under mine superintendent Sherman Carroll. According to MSHA Inspector Don McDaniel either Phillips or Carroll had informed him that parts had been ordered for the repair of the center section of the subject scoop more than a month before the accident.

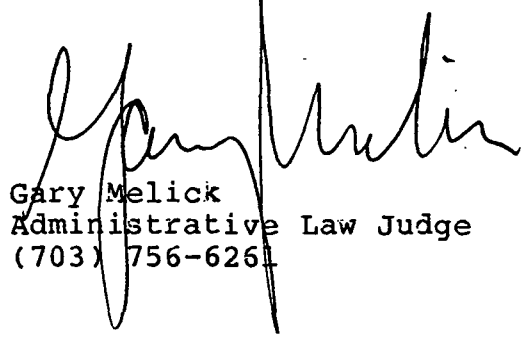
Alvin Goad was working as a roof bolter operator at the time of the accident. He testified that the defective conditions in the cited scoop had been "general knowledge" at the mine. He opined that Phillips in particular was aware of the defective condition of the scoop. He also confirmed that Phillips was acting in a supervisory capacity at the time of the accident. The undisputed statement of general laborer William Gouge further corroborates the evidence that the center section of the scoop had been defective long before the accident. Gouge stated that he told Phillips concerning the condition of the scoop about six months before the accident.

Within this framework of undisputed evidence it is clear that Phillips knew of the defective condition of the cited scoop at least a month before the fatal accident and failed to have this scoop removed from service. It is therefore clear that he was grossly negligent in his duties as an agent of the mine operator. In this regard I have not disregarded the testimony of Scarab owner Terry Reaves, that Carroll was superintendent of the No. 2 mine at the time of the fatality and that Phillips was the "number two man" serving under Carroll at that time. Clearly Phillips was in a position in which, knowing of the defective condition of the scoop, he had the authority and responsibility to have the scoop removed from service until it was in safe working condition.

In assessing a civil penalty in this case I have also considered other relevant criteria under section 110(i) of the Act. Mr. Phillips declined to present any evidence concerning his financial condition or ability to pay a civil penalty in this proceeding. The Secretary acknowledges that there is no history that Mr. Phillips has previously been subject to proceedings under section 110(c) of the Act. Under the circumstances I find that the Secretary's proposed penalty of $2,000 is appropriate.

ORDER

Mr. Junior L. Phillips is directed to pay a civil penalty of $2,000 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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Mr. Junior L. Phillips, Rt. #5, Box 186-A, Clinton, TN 37716 (Certified Mail)

nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

AUG 16 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 88-140-M
	:	A.C. No. 41-02522-05513
v.	:	
	:	Damon Quarry
V H W INCORPORATED,	:	

DECISION

Appearances: Brian L. Pudenz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Russell E. Mackert, Esq., Mackert & Garrett, Houston, Texas, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil assessments for 17 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed an answer denying the alleged violations, and a hearing was held in Houston, Texas.

Issues

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

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 in relevant part to the following (Exhibit ALJ-1):

1. The respondent is subject to the jurisdiction of the Act, and the alleged violations took place in or involves a mine that has products which affect commerce.

2. The name of the mine is Damon Quarry, and it is located near Damon, Texas in Brazoria County. The size of the company is 21,166 production tons or hours worked per year and the size of the mine is 21,166 production tons or hours worked per year.

3. The imposition of any penalty in this case will not affect the operator's ability to continue in business.

4. The total number of inspection days in the preceding twenty-four months is seventeen.

5. The total number of assessed violations (including single penalties timely paid) in the preceding twenty-four months is twenty two.

6. On March 10 through April 26, 1988, an inspection was conducted by MSHA Inspectors James S. Smiser and Robert J. Kinterknecht, and they issued 17 section 104(a) citations. All of the citations were abated by the respondent.

Findings and Conclusions

Inspector Smiser testified that the respondent is a crushed stone operator who operates a small surface quarry producing abrasive black limestone from different areas of one pit. He stated that the respondent employs 12 to 14 miners, has a very good compliance record, and has always attempted to address any safety problems in a timely manner. He characterized the respondent as a small-to-medium sized operator, and stated that the quarry pit is a small operation. Respondent's mine supervisor John Duke agreed that the respondent's normal employment consists of 12 to 14 miners (Tr. 30-31).

Contested section 104(a) non-"S&S" Citation Nos. 3273935, 3273939, 3273894, and 3273898, are all "single penalty" citations which were issued during regular mine inspections on March 10, and April 21, and 26, 1988. MSHA seeks civil penalty assessments in the amount of $20 for each of the citations. The respondent

agreed to pay the proposed civil penalties for these citations, and to withdraw its contests (Stipulation #3 (exhibit ALJ-1; Tr. 6). I considered the respondent's request as a motion to approve a settlement pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, and after review of the citations and the pleadings, the motion was approved from the bench, and my decision in this regard is herein reaffirmed.

With regard to section 104(a) "S&S" Citation Nos. 3273897 and 3273899, issued on April 26, 1988, citing violations of mandatory safety standards 30 C.F.R. § 56.9002 and 56.5003, the respondent agreed to pay the full amounts of the proposed civil penalty assessments of $85 and $98, and to withdraw its contests and request for a hearing (Tr. 8-9). I considered this request as a motion for approval of a settlement, and approved it from the bench. My decision in this regard is herein reaffirmed.

Section 104(a) "S&S" Citation No. 3273893, was issued by MSHA Inspector Robert J. Kinterknecht on April 20, 1988, and he cited a violation of mandatory safety standard 30 C.F.R. § 56.12019. The cited condition or practice states as follows:

> The access to the electrical switch gear in the N. West wall of the shop was not being maintained in that misc. diesel motor parts and (1) electrical Toshiba 40 H.P. 4-pole Nema design, serial No. 80905691 was in the walkway to the switch gear.

Mandatory safety standard 30 C.F.R. § 56.12019, provides as follows: "Where access is necessary, suitable clearance shall be provided at stationary electrical equipment or switchgear."

The evidence establishes that MSHA Inspector James S. Smiser accompanied Inspector Kinterknecht during the inspection on April 20, 1989, and that the citation was served on respondent's mine supervisor, John Duke. Mr. Smiser and Mr. Duke were present at the hearing, and they testified in this proceeding. Both Mr. Smiser and Mr. Duke viewed the cited conditions in question, and petitioner's counsel asserted that the citation should be reduced to a non-"S&S" citation because the likelihood of an injury was unlikely, and that the materials which were present in the area were from an engine which was being dismantled and that it was a temporary, rather than a continuing condition. The violation was immediately abated by simply moving the engine parts to one side.

Petitioner's counsel confirmed that the intent of the standard is to provide clearance so that someone could have ready access to the electrical switch controls, and that the presence of the engine parts did not provide "straight-line" access. Although the only conceivable hazard was a tripping hazard if someone stumbled over the engine parts, counsel confirmed that

there was enough room to go around the parts to access the switch, and that someone would likely go around the parts to do this.

Counsel proposed to reduce the proposed civil penalty assessment of $74 to $20 as a non-"S&S" single penalty citation, and Inspector Smiser agreed (Tr. 14-16). I considered the argument presented by petitioner's counsel as a motion for approval of a proposed settlement pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, and it was approved from the bench (Tr. 16). My bench decision in this regard is herein reaffirmed, and the section 104(a) "S&S" citation is modified to a single penalty non-"S&S" citation. The respondent agreed to pay the modified civil penalty assessment of $20 for the violation in question, and to withdraw its contest.

Section 104(a) "S&S" Citation No. 3273896, was issued by Inspector Kinterknecht on April 26, 1988, and he cited a violation of mandatory safety standard 30 C.F.R. § 56.12032. The cited condition or practice states as follows:

> The Dieplex box on the side of the crusher frame located just under a transformer was not provided with a cover plate. There was an orange colored extension cord plugged into it. This is a 120 VAC.

Mandatory safety standard 30 C.F.R. § 56.12032, provides as follows:

> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Petitioner's counsel stated that the parties proposed to settle this violation by a slight reduction in the original civil penalty assessment, from $74 to $60, and that the respondent has agreed to pay the settlement amount in satisfaction of the violation. In support of this proposal, counsel stated that after consulting with the inspectors, they agreed that the box in question was located out of sight under a transformer, and that the respondent's negligence was "low" rather than "moderate." The inspectors also agreed that cover plates were in place on other equipment, and that the plate in question had been removed for some unexplained reason, and simply not replaced (Tr. 17). Abatement was achieved immediately by the replacement of the cover plate. The proposed settlement was approved from the bench, and my decision in this regard is herein reaffirmed (Tr. 17).

Section 104(a) "S&S" Citation No. 3273937, was issued by Inspector Kinterknecht on March 10, 1988, and he cited a violation of mandatory safety standard 30 C.F.R. § 56.14001. The cited condition or practice states as follows:

> The head pulley on the shaker belt was not guarded, thus exposing a pinch point to persons that would have to work around this area cleaning up and maybe grease (sic) and maintenance work (sic).

Mandatory safety standard 30 C.F.R. § 56.14001, requires that pulleys and similar exposed moving machine parts which may be contested by persons, and which may cause injury to persons, be guarded.

Respondent's Mine Supervisor John Duke testified that the unguarded pulley belt in question was located out of reach and approximately 10 feet above a platform on which the shaker was located. He confirmed that while one could stand on the shaker and reach the belt, no one is permitted to stand on a vibrating shaker at any time, and that any maintenance work which would place someone in close proximity to the belt while standing on the shaker would only be done while the equipment was deenergized and inoperative (Tr. 18-20).

Inspector Smiser, who accompanied Inspector Kinterknecht when he issued the citation, agreed with Mr. Duke's testimony and agreed that it would be unlikely that anyone would come in contact with the unguarded belt during the normal operation of the shaker (Tr. 20-21).

Petitioner's counsel stated that in view of the fact that it was unlikely that anyone would contact the unguarded belt and sustain an injury, he proposed to modify the citation to a non-"S&S" citation, and to reduce the civil penalty assessment from $136 to $20. Respondent's counsel joined in the motion, and agreed that the respondent would pay the modified civil penalty. Upon further consideration of the proposed settlement disposition for this citation, it was approved from the bench (Tr. 21). My bench decision in this regard is herein reaffirmed.

Section 104(a) "S&S" Citation Nos. 3062190, 3062191, and 3062192, were issued sequentially by Inspector Smiser on March 17, 1988, after he found that three motors on a shaker conveyor were not being protected against excessive overloads by fuses of the correct type and capacity. Two of the motors were 7.5 horsepower, and the third one was a 5 horsepower motor, and they were all protected by one 100 amp. fused disconnect. Inspector Smiser cited violations of mandatory safety standard 30 C.F.R. § 56.12001, which requires that all circuits be protected against excessive overloads by fuses or circuit breakers of the correct type and capacity.

Petitioner's counsel stated that the parties proposed to settle these violations by joining the three citations into one citation which would be assessed at $136, and that the inspector's "S&S" finding would stand (Tr. 21-22). Counsel proposed to vacate Citation Nos. 3062191 and 3062192, and to modify Citation No. 3062190, to include all three of the cited motors, and that this citation will be affirmed as an "S&S" citation, and assessed a civil penalty in the amount of $136 (Tr. 29).

Inspector Smiser confirmed that he issued the citations after finding that the three motors were being protected by one 100 amp. disconnect fuse system rather than three individual fuses, and that this was contrary to the National Electrical Code which requires individual fuse protection for each motor. He stated that protecting each of the motors by one large 100 amp fuse disconnect would not afford adequate short circuit protection for each of the motors, and that section 75.12001 requires circuits to be protected against excessive overload by fuses of the correct type and capacity.

Mr. Smiser stated that the hazard presented involved inadequate short circuit protection which could result in an electrical shock should anyone touch any energized equipment frames. He agreed that such a hazard would only be present in the event of a fault condition, which may cause a short circuit in the motors.

Mr. Smiser confirmed that the violations were timely abated by the respondent by providing adequate fuse protection for each of the individual motors. Although he extended the abatement times because of the difficulty encountered by the respondent in obtaining the necessary parts to correct the conditions, he confirmed that the respondent exercised good faith in correcting the conditions.

Mr. Smiser confirmed that all of the conditions cited in the three individual citations were all the result of one violation, namely, the failure to provide fuses of the correct capacity to protect the motors from short circuits. He also confirmed that he issued three separate violations because of office policy, but agreed that the issuance of one citation incorporating the same violative conditions with respect to each of the motors would effectively take care of the problem.

With regard to the proposed settlement by vacating Citation Nos. 3062191 and 3062192, and incorporating the conditions as part of Citation No. 3062190, Mr. Smiser expressed agreement with this proposal and confirmed that it was a reasonable resolution since all of the citations essentially stemmed from one common violative condition. Mr. Smiser also agreed that payment of the full amount of $136 for "S&S" Citation No. 3062190, as amended, to incorporate the two other motors was reasonable and that he

would have no objection to the proposed settlement disposition for the three citations which he issued (Tr. 22-29).

The proposed settlement was approved from the bench (Tr. 29), and my bench decision in this regard is herein reaffirmed.

With regard to section 104(a) Citation Nos. 3273934, 3273936, 3273938, 3273887, and 3273895, the parties agreed to settle these violations. The respondent agreed to pay the full amount of the proposed civil penalty assessment of $74, for Citation No. 3273895. With respect to the remaining citations, the parties proposed to settle these citations by reducing the proposed civil penalty assessment of $85 to $75 for Citation No. 3273938; $112 to $100 for Citation No. 3273887; $112 to $100 for Citation No. 3273934; and $136 to $68 for Citation No. 3273936.

In support of the proposed settlements, Inspector Kinterknecht testified as to the facts and circumstances surrounding the issuance of the violations, and he confirmed that all of the violations were timely abated by the respondent, and that they all resulted from moderate negligence on the part of the respondent. He also testified as to certain mitigating factors in support of the proposed settlement reductions, and confirmed that he was in agreement with the proposed settlement dispositions for all of these violations (Tr. 7-25). The proposed settlements were approved from the bench, and my decision in this regard is herein reaffirmed (Tr. 33).

ORDER

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty criteria found in section 110(i) of the Act, I conclude and find that the approved settlement dispositions for the violations in question are reasonable and in the public interest. The respondent IS ORDERED to pay to MSHA the following civil penalty assessments for the violations which have settled and affirmed, and payment is to be made within thirty (30) days of the date of this decision.

Citation No.	Date	30 C.F.R. Section	Assessment
3273934	03/10/88	56.14001	$100
3273935	03/10/88	56.12032	$ 20
3273936	03/10/88	56.14007	$ 68
3273937	03/10/88	56.14001	$ 20
3273938	03/10/88	56.14003	$ 75
3273939	03/10/88	56.12013	$ 20
3062190	03/17/88	56.12001	$136
3273887	04/07/88	56.14003	$100
3273893	04/20/88	56.12019	$ 20
3273894	04/21/88	109)a) Act)	$ 20

3273895	04/20/88	56.12008	$ 74
3273896	04/26/88	56.12032	$ 60
3273897	04/26/88	56.9002	$ 85
3273898	04/26/88	56.15002	$ 20
3273899	04/26/88	56.5003	$ 98

Citation Nos. 3062191 and 3062192, ARE VACATED.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 17 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 88-312
	:	A.C. No. 36-00926-03753
v.	:	
	:	Homer City Mine
HELEN MINING COMPANY Respondent	:	

DECISION

Appearances: Judith L. Horowitz, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Ronald B. Johnson, Esq., Volk, Franovitch, Anetakis, Recht Robinson & Hellersted, Wheeling, West Virginia, for Respondent.

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq, (the Act).

Pursuant to notice, a hearing was commenced in Pittsburgh, Pennsylvania on June 27, 1989. At that hearing, prior to the taking of any testimony, the parties proposed a settlement agreement. The petitioner proposed reducing the specially assessed penalty for Order No. 2888642 from $600 to $300 based on reducing the negligence factor from "high" to "moderate" and therefore modifying the section 104(d)(2) order to a citation issued under section 104(a) of the Act. I approved that motion on the record at the hearing.

I have considered this matter in that light and under the criteria for civil penalties contained in section 110(i) of the Act and I conclude that the proffered settlement is appropriate under the circumstances.

Pursuant to the Rules of Practice before this Commission, this written decision confirms the bench decision I rendered at the hearing, approving the settlement.

Since the respondent already paid the $600 civil penalty originally assessed by mistake, and only $300 is actually owed, respondent should be given a $300 credit by MSHA, and upon such credit, this proceeding IS DISMISSED.

Roy J. Maurer
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 22 1989

ARNOLD R. SHARP, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 89-70-D
	:	MSHA Case No. PIKE CD 89-02
BIG ELK CREEK COAL COMPANY, Respondent	:	

DECISION

Appearances: Arnold Sharp, Bulan, Kentucky, pro se, for the Complainant;
Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs, Louisville, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a pro se discrimination complaint filed by Mr. Sharp with the Commission on January 25, 1989, against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. Mr. Sharp initially filed his complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), at its Hazard, Kentucky Field Office, on November 3, 1988. In a statement executed by Mr. Sharp on that day on an MSHA complaint form, he made the following complaint:

> M. C. Couch, Jim Neece (sic), and Big Elk Coal Co., Inc., are harassing me because I have missed work to stay home to take care of my sick wife. She is confined to bed rest and under a doctor's care. I have notified management and taken them a statement from the doctor. They still call my residence and harass me and my family, saying that this is no excuse for me to miss work. I want the harassment to stop.

MSHA conducted an investigation of Mr. Sharp's complaint, and by letter dated January 12, 1989, advised him that on the basis of the information gathered during the course of its investigation, a violation of section 105(c) of the Act had not

occurred. Mr. Sharp pursued his complaint further with the Commission, and filed it on January 25, 1989, stating as follows: "I disagree with MSHA determination and I'm asking for all expenses and damage (sic) in case number PIKE CD-89-02."

The respondent filed an answer to the complaint denying that it has harassed Mr. Sharp for any reason, including his staying home to take care of his sick wife. Respondent asserted that it took reasonable action in handling Mr. Sharp's absences from work, including the absences attributed to his wife's illness.

A hearing was held in Pikeville, Kentucky, on May 16, 1989, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and I have considered their respective arguments in the course of my adjudication of this matter. I have also considered all oral arguments and representations made by the parties on the record during the course of the hearing.

Issues

The critical issue presented in this case is whether or not the respondent's alleged harassment of Mr. Sharp in connection with his absences from work was motivated in whole or in part by any protected safety activities on the part of Mr. Sharp. I take note of the fact that in his complaint filed with MSHA, as well as the Commission, Mr. Sharp does not allege that the alleged harassment by the respondent was in any way "safety related." His complaint simply states that the alleged harassment resulted from Mr. Sharp's missing work to stay home with his sick wife. However, during the course of the hearing, Mr. Sharp alleged, for the first time, that the respondent harassed him for missing work because it sought to punish his wife for preparing a brief on his behalf in connection with an earlier discrimination proceeding which he initiated against the respondent, and that the respondent harassed him for missing work in order to retaliate against him for filing several prior discrimination complaints against the respondent. These and other issues raised by Mr. Sharp during the course of the hearing are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), (2) and (3).

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

Complainant's Testimony and Evidence

Complainant Arnold Sharp testified that he took his wife to the hospital emergency room on October 28, 1988, when she became ill, and also took her back on October 30, when her condition worsened. He took her to the family doctor on October 31, who prescribed bed rest, gave her medication, and advised her that she needed a back operation because of a ruptured disk and pinched leg nerve condition. He stated that he tried to hire people to take care of his wife while she was restricted to bed so that he could work, but that he could not find anyone to stay with her (Tr. 16).

Mr. Sharp stated that he telephoned the respondent on November 1, 1988, and spoke to Mr. Jim Meese at his office in Lexington, and advised him that he needed to be off work "a few days" to stay with his wife, and that Mr. Meese told him that he could be off work as long as he had a doctor's statement attesting to his wife's condition. Mr. Sharp stated that he obtained a doctor's statement and took it to the mine office at Isom, Kentucky, and gave it to Mine Superintendent M. C. Couch's secretary, Gloria. When asked to produce a copy of the statement, Mr. Sharp stated that had lost it (Tr. 17-19).

Mr. Sharp stated that Mr. M. C. Couch telephoned him at home on November 1, 2, and 3, 1988, and advised him that "my place was at work, not home with my wife." Mr. Sharp stated that Mr. Couch also stated to him that "Doctor's statements don't mean shit to him. He could care less if my wife lived or died" (Tr. 20). Mr. Sharp confirmed that after taking a doctor's statement to the mine office on November 1, he took off work, and Mr. Couch kept calling him, and that his wife would listen in on the calls through a cordless telephone in her bedroom (Tr. 21).

Mr. Sharp stated that as a result of Mr. Couch's telephone calls, he filed a complaint with MSHA on November 3, 1988, and also swore out a warrant against him for harassment because the telephone calls were upsetting his wife. Mr. Sharp explained the status of his court complaint against Mr. Couch and he stated that the state district court judge informed him that the matter belonged in the criminal circuit court and that "its turned over to my attorney right now, but we ain't never filed it in court yet" (Tr. 23). Mr. Sharp confirmed that the district court dismissed his case, but that he intends to pursue it in the circuit court (Tr. 25).

Mr. Sharp stated that after leaving court on November 16, 1988, Mr. Couch called him and changed his working hours from 6:00 p.m. to 4:00 a.m. to 5:00 p.m. to 3:00 a.m., and reassigned him (Tr. 24). Mr. Sharp stated that Mr. Couch changed his working hours "to keep me from helping my wife with the kids of an evening, getting them from school. So I couldn't help her none

of an evening" (Tr. 26). Mr. Sharp confirmed that he worked these new hours until he was fired on February 28, 1989 (Tr. 27).

Respondent's counsel raised an objection to Mr. Sharp's testimony concerning the steam jenny on the ground that he filed a subsequent MSHA complaint on February 8, 1989, PIKE CD 89-07, claiming that his assignment to the steam jenny was in retaliation for filing the November 3, 1988 complaint which is the subject of the instant case (Exhibit R-6). Counsel stated that MSHA dismissed his complaint, and Mr. Sharp stated that he did not appeal the dismissal of his complaint (Tr. 28-30; 35).

Mr. Sharp confirmed that he did not work for 2 weeks, from November 1, 1988, through November 14, 1988, and stayed home with his wife, and that he returned to work on November 15, 1988 (Tr. 32). He contended that when he returned to work, his new foreman Mack Cornett informed him that his job was to "steam jenny," and that he performed these duties until he was fired (Tr. 33). He claimed that he was taken off his job as a truck driver, and was assigned as a laborer in order to harass him "because I was off with my wife, because she took sick" and "because I filed that complaint on the 3rd of the month" (Tr. 34).

When asked to produce any evidence of his claim of harassment while he was off work for the 2-week period and home with wife, Mr. Sharp referred to certain notes which he kept concerning his work duties after he returned to work, and he stated that the harassment began after he returned to work on November 15, 1988 (Tr. 39-40). When asked whether he viewed these job assignments after he returned to work as harassment, Mr. Sharp replied "No," but again referred to the matter of being required to "steam jenny" in freezing weather (Tr. 40-41).

The notes produced by Mr. Sharp were daily notes made during November and December, 1988, and January 1989, and one noted item dated November 28, 1988, concerned an unexcused absence given to him that day when Mr. Sharp took his wife to a doctor for a checkup (Tr. 41). Mr. Sharp explained that his job foreman Harlan Couch, (not related to M. C. Couch), gave him an unexcused absence after he called in to advise that his wife was sick, and that he did so in order to harass him because his wife wrote up the brief in one of his earlier discrimination cases, and in spite of the fact that he produced a doctor's excuse for that absence. Mr. Sharp also stated that Harlan Couch told him "Don't lay out no more or you will be fired" (Tr. 42-45; 49).

Mr. Sharp produced a memorandum dated October 27, 1988, addressed to all mine employees from M. C. Couch, advising them that they must advise the office when they know they are going to be late or off work, and must produce a written doctor's excuse when going to a doctor. Mr. Sharp identified this memorandum as the respondent's work absence policy, and he asserted that prior

to this, respondent had no rules regarding work absences, and that employees could take off without calling in or producing a doctor's excuse (Tr. 50).

Mr. Sharp stated that mine employee J. R. Deaton missed 33 work days in the past 5 months and was not required to produce a doctor's excuse. Mr. Sharp stated that he did not know the reason for Mr. Deaton's absences, and stated that "he just took off any time he wanted to" (Tr. 51). He also stated that employee Jack Johnson missed 2 weeks of work, but did not know why (Tr. 52). Mr. Sharp further identified employee Rick Stacy as an individual who told him that he missed 3 days of work and was charged with unexcused absences for those days and was told that he would be laid off for 3 days after his third unexcused absence (Tr. 53).

Mr. Sharp confirmed that the respondent fired him after he missed work with strep throat, and that he has a pending complaint with respect to the discharge (Tr. 55).

Mr. Sharp referred to a November 8, 1988, letter mailed to him by Mr. Jim Meese, and he claimed that Mr. Meese advised him that he would give him a leave of absence to stay home with his wife (Tr. 56). Mr. Sharp also produced a copy of a letter which he stated was drafted by his attorney, and then rewritten by Mr. Sharp, concerning his need to have time off work (exhibit C-3). Mr. Sharp stated that a copy of this letter was sent to Mr. Meese (Tr. 57-60).

Mr. Sharp stated that he requested Mr. Meese to give him until November 14, 1988, to advise him further as to his need for a leave of absence, and after taking his wife to the doctor again on that day, he went back to work the next day and did nothing about Mr. Meese's suggestion that he take a leave of absence "because I didn't need it" (Tr. 62). Mr. Sharp stated that he did not in fact take a leave of absence and did not inform Mr. Meese that he did not need it because "I went back to work. There wasn't no use to tell him that" (Tr. 62).

Mr. Sharp produced copies of his payroll records, and he contended that they establish that pursuant to the respondent's work "show up" pay policy, he was required to work 2 hours before being sent home for lack of work, while other employees were allowed to go home and receive 2 hours pay without being required to work. Mr. Sharp cited November 16, 19, and 23, 1988, as days he was required to work before being sent home pursuant to this policy (Tr. 65-68).

On cross-examination, Mr. Sharp stated that he was not aware that as of the end of October 1988, he had missed 56 days of work, but was aware that "I missed with a broke foot," and he denied that anyone had ever discussed his absenteeism with him

(Tr. 70). Mr. Sharp could not recall speaking with Mr. Meese on October 24, and 26, 1988, about being off work on October 28, 1988, to watch his daughter perform as a cheerleader (Tr. 72). He confirmed missing 2 weeks of work, beginning on October 31, 1988, to be with his wife when she was sick because he had no one to take care of her (Tr. 72).

Mr. Sharp confirmed that when he was off work on October 31 and November 1, 1988, he advised Mr. Meese that he would go to work if he could find someone to stay with his wife, but after trying, he could find no one to stay with her (Tr. 72-73).

Mr. Sharp denied that he told Mr. M. C. Couch's secretary that he was going "to shut the company down" when he took her a doctor's statement on November 1, 1988, but admitted telling her that he was going to "indict" Mr. Couch for making false statements against him (Tr. 73). Mr. Sharp confirmed that he swore out a warrant against Mr. Couch for upsetting his wife with telephone calls threatening to fire him (Tr. 75). Mr. Sharp confirmed that his complaint against Mr. Couch was dismissed and voided by the district court judge, and although the court's order advised him to file his action in the circuit court, Mr. Sharp confirmed that he has not done so (Tr. 77).

Mr. Sharp confirmed that when he returned to work his pay rate remained the same (Tr. 77). He confirmed that his wife has not had an operation, and that Mr. Harlan Couch informed him at the end of November, 1988 that if he missed any further work because of his wife's condition he would be fired (Tr. 80).

Mr. Sharp confirmed that Mr. M. C. Couch spoke with him on November 1, 2, and 3, 1988, about his absences, and that on each occasion told him that he could "care less about my wife, if she lived or died, that wasn't his problems, that was mine, and he could care less. My place was at work, not home with her, taking care of her" (Tr. 84).

Mr. Sharp stated that he made notes concerning Mr. Couch's comments about his wife, and after producing them, he admitted that he prepared them "a couple of weeks ago" from his original notes which he did not have with him (Tr. 85). He explained that his original notes which were made the day that Mr. Couch called him "got folded up in a drawer and wadded up" and that is why he copied them down (Tr. 87).

Mr. Sharp confirmed that he spoke to M. C. Couch on October 28, 1988, and told him that he needed the day off because his wife had to be taken to the emergency room. Mr. Sharp stated that Mr. Couch told him to either come to work or be fired, and Mr. Sharp stated that he made no notes of this conversation (Tr. 87).

Mr. Sharp produced copies of documents, showing that he was off for 2 days on January 9, and 10, 1989, with the flu and that he was granted excused leave for January 9, when he produced a doctor's excuse, but was charged with an unexcused absence for January 10. The "slip" for that day contains a notation that Mr. Sharp did not call the office, and he claims that he did. He asserted that he called the office on January 9, and informed the respondent that he would be off for 2 days, and that Mr. Harlan Couch advised him that he was supposed to call on each day (Tr. 90).

Mrs. Imogene Sharp, the complainant's wife, testified that on October 28, 1988, her husband took her to the emergency room after she became ill, and when they returned home, her husband called the mine office at Isom, Kentucky, and asked to speak to Mr. M. C. Couch. Mr. Couch returned his call while her husband was picking up their children from school, and she advised Mr. Couch that her husband had to be off work that evening because she had been taken to the emergency room. Mrs. Sharp stated that Mr. Couch told her that "you tell Arnold he needs to be at work tonight or else he's fired" (Tr. 92).

Mrs. Sharp stated that when her husband returned home, he called Mr. Couch, and that after Mr. Couch told him "you're to be at work tonight, or you're fired," her husband reported for work that evening. Mrs. Sharp stated that she has a ruptured disk, and that her condition worsened, and that she visited her family doctor Elmer Ratliff, on October 31, 1988, and he advised her to stay in bed, and that she would require further tests and x-rays (Tr. 92).

Mrs. Sharp stated that her husband called Mr. Couch on November 1, 1988, and informed him that he needed to be off work that day, but that Mr. Couch would not let him off and "Arnold hung the phone up" and called Mr. Jim Meese who informed him that he could take the day off if he had a doctor's statement documenting Mrs. Sharp's condition. Mrs. Sharp stated that her husband obtained the doctor's statement and took it to the mine office that day, but that Mr. Couch continued to call Mr. Sharp, and told him that if he didn't come to work he would be fired (Tr. 93). Mrs. Sharp stated that she was aggravated because Mr. Meese told her husband he could take off work, and Mr. Couch threatened to fire him. She confirmed that her husband received a letter from Mr. Meese concerning his need to be off work, and that Mr. Sharp obtained a warrant against Mr. Couch because she was upset, and to keep him from calling her home about her husband.

Mrs. Sharp confirmed that she typed the brief filed by her husband in his first discrimination case, and she believed that she was resented because of this and her husband was being harassed and punished (Tr. 95). Mrs. Sharp stated that she

phoned the mine office on February 15, 1989, and left a message for her husband to come home because she was sick, but that he never received the message (Tr. 96). She believed that her husband was being harassed because Mr. Couch threatened to fire him (Tr. 98).

Mrs. Sharp confirmed that her husband missed 69 days of work in 1 year, which "couldn't have been helped," and she believed that he was not being treated equally because "he's not the only one who missed work" (Tr. 98-99). Mrs. Sharp confirmed that her husband told her that Mr. J. R. Deaton missed 33 days of work in the past 5 months, and that Mr. Richard Sexton fell off a horse and missed 6 months of work with a broken foot (Tr. 100). She also confirmed that some of the 69 days of missed work by her husband was due to the fact that he broke his foot, and that the 2-weeks of missed work which is at issue in this case resulted from the fact "that he was off with me" (Tr. 101). Mrs. Sharp also believed that another employee, Danny Napier, missed work when his wife had an operation (Tr. 101).

In response to further questions, Mrs. Sharp stated that when Mr. Couch spoke with her husband over the telephone he made the statement that the doctor's excuse "didn't mean shit," and that she listened in on the conversation on another occasion when Mr. Couch stated that "he didn't care if she lived or died" (Tr. 104). She confirmed that on this occasion, Mr. Sharp and Mr. Couch were arguing with each other and that she started to cry (Tr. 104).

Mrs. Sharp stated that Mr. Meese gave her husband permission to be off work for 2 weeks, and that Mr. Meese did not state that this was contingent on Mr. Sharp bringing in doctor's slips (Tr. 106). Mrs. Sharp believed that the telephone calls to her home were made because the respondent resented her for writing her husband's brief in a prior case, and that Mr. Couch's calls were made to harass her because they were always made when her husband left home to pick up their children (Tr. 107). Mrs. Sharp also believed that Mr. Meese gave her husband permission to stay home from work to take care of her as long as her husband supplied a doctor's excuse attesting to her condition (Tr. 108-109).

Respondent's Testimony and Evidence

James Meese testified that he is employed by the respondent in its Lexington, Kentucky office, and that he is in charge of administration. He stated that he was at the mine site on Monday, October 24, 1988, and on his way back to Lexington he encountered Mr. Sharp at a gas station in Isom, Kentucky. Mr. Sharp spoke to him and requested to be off on Friday, October 28, and Mr. Meese told Mr. Sharp to take it up with his foreman Harlan Couch.

Mr. Meese stated that he subsequently received a telephone call from Mr. Sharp on Wednesday, October 26, 1988, and Mr. Sharp informed him that Mr. M. C. Couch had denied his request to be off on Friday. Mr. Meese stated that it was his understanding that Mr. Sharp wanted the day off to attend a school event with his daughter, and at that time, Mr. Sharp had missed approximately 56 days of work.

Mr. Meese stated that Mr. Sharp called him again on Friday, October 28, and again informed him that Mr. Couch would not give him the day off. Mr. Sharp further informed Mr. Meese that he had a doctor's appointment that evening and did not know whether he would be able to report to work. Mr. Meese again informed Mr. Sharp to take it up with his supervisor, and Mr. Meese called Mr. Couch to advise him of Mr. Sharp's calls. He also suggested to Mr. Couch that he call Mr. Sharp to determine whether he was going to report to work, and Mr. Meese confirmed that Mr. Sharp did in fact report to work (Tr. 114-117).

Mr. Meese stated that Mr. Sharp called the mine office on Monday morning, October 31, 1988, and "reported off" for that day, as well as Tuesday, November 1, and that he stated that "he needed to attend to his wife at home. He was going to get some sort of doctor's slip" (Tr. 118). Mr. Sharp did not report for work on October 31.

Mr. Meese stated that Mr. Couch telephoned Mr. Sharp on Tuesday morning, November 1, to check on his leave status. Mr. Sharp called Mr. Meese that same day and advised him that he was taking his wife to the doctor and was not going to come to work (Tr. 118). Mr. Meese stated that Mr. Sharp again telephoned him on two more occasions on Tuesday and advised him that his wife was confined to bed rest and that he would try to find someone to sit with her, but that he was not coming to work. Mr. Meese called Mr. Sharp back and advised him to obtain a doctor's excuse for his absences (Tr. 119).

Mr. Meese stated that he and Mr. Couch jointly decided to excuse Mr. Sharp's absence of October 31, and Mr. Meese advised Mr. Sharp that he could be off that day, as well as November 1st (Tr. 120).

Mr. Meese stated that on Wednesday, November 2, 1988, Mr. Sharp brought a doctor's excuse to the mine office, and the excuse indicated that his wife would need bedrest for at least a week (Tr. 120). At that time, Mr. Sharp informed the office secretary, Gloria Stacy, that he would not be at work that evening and he "reported off." Mr. Meese telephoned Mrs. Sharp's doctor on the morning of November 2, to ascertain whether the doctor believed that Mrs. Sharp needed around the clock attention. Mr. Meese stated that the doctor said nothing about Mrs. Sharp's condition, and with respect to whether she needed

daily attention, stated to Mr. Meese "That's something you'll have to work out with your employee. I cannot tell you one way or the other, if she needs it or not" (Tr. 122).

Mr. Meese stated that he was present when Mr. Couch telephoned Mr. Sharp on November 2, and advised him to have someone stay with his wife so he could come to work. Mr. Couch also advised Mr. Sharp that the doctor's excuse was for his wife and that he was expected to do his job and to be at work. Mr. Meese stated that he never heard Mr. Couch state that he didn't care whether Mrs. Sharp lived or died, and did not hear him use any curse words (Tr. 123).

Mr. Meese stated that after Mr. Couch called Mr. Sharp, Mr. Sharp called his office, and they exchanged several calls that same day. Mr. Sharp advised him that he was swearing out a criminal complaint against Mr. Couch for harassment, and stated that he had the right to stay home with his wife. Mr. Meese stated that he reminded Mr. Sharp that he had taken time to find someone to stay with his wife and needed to pursue this search (Tr. 124).

Mr. Meese confirmed that he was again present when Mr. Couch telephoned Mr. Sharp on November 3, 1988. He explained that Mr. Sharp had called the mine office that morning and advised Mrs. Stacy that he had filed an MSHA complaint and would not report to work. Mr. Sharp advised Mr. Couch that he filed the complaint because he was being harassed. Mr. Couch and Mr. Meese advised Mr. Sharp that "we have a rock truck sitting, we have a job open, we feel that you have had plenty of time to find someone to sit with your wife, and we just reminded him of those facts" (Tr. 126).

Mr. Meese stated that during Mr. Sharp's initial absences from October 31 to November 3, 1988, his truck was parked, but he was not replaced because management did not know exactly when he would be returning to work (Tr. 127). Mr. Meese confirmed that he wrote Mr. Sharp a letter on November 8, 1988, after Mr. Sharp called the mine office on November 7, and advised that he would have to be off another week because he had taken his wife to the doctor again, and she would be confined to bed for a week.

Mr. Meese stated that he had spoken to Mr. Sharp about taking a leave of absence, and asked Mr. Sharp to provide him with a firm date for his return to work. After Mr. Sharp failed to respond, Mr. Meese decided to send him the letter concerning a leave of absence (Tr. 128, exhibit R-3).

Mr. Meese confirmed that he received a letter dated November 10, 1988, from Mr. Sharp on November 14, and on November 15, Mr. Sharp called him at his office and informed him that he would be returning to work that evening, but that his

wife would need to return to the doctor on November 28, that she may need an operation, and that he may have a need to be off in the future, but was unclear and did not know for certain (Tr. 129, exhibit R-4).

Mr. Meese stated that he wrote Mr. Sharp a letter on November 15, 1988, and informed him that his absences disrupted the scheduling of equipment, that he failed to give management a timely response with respect to his absences, and that he was being reassigned to another position "until he could get this situation worked out" (exhibit R-5, Tr. 130).

Mr. Meese stated that no action has been taken against Mr. Sharp because of any safety complaints on his part, or because of his filing of discrimination complaints against the company (Tr. 131).

Mr. Meese stated that he was aware of one employee who was off work for 2 days when his wife gave birth, but he could not recall the employee's name. Mr. Meese confirmed that he knew J. R. Deaton, as a mine employee, but in the absence of his attendance records, he had no knowledge as to whether he had any absences from work. Mr. Meese had no independent recollection of any absences by employees Jack Johnson and Richard Sexton, but confirmed that he would be aware of any leave problems if they were off for any extended periods of time (Tr. 132-133).

Mr. Meese stated that employees with excessive absenteeism are notified of their absences by certified mail, as was Mr. Sharp, and that similar letters have been sent to other employees. Mr. Meese stated that his November 15, letter to Mr. Sharp was part of his effort to deal with his work attendance (Tr. 134).

Mr. Meese explained the respondent's "two hour show up pay" procedure, but stated that he was not clear as to the exact policy, and was not aware of the particular circumstances concerning Mr. Sharp and this policy. Mr. Meese stated that as a general rule, an employee who reports for work when major machinery is down and there is no work for him to do is sent home with 2 hours of pay. The question of how each employee is treated with respect to this policy depends on the nature of his job and is discretionary with the employee's foreman (Tr. 135-136).

Mr. Meese confirmed that when Mr. Sharp came to work on November 15, he was assigned to a laborer's position and operated a steam jenny from time to time (Tr. 137). He denied that he took any action against Mr. Sharp because his wife wrote a brief in connection with his prior discrimination complaint. He also denied ever telling Mr. Sharp, or instructing anyone else to tell him, that he was on a leave of absence for an indefinite period of time. He also denied having any conversations with Mrs. Sharp

about Mr. Sharp's leave, except for one telephone call in which he left a message for Mr. Sharp to call him back. He denied saying anything to Mrs. Sharp indicating that Mr. Sharp could have any time off (Tr. 138).

During his cross-examination of Mr. Meese, Mr. Sharp stated that mine employee Richard Sexton missed 6 months of work with a broken foot and crushed leg which he sustained when he got drunk and fell off a horse (Tr. 141). Mr. Sharp also indicated that mine employee J. R. Deaton missed 33 days of work in the last 5 months, and that Jack Johnson missed 2-1/2 weeks in February, 1989, because he was sick (Tr. 143).

When asked why he did not produce these two individuals for testimony in this case, Mr. Sharp replied that "both of them is mixed up in Labor cases, and they say they don't want to get them mixed up in that." Mr. Sharp conceded that he never attempted to subpoena these individuals (Tr. 144).

Mr. Sharp also questioned Mr. Meese about employees Bony Banks and Ricky Stacy, missing work to be with their wives in an emergency, and Mr. Meese stated that he had no knowledge of these matters (Tr. 145, 150). He also denied any personal knowledge of the circumstances concerning Mr. Sexton, Mr. Deaton, and Mr. Johnson without reviewing their employment records (Tr. 152).

Mr. Meese denied that mine management required Mr. Sharp to steam clean coal equipment knowing he would become ill in order to punish him (Tr. 148). He also denied ever telling Mr. Sharp that he would steam clean equipment as long as he worked for the respondent, and that he would continue to harass him (Tr. 153).

In response to further questions, Mr. Meese stated that the respondent's leave policy was reduced to writing in letter form, and that it was a restatement of prior unwritten policy which required employees to call in and bring in doctor's excuses (Exhibit C-2; Tr. 154). He confirmed that under this policy an employee would state the time period he will need to be excused from work so that the respondent can work out a schedule to cover his work and position, and that any leave of absence granted by the respondent would be without pay. He also confirmed that the respondent was willing to work this out with Mr. Sharp (Tr. 154-155).

Mr. Meese stated that Mr. Sharp missed 41 days of work during January and February, 1988, when he broke his foot in a home accident, and that he had scattered absences during the remainder of the year, for a total of 69 absences for 1988 (Tr. 160). Mr. Meese stated that absences resulting from job related injuries for which an employee receives workmen's compensation are excused absences and are treated differently from non-work

injury related absences under the respondent's leave policy (Tr. 163).

Mr. Meese stated that the respondent has no written formal leave discipline policy, but that employees do receive warnings and are notified of their absentee record by certified mail. They are also informed when they need to discuss their leave record with their supervisors or when there is a need for improvement in their work attendance (Tr. 163-164).

Mr. Meese summarized the respondent's position in this matter as follows (Tr. 159-160; 164-165):

> Q. So what you're telling me, Mr. Meese, is that, beginning with the onset of Mr. Sharp's illness with his wife, that your position for the company in this case is that, absent any specific information from him as to specifically when he wanted to be off, how long he wanted to be off, and all that business, you took the position that the company could no longer afford to be without him as a rock truck driver, and that's why they gave that job to someone else or let the truck set or whatever, and then put him on as a laborer?
>
> A. That's correct.
>
> Q. I guess what this boils down to is Mr. Sharp wants to be home to take care of his wife, who is ill and needs and operation, and the company says, "I'm sorry, we can't accommodate you because we need you at work." Is that what it boils down to?
>
> A. Basically, yes, sir.
>
> Q. And when you tell him that we can't accommodate you, Mr. Sharp, I'm sorry, you have to get somebody to look after your wife, Mr. Sharp comes back and says the reason they're doing that to me, Judge, is they're trying to take it out on me, because my wife wrote the brief in the first case that I prevailed against them? Is that what you thing this case is all about, or am I being oversimplistic about it?
>
> A. No, I believe Mr. Sharp has it in his mind that his family comes first, and he's related that to me several times over the telephone, and I view work as more, as equal, or more important. You have to go to work. You have to provide for your family. I've related that to him several times, and whenever he cannot get a favor able decision in one area, he will keep going to everywhere he can to try to get it. And I feel in this instance that he felt that because we weren't giving

him a favorable response to his request, he issued a warrant for harassment, and he filed an MSHA complaint. At that point, we had no--didn't quite know what to know.

Mr. Meese denied Mr. Sharp's assertions that he resents Mr. Sharp's family, or that he "set up" and fired Mr. Sharp and canceled his insurance coverage in order to punish his wife (Tr. 166).

Marcus "M.C." Couch, Jr., respondent's surface mine supervisor, stated that Mr. Sharp telephoned him during the latter part of October, 1988, and informed him that he would not be at work on Friday, October 28, 1988, because of some athletic or cheerleading event concerning his daughter. Mr. Couch stated that Mr. Sharp said nothing about his wife during this conversation, and that after he informed Mr. Sharp that he was needed on the job, he did report for work that day (Tr. 168).

Mr. Couch stated that during the week of October 31, 1988, he returned several calls that Mr. Sharp had made to him at the mine office. During the first call, Mr. Couch stated that he asked Mr. Sharp to try and find someone to stay with his wife and that he was needed at work. Mr. Sharp advised him that he would try to find someone to stay with his wife (Tr. 170).

Mr. Couch stated that he had a second short telephone conversation with Mr. Sharp on Tuesday, November 1, 1988, and that he explained to Mr. Sharp that he was needed at work (Tr. 170).

Mr. Couch stated that he had a third telephone conversation with Mr. Sharp after Mr. Sharp swore out a warrant against him accusing him of harassing his wife, and as a result of this action by Mr. Sharp, Mr. Couch stated that he had no further telephone contact with Mr. Sharp, and that he "stayed away from him from there out" (Tr. 170).

Mr. Couch vehemently denied that he ever told Mr. Sharp that he "didn't care weather his wife lived or died." He also denied ever telling Mr. Sharp that he "didn't give a shit about any doctor's excuses that he brought in" (Tr. 171). He also denied any telephone conversations with Mrs. Sharp concerning Mr. Sharp's coming to work during the week of October 31, 1988 (Tr. 171). Mr. Couch further denied that he ever threatened to fire Mr. Sharp for not coming to work (Tr. 172).

Mr. Couch explained the circumstances under which Mr. Sharp's working hours were changed when he returned to work on November 15, 1988. He stated that all laborers are required to report to work at 5:00 p.m., an hour prior to the equipment operators who report at 6:00 p.m., in order to fuel and prepare the equipment for the second shift operation. He confirmed that

the laborers work until 3:00 a.m., and that the equipment operators work until 4:00 a.m. (Tr. 172).

With regard to Mr. Sharp's operating the steam jenny or steam cleaner in the winter time, Mr. Couch stated that all 90 employees under his supervision have operated the steam jenny at one time or another, regardless of the weather. He denied that he has ever taken any action against Mr. Sharp because of any complaints that he may have filed with MSHA, complaints about safety, or because of any discrimination complaints which he has filed. He also denied taking any action against Mr. Sharp because his wife was involved in the typing of his brief in an earlier discrimination case (Tr. 173-174).

On cross-examination, Mr. Couch confirmed that the respondent purchased a new steam jenny in April, 1989, and now has three of these machines (Tr. 174). He also confirmed that he informed Mr. Sharp that he would perform the duties of a laborer, including steam cleaning, fueling equipment, and cleaning up, and that he changed his working hours after he was relieved of his rock truck duties and assigned as a laborer (Tr. 177-178).

Mr. Couch stated that he recently notified employee J. R. Deaton that he was missing too much work and that he would receive a written notice to this effect (Tr. 179). He confirmed that employee Jack Johnson was hospitalized, and that employee Bony Banks has had a written notice served on him for several weeks for missing too much work (Tr. 180).

Mr. Couch confirmed that employee Mike Campbell was transferred from the reclamation day shift to the production second shift to drive the truck that Mr. Sharp was previously assigned to (Tr. 185-186). With regard to Mr. Sharp's "show up" time, Mr. Couch stated that as a laborer, Mr. Sharp would be required to work cleaning off a piece of machinery, and if the equipment did not operate, he could be sent home. He could also be assigned to cleaning up coal on his night shift, and Mr. Couch did not recall ever requiring Mr. Sharp to work for 2 hours, and then sending him home (Tr. 192).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v.

Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ____ U.S. ___, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

> As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

The evidence in this case establishes that on or about Monday, October 24, 1988, at a chance meeting with Mr. Meese, Mr. Sharp made a verbal request of Mr. Meese to be off work on Friday evening, October 28, 1988. Mr. Meese informed Mr. Sharp to contact his supervisor to discuss the matter, and that he (Meese) could not give him the day off. Subsequently, on Wednesday, October 26, 1988, Mr. Sharp telephoned Mr. Meese at his office in Lexington and informed him that Mr. Couch would not give him the day off, and Mr. Sharp again requested Mr. Meese to allow him to be off on Friday evening. Mr. Meese informed Mr. Sharp that it was not his decision to make, and Mr. Meese believed that Mr. Sharp wanted the evening off to attend a school event with his daughter. Mr. Sharp telephoned Mr. Meese again on Friday, October 28, 1988, and again informed Mr. Meese that Mr. Couch would not give him the evening off. Mr. Sharp also informed Mr. Meese at this time that he had a doctor's appointment for Friday evening, and did not know whether he would be able to report for work. Mr. Meese again informed Mr. Sharp to take the matter up with his foreman, and Mr. Sharp did in fact show up for work that evening.

Mr. Meese's credible testimony reflects that Mr. Sharp telephoned the mine office on Monday morning, October 31, 1988, and "reported off" for that day, as well as Tuesday, November 1, 1988, in order to stay home with his wife who was ill. Mr. Sharp confirmed that he telephoned Mr. Meese on November 1, 1988, and advised him of his need to be off work for "a few days" to stay home with his wife, and that Mr. Meese informed him that he could be off as long as he had a doctor's statement attesting to his wife condition. Mine policy, as reflected by a memorandum issued on October 27, 1988, by mine superintendent M. C. Couch (exhibit C-2), required all employees to inform the mine office when they know they will be off work, and to produce a written excuse when they miss work to go to a doctor. Mr. Sharp produced a statement

from a doctor dated October 31, 1988, which attests to the fact that he brought his wife to the doctor that day. The doctor also indicated in his statement that Mr. Sharp's wife "needs to be on bed rest for one week." Mr. Sharp could not produce a doctor's statement for his absence of November 1, 1988, claiming that he gave the original excuse to Mr. M. C. Couch's secretary, and that he had lost the copy of the excuse. In any event, Mr. Meese confirmed that he and Mr. M. C. Couch jointly decided to excuse Mr. Sharp's absence of October 31, 1988, and that Mr. Meese excused his absence of November 1, 1988.

The evidence further establishes that on Wednesday, November 2, 1988, Mr. Sharp went to the mine with a copy of the doctor's excuse of October 31, 1988, for his wife, which indicated that she was in need of bed rest for at least a week. At that time, Mr. Sharp advised Mr. M. C. Couch's secretary that he would not be at work that evening, and Mr. Sharp "reported off" and did not work. Mr. Meese confirmed that he telephoned Mrs. Sharp's doctor that same morning to inquire about her condition and to determine whether she required daily attention. Mr. Meese testified that the doctor advised him that he could not state whether or not Mrs. Sharp required daily attention, and that this was a matter for Mr. Meese "to work out with your employee."

A copy of Mr. Sharp's attendance record (exhibit C-5), reflects that he was absent from work from November 3, 1988, through November 13, 1988, and Mr. Sharp confirmed that he did not report for work for 2 weeks, from November 1, through November 14, 1988, when he was home with his wife, and that he next reported for work on November 15, 1988. Mr. Sharp produced a copy of a doctor's statement dated November 7, 1988, which reflects that his wife had an appointment with a neurosurgeon for "a possible ruptured disk," and that she was confined to bed rest until she could see that doctor. He also produced a copy of a doctor's statement which states that his wife visited a doctor's clinic and that she was brought in by Mr. Sharp. The statement is dated in November, but the day of the visit is not clear, and it appears to be "11/14."

Mr. Meese testified that after he learned that Mr. Sharp had called the mine office on November 7, 1988, to advise that he would be off work for another week because he had again taken his wife to the doctor and that she would be confined to bed for a week, he sent Mr. Sharp a letter on November 8, 1988 (exhibit C-3(a). In the letter, Mr. Meese informed Mr. Sharp that his absences from work on November 3, 5, and 7, 1988, were considered by mine management as unexcused. Mr. Meese further informed Mr. Sharp in the letter that management had a need for someone to perform his rock truck driver's duties, and that if he could not return to work within a reasonable time, management would be forced to hire a permanent replacement to fill that job, and that

Mr. Sharp should consider taking a leave of absence for the time that he needed to be off work. Mr. Meese confirmed that he had previously spoken to Mr. Sharp about taking a leave of absence and requested him to provide a firm date for his return to work. However, when Mr. Sharp could not provide him with the requested information, Mr. Meese confirmed that he decided to send the letter in question.

Mr. Meese confirmed that he received a response to his letter from Mr. Sharp on November 14, 1988 (exhibit R-4). In that letter, Mr. Sharp states that after another doctor's appointment on an unspecified Monday, he "will know whether or not a temporary leave of absence is in order," and that he complied with company policy by calling the mine office to report off work on the dates mentioned in Mr. Meese's letter, and that he also supplied management with doctor's excuses for the days in question. Mr. Sharp alluded to another letter which he claimed had been drafted by his attorney, and which he had rewritten and mailed to Mr. Meese, explaining his need to be off work. I have reviewed that purported letter, and it is an unsigned "rough draft" in some unknown individual's handwriting. I find no credible evidence that Mr. Sharp sent Mr. Meese any letter other than the one dated November 10, 1988, with his signature. This is the same letter received by Mr. Meese on November 14, 1988. Further, I find no credible support for Mr. Sharp's assertion that Mr. Meese in fact granted him a leave of absence (Tr. 56). The letter clearly states that Mr. Sharp should consider a leave of absence, and Mr. Sharp confirmed that this was the case (Tr. 57). I also find no credible evidence to support any conclusion that Mr. Sharp ever made a decision to request a leave of absence, or to otherwise inform Mr. Meese of his desire to do so.

Mr. Meese's credible testimony reflects that Mr. Sharp telephoned Mr. Meese at his office on November 15, 1988, and informed him that he would return to work that evening, but that his wife would need to return to the doctor again, that she may need an operation, and that Mr. Sharp may have a need to be off work again at some further uncertain time. Mr. Sharp did in fact return to work on November 15, 1988, and he confirmed that he did not take any leave of absence, and did nothing about Mr. Meese's suggestion that he request a leave of absence.

Upon Mr. Sharp's return to work on November 15, 1988, he was reassigned from his rock truck driver's position to a laborer's position at the same rate of pay, and his work hours were changed from 6:00 p.m. to 4:00 a.m. to 5:00 p.m. to 3:00 a.m. Mr. Meese confirmed that he sent Mr. Sharp a letter on November 15, 1988, informing him of his reassignment, and the letter states as follows (exhibit R-5):

> This is to confirm our conversation in which we discussed your assignment to a laborer position effective immediately.
>
> This past year you have missed a total of 69 work days. Most recently, you have been off due to a medical problem in your family. Although we pressed you for a firm date of return so that we could put you on a leave of absence and plan for our production needs, you refused to give us a firm date. Therefore, we are compelled to put someone who is more dependable in your former position. Your absences over the past year have been very disruptive to our ability to schedule your truck in an orderly manner, thereby contributing to inefficiencies.
>
> In the next 90 days, we expect to see an improvement in your attendance. If improvement is not forthcoming, we will have no alternative but to take disciplinary action.

Mr. Sharp continued to work for the respondent until he was terminated on February 28, 1989.

Mr. Sharp's Complaint

The basis of Mr. Sharp's discrimination complaint in this case is his assertion that mine superintendent Marcus "M.C." Couch harassed him by making telephone calls to his home during the period November 1-3, 1988. Mr. Sharp confirmed that his wife listened in on the calls through a cordless telephone in her bedroom, and that she was upset by the calls. Mr. Sharp confirmed that the telephone calls prompted the filing of his complaint with MSHA on November 3, 1988, and also prompted him to swear out a criminal warrant against Mr. Couch for harassment. The record reflects that this complaint was dismissed by a local Kentucky state court judge on March 7, 1989.

Mr. Sharp alleges that Mr. Couch's motive in calling him at home was to harass him for having filed a prior discrimination complaint against the respondent in which he prevailed, and to punish his wife because she drafted some of his briefs which he filed in connection with prior discrimination complaints which he had filed against the respondent. He also alleges that other employees had missed work for illnesses or to stay home with a sick wife, but were not accorded the treatment that he received from the respondent because he missed work to stay with his wife.

In the course of the hearing in this case, Mr. Sharp alluded to several additional alleged acts of discrimination by the respondent which are not the subject of his present complaint. He claimed that the respondent discharged him out of retribution

for his prior discrimination complaints and to punish him for staying home with his wife. Mr. Sharp has filed a complaint concerning this discharge, and it is my understanding that it is still pending. Under the circumstances, I will make no findings or conclusions concerning Mr. Sharp's discharge.

With regard to Mr. Sharp's allegations of disparate treatment in connection with his absences from work, he claimed that other employees missed work because of illnesses to themselves or their spouses, but were not subjected to any discriminatory treatment by the respondent. Although I find no connection between this allegation and the alleged telephone harassment of Mr. Sharp by Mr. Couch, I do note in passing that Mr. Sharp failed to call any of the employees in question to testify in this case, and he did not produce any credible facts or evidence to support such a claim. Further, in view of Mr. Sharp's pending discrimination claim resulting from his discharge, and his assertion during the course of the hearing that he was terminated after missing work with a strep throat (Tr. 55), I believe that any further findings and conclusions on this issue is best left to the judge who will adjudicate that claim.

Mr. Sharp claimed that his reassignment as a laborer after his return to work on November 15, 1988, and his work assignments in connection with that job (steam cleaning equipment), were made to punish and harass him for filing the November 3, 1988, complaint which is the subject of this case, and because he missed work to stay home with his ill wife (Tr. 34). With regard to this complaint, the record reflects that Mr. Sharp filed a complaint with MSHA on February 2, 1989, Complaint Docket No. PIKE CD-89-07 (exhibit R-6). MSHA apparently investigated the complaint and found no violation of section 105(c) of the Act. Respondent's counsel confirmed that MSHA dismissed the matter, and Mr. Sharp confirmed that he took no further appeal to the Commission with respect to MSHA's decision. Under the circumstances, I conclude and find that this complaint is moot, and since it is outside the scope of the instant complaint filed by Mr. Sharp, I decline to make any findings or conclusions with respect to Mr. Sharp's allegations.

Mr. Sharp also raised an issue concerning the respondent's work "show up" policy, and claimed that he was treated differently from other employees because he was required to work on November 16, 19, and 23, 1988, before being sent home pursuant to this policy. I find that Mr. Sharp's allegations in this regard are outside the scope of the complaint and issues which are the subject of the instant proceeding, and I declined to make any findings or conclusions regarding Mr. Sharp's allegations. My findings and conclusions in this case will be limited to Mr. Sharp's complaint concerning the alleged harassing telephone calls by Mr. Couch.

With regard to the telephone calls in question, I take initial note of the fact that the record in this case clearly reflects that the issue concerning Mr. Sharp's absences from work is unrelated to any illness on the part of Mr. Sharp. His absences from work were the result of his desire to stay home to be with his sick wife, and Mr. Sharp obviously made a judgment that his first priority was to be with his wife rather than to report for work when the respondent expected him to be there. Although I sympathize with Mr. Sharp's predicament, particularly in light of his wife's illness, I must balance his concern for his wife and the legitimate business interest of the respondent in attempting to maintain the continuity of its day-to-day mining operation.

The record in this case establishes that some of the calls were initiated by Mr. Couch, and some were "call backs" by Mr. Couch in response to prior calls initiated by Mr. Sharp. There is no evidence that the calls were made during other than normal business hours, or that they were made at unusual hours of the day or evening. Although Mr. Sharp indicated that some of the calls were taken by his wife while he was away from the house picking up his children from school, I find no credible evidence that Mr. Couch deliberately timed his calls so that he could harass Mr. Sharp's wife. Although Mrs. Sharp believed that this was the case, and stated that all of the calls made by Mr. Couch were at a time when her husband was not at home, Mr. Sharp testified that he received the calls made on November 1-3, 1988, by Mr. Couch during which they discussed his absences from work.

With regard to the frequency of the calls prior to the filing of the complaint on November 3, 1988, Mr. Couch testified that he returned several calls that Mr. Sharp had placed to him at the mine office during the week of October 31, 1988, during which he discussed with Mr. Sharp his need to be at work and to find someone to stay with wife. Mr. Couch confirmed another telephone conversation with Mr. Sharp on November 1, 1988, when he again discussed the need for Mr. Sharp to come to work. Mr. Couch confirmed a subsequent telephone conversation with Mr. Sharp after he swore out the warrant against him on November 3, 1988, and as a result of the warrant, Mr. Couch confirmed that he had no further telephone contact with Mr. Sharp.

With regard to the alleged harassing nature of the calls, Mr. Sharp claimed that Mr. Couch's alleged threats to fire him for not reporting to work, and Mr. Couch's alleged statements that "doctor's statements don't mean shit" and that "he could care less whether his wife lived or died," were upsetting to his wife and were intended to punish his wife for assisting him with his prior complaints. The evidence establishes that these statements attributed to Mr. Couch were not made directly to Mrs. Sharp. She was listening in on another telephone, and she

testified that Mr. Couch made the statements, and that she began to cry after Mr. Sharp and Mr. Couch began arguing. Mr. Couch vehemently denied making the statements, denied that he ever spoke to Mrs. Sharp and told her that he would fire Mr. Sharp for not coming to work, but he confirmed that he returned some calls made by Mrs. Sharp after Mr. Sharp was terminated. Mr. Meese testified that he was present when Mr. Couch spoke with Mr. Sharp over the telephone from his office concerning his failure to come to work, and that he never heard Mr. Couch make the statements in question.

Having viewed Mr. Sharp's demeanor during the course of the hearing in this case, it is more than obvious to me that he has a most extreme personal dislike for Mr. Couch. Although Mr. Couch's demeanor reflects a rather outward calm and dispationate nature, given the fact that Mr. Sharp obtained a warrant and took him to court for allegedly harassing his wife, and has on several occasions caused Mr. Couch to be called to answer for his alleged discriminatory actions against Mr. Sharp, I would venture a guess that Mr. Couch is not particularly fond of Mr. Sharp. However, the issue here is not whether Mr. Couch or Mr. Sharp like each other. The issue is whether or not one can conclude from the credible evidence in this case that the telephone calls made to Mr. Sharp's home by Mr. Couch establish harassment, and if so, whether the harassment was motivated by Mr. Couch's desire to punish Mr. Sharp or to otherwise discriminate against him for engaging in any safety activity protected by the Act.

Having viewed Mr. Couch and Mr. Meese during the course of the hearing, I find them to be credible witnesses. I find it very difficult to believe that the telephone calls in question were made by Mr. Couch to punish or otherwise harass Mr. Sharp's wife for simply preparing some of his briefs in prior discrimination cases. I find no credible evidentiary support for any such conclusion. I also find it difficult to believe that Mr. Couch did not care whether Mr. Sharp's wife lived or died. Mr. Couch simply did not impress me as being that type of an individual. Even if Mr. Couch did make the statements attributed to him, Mrs. Sharp would not have heard them had she not been listening in on the conversation. Further, given Mr. Couch's obvious frustrations in attempting to determine when Mr. Sharp would return to work, the argumentative and hostile mood which prevailed during the conversation, and Mr. Sharp's provocative nature and propensity for making indiscriminate accusations against Mr. Couch, I believe that if the statements attributed to Mr. Couch were in fact made, they were made in the anger of the moment, and that Mr. Sharp more than likely provoked Mr. Couch, and he reacted in kind. Mr. Couch testified that Mr. Sharp had cursed him on several occasions during telephone conversations (Tr. 170).

After careful review of all of the testimony and evidence in this case, I conclude and find that the telephone calls and conversations initiated by Mr. Couch, as well as Mr. Sharp, during which the subject of Mr. Sharp's absences from work because of his wife's illness were discussed, do not constitute harassment by Mr. Couch because of any protected activity on the part of Mr. Sharp. Mr. Sharp's absences from work because of his wife's illness is not protected activity under the Act. I find no credible evidence to support any conclusion that the respondent acted unreasonably in its attempts to determine when Mr. Sharp would be able to return to his normal work schedule at the mine.

I conclude and find that the respondent had a legitimate, reasonable, and plausible concern for Mr. Sharp's absences, and the need to insure that he either return to work, or at least give the respondent some assurance as to when he would be able to return to his normal scheduled work. Mr. Sharp did neither. As a result of his failure to respond, and his sporadic day-to-day attendance record, Mr. Sharp placed the respondent in a position of not knowing from day-to-day if or when he would show up for work, when he would return to work on a regular basis, or whether he would request a leave of absence to stay home with his wife.

I conclude and find that mine management's actions in dealing with Mr. Sharp, including the telephone calls by Mr. Couch, were prompted by a legitimate and rational effort to determine if and when Mr. Sharp would return to his normal work schedule at the mine. Given Mr. Sharp's overall attendance record, and his rather erratic and unpredictable practice of reporting on and off work during late October, and early November, 1988, when he wife was ill, I cannot conclude that the telephone calls made by Mr. Couch to Mr. Sharp's home, or the conversations Mr. Sharp had with Mr. Meese, were anything more than a reasonable effort by mine management to resolve a work attendance problem with one of its employees. I further conclude and find that Mr. Sharp has failed to present any credible evidence to support his claim that management's actions were motivated by its desire to harass or punish him for any safety related activities protected by the Act.

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that Mr. Sharp has failed to establish that the respondent has discriminated against him or has otherwise harassed him or retaliated against him because of the exercise of any protected rights on his part.

Accordingly, Mr. Sharp's complaint IS DISMISSED, and his claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
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DENVER, CO 80204

AUG 22 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-206 A.C. No. 05-01370-03573
v.	:	Eagle No. 5 Mine
CYPRUS EMPIRE CORPORATION, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Michael S. Beaver, Esq., Holland & Hart, Englewood, Colorado, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with violating a safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties a hearing on the merits was held in Steamboat Springs, Colorado on July 26, 1989.

The parties waived receipt of the transcript and waived the filing of post-trial briefs. They also submitted the issues on oral argument and requested an expedited decision.

Summary of the Case

Citation No. 2504948 charges respondent with violating 30 C.F.R. § 75.316, which provides as follows:

§ 75.316 Ventilation system and methane and and dust control plan.

[Statutory Provisions]

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be

adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Citation No. 2504948 states as follows:

> The ventilation system and methane and dust control plan was not being complied with in that the setup entry at 16 East - longwall did not have enough air movement to turn the anemometer to take a reading. A smoke tube was used and the smoke just went up to the roof and spread in all directions. Visability (sic) was restricted because of the diesel equipment that was being used in the intake entry. The plan requires 200 FPM at Shield #10.

Stipulation

At the hearing the parties stipulated as follows:

1. The Commission and the Administrative Law Judge have jurisdiction to hear and determine this matter.

2. Citation No. 2854948 was properly issued and served on respondent.

3. Respondent's history is shown by the computer printout which can be received in evidence (Exhibit P-1).

4. The penalty as proposed is appropriate and such a penalty will not hinder the ability of the operator to continue in business.

5. The parties agree on the authenticity of exhibits submitted by both parties.

6. The photographs received in evidence in the case are for illustrative purposes.

Issues

The principal issues are whether the presence of 10 percent of the shields needed to mine coal and one-half of a pan-line cause a setup entry to be a "working face" within the meaning of 30 C.F.R. § 75.316.

Summary of the Testimony

ERNEST L. MONTOYA of Craig, Colorado has been a coal mine inspector for 11 years. He is experienced in mining, safety and ventilation.

Eagle No. 5 is an underground coal mine 8 miles south of Craig, Colorado. Inspector Montoya has inspected this particular mine from 1 to 3 years.

On December 10, 1987, Inspector Montoya arrived at the company site and contacted company representatives. He was accompanied by Robert Stolter of the safety department when he went underground.

When the inspector arrived in the 16 East Longwall section of the mine, he observed that the entry was foggy. He could also see a welding flash and an accumulation of welding smoke. These conditions caused him to believe that the ventilation was not good. At the time there were 6 to 8 miners in the entry.

Inspector Montoya drew Exhibit P-2 . The exhibit shows the intake entry (at the left), the "setup entry" (at the top) and the return entry (on the right side of the exhibit).

After he observed the conditions in the entry the inspector used an anemometer to determine the flow of the air. But the blades would not turn. By using a smoke tube he then put a puff of smoke into the air. He observed the air go into the tailgate and spread in all directions. Due to these conditions he concluded that there was insufficient air in the entry. However, there were times when there was air movement in this entry. Such movement occurred when the diesel equipment went into the entry. However, at that time the air velocity was between 30 to 80 CFM. (The witness marked an x on the left side of Exhibit P-2 showing where the diesel equipment would enter the area; he further marked an xx on the right side of Exhibit P-2 indicating where the equipment would exit the area.)

Inspector Montoya stayed on the site until about 5 or 6 p.m.; he terminated the citation when the second shift came to work.

On Exhibit 2 witness Montoya marked the air direction with double arrows in red. He also marked the direction of the return air.

There were no curtains directing the air into the setup entry. Two curtains kept the air from entering the bleeder entry; the net result was to direct the air into the setup entry.

Mr. Montoya and two management representatives reviewed the company's ventilation plan. The ventilation plan (Exhibit P-3) applies to the 16 east section. The ventilation plan provides in part that "the minimum quantity reaching the intake end of the longwall face shall be 40,000 CFM" (Paragraph 1 of Exhibit P-3). Further, paragraph 3 of the ventilation plan provides that the minimal velocity of air maintained across the longwall face shall be 200 feet/min. at shield No. 10 (on the intake side) and 100 feet/min. at shield No. 115 (on the return side).

It was the inspector's view that the setup entry did not have 200 feet per minute of air, which is a requirement of the ventilation plan.

The crux of the Secretary's case: the ventilation plan refers to the longwall face; the setup entry cited by the inspector is the same as the longwall face (Exhibit P-6).

The inspector took 25 to 30 readings in the area but he did not record them each time.

Mr. Cobb, the company's fire boss was present and he also took readings. Cobb stated to the inspector that he could not observe any readings because there was no air and they discussed the lack of air movement.

In the inspector's opinion, Citation No. 2504948 was an S&S violation.

The hazard from the described condition is that a miner will breath air containing carbon monoxide from the diesel equipment and he would also breath welding fumes. These contaminants can cause cancer in the long term.

There were miners working in the setup entry when Mr. Montoya took his readings and there were workers continually moving in and out of the entry.

An anemometer measures cubic feet of air per minute. Witness Montoya discussed how the flow of air is calculated. Measurements that were taken when the anemometer would turn would indicate an average flow of 3200 CFM.

It was the inspector's opinion that when the very first piece of equipment goes into the setup entry the area becomes a longwall face.

Along the longwall is equipment called the pan-line. It contains the electrical wiring, the chain conveyor and related equipment. The pan-line when in operation also conveys coal from the face and it is located ahead of the shields. The pan-line itself was 250 to 300 feet in length (about half of the length when the pan-line is in operation).

The setup entry is the same as the setup room and it measures 22 to 25 feet wide. This is wider than a normal entry. The setup entry is used to set up equipment but actual mining does not take place in the entry.

At the time this citation was issued active mining was taking place in the 17 east intake entry. (It is apparent that the active mining was taking place at some place other than where this citation was issued.)

The company was also developing the No. 6 mine located underneath Eagle No. 5 mine. There was at least one worker present in the setup entry at all times while the inspector was in the area.

Shields used in mining can be raised up to 12 feet high and they are 4½ to 5 feet wide. When all shields are in place the mining then proceeds. The normal longwall face consists of 130 to 140 shields. The top of the shield defines the roof. The floor is coal; the backwall is the shield and at the front of the shield is the coal face.

At the time of the inspection there were 8 to 14 shields in the setup entry. These was about 10 percent of the shields that would be needed before any mining could commence.

The shields are moved into the setup entry one at a time. It would take about 28 additional days to move all of the shields into position. The operator had just started the process of moving the shields.

When it is set up, the pan-line is some 600 feet long; at the time of the inspection about 300 feet of the pan-line was in place. It would have taken the operator an additional 3 weeks to set up the balance of the pan-line. The shield was not in place and the mining equipment was not energized. No mining could take place in this area until the drums are installed and energized and the shields are in place.

Workers were using diesel equipment to set up the mining equipment. The presence of such diesel equipment in the setup entry affects and partly blocks the entry. The cooling fans on the diesel equipment will affect the air in the entry.

Company representative Stolter did not complain when Inspector Montoya took readings next to a piece of diesel equipment. Cobb's reading shows there was no carbon monoxide present but at that time the foggy area had cleared up. From everything that could be seen the inspector concluded that the carbon monoxide was within the limits of the applicable regulation. No respirable dust measurements were taken.

Inspector Montoya reiterates his opinion: in this section of the mine there was a lack of air or, as he described, "no air."

Measurements by Cyprus were consistent with the inspector's readings and a couple of times Cobb took readings that were 1,000 to 1,200 CFM in excess of the inspector's readings.

Towards the end of the shift Cobb had readings of 1,000 to 1,500 more CFM than Inspector Montoya would measure.

Montoya was with company representative Pike when Pike took a measurement in excess of 50,000 CFM on the intake end of the longwall face. The inspector agreed at the hearing that there was plenty of air on the intake roadway where Pike had taken his measurements.

If there is no ventilation plan in effect, MSHA regulations provide for a minimum airflow but the company was not cited for such a violation.

The minimum MSHA requirements apply if there is no ventilation plan and miners are present in the area.

An MMU (mechanized mining unit) is identified by an MSHA I.D. number.

The ventilation plan (Exhibit P-3) follows this particular longwall section. (The idea is the MMU number stays the same regardless of the location of the equipment.)

MSHA requires that ventilation be directed at active mining areas. The purpose of the ventilation plan is to provide sufficient air for miners.

A "working section" to Inspector Montoya means the presence of miners working on equipment in a setup entry.

The setup entry itself is cut with a continuous miner. When it is being cut, a continuous miner ventilation plan would apply. Once the company starts to move mining equipment into the entry, then the longwall ventilation requirements apply. The continuous miner plan requires a lower air movement.

The longwall and the shear both carry the same MMU number. If the section does not have an MMU number designation the ventilation plan would apply.

The inspector obtained no anemometer readings at all. However, there were times when he had 2,000 to 3,000 CFM. These readings would last for 5 minutes then go to zero.

Respondent's Evidence

ROSS STOLTER is a safety director for respondent. His responsibilities include inspections, test devices, and workman's compensation. He also oversees the safety department.

On the date of this inspection he accompanied Inspector Montoya and was present when the air measurements were taken. They initially went to the take-down room where most of the shields (115 to 120) were located.

When they arrived at the setup room there were two mechanics and a maintenance foreman present. The purpose of the setup entry is to set up the mining equipment. The entry is 26 feet wide and it can be as wide as 28 feet. A regular entry is 18 feet wide but it will not exceed 20 feet.

The common air comes into this area on the left-hand side of Exhibit P-2 and the air is then split into three entries.

There were a few shields in the setup room. The back of the shields make up the back wall. It is not over 15 feet from the longwall face to the back of the shields. (The witness illustrated his testimony on a blackboard).

The shields themselves were not in place at the time of this inspection. The company could not mine coal until the shields were situated. The company was at least 14 days from mining any coal. All equipment must be totally installed before coal mining can begin.

Diesel equipment moves the shields into the setup area. In addition, the pan-line is moved into the area in 15 foot sections.

Inspector Montoya took readings near the scoop. The scoop fan blew air against the normal flow of air into the entry. In effect the scoop was creating resistance to the normal airflow. This phenomena only occurs during setup and take-down procedures.

The inspector concentrated his measurements near the headgate area. The witness did not recall how many times the inspector took air measurements. Low air movements were recorded near the scoop.

Company representative Pike also took measurements at the intake and the longwall face. These measurements indicated an airflow of 55,400 CFM.

At the time of the inspection, Shield No. 10 and Shield No. 115 had not been moved into the setup entry.

The entry behind the setup entry is the one that Mr. Montoya referred to as a bleeder entry.

During the set up it is not possible to seal off the bleeder entry because that entry must be used by the equipment and because the setup entry was blocked by the shields. The shields increase the velocity of the air.

The ventilation plan was submitted to MSHA and it was intended that it would be applicable when there was active cutting of the coal.

During the inspection the witness took carbon monoxide measurements which measured less than 10 PPM. The threshold limit is 50 PPM. Mr. Montoya took no dust samples.

Mr. Stolter and Mr. Pike also took measurements. There were fluctuations in the airflow depending on the diesel equipment that was checked.

After Mr. Montoya took measurements showing insufficient air, he asked for the ventilation plan and threatened the company with a (d) order. He also stated he wanted 30,000 to 35,000 CFM before he would abate the citation. He also wanted the company to change the ventilation. Stolter did not have the authority for such a change so he contacted Jim Pike, the company's foreman.

When there was no diesel equipment in the setup entry the airflow was 31,000 CFM but that was insufficient because it was not constant. Inspector Montoya believed it to be insufficient.

Mr. Montoya does not understand the delicate nature of the ventilation of the mine; further, Mr. Stolter did not have the authority to change the ventilation. Such change could affect and heat the gob.

At the time the company was under an MSHA (k) order due to a previous fire. The (k) order had critical restrictions and because of this the company could not randomly move the ventilation.

Regarding the MMU number: After the longwall was finished the company would send a letter to MSHA deactivating the MMU. It would then be reactivated when the company cut coal again. When this citation was issued the MMU unit was not active and MSHA had been so advised.

At the time of the inspection there were some shields in place and there was a pan-line about half way down the entry.

Mr. Stolter did not know how many times Inspector Montoya had taken air samples and he didn't recall the number of measurements that he had taken himself. It was somewhere between ten and twenty measurements. Montoya took measurements on both sides of the shields.

Also measurements were taken throughout the area but most of them at the tailgate side in the entry.

Mr. Stolter used an anemometer and the smoke tube; CFM can be determined with an anemometer.

Mr. Stolter did not take any readings near zero and he was present when Mr. Cobb, the fire boss, was in the area. He agreed that there was little air movement when Mr. Montoya took his readings.

Between 6:30 p.m. and 7:30 p.m. there was more active air movement.

In order to attain an airflow of 200 feet per minute at a given point you would need 49,400 CFM. The witness did not know what it would take to establish a 200 feet/min. airflow with 3 shields in the setup entry but it would be something less than 49,400 CFM. The ventilation plan also serves to control methane.

State law requires that the company maintain a certain amount of air.

A working section is defined in the regulations as being where coal is extracted and loaded out.

The ventilation plan goes into effect when the shear goes into operation. Less than 10 percent of the shields were in place and most of Mr. Montoya's measurements were taken in the middle of the face.

During the continuous miner operation the company transports materials such as roof bolts into the section.

CLIFFORD J. PIKE, General Mine Foreman, is a person experienced in mining and he is responsible for the enforcement of the company's ventilation plan.

On December 10, 1987, he made the plan available to Mr. Montoya and Mr. Stolter. He measured the air in the intake entry at 53,000 CFM. He was also present during the rest of the inspection. He let Mr. Cobb do most of the air readings. While measurements were being taken he was concerned with directing into the area the amount of air that Inspector Montoya wanted. He felt the company had a sponton 1/ problem.

It is the witness' policy that he tries to make MSHA happy whether they are right or wrong. But to him there was nothing in this section that indicated a lack of air movement. However, the company did not delay and tried to get Mr. Montoya what he requested. However, the witness had to make sure that ventilation changes did not cause detrimental things to happen elsewhere in the mine. In addition to putting more air into the setup entry, he put up a directional air current that did not cause any emissions problem in the area.

1/ Spontaneous combustion.

By way of illustration Mr. Pike indicated that if one were to place an anemometer at a window, he would get a certain CFM airflow. On the other hand, if you take the same anemometer and place it in the corner of a room, you would get a lower airflow. In his opinion, the flow of air is similar to the flow of water. The CFM remains the same. In short, the measurements should be on the intake side and the return side.

The witness agrees he took a few readings in the setup entry and found very little movement on the anemometer. However, velocity does not have to be constant. Mr. Pike took measurements at the mouth of the section and the measurements measured 78,000 CFM. At the end of the section the second reading indicated a flow in excess of 50,000 CFM but these measurements were not taken in the setup entry.

In the witness' opinion the amount of airflow required by the ventilation plan would not apply to the setup entry. Other portions of the law would apply such as the required concentration of oxygen or a perceptible movement of air.

Concerning scoops that might be in the area: airflow is required by the ventilation plan at half of the nameplate of the braking power. Some machines go to 7,000 to 9,000 CFM. The witness did not see any dust in the air but there was smoke. That is common to diesel and welding activity.

When the witness examined for air he didn't see any dust in the area but there was smoke. This is common to diesel and welding activity.

Evaluation of the Evidence

A credibility issue arises in this case as to the airflow in the setup entry. Inspector Montoya indicated that the airflow was so minimal that the anemometer would not turn. He then used a smoke tube. These two factors establish a lack of air movement in the setup entry. The operator's witnesses essentially concede the above condition in the setup entry.

On the other hand, measurements taken by company representatives on the intake side and return entry side indicate a sufficient airflow. The inspector does not dispute that there was sufficient air at these places.

However, the pivotal issue in this case is whether the operator violated the ventilation plan. The ventilation plan mandates the quantity and velocity of air reaching each working face.

The ventilation plan, as evidenced by Exhibit P-3, requires a minimum quantity of air reaching the intake end of the longwall face to be 40,000 CFM. Further, the minimum velocity of air maintained across the longwall face shall be 200 feet/min. at Shield No. 10 (intake side) and 100 feet/min. at Shield No. 115 (return side). The pivotal issue in turn requires a definition of what constitutes a working face.

MSHA believes that the term "working face" is to be read broadly, that any time there is some work which is the beginning of activity which will result in the extraction of coal, then the ventilation plan is in effect.

I disagree. The evidence here is uncontroverted that the pan-line and shields were not in place and they are necessary predicates to establish a working face. Obviously no coal was being produced.

Respondent argues that this case is controlled by the Secretary's own definitions as contained in 30 CFR § 75.12(g)(3) and § 75.2(g)(1).

30 CFR § 75.2(g)(1) provides as follows:

> "Working face" means any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed and during the mining cycle.

30 CFR § 75.12(g)(3) provides as follows:

> "Working section" means all areas of the coal mine from the loading point of the section to and including the working faces."

The facts involved in this case fail to fall within either of MSHA's definitions. A working face, in part, is where "work of extracting coal from its natural deposit in the earth is performed".

It is apparent on the uncontroverted evidence that no such work as comtemplated by the regulation was performed. No coal was extracted from its natural deposit in the earth. The only work being performed was the work preparatory to the actual extraction of coal. Nor was there a mining cycle. To like effect

see the decision of Commission Judge Roy Maurer in BethEnergy Mines, Inc., 10 FMSHRC 224 (1988). (Pending on review.)

The Secretary also relies on the velocity of air required by the ventilation plan at shield No. 10 and No. 115. However, it is uncontroverted that these shields were not in the entry when the citation was issued.

In sum, the setup entry was not a working face and 30 C.F.R. § 75.316 is not applicable.

It follows that the Secretary has not established a violation of the ventilation plan. It accordingly follows that Citation No. 2504948 should be vacated.

At the conclusion of the hearing, in her closing argument, the Secretary stated that if the ventilation plan is not applicable then 30 CFR § 75.301 applies and the court should rely on that section to establish a violation.

The Secretary did not move to amend her complaint. Further, the Secretary's "suggestion" was not timely made.

ORDER

For the foregoing reasons the following order is appropriate:

Citation No. 2504948 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 23 1989

ED YANKOVICH, President PAUL BRANCHISH, Chairman et al., Complainants	:	DISCRIMINATION PROCEEDING Docket No. PENN 89-214-D
v.	:	Dilworth Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by several UMWA miners against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. The complaint alleges that on or about October 5, 1988, respondent's mine management met with complainants Yankovich and Snyder, officials of Local Union 1980, who represent the miners, and announced the proposed implementation of "a new approach" to the reporting of work related accidents. The complaint alleges that after explaining the new approach to the local union officials, management called in approximately eight or nine employees, including the named complainants Stockdale, Adams, Azzardi, Kridle, and Reed, and informed them that they were considered "high risk" because of their previously reported accidents, and that a future reportable accident could subject them to discipline or discharge. The complainants assert that this new program inhibits miners from filing accident reports required to be submitted to MSHA, and is an interference with their rights under section 105(c) of the Act.

The respondent filed an answer to the complaint, and admitted that it had met with the complainants and informed them of management's intentions to adopt and implement "a safety awareness approach" with respect to reportable accidents. However, the respondent denied that it threatened any employees with discipline solely because of any accident reports that they may file, and denied that its program interfered with the

statutory rights of the complainants. The respondent further asserted that its "safety awareness approach" has been permanently suspended and does not exist at the mine.

The respondent has now filed a motion to dismiss the complaint, and in support of its motion states that the issue raised by the complaint concerning its "safety awareness approach" is now moot because of an adverse arbitration decision which has caused mine management to permanently suspend the approach. The United Mine Workers of America (UMWA) has responded to the motion and states that it "would not oppose dismissal without prejudice to refile with the Commission should the complained of program be reinstituted."

ORDER

The respondent's motion to dismiss IS GRANTED, and the complaint IS DISMISSED, without prejudice to its refiling by the complainants.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 30 1989

CLINCHFIELD COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. VA 89-67-R
	:	Order No. 2965464; 8/1/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	McClure No. 1 Mine
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

DECISION

Appearances: Laura E. Beverage, Esq., and David J. Hardy, Esq., Jackson & Kelly, Charleston, West Virginia, for Contestant; James Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Respondent, the Secretary of Labor (Secretary); Mary Lu Jordan, Esq., Washington, D.C., for Intervenor, United Mine Workers of America (UMWA).

Before: Judge Broderick

STATEMENT OF THE CASE

On August 2, 1989, Contestant Clinchfield filed a Notice of Contest of an order of withdrawal issued August 1, 1989, under section 104(b) of the Act for failure to abate a citation issued June 5, 1989. On the same day Clinchfield filed a Motion for Expedited Proceedings. Following a telephone conference call with counsel for Clinchfield and the Secretary, I scheduled a prehearing conference in Falls Church, Virginia, on August 3, 1989, and notified counsel for the UMWA as the putative representative of the miners. The Secretary's counsel stated the Secretary's answer to the notice of contest on the record at the prehearing conference. The parties informed me that a Petition for Modification had been filed by Clinchfield, which, if granted, would permit the condition for which the citation and order were issued. The Secretary supports the Petition, but it is opposed by the UMWA, and a hearing was requested, and is

scheduled in November 1989, before a Department of Labor Administrative Law Judge.

Clinchfield also filed an Application for Temporary Relief on August 3, 1989, and a memorandum in opposition to UMWA's request to intervene on August 4, 1989.

Pursuant to notice issued August 3, 1989, the hearing commenced in Abingdon, Virginia, on August 7, 1989. Following oral argument, I granted UMWA's request to intervene and denied Clinchfield's motion to dismiss UMWA as a party. The case was heard on August 7, 8, and 9, 1989. James A. Baker, Robert A. Elam and Harry C. Verakis testified on behalf of the Secretary. George Strong, Donald Mitchell, and Thomas Asbury testified on behalf of Clinchfield. George P. Willis, Thomas J. Rabbit, Robert J. Scaramozzino, James Weeks, Samuel J. Clay, and Danny Davidson testified on behalf of the UMWA.

At the conclusion of the testimony, counsel for all parties waived their right to file post-hearing briefs and each argued his/her client's position on the record. Following the oral arguments, I issued the following decision from the Bench:

JUDGE BRODERICK: All Right.

First, there are a couple of matters that I will rule on.

Number one, the motion to certify my order permitting UMWA intervention, to certify that order to the Commission for Interlocutory Review is denied.

Secondly, because I have heard the entire testimony on the merits of this proceeding, the motion for relief under section 105(c) of the Act is denied.

Now, on the basis of the entire record made before me, and the contentions of the parties, I issue the following Decision. I should preface that with the observation that the overriding value in the Mine Act is the health and safety of the miners, and all Commission decisions interpreting the Mine Act have to keep that overriding value foremost.

Citation Number 2911079 was issued June 5, 1989, to the McClure Number One Mine alleging that the conditions in the Decision and Order modifying the effect of 30 C.F.R. 75.326, which were in effect at the subject mine, were not being complied with, in that air velocity in excess

of three hundred feet per minute was found to exist on the belt entry; namely, at one location, a velocity of seven hundred twenty feet per minute was found.

Because the citation was not abated in the time fixed and extended for abatement, an order of withdrawal was issued on August 1, 1989, under section 104(b) of the Act for failure to abate.

Clinchfield filed a notice of contest of the order. It is not contested that the conditions found in the citation and order existed; nor is it contested that these conditions violated the provisions of 30 C.F.R. 75.326, as modified. The contest is based on the contention that complying with those provisions would create a diminution of safety in the mine.

The Secretary who issued both the Citation and the Order agrees that compliance with the present requirements, that the air velocity in the belt entry not exceed three hundred feet per minute, would result in a hazard to miners.

The Intervenor, United Mine Workers of America, representative of the miners, disagrees with the Secretary's position and urges that the Order of Withdrawal be affirmed. The Secretary and the operator have introduced substantial evidence that to enforce the present belt entry air velocity requirements would result in serious danger to miners in the subject mine because of the possibility of a methane fire or explosion.

The United Mine Workers of America have introduced substantial evidence that permitting an increase in the belt entry air velocity would result in serious danger to miners in the subject mine because of the potential for propogating belt fires and because of the potential of causing float coal dust and respirable dust.

Whether the belt entry air velocity requirements should be increased or remain unchanged is, I believe, the primary issue in the Petition for Modification proceeding presently pending before the Department of Labor. I have heard substantial evidence relating to that issue and I permitted evidence to be introduced by all parties in order to complete the record because I believe the case before me is a case of first impression.

This evidence has been perhaps far ranging beyond the scope of my responsibility in this hearing, but I believe it is important to have as complete a picture as I can. However, I do not have, fortunately or unfortunately, the responsibility or jurisdiction to determine whether the belt entry air velocity requirements should be increased or should be kept at the same level. The question before me, as I see it, is whether to affirm, vacate, or modify the contested order and its underlying citation.

On the bases of the substantial evidence submitted by Contestant and the Secretary, and particularly that submitted by the Mine Safety and Health Administration, which is the government agency charged with enforcing the Act in the interests of the safety of miners, and because there is a pending petition for modification which is intended to resolve the conflicting views relative to safety and hazards presented by the belt entry air velocity, I hereby order that Order of Withdrawal, Number 2965464 is DISSOLVED.

I further order that the underlying Citation 2911079, is modified to extend the time of abatement to the date of the commencement of hearing on the 101(c) Petition for Modification.

By these orders, I am not in any way discounting or minimizing the substantial safety issues raised by the Intervenor, the United Mine Workers of America. Neither am I attempting to weigh the evidence on either side of the issue, which is the responsibility of the authorities charged with deciding the Petition for Modification.

I am, however, ruling that in view of the Secretary's position and the evidence introduced in support of it, that complying with the contested citation and order may result in a diminution of safety, and in view of the pending petition for modification, relief should be granted. I am granting it from the terms of the order until this matter is submitted for decision on the Petition for Modification.

I hereby reaffirm the above Bench Decision. I GRANT the Notice of Contest and VACATE the contested order. I MODIFY the underlying citation by EXTENDING THE TIME FOR ITS ABATEMENT to the date the hearing commences on the pending Petition for Modification.

James A. Broderick
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 12 1989

ASARCO, INCORPORATED, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 88-82-RM Citation No. 3252969; 7/16/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. SE 88-83-RM Citation No. 3252970; 7/16/88
	:	Immel Mine MINE ID 40-00170
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. SE 89-67-M A. C. No. 40-00170-05520
ASARCO, INCORPORATED, Respondent	:	Immel Mine

ORDER

I.

On April 12, 1989, the Secretary (Petitioner) served ASARCO (Respondent) with a Deposition Notice and Request for Production of Documents. The Notice requested the Respondent to designate representatives to testify, in essence, as to the Tennessee Mines Division's history of compliance with various standards of the Federal Mine Safety and Health Act and applicable regulations, as well as its safety policies and procedures, management structure and responsibility for determining electrical maintenance procedures and policies, and the factual events leading up to the death of Ronald Miller on July 15, 1988, and ASARCO's actions immediately following the fatality. In addition, Petitioner requested depositions be taken of certain enumerated individuals including Fred Cain, John Ellis, John Jacques, Don Walter, and Jim Bales.

On April 21, 1989, Respondent filed a Motion for Protective Order. In its Motion, Respondent seeks protection from the depositions of a corporate designee along with the following individuals Cain, Ellis, Walter, Bales and Jacques. In essence,

Respondent indicates that its "would be," corporate designee Donald R. Ledbetter was deposed on October 12, 1988, and testified regarding all the matter requested by Petitioner, and that Petitioner extensively cross-examined him, and that deposing another corporate representative would "contribute nothing to resolving the Secretary's questions . . . ." Respondent also alleges, in essence, that nether Cain, Ellis, Walter, Bales, nor Jacques have personal knowledge of the circumstances of the incident in question nor could they testify as to ASARCO's relevant electrical policies and procedures.

On May 12, 1989, Petitioner filed a response to Respondent's Motion for a Protective Order. Along with its response it attached a copy of Ledbetter's Deposition.

On May 15, 1989, Respondent filed a statement in which it indicated that, pursuant to an understanding it reacned with Petitioner's Counsel, its reply to Petitioner's opposition to its Motion for Protective Order would be filed on or before May 31, 1989. On June 1, 1989, Respondent's reply to the Secretary's response to its Motion for Protective Order was filed.

The subject citations which are being contested by Respondent in the above captioned cases, allege violations of 30 C.F.R. §§ 5712017 and 5712019, and that the violations therein resulted from Respondent's high negligence. Accordingly, it is clear that an examination of Respondent's representatives with regard to the matters set forth in Petitioner's Motion, is relevant to these proceedings. It is manifest that an examination with regard to the events leading up to the cited incident and ASARCO's actions immediately following the incident, as well as an examination as to Respondent's policies and procedures and management structure as well as its history of compliance with various regulations, would be relevant to the issue of its negligence, which is a factor to be considered in determining the amount of a penalty to be assessed, should it be found that Respondent has violated a mandatory safety standard. Thus, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Respondent shall designate a representative or representatives to testify as to the matters set forth in paragraph 1.(a-d) and produce the documents set forth in paragraphs i, ii, and iii of Deposition Notice and Request for Production of Documents. The fact that Ledbetter had already been deposed by Respondent, and cross-examined by Petitioner, shall not serve to deprive Petitioner of its right to prepare for trial by examining Respondent's representatives who have knowledge of the matters set forth in paragraph 1 of Petitioner's Notice.

Aside from asserting that Cain, Ellis, Jacques, Walter, and Bales ". . . represent an apparent chain of authority of ASARCO's Immel Mine, one leading ultimately to Ronald Miller, the miner

who was killed," Petitioner does not set forth any facts to support a conclusion that an examination of these individuals would be relevant to the subject matter involved in the pending action. Indeed, there are no facts presented to conclude that an examination of these individuals is reasonably calculated to lead to a discovery of admissible evidence. Respondent has asserted that the enumerated individuals, in essence, do not have knowledge of the matters set forth in Petitioner's Notice. However, aside from its own assertion, there are no affidavits setting forth any facts to support these assertions. I thus conclude that there are not sufficient facts set forth before me to conclude that an examination of the above enumerated individuals would be relevant to the subject matter at hand. However, should it appear from the deposition of the individual or individuals designated by Respondent, and examined pursuant to this Order, that other individuals have knowledge of the matters sought to be deposed as set forth in Petitioner's Notice, then Petitioner shall be afforded the right to depose these individuals.

Inasmuch as Petitioner, in its response to Respondent's Motion, indicated that it has withdrawn the request made in its Notice that Larry E. Thomas be present at the time of a requested inspection of the mine and accident site, it appears from Respondent's reply that it no longer objects to Petitioner's request to inspect and photograph the mine and accident site. Accordingly, this request is GRANTED and it is ORDERED that Respondent permit the Petitioner to inspect the subject mine and accident site, and photograph the same, and such inspection is to be performed at a time to be agreed upon by Counsel for both Parties. It is further ORDERED that Respondent shall produce for deposition all individuals having knowledge of the matter set forth in paragraph 1 of Petitioner's Notice, and these individuals shall produce all documents referred to in paragraph 1 of Petitioner's Notice. The depositions are to be taken within 10 days of this Order, unless the Parties agree upon an extension, at a site to be mutually agreed upon.

II.

On March 9, 1989, Respondent served upon Petitioner a First Set of Interrogatories requiring an answer and response on or before 15 days after service. On April 21, 1989, Respondent filed a Motion for an Order to Compel Answers to Interrogatories. On May 12, 1989, Petitioner filed its Answers to Respondent's First Set of Interrogatories. In its Answer it objected to a number of the Interrogatories. On June 1, 1989, Respondent filed a Motion to Compel Answers to Interrogatories. Petitioner did not file any response to this Motion.

a. Interrogatory No. 2

Interrogatory No. 2 requests as follows:

> Please state the names, addresses, and employment positions of each person assisting in any way, directly or indirectly in the preparation of the answers to these Interrogatories, and state the answer(s) which each person so listed has assisted in preparing.

Petitioner in its response has indicated that a Mr. Daugherty in answering the Interrogatory was assisted by an attorney for the Secretary and "These communications are privileged pursuant to the attorney-client privilege." It should be noted that Respondent does not seek to discover any communications between the attorney for the Secretary of Labor and his client. The Interrogatory merely request the identification of any person assisting in the preparation of Answers to the Interrogatories. As such a response to Interrogatory No. 2 does not violate an attorney-client privilege and should be answered.

b. Interrogatory No. 7

Interrogatory No. 7 requires the listing by name of each person the MSHA Inspectors contacted in the course of the MSHA investigation prior to and after the issuance of each of the citations in issue. Petitioner as a response indicated that "Contacts after the initiation of these proceedings would be privileged as 'work product' under Rule 26(b)(3), Fed. R. Civ. P."

This Interrogatory, in essence, seeks the identity of persons contacted by an MSHA Inspector, rather than material prepared by Counsel in preparation of trial. As such, the listing of names would be beyond the "work product" protection (see cases cited in Moores Federal Practice at 26-354, 355).

In its Answer, Petitioner further indicates that "consultation with miners and informants would be nondiscoverable except as provided under Commission Rule 59." In this connection, Respondent has requested that information requiring informants be provided 2 full days before the hearing pursuant to 29 C.F.R. § 2700.59.

Section 2700.59, supra, prohibits the disclosure of names of miners who are informants, except in "extraordinary circumstances." Respondent has not alleged any extraordinary circumstances herein. Accordingly, in complying with Interrogatory No. 7, Petitioner shall not divulge names of informants who are miners. Also, pursuant to Section 2700.59, supra, Petitioner, in answering Interrogatory No. 7, shall, 2 days prior to the hearing, disclose the names of miners who are expected to testify at the hearing.

c. Interrogatory No. 11

Interrogatory No. 11 requests as follows:

> Please state, if not in writing and subject to one of the following requests for production, MSHA's policy or policies regarding (a) findings of high negligence; (b) interpretation of 30 C.F.R. § 57.12017; and (c) interpretation of 30 C.F.R. § 57.12019.

Petitioner's response to this interrogatory was as follows: "None." Respondent in its Motion argues as follows: "It is unclear whether 'none' means none exist, or none exist other than those in writing and not produced pursuant to the request for production." Accordingly, Respondent's position, in the interests of justice, is sustained, and Petitioner shall clarify, in its response to Interrogatory No. 11, whether MSHA does not have any policy with regard to matters referred to in Interrogatory No. 11, or whether it does not have any such policy other than those in writing and not produced pursuant to the request for production.

d. Interrogatory No. 14

Interrogatory No. 14 which was objected to by Petitioner on the ground that it was not relevant nor would it lead to relevant evidence, requires the identification of individuals who initiated, consulted on, and/or participated in the special assessment of civil penalties relating to the citations in issue and a description of their roles in the assessment process. Respondent's position is that the request for these names is relevant as they are the ones who determined the penalty which is a relevant issue to the case at bar. Inasmuch as the Commission has the authority, de novo, to assess all civil penalties provided for in the Federal Mine Safety and Health Act of 1977, based upon factors enumerated in section 110(i), supra, it is clear that the identity of individuals who participated in the special assessments of civil penalties would not be relevant to a decision by the Commission. Such a decision, on the issue of a penalty is to be based upon the factors in section 110(i) of the Act, which have to be established in an evidentiary hearing. Further, aside from indicating that those who participated in the special assessments are the very ones who determined the penalty found by MSHA herein, Respondent has not articulated in what fashion the identity of these individuals would be reasonably calculated to lead to the discovery of evidence which would be relevant to the establishment of any of the factors set forth in section 110(i) of the Act, and thus a resolution of the issue of a penalty to be set by the Commission. (c.f. see cases cited in Moores Federal Practice, supra, at 26-96.) As such, the objection of Petitioner to Interrogatory No. 14 is sustained.

e. Interrogatory No. 16

Interrogatory No. 16 requests as follows:

> Identify the individuals who initiated, consulted on and/or participated in the special investigation of the alleged violations which are at issue in this proceeding and describe each of their roles in the special investigation.

Petitioner has objected to this Interrogatory on the ground that it is not relevant nor would it lead to relevant evidence. In the alternative Petitioner asserts that in order to avoid the appearance of impropriety and protect the rights of the individuals who many be targeted for investigation under criminal provisions of the Act, it has kept the civil proceedings segregated from any criminal investigation.

Respondent has alleged, that the investigation involved the same subject matter as that involved the incident proceeding. This allegation has not been contested by Petitioner. Further, Petitioner has indicated that the criminal investigation has been completed. Also, importantly, it is clear that the Petitioner's interest in avoiding ". . . the appearance of impropriety and protect the rights of those individual who may be targeted for investigation under criminal provisions of the Act," would not be thwarted by identifying individuals who "initiated, consulted on, and/or participated," in the special investigation. Respondent has not requested, and no identification shall be allowed, of any list or identification of those individuals who may be the target of or subject of the investigation. Hence, Petitioner shall answer this Interrogatory.

Thus, it is ORDERED, that within 10 days of this Order, Petitioner shall serve Respondent with a full and complete answer to Interrogatories 2, 7, 11, and 16. It is further ORDERED that Petitioner's objection to Interrogatory No. 14 is sustained.

It is ORDERED that, with regard to Interrogatory No. 7, Petitioner shall not divulge names of informants who are miners. Also, pursuant to section 2700.59, supra, Petitioner, in answering Interrogatory No. 7, shall 2 days prior to the hearing, disclose names of miners who are expected to testify at the hearing.

III.

On March 9, 1989, Respondent served Petitioner with a Request for Production. On April 21, 1989, Respondent filed a Motion for Order to Compel Document Production. On May 12, 1989, Petitioner

filed its Responses and Objections to Respondent's Request for Production of Documents. On June 1, 1989, Respondent filed a Motion to Compel Production of Documents.

In essence, Respondent's requests one through four require the production of documents pertaining to Petitioner's enforcement policies for Respondent's mine including documents exchanged between various MSHA personnel, contacts between MSHA personnel and Respondent with regard to its violations and documents received by MSHA personnel or provided by these personnel to various investigative agencies concerning alleged violations or mining practices of Respondent. Also requested were any documents pertaining to the initiation, criteria, review, and processing of special assessment violations during the past 2 years. In Respondent's Motion to Compel Production of Documents it indicates that the latter request (request No. 3) seeks not all individuals special assessment documents "but rather the policies underlining them."

In essence, Petitioner refuses to respond to these requests on the ground that it does not have any enforcement policies peculiar to one operator, and if it did have such policies they would not have any relevance to the instant, de novo, proceeding. In addition, Petitioner argues that the requests are so broad "as to be impossible to comply with," and as to be "unduly burdensome."

In general, in order to eliminate surprise and allow the Parties to adequately prepare for trial, in general, the rules of discovery should be broadly applied (see, Hickman v. Taylor, 329 U.S. 495 (1947)). Further, Rule 26(b)(1), supra, provides for the discovery of material which is "relevant to the subject matter." It is not necessary for the matter sought to be discovered to be admissible in evidence as long as it is reasonably calculated to lead to the discovery of admissible evidence (see cases cited in Moores Federal Practice, supra, at 26-96). In this connection, Respondent has alleged that the information sought is ". . . essential to explore and expose bias, undercover the bases for agency's actions and reveal potential exculpatory information." Respondent has also indicated that request No. 3 does not require the production of all individual special assessment documents, but is limited to the production of policies underlining them. Accordingly, I conclude that the information sought in requests 1 - 4 are relevant.

Petitioner in its objection to request No. 2 argued that the request seeking documents made from contacts with MSHA personnel and "hourly personnel," regarding Respondent's operations seeks documents which "will or could identify miners" in violation of

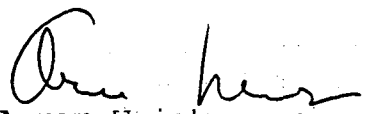
Rule 59. Thus, in complying with request No. 2 the Petitioner shall not disclose, until 2 days before the hearing, the name of any miner who was expected to testify at the hearing, nor shall it disclose the name of any informant who is a miner, unless the Respondent establish the existence of "extraordinary circumstances."

Respondent also requested documents initiating the special investigation, documents initiating and relating to the special assessment, and relating to the special investigation of the events of July 15, 1988. Petitioner essentially argued that these requests are overly broad and that the matters sought to be disclosed are not relevant. In addition, with regard to the request for production of documents relating to the special investigation of the events of July 15, 1988, Petitioner incorporated the objections that it had made to Interrogatory No. 16, infra, and indicated in addition that the documents are protected as a "work product" of the Secretary's employees.

Respondent has argued that the material requested in request Nos. 5 to 9, i.e. the investigatory and assessment files specific to the citations at issue, ". . . are essential to testing the accuracy of witnesses' perceptions; to probe the truthfulness of witnesses; to question memory; to explore and expose bias; to uncover the basis for opinions and actions; and, to reveal potentially exculpatory information which may aid a respondent, such as ASARCO, in the preparation of its case." Petitioner has not filed any response to Respondent's Motion to Compel and thus has not rebutted Respondent's assertions. As such, I conclude that the material sought to be discovered is relevant.

Petitioner has not definitively indicated that the material sought by Respondent in request No. 9 was prepared in anticipation of litigation. Also the material sought would not impede the investigatory process as Petitioner, in its objection to Interrogatory No. 16, filed May 12, 1989, indicated that although the investigation was "not technically closed," the Solicitor had been informed that the investigation "has been completed." Accordingly, Respondent shall comply with this request.

It is ORDERED that, within 10 days of this Order, the Petitioner shall respond to Interrogatories 1 through 13, 15, and 16 and Request for Production of Documents 1 through 9 served by Respondent on March 9, 1989.



Avram Weisberger
Administrative Law Judge
(703) 756-6210

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 20, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 89-20
	:	A. C. No. 46-01433-03848
v.	:	
	:	Loveridge No. 22 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	
	:	Docket No. WEVA 89-159
	:	A. C. No. 46-01968-03800
	:	
	:	Blacksville No. 2 Mine
	:	
	:	Docket No. WEVA 89-162
	:	A. C. No. 46-01318-03872
	:	
	:	Docket No. WEVA 89-170
	:	A. C. No. 46-01318-03873
	:	
	:	Docket No. WEVA 89-171
	:	A. C. No. 46-01318-03877
	:	
	:	Robinson Run No. 95 Mine
	:	
	:	Docket No. WEVA 89-183
	:	A. C. No. 46-01453-03848
	:	
	:	Humphrey No. 7 Mine

ORDER DENYING SECRETARY'S MOTION FOR CHANGE OF HEARING SITE AND FOR CANCELLATION OF PREHEARING

By notices dated June 16, 1989, and June 30, 1989, the above-captioned cases were set for prehearing conferences at 2:30 p.m. on September 11, 1989, and hearings at 8:30 a.m. on September 12, 1989. On July 13, 1989, the Arlington Solicitor filed a motion objecting to the hearing site and to the prehearings. On July 18, 1989, the operator responded requesting that the prehearings and hearings remain unchanged.

After pointing out the operator in its answer initially requested a Morgantown site, the Arlington Solicitor asserts that Pittsburgh is not a convenient location. However, in its response to the Solicitor's present motion the operator advises that it has no objection to the Pittsburgh site and in fact prefers it. Obviously, the operator does not need the Solicitor to speak for it. The Solicitor's reference to a two hour drive

(which would be the maximum time) to the designated site (which has a nearby airport) is not persuasive. The operator clearly does not view this as unduly burdensome and neither do I.

The Arlington Solicitor further complains about the prehearing conference. He alleges that 29 C.F.R. § 2700.54(b) which provides that the judge may require prehearing statements or prehearing conferences, means that he cannot ask for both. This interpretation is rejected. There is no indication that subparagraph (b) is intended to so limit the judge. Rather the choice is left to the judge of those procedural devices which in his view will best advance the many purposes enumerated in items (1) through (5) of the subparagraph. Also, subparagraph (b) follows subparagraph (a) of § 2700.54 which enumerates the powers of an administrative law judge to conduct and regulate administrative hearings.

That the Arlington Solicitor's approach makes no sense is demonstrated by the recent case of Consolidation Coal Company v. Secretary of Labor, (Docket Nos. WEVA 88-290-R, WEVA 89-4) heard on May 9, 1989, and also assigned to the Arlington Solicitor. In that case which involved significant and complex ventilation issues, preliminary statements were required and filed. Only after receipt of those statements did it become clear that there was substantial confusion and lack of understanding, particularly on the Solicitor's part, with respect to the issues presented. In order to assist the parties and expedite the hearing, I scheduled a prehearing conference for the afternoon preceding the day set for hearing. Crucial to the trial and disposition of that case was a mine map with more than 100 separate markings. The meaning and relevance of the map were explored and resolved at the prehearing and remaining areas of dispute were identified. Because of the prehearing the subsequent hearing proceeded efficiently and expeditiously.

To meet the Arlington Solicitor's allegation of lack of adequate notice for the prehearing in WEVA 88-290-R and WEVA 89-4, the date of the conference in those cases was rescheduled to the day of the hearing. In order to meet possible future objections regarding adequate notice, subsequent prehearing conferences have been scheduled in the notice which sets the case for hearing. Now the Solicitor wants to do away with prehearing conferences whenever he files a preliminary statement regardless of how much advance notice he has or what the case involves.

Prehearing conferences held the day before the hearing have proved particularly helpful because the judge and counsel are free to consider relevant matters without pressure and time constraints arising from the immediate presence of witnesses waiting to testify. Thus in Secretary of Labor v. Consol Pennsylvania Coal Company, (Docket No. PENN 89-111) heard on

July 11, 1989, where a Philadelphia Solicitor appeared, comprehensive stipulations were reached at the prehearing held on the afternoon before the hearing. As a result, the hearing in that case took approximately one half the time it would have, had there been no prehearing.

It is astonishing for the Arlington Solicitor to assert that "Prehearing conferences are not critical because these are not complex cases." The Arlington Solicitor supplies no basis for this sweeping generalization. If he is referring to the above-captioned cases set for September 11 and 12, I do not believe he has sufficiently familiarized himself with them to make such an argument. The preliminary statements in these cases are not due for another month. In this respect also the Arlington Solicitor's position is wholly at odds with that of the operator whose response expresses the belief that such conferences can clarify and simplify the issues involved in the September cases. The operator asks that the prehearings remain as scheduled.

If the Arlington Solicitor's assertion of non-complexity includes all MSHA cases, I must disagree at least insofar as cases which have come before me, are concerned. Note again the mine map which had more than 100 separate markings. If indeed, all MSHA cases are simple for the Arlington Solicitor, then he must be patient so that this Chief Judge and the operator may attain his level of understanding.

As the Arlington Solicitor undoubtedly is aware, the number of cases filed with the Commission and going to hearing are increasing. The Commission spends tens of thousands of dollars annually on reporting services for administrative transcripts. Preliminary statements and prehearing conferences are intended to handle cases not only promptly but economically. To identify issues and discuss preliminary matters for the first time at the hearing is a waste of time and money. I am sensitive to the Arlington Solicitor's desire to hold down his travel expenses and to the logistics whereby he prepares for hearings. In its response the operator suggests that in some cases prehearing conferences may not be of assistance and that each case should be judged individually. If the parties agree a prehearing would not be useful in a particular case and if I am notified sufficiently in advance for a conference call to be held at which time I can consider their views, the prehearing may be canceled where appropriate.

In conclusion, I must state the Solicitor's motion comes as a surprise since I understand that the Arlington office operates under the aegis of Office of the Philadelphia Regional Solicitor.

For the past two decades I have found the Philadelphia Office preeminent not only for the timeliness and substance of its filings, but for its cooperative attitude.

In light of the foregoing, the Solicitor's motion is DENIED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Ronald Gurka, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

August 2, 1989

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 88-246-DM
ON BEHALF OF HARRY RAMSEY,	:	
Complainant	:	MD 87-51
v.	:	
	:	Colosseum Mine
INDUSTRIAL CONSTRUCTORS CORP.,	:	
Respondent	:	

INTERIM ORDER

Appearances: Norman J. Reed, Esq. and Nathaniel J. Reed, Esq.
Reno, Nevada,
for Complainant;
William T. Murphy, Esq., Washington Corporations,
Missoula, Montana,
for Respondent.

Before: Judge Morris

This case involves a complainant discrimination filed by the Secretary on behalf of complainant pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. After the case was at issue, and after other counsel appeared, the Solicitor of Labor moved to withdraw as counsel for complainant. After notice, no person objected and the Solicitor's motion to withdraw was granted (Orders: January 9, 1989 and January 23, 1989).

After notice to the parties a hearing on the merits was held in Las Vegas, Nevada, on January 31, 1989. A subsequent hearing on the issue of attorney's fees is scheduled for October 24, 1989.

The applicable portion of the Mine Act, Section 105(c)(1), in its pertinent portion, provides as follows:

> Discrimination or interference prohibited; complaint; investigation; determination; hearing
>
> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or

> other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine .... 30 U.S.C. § 815(c)(1).

Post trial briefs on the merits were filed by the parties.

Applicable Case Law

The general principles of discrimination cases under the Mine Act are well 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 a protected activity, and (2) the adverse action complained of was motivated in any part by that particular 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 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, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

SUMMARY OF THE EVIDENCE

This case does not lack for credibility issues: The prior employment of HARRY C. RAMSEY, SR., included 20 years with Mobil Oil Company. He retired from Mobil in 1987. While working for Mobil his work schedule permitted him to own and operate a construction company. His company employed up to 100 workers. The business was sold in 1983 when it became too large (Tr. 27-30).

Since July 1988 Ramsey has been a ranger at a golf course in Las Vegas, Nevada (Tr. 24, 26).

Between 1976 and 1987 Ramsey has owned and operated many pieces of heavy construction equipment (Tr. 27, 28, 33-34). He has been trained in fire fighting, safety training and first aid (Tr. 26, 29).

After leaving Mobil, Ramsey went to work for respondent, He was hired to operate all types of equipment on the job site (Tr. 30-33). He was also a pick and shovel laborer for one or two weeks (Tr. 35, 36).

In late June, or early July, when the company set up a crusher operation, Ramsey became the loader operator. He spent most of his time on the loader but he didn't receive a re-classification slip (Tr. 36, 37).

The crusher operator has various duties. He is involved with the continuous flow of material, monitoring personnel and signaling personnel by hand and horn signals if a problem occurs (Tr. 38, 39) (Exhibit C-3 is an unscaled drawing showing the equipment layout for the crusher spreader) (Tr. 40).

Cliff Morrison, the crusher foreman, instructed Ramsey in the manner and use of signals.

The 8 foot by 8 foot building (control tower) where Ramsey operated the crusher had windows on all sides. It was 20 feet above ground level so the operator could see everything in the work field (Tr. 41, 42). Ramsey's duties required him to remain in the control tower structure.

If a build-up of material occurred the mechanic or foreman would indicate this to the crusher operator. The operator would then, by whistle signal, bring in the rest of the workers. When he could see all of the workers, the operator would then shut down the equipment. This is normal procedure for shutting off the machine (Tr. 44). Morrison told Ramsey to operate under these procedures (Tr. 45).

On the swing shift of August 12/13, 1987, Ramsey was in the control tower. The evening shift had started at 4:00 or 4:30 p.m. The normal shift lasts 10 hours. The foreman was in and out of the tower all of the time (Tr. 42, 43).

About 45 minutes before the end of the shift they were crushing rock. At this point Superintendent Morrison came into view and gave Mr. Ramsey a hand signal to shut off the water. The signal was given from the normal signaling area. Ramsey hesitated when he saw the signal. There was still 30 to 45 minutes of production left and he wasn't anticipating a shut-down at that exact time (Tr. 45, 46). When the water remained on, Morrison signaled again. Ramsey had no idea why he should shut down the water but he followed the second direction (Tr. 46, 47). In a couple of minutes Ramsey could not see the window of the control tower in front of him (Tr. 47).

The main function of the water is dust control (Tr. 47).

Ramsey agreed that they have operated a few times without water. If a worker walked through the area it is necessary to see that person to know if he is safe. If an employee cannot be seen on the site, the control operator automatically shuts down "real quick" (Tr. 48). There have been occasions where Ramsey shut down the equipment without signaling (Tr. 49). Ramsey has followed normal procedure by shutting off the machine and getting all employees out in front of the tower (Tr. 49, 50).

On this occasion, after shutting off the water, in two or three minutes, Ramsey couldn't see anything. He listened but he heard nothing unusual (Tr. 50, 57). About two or three minutes elapsed after he shut off the machine (Tr. 51).

Ramsey estimated that five minutes elapsed from when he couldn't see at all until he could make out shadows and equipment (Tr. 52). As soon as visibility cleared Morrison came up to the control tower and asked Ramsey why he had shut down the crusher. Ramsey said he couldn't see. Morrison, who was hostile, told Ramsey that he'd tell him when to shut the water on and off (Tr. 54).

Morrison then tore the daily work paper off the wall and went down the stairs (Tr. 54).

Ramsey then ran the crusher (to clean off the accumulated material). It took about three to five minutes to clean the machine (Tr. 55).

Ramsey then approached Morrison and asked if he had the authority to turn the water on and off (as he had been previously advised when he started as an operator) (Tr. 57). In a three to five minute conversation, Morrison replied that he (Morrison) would be the one to tell him when to turn the water on and off (Tr. 58, 59). Ramsey then replied that he wouldn't work for him under these conditions (Tr. 59). Ramsey was trying to get Morrison to tell him there was no problem. But he would only say that he'd be the one to tell him what to do (Tr. 60). Ramsey repeated that he wouldn't work under those conditions. Morrison asked if he was quitting and Ramsey replied he was. Ramsey felt if he didn't have this latitude he would quit because it was not safe (Tr. 60, 61). However, Ramsey didn't intend to quit working for ICC 1/ (Tr. 61).

1/ While Ramsey stated he didn't intend to quit ICC, his actions of turning in his hard hat and flashlight and saying he "quit" establish that he did, in fact, quit (Tr. 162, 164).

Ramsey and the rest of the crew spent another 15 minutes completing normal clean-up work. Ramsey then got in Morrison's truck to ride to the bus and eventually home. There was no conversation between Ramsey and Morrison on the way to the bus (Tr. 61-63).

About 9:30 a.m. the following morning Ramsey called Mine Superintendent Hildebrandt and told him what had occurred at the end of the shift (Tr. 65). Hildebrandt said he'd check into it and get back with him (Tr. 65, 66). When he again contacted Hildebrandt, about a week later, Ramsey was advised by the company secretary that there was no work available (Tr. 68, 69, Ex. C-18).

Ramsey talked to loader operator Boudreaux and company mechanic Chris Norskog. They concurred with what Ramsey had done (Tr. 70).

Ramsey subsequently filed a discrimination complaint with MSHA (Tr. 72, 73, Ex. C-5). He also took statements from company employees Chris Norskog, Alvin Boudreaux, Hildebrandt and Morrison (Tr. 75). The Norskog and Boudreaux statements were taken at the MSHA inspector's request (Tr. 78, Ex. C-16). Ramsey also heard the company had been cited for dust problems (Tr. 76, Ex. C-12).

After he was terminated Ramsey sought other employment. He sent 60 to 70 resumés to potential employers (Tr. 81, 84, Ex. C-7, C-8). He has continued to seek employment in his field. In addition, he has held several jobs (Tr. 87-90).

Respondent's Evidence

CLIFFORD MORRISON, a person experienced in construction, was laid off together with the entire crew at the Colosseum site when the crushing job was finished (Tr. 153, 154).

Morrison, as supervisor, reclassified and gave Ramsey a raise (Tr. 156). He felt the raise was deserved as Ramsey was doing a good job in the short period of time he was there (Tr. 157, 158). After the raise Ramsey was receiving the money crusher operators were worth (Tr. 158). However, there were a few unsatisfactory incidents involving Ramsey. [These incidents did not cause Ramsey to be discharged.]

On August 12, 1987, Ramsey and Morrison had a disagreement over crusher dust and safety procedures for the crusher (Tr. 158, 159, Ex. C-4).

On this occasion, about ten or fifteen minutes before the end of the shift the miners were standing in front of the parts trailer. At that point Morrison asked Ramsey to shut off the water so they could clean the screens 2/ (Tr. 160).

Ramsey turned the water off and then he turned off the crusher. Morrison went up into the tower and asked him why he had taken that action. There was no reason to shut off the crusher because Morrison was standing right below him. Morrison could see Ramsey and part of the plant. Before he signaled the shutoff of the water Morrison signaled him to assure the safety of the other workers. All of the workers were safe and they were standing next to Morrison or they were in the parts van. Ramsey could have seen them. Morrison agrees that Ramsey could have shut down if he hadn't seen the employees. This is standard procedure (Tr. 160).

In the tower, when Morrison asked Ramsey why he had shut down, Ramsey said he couldn't see. Morrison replied that there was only a little material left to run. It would only take a minute. Morrison then tore off the daily log and left (Tr. 161, 162).

Morrison finished his paper work and took it to the office. When he returned Ramsey handed him his hard hat and flashlight. He then said he quit. Morrison asked if he was going to quit over a little bit of dust. Ramsey said, "Yes, if it continues." Morrison walked away. The disagreement involved turning the water on or off (Tr. 162, 164). Ramsey never argued about turning the crusher on or off (Tr. 162). Ramsey had the authority to turn it on or off if there was a safety hazard. This was a standard procedure (Tr. 163). Ramsey requested no further consultations over the issues. Morrison was laid off a month later. Ramsey didn't contact him during that period (Tr. 163, 164).

2/ The screens are cleaned by letting the material hit them without the water being turned on. The material chips off the buildup of mud. By proceeding in this manner the miners do not have to crawl up inside the equipment to remove the accumulations by hand (Tr. 160).

When Morrison hired workers for the crusher crew, none of them were told that they would have long-term employment. Such employment is not standard in the industry. When crushing is complete the crew is laid off. Ramsey wasn't given any reason to believe he'd be kept on when the project was completed (Tr. 164).

Morrison told Ramsey to shut the water off -- not the crusher. He was also standing where he could view the dust once the water was shut off. Morrison could see every bit of the crusher. Visibility was not reduced to the extent that it was dangerous. Morrison could also see Ramsey in the control tower. He could have signaled him in the tower, even after the water was shut off, had he wanted to do so (Tr. 165, 166).

Morrison agrees that Ramsey was performing adequately as an operator when Morrison suggested he receive a raise (Tr. 174).

On Ramsey's separation slip Morrison wrote "quit" (Tr. 176, 186, Ex. C-4, R-1).

DICK NASH, ICC's personnel manager, identified certain records and testified the crusher crew was laid off September 25, 1986 (Tr. 200-202, Ex. R-1). He further testified concerning the 401(k) plan involving waged employees as compared to salaried employees (Tr. 211, 212, Ex. C-1, R-1). [Discussed under damages, infra].

ORVILLE HILDEBRANDT, ICC's project manager, worked on the Colosseum job (Tr. 244).

When he hired Ramsey he gave him a safety tour which is standard for all new employees. On one occasion while running the loader, ICC supervisor Brown gave Ramsey some instructions. Ramsey felt he was abusing the equipment and he might quit sometime over that issue. But he still wanted to work some other area of the project. Hildebrant believed that Ramsey felt he was probably more qualified than the foreman. As a result Hildebrandt felt [Ramsey] resented the foreman giving him directions (Tr. 247, 248).

The morning after the August 12th incident Hildebrant learned of the conflict between Ramsey and Morrison. Ramsey said he'd quit but he would like to remain in another position on the project (Tr. 248). Ramsey said he'd return to the crusher if Hildebrant would authorize him to have control (Tr. 248).

Hildebrant and Morrison talked. Morrison told Hildebrant that Ramsey had quit over the dust and who was turning off the water and such (Tr. 249). Hildebrant did return Ramsey's call and he decided not to rehire him because of two incidents. These two incidents involved the loader and the crusher (Tr. 249). 3/

On September 8, 1987, an MSHA investigator came to the plant and issued citations due to crusher dust 4/ (Tr. 251, 252, Ex. C-12). Hildebrant, in abating the citation, wrote a letter to control the dust from the crusher (Tr. 252, Ex. C-15).

Hildebrant also testified concerning the company's 401(k) plan (Tr. 254).

Superintendant Hildebrant also indicated that Ramsey received a raise; further, he was transferred to a different position at a later date (Tr. 259).

As a crusher operator a part of Ramsey's duties relate to when to shut the water and the machine on and off (Tr. 259). The crusher operator could shut down the machinery if he didn't know where the workers were located. In an emergency he could also shut the water on or off (Tr. 260).

When Ramsey called Hildebrandt he told him he had quit because he had a disagreement with Morrison over the way the water should be shut off or how the dust should be controlled (Tr. 278). He also stated he would like to work in some other area of the project (Tr. 278, 279). In addition, he would go back to the same position if Hildebrant would give him control of the crusher (Tr. 279).

3/ The loader incident was when supervisor Brown directed Ramsey as to how the loader should be operated. Ramsey complained to Hildebrandt and stated this particular use was an abuse of the loader teeth (Tr. 246, 247). The crusher incident was the conflict with Morrison over the pressure dust.

4/ The MSHA inspection on September 8, 1987, is entitled to zero weight because it is not shown how the conditions of that date related to the conditions on the morning of August 12, 1987.

The Colosseum mine is still operating. Further, miners are using heavy equipment used in the production of gold (Tr. 280, 289).

BEN BROWN was an ICC night shift foreman in the summer of 1987. He has since been laid off (Tr. 283, 284).

Brown considered Ramsey's skill as a loader operator to be below average. He further considered Ramsey to be a poor dozer operator (Tr. 285).

Brown and Ramsey were involved in two conflicts. These didn't cause Ramsey to be terminated. One involved Ramsey running the loader at half throttle or lower. The other involved loading with the front of the bucket rather than the heel. He considered that Ramsey's ability to take orders was poor (Tr. 286, 289).

Brown admits Ramsey received a raise after two conflicts between them. However, it was Morrison and not Brown who recommended the raise (Tr. 288, 289).

CHRIS NORSKOG testified by deposition. Norskog has spent 15 years working around rock crushers (Dep. 5, 6).

Norskog had to show Ramsey some basic matters concerning the rock crusher (Dep. 8).

Norskog recalls an argument between Ramsey and Morrison about whether to fire the crusher up again with or without water. Both men were angry (Dep. 8). Ramsey did not want to fire the crusher up. Morrison replied he was the boss and he'd fire the crusher up. Ramsey said he was going to quit (Dep. 8, 9). The two men didn't appear to be acting rationally (Dep. 9). Phillip Boudreaux heard less of the argument (Dep. 9, 10).

There was a little more dust than usual when they shut the water off but it was not enough to be dangerous (Dep. 11).

It was standard procedure to let the machine run without water. It would only take a short while to clean the screens. Ramsey hadn't complained about it prior to that time (Dep. 11). There are other options besides running the equipment without water but Norskog didn't know if Ramsey knew about them (Dep. 12, 13).

Within a day or two later Norskog refused Ramsey's request to sign a statement that it was unsafe to work in the area. However, Boudreaux signed the document. Norskog later gave a statement to an MSHA inspector (Dep. 15).

Discussion on the Merits

The credible evidence adduced by complainant establishes that Ramsey was engaged in a protected activity when he complained to his supervisor Morrison about the dusty conditions that precluded him from seeing the workers who were in close proximity to the crusher. He was thus constructively discharged since he has shown that ICC created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. One act of discrimination occurred at the time of the constructive discharge. A second act of discrimination occurred when the company refused to rehire Ramsey.

ICC contends that Ramsey was not engaged in a protected activity but merely disagreed with his supervisor about the crusher operation.

In support of its view, ICC points to several facets of the case. Specifically, in his complaint, it is asserted that Ramsey never indicated the dispute with Morrison involved anything other than turning the crusher on or off. (Ramsey could do this any time a hazard developed.) Further in support of ICC's position is found in MSHA's interview with Morrison (Ex. C-10, p.4-6).

I reject ICC's arguments. I question whether any discrepancy exists but the facts here involve a mix of what would occur when the crusher operator turned off the crusher and/or the water. The critical point is that Ramsey's complaint was clearly safety related.

Supporting Ramsey's testimony is his statement to MSHA. The statement reads in part as follows:

> And on the morning of the 13th which is a continuance of, you know, the same shift, we work from 5 in the evening 'til 3 in the morning. It was approximately 2:30 and Cliff, the foreman, walked down to, this one area is kinda designated as a signal area for the men down below where I can see them. He walked into that area and signaled me to shut the water off to the whole spread

and I hesitated. He very abruptly motioned again. So I shut it off and within a matter of two to three minutes the visibility was just, I mean absolutely zero. I mean I couldn't, I couldn't see the window that I was looking out of let alone monitor the people, the equipment or anything else so I just shut the feeder and the jaws down which feeds material to the whole area and the minute that I felt that there was nothing else through it, just be noise, I shut the whole spread down and about seven to ten minutes later when everything cleared enough where a person could see to walk ten feet, Cliff come boiling up the steps. I mean he was hostile, attitude and asked me what the hell I was doing shutting the spread down. I said, "Well, if I can't see, I'm damn sure not going to run anything." I said "Well you know, when we shut that water off, I can't see nothing." And he's very, very verbally, I mean loud. "I've run one of these G-D things for so many years. I'll tell you when to shut it down."

And I says "Hey, you know, if I'm operating the damn thing, I've got to have the option whenever I can't see and I can't see the men down there to knock her off. You know, until we can safety operate." And he went boiling down the steps so I just went ahead and run the belts clear, what was on them, you know, so you don't leave them for the next shift and then I went downstairs and I confronted him again. I says "Cliff, you know, under those conditions," I says "we can't operate." "God damn it," he says, "I'll tell you when to run and when not to run." I says "Hey," I said, "if you're going to be like that," I said "I can't work for you." I said "I have got to have the option to be able to shut the damn thing down when we can't see. The first thing you told me when you hired me was that even if a man has got to go to the john, that he's got to check out with me because I've got to be able to see him and know where he's at. And now you tell me that you're going to tell me when to shut it down and half the time you're not even here." I says "Hey," I said "I'm not working for you under those conditions." He said "Are you

> quitting?" I said "Under those conditions, you're damn right." And it was the end of the shift then so we went ahead and finished our normal 3 o'clock clean-up and I got in the truck with him, drove up to the impound area more or less, and we got in the buses and everything and went downhill.
>
> (Exhibit R-2, pages 3, 4)

It necessarily follows that I disagree with ICC's view that the argument over when and how the screens are cleared is not a protected activity. For the reasons stated I find that Ramsey's complaints were safety related.

ICC further contends that Ramsey's refusal to work was not based on good faith belief that a hazard existed. This is so because Ramsey had operated the crusher for five weeks and it was standard procedure to turn the water off so the screens could be cleaned. Further, Ramsey's failure to voice his concerns for the safety of fellow employees (before August 13th) does not support his position that a hazard existed.

I disagree. The evidencing hearing focused on the events of August 12th, but in any event ICC's position lacks merit. Ramsey's testimony is unrebutted that if an employee cannot be seen on the site, the crusher operator automatically shuts down "real quick" (Tr. 48). Further, there have been times where Ramsey shut down the equipment without signaling (Tr. 49).

In addition, on the issue of good faith, Ramsey's testimony is further supported by Morrison, Hildebrandt and Norskog. Morrison, after the confrontation, asked Ramsey if he was going "to quit over a little bit of dust" (Tr. 162, 164). Morrison also told Hildebrant that Ramsey quit over the dust and an argument as to who would be turning off the water (Tr. 249). See also separation slip (Ex. C-4). The slip, signed by Morrison, states, "We had a disagreement on the way to run the crusher." Further, Norskog recalled an angry argument between Ramsey and Morrison about whether to fire up the crusher again with or without water. Ramsey did not want to fire the crusher up. Morrison replied he was the boss and he'd fire the crusher up. Ramsey then said he was going to quit (Dep. pages 8, 9).

The above evidence causes me to conclude that Ramsey acted in good faith and he did not invent a safety complaint on August 13th.

ICC further argues that a difference of opinion over a proper way to perform a task are not a protected work refusal citing Secretary on behalf of Cameron v. Consolidation Coal Co., 7 FMSHRC 319 (1985).

The evidence shows more than a difference of opinion. It shows concern by Ramsey for the safety of miners at the worksite. In the instant case the nexus is clear between the complaint and possible injury to workers.

ICC asserts that Ramsey's work refusal, and his voluntary "quit", occurred after the end of the shift when the crusher had been shut down and the belts cleaned.

I agree that it is uncontroverted that Ramsey quit at the end of the shift. However, Ramsey's action was a constructive discharge as discussed infra. It is also apparent why Ramsey quit and the timing was closely related to the protected activity.

Cameron is not inopposite this view.

It is also ICC's view that Ramsey failed to communicate any hazard to ICC.

The thrust of ICC's argument is that Ramsey and Morrison did not communicate, rather they were "angry," "not listening to each other" and "excited." Further, when they rode down the hill it is undisputed that the two men did not talk.

It is apparent from the record here that the words spoken encompassed and communicated the safety hazard. Further, by their very nature safety complaints often revolve in a heated and argumentative manner. Compare, Secretary on behalf of John Gabossi v. Western Fuels - Utah, Inc., 9 FMSHRC 1481 (1987).

ICC also states that even if Ramsey was engaged in a protected activity no adverse action was taken against him in retaliation for the complaint, citing Pasula, supra; Thurman v. Queen Anne Coal Co. et al, 10 FMSHRC 131 (1988) and Edwards v. Aaron Mining Co., 5 FMSHRC 2035 (1983). Further, a single act of alleged discrimination standing alone would not constitute an aggravated situation which would force a reasonable person to resign, citing Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988).

In considering the doctrine of constructive discharge, different appellate courts have different views. For example, the Court of Appeals for the Fourth Circuit requires proof of the employer's specific intent to force an employee to leave 5/. Bristow v. Daily Press, Inc., 770 F.2d 1251 (1985). The Commission adhered to this position in Robert Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034 (1986).

On the other hand, the Commission's decision in Simpson was specifically reversed by the U.S. Court of Appeals for the District of Columbia, 842 F.2d. 453. The Court reversed the Commission and held that the proper application of the law involves an objective approach to constructive discharge. In short, the intent of an operator to cause a miner to quit is not relevant.

The Court summarizes its view that whether conditions are so intolerable that a reasonable person would feel compelled to resign is a question for the trier of fact, 842 F.2d at 463.

The Commission on May 11, 1989, adopted the view of the Court of Appeals. I am constrained by the Commission's adoption of the Court of Appeals decision in Simpson.

In the instant case two acts of discrimination occurred. Ramsey was constructively discharged when he quit at the end of the shift on August 13th. Further, he was discriminated against (as was Robert Simpson) when the company refused to rehire him.

Whether the company was justified in refusing to rehire Ramsey requires a review of conflicting evidence.

Ramsey's evidence shows he has had extensive experience in operating heavy equipment. This appears from the testimony of his background and the resumés he has forwarded to potential employers.

5/ The record in this case is devoid of any facts indicating ICC intended to force Ramsey to quit on August 13th.

On the other hand, the operator's evidence indicates Ramsey's skill as a loader operator was below average to poor. Further, he was inexperienced and not competent as a crusher operator. In addition, it was believed Ramsey didn't like to take orders because he felt he was more experienced than the foreman. I do not find ICC's evidence to be credible. If Ramsey was such a poor worker it seems incredible that he would receive a pay increase after a short time on the job. Compare: Secretary on behalf of Patricia Anderson v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984).In any event superintendent Hildebrant identified two reasons not to rehire. One reason involved Ramsey's claim that the instructions from Brown required him to abuse the loader teeth (an unprotected activity since it did not involve safety). The additional reason was the crusher incident of Ramsey and Morrison (a protected activity).

In sum, ICC discriminated against Ramsey in refusing to rehire him.

ICC also states that Ramsey failed to attempt to resolve the conflict. It argues such failure constitutes a bar to recovery.

In support of its position ICC cites Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61 (5th Cir., 1980) and Alicea Rosado v. Garcia Santiago, et al, 562 F.2d 114 (1st Cir. 1977).

Specifically ICC contends that Ramsey had two honest alternatives open to him. He could have simply refused to work until he discussed the matter with Morrison's superior, or he could have made sure all the other employees were away from the crusher for the final few minutes required to clean the screens.

The position urged by ICC would invoke a new doctrine not presently contemplated under the Mine Act. Further, the cases relied on by ICC do not arise under the Mine Act.

For the foregoing reasons the complaint of discrimination filed herein is sustained.

REINSTATEMENT

Complainant herein sought to be reinstated (Tr. 22).

If charges of discrimination are sustained then Section 105(c)(3) authorizes reinstatement of a miner to his former position with backpay and interest.

The evidence here is uncontroverted in several respects.

On behalf of ICC the evidence shows that none of the workers were given any indication that their job was long term. Such long term employment is not standard in the industry. The evidence also shows that the work shift was in fact shut down in its entirety about a month after the Ramsey/Morrison incident.

On behalf of Ramsey the evidence is uncontroverted that the Colosseum Mine is still operating. Further, the operator is presently using heavy equipment in the production of gold.

Discussion

If a miner has been discriminated against then he should be restored, as nearly as possible, to his position as if the discrimination had not occurred.

Accordingly, an order of reinstatement to his former position as a crusher operator at the Colosseum Mine is appropriate. If the position of crusher operator is no longer available (an uncontroverted fact in the record) then complainant is to be reinstated to a comparable position without any loss of pay or benefits. Kenneth A. Wiggins v. Eastern Associated Coal Corporation, 7 FMSHRC 1766, 1773 (1985).

Damages

The Act provides that a miner should be reinstated to his former position with backpay and interest.

Ramsey was constructively discharged on August 13, 1987. He is entitled to backpay with interest from that date until the date of his reinstatement.

Accordingly, the parties are directed, within 20 days, to agree on the wage loss incurred by complainant.

In calculating the interest the parties are directed to make their calculations on the bases of the attached memoranda from the Commission's Executive Director dated January 10, 1989, and April 6, 1989.

Further Damages

A further credibility issue in this case concerns whether Ramsey is entitled to certain retirement benefits under the company's 401(k) retirement plan.

In connection with this issue Ramsey testified that if you are with the company 30 days, an employee can contribute up to 15 percent of your paycheck. In turn, ICC will match the employee contribution up to the legal limit allowed by law. Ramsey asserts he contributed $553.50 to this plan, as shown by his check (Tr. 91-93, Ex. C-6). Witness Wallis Hack, a certified public accountant, testified as to the benefits due Ramsey under the company plan (Tr. 127-149, Ex. C-1).

I credit the contrary evidence adduced by ICC's personnel manager DICK NASH. The witness, familiar with the plan, indicates there is a difference between the 401(k) plan for waged employees (such as Ramsey) as compared to salaried employees (Tr. 211). Salaried employees receive a matching contribution up to 50 percent of the first 4 percent of the base salary of that employee (Tr. 212). On the other hand, waged employees receive 75 percent per hour for every hour of straight time and overtime the employees work (Tr. 212).

Ramsey was a waged employee. The ICC pay stub for Ramsey (for 8/14/87) shows a figure of $553.50 (Ex. C-6). That number is not related to the 401(k) plan but is ICC's matching contribution under FICA, social security tax (Tr. 215-220). Hourly employees do not receive a matching contribution. However, Ramsey received payment for the 590.5 hours he worked at 75 cents per hour or $442.88. That amount was contributed by ICC to Ramsey's personal accounts.

Discussion

Ramsey is entitled to his lost pay until reinstated. Further, the pay would include ICC's 75 cent per hour contribution for each hour worked by Ramsey.

I credit ICC's evidence because a personnel manager would know the benefits the company provides its employees. ICC's position is also supported on this issue by the testimony of Hildebrandt (Tr. 254).

In addition, Ramsey, as a waged employee of less than 14 weeks, would not have the requisite expertise to know if he could participate in ICC's 401(k) plan.

ORDER

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

1. Respondent reinstate complainant to his position as a crusher operator, or if the position of crusher operator is unavailable, a comparable position.

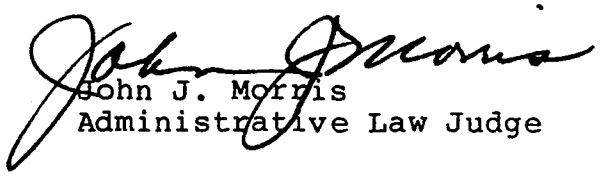
2. Respondent shall pay to complainant backpay from August 13, 1987, until complainant is reinstated. Said backpay shall bear interest thereon in accordance with the memoranda attached to this order.

3. Complainant shall file a statement, within 20 days of the date of this order, showing the amount he claims as backpay and interest under paragraph 2 above. Complainant, within said 20 days, shall also file a statement showing the amount he claims for attorneys' fees and necessary legal expenses.

The foregoing statement shall be served on respondent who shall have 20 days from the date of service to reply thereto.

4. This decision is not final until a further order is issued with respect to the amount of complainant's entitlement to backpay, attorneys' fees and litigation expenses.

5. If the parties cannot agree a hearing on the issue of attorneys' fees will proceed as heretofore scheduled on October 24, 1989, in Las Vegas, Nevada.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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COLONNADE CENTER
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DENVER, CO 80204

August 9, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-275-M A.C. No. 04-01937-05505
v.	:	Docket No. WEST 89-71-M A.C. No. 04-01937-05506
SANGER ROCK & SAND, Respondent	:	Sanger Pit and Mill

ORDER

The issue in the above cases is whether respondent, Sanger Rock & Sand (Sanger), is subject to MSHA's jurisdiction.

As a threshold matter, Sanger asserts MSHA has not acquired jurisdiction over it for the reason that the federal government has failed to comply with Article I, Section 8, Clause 17 1/ of the United States Constitution. Specifically, it is argued that since the United States does not possess fee simple title to Sanger's property and since the State of California did not cede the property to the United States then the case should be dismissed for lack of "territorial jurisdiction."

For the purpose of this ruling I assume the federal government does not own this property and I further assume the property has not been ceded to the federal government by the State of California. But I nevertheless conclude that Sanger's arguments are misdirected. The cited portion of the Constitution relied on

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1/ The cited portion of the Constitution provides that Congress shall have the right:

> "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; ..."

by Sanger relates to the District of Columbia, the seat of government of the United States. Its plain words do not constitute a grant of power to the Congress to regulate commerce nor is it a restriction on the power of Congress to regulate commerce.

Specifically, this section of the Constitution relates to the Congress having exclusive authority over the District of Columbia, (the seat of government), as well as all other places purchased by the federal government.

In support of its position Sanger relies upon and cites United States v. Benson, 495 F.2d 475 (1974).

The Benson case is not controlling. In Benson the defendants were convicted of robbery that was committed within the territorial jurisdiction of the United States. The territorial jurisdiction of the United States in the case was Fort Rucker, Alabama, a military installation. The federal military code, by virtue of Clause 17, was exclusive in this area which was a federal military reservation.

Contrary to Sanger's views, the grant of authority for Congress to regulate mines rests in Article 1, Section 8, Clause 3 2/ of the Constitution, the "Commerce Clause."

When Congress enacted the Mine Act it considered and defined commerce as it related to mining. Specifically, Section 4 of the Act provides:

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

2/ The cited portion of the Constitution provides that Congress shall have the right

> "To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."

Further, "Commerce" is defined in section 3(h) of the Act as:

> Trade, traffic, commerce, transportation or communication among the several states, or between a place in a state and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points within the same state but through a point outside thereof."

The use of the phrase "which affect commerce" in Section 4 of the Act, indicates the intent of Congress to exercise the full reach of its constitutional authority under the commerce clause. See: Brennan v. OSHA, 492 F.2d 1027 (2nd Cir. 1974); U.S. v. Dye Construction Co., 510 F.2d 78 (10th Cir. 1975); Polish National Alliance v. NLRB, 332 U.S. 643 (1977); Godwin v. OSHRC, 540 F.2d 1013 (9th Cir. 1976).

In Perez v. United States, 402 U.S. 146 (1971), it was held that Congress may make a finding as to what activity affects interstate commerce, and by doing so it obviates the necessity for demonstrating jurisdiction under the commerce clause in individual cases. Thus, it is not necessary to prove that any particular intrastate activity affects commerce if the activity is included in a class of activities which Congress intended to regulate because that class affects commerce.

In short, mining is among those classes of activities which are regulated under the Commerce Clause of the United States Constitution and thus is among those classes which are subject to the broadest reaches of Federal regulation because the activities affect interstate commerce. Marshall v. Kraynak, 457 F. Supp. 907, (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). Further, the legislative history of the Act as well as court decisions, encourage a liberal reading of the definition of a mine found in the Act in order to achieve the Act's purpose of protecting the safety of miners. Westmoreland Coal Company v. Federal Mine Safety and Health Review Commission, 606 F.2d 417 (4th Cir. 1979). See also: Godwin v. Occupational Safety and Health Review Commission, supra, where the court held that unsafe working conditions of one operation, even if in initial and preparatory stages, influences all other operations similarly situated, and consequently affect interstate commerce.

The courts have consistently held that mining activities which may be conducted affect commerce sufficiently to subject the mines to federal control. See: Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979); Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976); Marshall v. Bosack, 463 F. Supp. 800, 801 (E.D. Pa. 1978). Likewise, Commission judges have held that intrastate mining activities are covered by the Act because they affect interstate commerce. See: Secretary of Labor v. Rockite Gravel Company, 2 FMSHRC 3543 (December 1980): Secretary of Labor v. Klippstein and Pickett, 5 FMSHRC 1424 (August 1983); Secretary of Labor v. Haviland Brothers Coal Company, 3 FMSHRC 1574 (June 1981); Secretary of Labor v. Mellott Trucking Company, 10 FMSHRC 409 (March 1988).

In a decision involving the same parties, Commission Judge August F. Cetti ruled against Sanger's "territorial jurisdictional argument." Sanger Rock & Sand, 11 FMSHRC 403 (March 1989).

Sanger also states that the State of California has its own laws and regulations that protect the safety and health of its people.

This argument has been raised in a number of cases. Commission judges have consistently held that state and federal OSHA statutes do not preempt the 1977 Mine Act. See: Brubaker-Mann, Inc., 2 FMSHRC 227 (January 1980); Valley Rock and Sand Corporation, 4 FMSHRC 113 (January 1982); Black River Sand and Gravel, Inc., 4 FMSHRC 743 (April 1982); San Juan Cement Company, Inc., 2 FMSHRC 2602 (September 1980); Sierra Aggregate Co., 9 FMSHRC 426 (March 1987). I agree with these holdings, and I also take note of the fact that section 506 of the 1977 Mine Act permits concurrent state and federal regulation, and that under the federal supremacy doctrine, a state statute is void to the extent that it conflicts with a valid federal statute. Dixie Lee Ray v. Atlantic Richfield Company, 435 U.S. 151, 55 L. Ed. 2d 179 (1978); Bradley v. Belva Coal Company, 4 FMSHRC 982, 986 (June 1982).

In WEST 89-71-M Sanger has also moved to dismiss the case on the grounds that MSHA has lost or misplaced records.

It is not possible at this time to identify what records, if any, may be lost. Further, any evidence on that issue will relate to the merits of the cases.

For the foregoing reasons I conclude that the Secretary of Labor, on behalf of MSHA, has jurisdiction in this matter. Further, Sanger, as a sand and gravel operation, is generally subject to the Secretary's authority by virtue of MSHA.

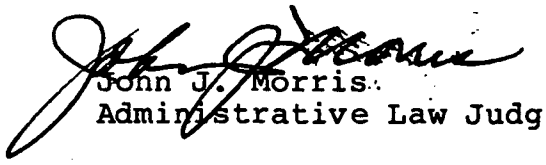
For the foregoing reasons the following order is appropriate:

ORDER

1. In WEST 88-275-M: Petitioner's motion for a preliminary finding that respondent is subject to the jurisdiction of the Secretary under the authority of the Federal Mine Safety and Health Act is granted.

2. In WEST 89-71-M: Respondent's motion to dismiss on the merits and for a lack of territorial jurisdiction are denied.

3. These cases will be shortly set for a hearing on the merits.



John J. Morris
Administrative Law Judge

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